PROCEEDINGS OF THE INTERNATIONAL CONFERENCE OF LAW, EUROPEAN STUDIES AND INTERNATIONAL RELATIONS

8th EDITION, BUCHAREST, MAY 15, 2020

ROMANIAN LAW, 30 YEARS AFTER THE COLLAPSE OF COMMUNISM

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Str. Mitropolit Filaret nr. 39-39A, Sector 4, București, O.P. 5, C.P. 91
Tel./Fax: 021.336.04.43; 031.805.80.21;
Vânzări: 021.336.01.25; 031.425.42.24
E-mail: redactia@hamangiu.ro

ISSN 2668-0203
ISSN-L 2668-0203
ISBN 978-606-27-1595-3

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Volume coordinated by
Petruța-Elena Ispas Felicia Maxim

Editura Hamangiu 2020

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CONTENT

PUBLIC LAW

I, Robot! The lawfulness of a Dichotomy: Human Rights *v.* Robots' rights
Nicolae Voiculescu ____ *3*

At the confluence of criminal matters with insolvency. Insolvency – prerequisite of bankruptcy offences
Ionel Didea, Diana Maria Ilie ____ *15*

Brief considerations regarding the criterion of the appropriateness of granting conditional release by the court
Alexandru Boroi, Georgian Toma ____ *31*

The free movement of workers during a state of emergency
Gabriel-Liviu Ispas ____ *39*

Contributions Regarding the Constitutional Regime of the State of Emergency
Adrian Severin ____ *48*

Transnational Action and the International Legal System
Gabriela A. Oanță ____ *65*

Considerations regarding the incidence of Decision no. 581/2019 of the Constitutional Court on precautionary measures in criminal proceedings
Andreea Simona Uzlău ____ *81*

The appeal regarding the duration of the criminal trial – an inefficient remedy for the observance of the right to a fair trial
Constantin Sima ____ *90*

Agricultural Policy-Making by Using European Legal Acts
Carmen M. Diaconu ____ *96*

Aspects regarding the competence of the President of Romania in the Government's investiture and the Ministers' appointment
Marieta Safta ____ *103*

***Hard law* versus *soft law* in international law**
Felicia Maxim ____ *113*

Interception of communications or any type of remote communication seen as a special method of forensic investigation
Adrian Cristian Moise 127

The finding of fact report drawn up pursuant to article 172 (9) of the Code of criminal procedure and the observance of the right to a fair trial in the case of tax evasion offenses
Bogdan Vîrjan 135

Admissibility of the request for temporary suspension of the administrative act
Andrei Tinu, Mirela Popescu 146

The evolution of the reparation of moral damages in doctrine and jurisprudence. Criminal, civil and comparat law issues
Adrian Truichici, Luiza Neagu 153

Recent Interpretations by the CJEU in the Field of Unfair Terms
Mihaela Georgiana Iliescu 161

Theft of food for subsistence is not a crime
Rodica Burduşel 172

The Role of the Consent in Differentiating the Crimes of Rape and Sexual Intercourse with a Minor
Andrada Nour 182

Democratic government impossible without the decentralization
Iulian Nedelcu, Paul-Iulian Nedelcu 191

Legal problems in the matter of the competition of crimes between bribery or influence peddling and tax evasion provided by art. 9 para. (1) lett. c) of Law no. 241/2005 for preventing and combating tax evasion
Georgiana Teodorescu 203

Considerations regarding the regulation of body search and physical examination in the code of criminal procedure, including the relationship between the two evidentiary proceedings in connection with the possibilities of investigating the person's body
Teodor Manea 216

Issues on the Insolvency Procedure from a Human Rights Perspective
Beatrice Berna 224

Compatibility of State Aid with the Internal Market of the European Union in times of Public Health Crisis caused by COVID-19
Daniela Panc 235

Human dignity in criminal proceedings. Relevant decisions in the case-law of the European Court of Human Rights and the Inter-American Court of Human Rights
Ramona Predescu 244

Digital identity
Larisa Antonia Capisizu 256

Territorial administrative deconcentration in Romania
Adina-Lorena Morărescu (Codeia) 264

From Liberty to Encroachment via National Security
David-Alexandru Pădurariu 274

La liberté religieuse au niveau constitutionnel – analyse de contenu
Radu Zidaru 284

The Impact of the Activity of the United Nations General Assembly in Maintaining Peace among the States of the World
Liana Manciu 293

European Union Foreign Policy and Diplomacy. News and Perspectives
Titi Sultan 308

Considerations concerning the offences against the financial interests of European Union
Adina Maria Alexandra Popescu 321

The evolutive interpretation of the European Convention of Human Rights and the development of the right to a fair trial
Radu Ciobanu 331

Legal nature of the urbanism certificate; a document intended for information or for administrative purposes
Ștefania-Dorina Kerth (Dobrescu) 339

Considerations regarding the rejection of the request for confirmation of the solution of waiving the criminal investigation and the possibility of violating the right to a fair trial and defense
Rareș Rotaru 347

Applicability of Article 9 of the Regulation (EU) 2016/679 on the Protection of personal sensitive data during COVID-19 pandemic
Ana-Elena Iunker 357

Crimes against humanity committed by officials of the Romanian state during the communist era and ignored by justice
Vasile Doană 369

Remarks on the active subject of the offense of embezzlement
Georgian Toma, Iulia Nistor 380

Interpretation of the provisions of art. 155 par. 1 of the Penal Code
Adinan Halil, Bogdan Dumitru 389

Mode of consummation of the money laundering offence in relation to the predicate offence of tax evasion
Mihai-Costin Toader 396

The procedural remedy in the situation of non-capitalization of the legal benefit regulated by art. 19 of Law no. 682/2002 on the protection of witnesses
Costin-Cristian Pușcă 403

The evolution of regional development in Romania
Aida Petcu 414

Considerations regarding the systematization of political and diplomatic instruments of international dispute settlement
Robert Damaschin, Georgiana Mihăilă 425

The Right to Silence – a Fundamental Right of the Defendant
Carmen-Silvia Paraschiv 435

PRIVATE LAW

Some aspects relating to the legal language and systematisation in the drafting of the regulations of the Civil Code
Iosif R. Urs 443

The features of the sales contract – as an act of commerce
Smaranda Angheni 451

Some procedural difficulties relating to the scope and method of solving the eviction procedure out of the real estate being used without having the right to
Gabriela Răducan 462

Flexibility of working time, between the organizational prerogative of the employer and the social protection of employees
Magda Volonciu 474

***Animus* – Manifest Intention of the Patrimonial Expansion or Penalty for the Non-diligent owner?**
Aurel Băieșu, Marian Russo 481

The insolvency law for individuals. Success or failure?
Carmen Pălăcean 490

Procedural aspects in the liability action of the administrator of the company regulated by Law no. 31/1990
Carmen Todică 504

Organic contractual freedom and slowing down insolvency
Manuela Tăbăraș 513

Authentic Form – The *Quo vadis* regarding the tenants' option to buy houses, based upon Law no. 10/2001
Manuela Tăbăraș 521

Theoretical and practical aspects regarding the forced surrender of immovable property as a form of direct enforcement proceedings
Mădălina Dinu 528

Divorce procedures in other EU Member States Italy. Cyprus. Finland
Mădălina Dinu, Marian-Cristian Ioana 537

Exoneration from civil liability. Force majeure and the fortuitous event
Petruța-Elena Ispas 549

Real rights over the property of another in Roman law
Alina Monica Axente 558

Coronavirus and Force Majeure – Impact on International Trade Contracts
Carolina Niță 566

Interference of institutions of contract law with the procedure of insolvency of individuals, regulated by Law no. 151/2015
Ioan Morariu 580

The correlation between categories of shares and type of assemblies of the issuing company
Andreea Târşia 588

A brief overlook at the evolution of technical unemployment in pre- and post-December Romania
Luiza Lungu 601

Humanization of state justice through institutionalized arbitration
Daniel Cătălin Chifor 608

Considerations on the causality – condition relation of the tort civil liability
Laura Tuduruţ 614

Mediation – an alternative method of resolving labour disputes
Iulian Hagiu 626

The notice in case of dismissal for reasons not related to the person of the employee – Respecting the right to work and the principle of non-discrimination
Alice Dobrinoiu 634

Conventional representation during the state of emergency
Andreea-Diana Stupu 643

The abuse of right in labor law. The resignation
Floriana Tudor 655

Possibility of forced execution of social parts in fiscal matters. Capitalization of the social parts in order to settle the budget receivables
Ana-Maria Gaspar 664

Guidelines on lawyer's professional liability
Elena-Cristiana Savu 672

Institution of the special conservator in the case of the debtor's death during the foreclosure stage
Vlad-Ionuţ Savu 681

Judicial Partition Procedure
Ion-Cristian Zăvoi 689

PUBLIC LAW

I, Robot! The lawfulness of a Dichotomy: Human Rights *v*. Robots' rights

Voiculescu N.

Abstract

Increasing advances in high-tech areas involve reflections on their effects on the structure and functionality of society in general, but also on respect for human rights, especially in the context of increasingly complex and profound interaction between man and machine in its forms the most evaluated. The author presents a series of documents, adopted at the level of international organizations in this field, aimed at detecting legal and ethical issues aimed to be standardized, so that human rights standards are adapted to new conceptual and content challenges.

Keywords. Robotics, Fourth Industrial Revolution, European Charter of Ethics, reliable artificial intelligence, civil liability, responsible electronic person

1 Context and challenges

The period that humanity is currently going through, also called *the Fourth Industrial Revolution* [1], and which is marked by advances in geometric rhythm in high-tech fields such as robotics, artificial intelligence, nanotechnology, quantum computing, biotechnology, the Internet of Things, the industrial Internet of Things, decentralized consensus, fifth generation (5G) wireless technologies, 3D printing and fully autonomous vehicles, raise growing concerns about the effects on the structure and functionality of society in general, but also on respect for human rights, in particular in the context of the increasingly complex and profound interaction between man and machine in its most valued forms (robots, artificial intelligence [2]).

Fundamental values and principles in the field of human rights, as they are currently structured at the international level, and we recall as example human dignity, equality and justice and fairness, non-discrimination, respect for privacy and data protection, will be supplemented and nuanced.

At the same time, the issue is not only human rights in relation to increasingly performing robots, but also their rights in the context in which greater autonomy and the ability to learn from experience and interaction, not long after they will evolve. to non-human entities.

Therefore, the need to regulate more clearly the issues related to the responsibility and accountability of those involved in the industries, but also regarding the activities and decisions that robots take, especially when they are not under the direct control of people.

2 Awareness, conceptualization, principles

This imperative was underlined at the *UN General Assembly* presentation *on 29 August 2018* of the *Report prepared by the Special Rapporteur of the United Nations (UN) on the promotion and protection of the right to freedom of opinion and expression* on the implications of artificial intelligence technologies (AI) for human rights [3].

The text focuses in particular on freedom of expression and opinion, confidentiality and non-discrimination. The author of the Report emphasizes that "the development of codes of ethics and the accompanying institutional structures may be important for human rights commitments, but they cannot replace them. Codes and guidelines issued by public and private sector bodies should emphasize that human rights law provides the fundamental rules for the protection of individuals in the context of artificial intelligence, while ethical principles can help in the further development of the content and application of human rights specific circumstances"[4].

However, at the universal level, it has not been possible to adopt rules to address these issues, although some seem to raise serious concerns in the international community, such as the issue of autonomous lethal weapons, the so-called "killer robots". The amendment in this direction of *the UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons That May Be Considered to Be Excessively Harmful or Non-Discriminatory (CCW)* [5] has not been made, although discussions in the Working Group have yet to begin since 2010 [6].

Various civic organizations have called for those weapons systems that can make the decision to kill a human being on their own to be banned, given that artificial intelligence is evolving very rapidly. "A machine has no moral dilemmas. It's just a machine (...) We think a red line has been crossed here, if we allow a machine to decide, based on an algorithm, who to target or attack. It is an unethical and immoral matter"[7].

At the level of the *Council of Europe*, the European Commission for the Efficiency of Justice (CEPEJ) adopted, on 4 December 2018, ***the European Charter of Ethics on the use of artificial intelligence in judicial systems and their environment*** *[8],* which sets out five ethical principles and is intended to serve as guide for decision makers, legislators and justice professionals when dealing with artificial intelligence.

The document was drafted in the context in which new technologies are making impressive progress, including in the judicial field. Thus, *"robot lawyers*" appeared and interact naturally with people.

There are also more and more *legaltechs*, start-ups specializing in the design of new legal services, also offering new applications to the legal professions, mainly lawyers, legal services and insurers, allowing them to have in-depth access to legal information and jurisprudence. These private companies even aim to anticipate judges' decisions through so-called "*predictive justice*" instruments [9].

The 5 principles set out in *the European Charter of Ethics on the use of artificial intelligence in judicial systems and their environment* are the following:

1. *The principle of respect for fundamental rights*: ensuring the design and implementation of artificial intelligence tools and services that are compatible with fundamental rights. The CEPEJ's approach is that the use of AI tools and services in judicial systems is meant to improve the efficiency and quality of justice and deserves to be encouraged. However, it must be done in a responsible manner, respecting the fundamental rights of persons enshrined in the European Convention on Human Rights (ECHR) and Convention No. 108 of the Council of Europe for the Protection of Personal Data [10], as well as other fundamental principles.
2. The *principle of non-discrimination*: in particular the prevention of the creation or consolidation of discrimination between individuals or groups of individuals.
3. The *principle of quality and security*: with regard to the processing of court decisions and judicial data, the use of certified sources and intangible data with models designed in a multidisciplinary manner, in a secure technological environment [11].
4. The *principle of transparency, neutrality and intellectual integrity*: allows the accessibility and intelligibility of data processing methodologies, authorizes external audits.
5. The *principle of user control*: the prohibition of a prescriptive approach and allows the user to be an informed actor and master of his choices.

Even at the level of the Council of Europe, so far, it has not been possible to move from studies and codes of ethics to a more systematic regulation, because of the complexity of the issues involved in standardization in a field with multiple aspects, unclear concepts contoured and very rapid technological evolution.

However, more consistent in this respect is a document adopted at *European Union* level, namely **the European Parliament Resolution of 16 February 2017 containing recommendations to the Commission on civil law rules on robotics [2015/2103 (INL)]** [12]. The basis for the adoption of this resolution is the reality of the new industrial revolution in which robots, bots, androids and other embodiments of artificial intelligence have legal and ethical implications and effects that must be taken into account [13].

These implications, mentioned in the Introduction to the document, are direct, both on the labor market due to robotics and machine learning, and on jobs, and "the widespread use of robotics will lead to lower-skilled jobs in the occupational sectors being more vulnerable to the expansion of automation" (J).

An alarm signal targets the structure of society that will also change, through the possibility of excessive polarization and increasing the gap between poor and rich "in the face of increasing divisions of society, with a declining middle class, the development of robotics can lead to acute concentration of wealth and influence in the hands of a minority"(K).

Therefore, it is necessary to take measures to ensure non-discrimination, compliance with procedural guarantees, transparency and intelligibility of decision-making processes (H).

However, economic developments must be subsumed under *ethical and legal principles, and it* is important to start with *civil liability* issues.

Given that for a period of time appreciated in the document as long, although given the accelerated pace of progress in the field it may be more constrained, artificial intelligence will be able to exceed human intellectual capacity (P), developments in robotics and AI can and should be designed in such a way as to *protect the dignity, autonomy and self-determination of persons* (O).

And here, we are already at the interference between reality and science fiction. Moreover, the Resolution expressly invokes *Asimov's laws* [14] targeting designers, manufacturers and operators of robots, including those with integrated autonomy and individual learning ability, in order to support the need to adopt rules governing in particular liability, transparency and accountability, reflecting the specific European values and universal humanistic values that characterize the European contribution to society (U).

Today, robots are capable of activities that were usually performed exclusively by humans, and the development of certain autonomous and cognitive characteristics – for example, the ability to learn from experience and make decisions almost independently – has brought them closer more and more to agents that interact with the environment and are able to change it significantly. As such, the legal liability arising from a harmful action of a robot becomes an essential issue (Z).

The resolution states that the more autonomous the robots, the less they can be considered as mere tools available to other actors (such as the manufacturer, operator, owner, user, etc.) Instead, questions arise as to the extent to which the usual rules on liability are sufficient or if new principles and rules are needed to provide clarity on the legal liability of the various actors for acts and omissions of robots when the causes cannot be attributed to a particular human actor or the extent to which the acts or omissions of the robots damage could have been avoided (AB).

Last but not least, as the technological developments deepen, the autonomy of robots will raise the *issue of their nature* in the context of the current legal categories or the need to create a new category, with its own characteristics and implications (CA).

However, it starts with the need for a *common* Union-wide *definition* of cyberphysical systems, autonomous systems, autonomous intelligent robots and their subcategories, taking into account the *characteristics of an "intelligent robot"* listed in the text of the resolution, namely "gain autonomy with sensors and/or by exchanging data with its environment (interconnectivity) and negotiating and analyzing this data; has individual learning systems from experience and interaction (optional criterion); has at least minor physical support; has the ability to adapt their behavior and actions to the environment; it is not alive in the biological sense"(1).

An important principle emphasized is that the development of robotics should be geared towards *complementing human capabilities and not replacing them*. At the same time, it is essential to ensure that, in the development of robotics and AI, people have control over smart devices at all times.

Special attention is considered to be paid to the possibility of creating an *emotional connection between humans and robots* – especially in vulnerable groups (children, the elderly or people with disabilities) – and highlights the issues raised by the serious emotional or physical impact that this emotional attachment could have on the human user (3). However, it is not clear why this emotional attachment would generate a

serious emotional or physical impact. Rather, the effects would be complex, sometimes beneficial [15].

Also, a series of *tensions and risks* that must be carefully analyzed from the perspective of human security, health and safety, freedom, privacy and dignity, self-determination, non-discrimination and protection of personal data (para. 10). The text of the resolution emphasizes that the right to *privacy and the protection of personal data,* enshrined in Articles 7 and 8 of the Charter and Article 16 of the Treaty on the Functioning of the European Union (TFEU), applies in all areas of robotics. It is also necessary to clarify, in the framework of the implementation of the General Data Protection Regulation, the rules and criteria for the use of cameras and robot sensors (para. 20).

Aware of the many social, medical and bioethical implications of robotics development, the Resolution is accompanied by an *Annex* establishing, through a **Robotics Charter,** an indicative *Code of Ethics* based on a set of ***ethical principles,*** reflecting the need for researchers, practitioners, users and designers of ethical standards with the fundamental aim of respecting the dignity, privacy and safety of people.

The established ethical principles are the following:

– *benefit* – robots should act in the interest of humans;
– *non-malice* – the principle "first of all, do no harm": robots must not cause harm to humans;
– *autonomy* – the ability to make decisions in complete freedom and in an informed manner regarding the terms of interaction with robots;
– *justice* – the equitable distribution of the benefits associated with robotics and the accessibility of home care robots and especially of health care robots.

Acting in the interests of the people and not harming them means respecting their fundamental rights. This very truism is contained in the mentioned Code of Ethics, by emphasizing the fact that research activities in the field of robotics must respect fundamental rights and be carried out in the interest of good and self-determination of persons and society in terms of design, implementation, dissemination and use, human dignity and autonomy, both physical and psychological, must always be respected.

Also, as a reflection of the requirement to respect operational safety, robot designers should consider the physical comfort, safety, health and rights of people. Robotics engineers must not harm people's well-being while respecting human rights.

The right to privacy is important among them. Therefore, guarantees are needed that persons are not personally identifiable, except in exceptional circumstances and then only with informed, clear and unambiguous consent. As such, robotics designers are responsible for developing and following valid approval procedures, confidentiality, anonymity, fair treatment and compliance with procedural guarantees.

Following the adoption of the European Parliament Resolution, a number of *studies* were developed to develop the principles listed therein. Thus, in the opinion of specialists, *reliable artificial intelligence*, which should lead to confidence in the development of technology and its applications, should cover three components: 1. be legal, ensuring compliance with all applicable laws and regulations; 2. be ethical, ensuring respect for ethical principles and values; 3. be sound, both technically and socially, because, even if well-intentioned, AI systems can cause unintentional damage. [16]

A number of ethical principles associated with the development of artificial intelligence have their *origins in fundamental rights, as enshrined in the Charter of Fundamental Rights of the European Union,* and they must be respected to ensure that AI systems are developed, implemented and used reliably by those working in the field: (i) respect for human autonomy; (ii) damage prevention; (iii) equity; (iv) explicability. Thus, respect for human autonomy is associated with the right to human dignity and liberty (reflected in Articles 1 and 6 of the Charter). Damage prevention is closely linked to the protection of physical or mental integrity (reflected in Article 3). Equity is linked to the rights to non-discrimination, solidarity and justice (reflected in Articles 21 et seq.). Accountability and liability refer to rights related to justice (reflected in Article 47) [17].

The central objective is to promote *human-centered artificial intelligence* that seeks to ensure that human values are central to the way AI systems are developed, implemented, used and monitored, by ensuring respect for fundamental rights, including those set out in the Union Treaties. And in the Charter of Fundamental Rights of the European Union, all of which are brought together by reference to a common foundation that has its origins in respect for human dignity, the human being enjoying a unique and inalienable moral status. [18]

3 Civil liability for damage caused by robots

Considered an essential issue, "so as to ensure the same level of efficiency, transparency and consistency in ensuring legal certainty throughout the Union" (para. 49), the issue of civil liability for damage caused by robots should be supported, appreciates in the European Parliament's resolution (para. 50) on two central interdependent relations, namely *predictability and controllability*, principles that will underpin the drafting of a *future legislative instrument* [19] on the legal aspects of the development and use of robotics and AI.

However, regardless of the legal solution applied to civil liability for damage caused by robots in cases other than those involving property damage, the future legislative instrument will not, in the authors of the document, have to restrict in any way the type or amount of damage that could be recovered, nor to limit the forms of compensation that could be offered to the injured party, solely on the grounds that the damage was caused by a non-human agent (para. 52).

The document states (para. 53-55) that institutions with regulatory powers at the level of the European Union will have to choose between two approaches: the perspective *of strict liability* (involves only proof of damage and establishing the causal link between the malfunction of the robot and the damage suffered of the injured person) or that of *risk control* (does not focus on the person "who acted negligently" as individually liable, but on the person who can, in certain circumstances, minimize risks and address the issue of negative impact).

On the other hand, once the ultimately responsible parties have been identified, their responsibility should be proportionate to the actual level of instructions given to the robot and its degree of autonomy. However, at least at the present stage, the responsibility must lie with the human being, not the robots (para. 56).

As possible solutions to the complex problem of liability for the damage caused by increasingly autonomous robots, it is suggested to establish a *mandatory insurance*

scheme, set up a *compensation fund,* create the possibility for the manufacturer, programmer, owner or user to have a *limited liability* if they contribute to a clearing fund or jointly take out insurance to guarantee compensation if the damage is caused by a robot or the decision whether or not to create a general fund for all intelligent autonomous robots, or a separate fund for each category of robots (para. 59).

Some issues are also considered important, although they are not mentioned *expressis verbis,* but rather in the debates of the doctrine and specialists. Thus, there is the issue of *owning the copyright of a work generated by artificial intelligence and, implicitly, the responsibility for its elaboration,* given that artificial intelligence is already used to generate works of music, journalism and games, and these works could be theoretically considered copyright-free because they are not created by a human author. Although robots do not yet have the rights and status of people under the law, there should be no copyright. Under the current conditions, it is possible that copyright may be granted to the person (company or human) through whom the necessary steps are taken to create [20]. But in the future, the benefit of copyright could be exercised in a more complex way, involving the robot itself.

4 Responsible electronic person status

The proposal, which after the adoption of the resolution also generated reactions in the scientific environment and beyond, is that of "creating a specific legal status for robots, so that at least the most sophisticated autonomous robots can have the *status of electronic person responsible* for repairing damage to robots which causes them and possibly the electronic personality can be applied in cases where robots make autonomous decisions or interact independently, in another way, with third parties (para. 59 lit. f).

This status of electronic person refers, in an opinion, to "treating robots as a corporation, a legal entity that has certain rights and obligations that are purely instrumental to pursue a specific economic interest of a human being" [21].

This idea was rejected in an open letter from a group of experts in robotics and artificial intelligence, with plans to give robots legal status as "absurd and not pragmatic", and able to violate human rights [22].

The authors of the letter considered that "A legal status for a robot cannot derive from the model of a natural person, because the robot would then have human rights, such as the right to dignity, the right to its integrity, the right to remuneration or the right to citizenship in direct confrontation with human rights. This would be contrary to the Charter of Fundamental Rights of the European Union and the Convention for the Protection of Human Rights and Fundamental Freedoms [23]".

In 2017, the news that the humanoid robot Sophia received citizenship in Saudi Arabia aroused many comments [24], some appreciative, others pointing out that she received more rights than women living in the same country [25].

There were some reactions in the local legal space as well. Thus, the answer to the question: "*Is a humanoid robot a thing or a being?"* can only be one: "a humanoid robot is a man-made thing, regardless of the degree of autonomy it could reach or the connections between the data it has or the improvements it will be able to make single. This is the only answer that ensures the safeguarding of the human species against its

own mistake of creating forms of intelligence that are superior to it". Therefore, "granting civil rights to humanoid robots, even if they will be greatly reduced at an early stage, would be a major mistake of any legislator. It will be just a step towards eliminating people, only a legal one" [26].

It has also been stated that the Universal Declaration of Human Rights states that all human beings are born free and equal and, as such, a robot can be a citizen, but certainly not a human being [27].

The apocalyptic tone is perhaps a little too accentuated. But the subject will have to be developed with logical-legal arguments and not emotional ones. Denying any rights for the benefit of robots would be "against one of the modern principles of our humanity, namely to respect beings who possess enough intelligence to be aware and try not to harm them". We are, in fact, facing a moral dilemma: does anyone have the moral right to be in control of intelligent entities? In the end, as it turned out, "the question of robot rights is fundamentally about us and our way of claiming, or not, our right to own intelligent entities." [28]

At the international level, rights have been granted to other entities, such as some animals. Given the accelerated deployment of robots in almost all areas of human life, it is necessary to develop a rights system that takes into account the legal and ethical ramifications of integrating robots into our workplaces, military forces, police forces, judges, hospitals, nursing homes, schools and in the domestic space. This means paying renewed attention to the meaning of human rights in the age of smart machines [29].

To the question of whether robots should have rights, an increasingly important part of specialists considers the affirmative answer necessary, as "Humanity has obligations to our ecosystem and social system. Robots will be part of both systems. We are morally obligated to protect them, to design them to protect themselves against misuse and to be morally harmonized with humanity. There are a number of rights that should be granted, here are two: the right to be protected by our legal and ethical system and the right to be designed to be trusted"[30].

It is true that, at present, artificial intelligence systems have not yet reached the level where they can provide robots with total autonomy to sublimate themselves in the consciousness of their own identity. But, at the moment when this technological evolution will become reality, regardless of the intended primary functionality, the interrelation will no longer be a simple one from man to machine, but from man to a non-human entity, with the status that the respective era will set [31].

What is noteworthy is that regulations tend to remain significant in the wake of technological change. In fact, "Lawmakers cannot predict what technology companies will produce, and these companies often fail to predict how the public will use the technology." [32]

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revolution). The author includes in this fourth era technologies that combine hardware, software and biology (cyber-physical systems), and emphasizes advances in communication and connectivity.

[2] "Artificial intelligence (AI) systems" are software (and possibly hardware) systems designed by humans that, if given a complex objective, act in the physical or digital dimension, perceiving the environment through data retrieval, by interpreting the structured or unstructured data collected, by reasoning about knowledge or by processing the information obtained from these data and by deciding on the best action to be taken to achieve the given objective. AI systems can either use symbolic rules, or learn a numerical model, and they can also adapt their behavior by analyzing how the environment is affected by their past actions. European Commission, High Level Expert Group on Artificial Intelligence, *Ethical Guidelines for Reliable Artificial Intelligence (AI),* Brussels, 2019, p. 46. https://ec.europa.eu/digital-single-market/en/news/ethics-guidelines-trustworthy-ai

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At the confluence of criminal matters with insolvency. Insolvency – prerequisite of bankruptcy offences

Didea I.[1], Ilie D.-M.[2]

[1] Faculty of Economics and Law, University of Pitesti (ROMANIA)
Faculty of Law – Doctoral School, "Titu Maiorescu" University, Bucharest (ROMANIA)
[2] Legal Department, University of Pitesti (ROMANIA)
Doctoral School – Law, "Titu Maiorescu" University, Bucharest (ROMANIA)
E-mails: prof.didea@yahoo.com, dianamaria.ilie@yahoo.com

Abstract

Through this research we aim to highlight the need for the intervention of criminal law in the field of insolvency proceedings, as well as offences related to insolvency proceedings, respectively simple bankruptcy and fraudulent bankruptcy, reviewing the doctrinal opinions expressed and jurisprudence developed in the field. The interference imposes an interdisciplinary vision by the fact that, although the notion of insolvency is regulated in art. 240, respectively 241 of the Criminal Code and one can thus take into account a particular meaning of this notion from the perspective of criminal law, the offences in this case still refer to a field of law of its own, special, operating with its own notions and terminology, [1] each of the incriminations bearing an indissoluble link with the notion of insolvency. On a different note, the scope of bankruptcy offenses requires an interdisciplinary analysis, the mere application of the means of criminal law being insufficient. The criminal judicial body is also challenged to explore the field of insolvency in order to understand notions intrinsically related to elements that often do not represent points of interest for the criminal law specialist.

Keywords: insolvency law, criminal law, criminal liability, the offence of simple bankruptcy, the offence of fraudulent bankruptcy, the prerequisite of offences.

1 Is criminal liability necessary in insolvency law?

We consider that in the hierarchy of different forms of legal liability, criminal liability should intervene only to the extent that other measures specific to civil liability or contravention liability would not be sufficient [2]. Moreover, starting this interdisciplinary analysis, we must also take into account the sanctioning regulations contained in the Special Law no. 85/2014 on insolvency prevention and insolvency procedures, respectively Title II, Chapter I, Section 5, Subsection 2, art. 117-122 – "Cancellation of fraudulent acts", Title II, Chapter I, Section 8, art. 169-173 – "Attracting liability for entering insolvency", Title II, Chapter III, Section 4, art. 235-236 – "Liability of the management bodies, of the censors and of the execution personnel or with control attributions from the bankrupt credit institution", Title II, Chapter IV, Section 2, art. 268-270 – "Liability of the management bodies of the insurance/reinsurance company", Title IV, art. 337 – "Sanctions".

According to art. 169 para. (8) of Law no. 85/2014, the exercise of the special civil action in tort against the members of the management/supervision bodies as well as of any other persons who contributed to the debtor's insolvency state does not exclude the possibility of applying the criminal law for those torts regulated by art. 169 para. (1) letter a)-h) which, at the same time, may constitute offences. In other words, against the persons responsible for the debtor's state of insolvency, the civil action in liability can be exercised, both separately, within the insolvency procedure, and together with the criminal action, within the criminal trial.

The relationship between the action regarding the liability of the persons responsible for the debtor's state of insolvency, carried out under the conditions of the special insolvency law, on the one hand, which also gives it the characteristic of a special liability in relation to civil liability, [3] and the civil action exercised along with the criminal one, if the tort also constitutes an offence, on the other hand, it remains one in question, counterbalanced by doctrinal opinions in antithesis, there is no unitary and generally accepted interpretation in respect of *authority/power of res judicata* of court decisions handed down in criminal and civil matters. Of course, the problem of the relationship between the civil action and the criminal action for the deeds that determined the insolvency arises only when the deeds described by art. 169 para. (1) also meet the conditions of criminal liability, the responsible persons being sanctioned also criminally, despite the fact that they were also prosecuted in a civil way.

At the national level, the offences related to bankruptcy have been incriminated, traditionally, in the commercial codes, following that after the year 1989 to be incriminated by Law no. 31/1990 on trade companies, and subsequently to be taken over by the special law, respectively Law no. 64/1995 regarding the procedure of reorganization and judicial liquidation, the bankruptcy offence being divided coherently only by Law no. 85/2006 on the insolvency procedure, within which art. 143 regulated simple bankruptcy, respectively fraudulent bankruptcy.

In 2014, with the entry into force of the new Criminal Code, bankruptcy offenses are absorbed almost identically by the criminal law from the content and structure of the special insolvency law, where in our opinion they should remain and outline what would become the Insolvency Code by Law no. 85/2014, all the more so as such an organic link between offences and the special law cannot be abruptly interrupted, a

correct interpretation of them imposing a uniform analysis. That is why we point out the need to bend the criminal doctrine and the practitioners towards an interdisciplinary vision, the criminal side often having the tendency of a unilateral approach.

Part of the doctrine [4] considers that by "importing" bankruptcy offences into the New Criminal Code, it was intended to increase their "visibility" and emphasize the degree of danger. However, a "browse" through the literature proves the opposite as the analysis of these offences is quite brief and almost unapproached in the specialized articles, the lack of interest in scientific research in the field being justified by the pretty low casuistry.

It is no coincidence that we have drawn attention since the beginning of the research on the interference of criminal law with insolvency law in terms of the need for intervention or not of criminal liability in this matter. We meet opinions according to which the intervention of the criminal legislator in the complex scope of business law, where the insolvency law is also found, is not necessary, being sufficient the civil and administrative sanctioning treatment, "there being a problem of antinomy between economics and criminal law ... which is within the scope of contractual law must be excluded from the area of criminal law ... regulations have become antieconomic ... business dies due to accumulating fears ... criminal law kills the will to enter the business ... it is a brake on dynamism".[5]

It is in this sense that the foundations of "*business judgment rule"* were laid, being encouraged the business environment in assuming commercial risks, and the bona fide administrators exonerated from the responsibility for the decisions that harmed the company. This rule was imported into the domestic legal order from the American system, being inserted in the content of Law no. 31/990 by Law no. 441/2006 [6], in the context of Romania's participation in the signing of the Investment Agreement – White Paper on corporate governance in South Eastern Europe, a document aimed at supporting the states of South Eastern Europe in the process of reforming national economies for the transition towards a challenging, competitive and efficient market economy [7]. Developed under the auspices of the Organization for Economic Co-operation and Development – OECD and the World Bank, the White Paper aims to implement a new vision in the economic and legal sphere, to reform the national economy towards a competitive market economy, in order to allow the governing bodies of a company to have freedom in making decisions with an impact on the business they run, [8] not being liable even in the event of obvious mistakes, with exceptions such as fraud, conflicts of interest, acting outside the corporate purpose. In other words, the administrators of a company are not liable for mistakes committed in the management activity, even in the situation of generating damages to the company, but subject to acting in good faith, with the diligence and prudence of a good owner and considering that they act in the interest of the company. [9] However, *business judgment rule* is a fairly new principle in national regulation and perhaps too little known in the economic environment. In the idea of a possible interference with the insolvency liability regime, as a means of exonerating from the common law liability of the companies, can we consider a possible incidence of the business decision regarding the liability of the administrator for the insolvency of the company? Such an interaction is non-existent for the following reasons. The invocation of the business judgment rule is limited to the actions under common law liability exercised against the members of the

management and supervisory bodies for the culpable violation of some obligations of diligence and prudence, following that in case of fulfilling the special requirements of the rule the administrator will benefit from protection, whereas in the case of liability for insolvency state, the existence of an intentional tort is required, which is why the issue of invoking the business judgment rule cannot be raised as an exonerating liability cause in the action to engage such liability, the rule becoming ineffective.

Trying to get close to an answer on the necessity or not of the intervention of criminal liability in the sphere of insolvency, which in turn includes many forms of special civil liability, we can not fail to note that although the intervention of the criminal legislator is obvious, by incriminating certain deeds in direct and mandatory connection with insolvency, this is a minimal one compared to past regulations. If we look back, in Roman law, for example, any trader who was unable to honor his/her obligations was subject to sanctions of a civil nature, but also of a criminal nature, regardless of whether the reasons were purely objective. However, the first restrictions on the intervention of criminal law in insolvency appeared only in the 16th century, and now we are witnessing the approach under a new vision of the insolvency phenomenon, respectively to discourage the stigma of the insolvent and practically to rarefy the incriminated deeds. We also note that the offences related to the insolvency procedure are regulated at the level of each legal system of a State in which the economy is free.

As we will see later in the analysis of offences, insolvency can play either the role of a prerequisite or the role of a condition attached to the objective side. Also in the spectrum of controversies, we will try to reflect on the obligation of the existence or not of a decision pronounced by the bankruptcy judge to establish the insolvency of the debtor as a condition for starting criminal proceedings, opinions being divergent in the interpretation of the state of insolvency as a matter of fact (*ens facti*) or as a matter of law (*ens juris*).

2 Simple bankruptcy in respect to Law no. 85/2014 on insolvency prevention and insolvency procedures

It is relevant that the bankruptcy offenses evolved together with the insolvency institution and although they are not regulated in the special insolvency law in force, respectively Law no. 85/2014, we cannot fail to keep in mind that these offences refer to a field of special law that operates with its own notions, principles and rules, imposing an interdisciplinary analysis by the criminal court. In fact, bankruptcy offenses can only be committed on the basis of insolvency state.

Currently, the explanatory dictionary of the Romanian language defines *bancruta* (*bankruptcy)* as that "bankruptcy accompanied by financial irregularities to the detriment of creditors". Etymologically speaking, the word comes from the Italian language, respectively "banca" (counter, bank) and "rotta"; (torn, broken). Thus, in the medieval period, Italian merchants whose activity took place in fairs used to destroy the stall of the merchant who no longer honored his debts. [11] Romanian legislation has taken the word bancruta from French – *banqueroute*, and in Anglo-Saxon law the equivalent term of *backruptcy* is preserved even nowadays. However, referring to the present, we notice that, both internationally and at European level, but also nationally,

the notion of bankruptcy has been extended to the notion of insolvency, much more complex and much more open to a new vision of bankrupt. Therefore, although at the origin we can say that "*bancruta"* (bankruptcy) could easily be confused with "*faliment"* (bankruptcy), in time, the two notions were delimited and outlined by very clear and precise regulations. In other words, there can be no sign of equality between bankruptcy and insolvency, as bankruptcy implies a condition adjacent to insolvency, namely that the impossibility of paying due debts is caused by certain irregularities, while in the case of insolvency the simple impossibility of the debtor to pay due debts with available liquidity. [12] It follows, therefore, that bankruptcy is not identified and should not be confused with business failure. Since insolvency can be determined by objective causes such as natural disasters, man-made disasters (terrorist acts, stock market speculation, etc.), an unpredictable market situation by exaggerated decrease in demand for certain services and products or a chaotic evolution of the monetary rate, external causes that obviously exclude the offence of bankruptcy. At the same time, we also consider subjective causes that can cause irregularities in business administration.

Simple bankruptcy it is an offence with a rather tumultuous history in domestic law and which for a certain period of time has gone beyond the scope of criminal illicit deeds. [13] The deed is currently incriminated at art. 240 Criminal Code, with the following content: "(1) *Failure to file or late introduction, by the natural person debtor or by the legal representative of the legal person debtor, of the request to open insolvency proceedings, within a period exceeding by more than 6 months the period provided by law from the state of insolvency, shall be punished by imprisonment from 3 months to one year or by a fine. (2) The criminal action is initiated on the prior complaint of the injured person".*

Without proposing an exhaustive analysis of the crime in a way characteristic of criminal law, related to the objective, subjective side, etc., we further turn our attention strictly to the analysis of the *prerequisite* of the offence of simple bankruptcy, which we consider the link between the Insolvency Code and the Criminal Code regarding this offence. Why? Because, as we said, the interpretation of art. 240 Criminal Code must be passed through the filter of insolvency proceedings. In other words, we must correlate the provisions of art. 240, on the one hand, with the provisions of art. 66 of the special insolvency law, which according to the doctrine plays the role of a compliant norm, and which provides that "debtor *in a state of insolvency* is obliged to submit to the court a request to be subject to the provisions of this law, within a maximum of 30 days from the occurrence of the state of insolvency", and on the other hand with the provisions of art. 5, paragraph 29 of Law no. 85/2015 which define the *state of insolvency* as "that state of the debtor's patrimony which is characterized by the insufficiency of the money funds available for the payment of certain, liquid and due debts as it follows: "a) the insolvency of the debtor is *presumed* when he/she, after 60 days from the due date, has not paid his/her debt to the creditor; the presumption is relative, b) the insolvency is *imminent* when it is proved that the debtor will not be able to pay at maturity the debts due committed, with money funds available at the maturity date".

From the systematic and logical interpretation of these articles, we consider that the term of 6 months taken into account by the criminal legislator by correlation with the provisions of the Insolvency Code mentioned above, begins to flow from the occurrence of the state of insolvency, as a state of the debtor's assets cash available for

the payment of certain, liquid and due debts. Basically, the offence is consumed after exceeding the term of 6 months from the installation of the state of insolvency, as an omission of the introduction of the application or as a late introduction, although part of the doctrine takes into account a term of 7 months, adding the 30 days provided by art. 66 of the Insolvency Code at the 6 months provided by the Criminal Code [14]. At a careful analysis of art. 240 of the Criminal Code, we note that the legislator expressly provides that the term of 6 months begins to run at the expiration of the term "provided by law since the occurrence of the state of insolvency". Or, the expression "since the occurrence of the state of insolvency" can be interpreted only by reference to art. 5, paragraph 29 of the Insolvency Code which defines the state of insolvency.

The situation also complicates in the interpretation of the expression "*state of insolvency*", in the sense that the jurisprudence applies differently including the provisions of art. 66 paragraph (1) of Law no. 85/2014. In order to continue the analysis, it is necessary to mention here that the literature also talks about a state of *current insolvency* which the legislator would have omitted to define explicitly but which results from the corroboration of art. 5, par. 29 thesis I with art. 66 par. (1) thesis I of Law no. 85/2014. [15] In other words, the current insolvency is defined by art. 5, par. 29 thesis I, that is "that state of the debtor's patrimony which is characterized by the insufficiency of the money funds available for the payment of certain, liquid and due debts". Therefore, *current insolvency* differs from *presumed insolvency* by the fact that it is no longer necessary to run any term, but is strictly related to the moment when the debtor is in the situation when he/she does not have the necessary money funds to pay certain, liquid and due debts. For example, when is the offence committed? The court will consider the state of *current* insolvency or *presumed* insolvency in order to calculate the 6-month term? It is true that the legislator does not expressly define or regulate the current insolvency. At the same time, we observe that the delimitations between the presumed insolvency and the imminent insolvency are made in the content of the same article and in the continuation of the first thesis of art. 5, par. 29 which would represent the current insolvency, so that exactly the details from letters a) and b) give rise to a controversial interpretation regarding the moment of birth of the state of insolvency.

What was the legislator's reason, though? The specialized doctrine [16] invokes the need to interpret art. 66 taking into account art. 70 par. (1) [17] of Law no. 85/2014, whose provisions establish the conditions under which the creditor may request the opening of the insolvency procedure of the debtor. This time, the legislator expressly provided that a creditor may request the opening of insolvency only against a *preseumed* debtor in insolvency, so only after the 60 days have elapsed. We consider that the reasoning considered by the legislator thus becomes quite clear, in the sense that when the debtor himself/herself requests the opening of insolvency proceedings, he/she refers to the current state of insolvency, being the only one able to know and analyze his/her financial situation and inability to pay certain, liquid and due debts. Consequently, the creditor cannot objectively assess the state of his/her debtor's patrimony, benefiting from the presumption offered by law after 60 days from the due date, in order to give rise to the right to sue, which the debtor can overturn by proving the existence of the necessary money funds to cover the debt. Moreover, the lack of a regulation that would impose a certain conduct on the creditor, such as waiting for a period of 60 days

to initiate insolvency proceedings, would give rise to an avalanche of abusive claims from creditors.

Criminal doctrine expressed in the sense of relating to the state of current insolvency, "being marked by a general inability to pay, related to all funds and all debts (...) the moment of occurrence of insolvency is an objective one (...) therefore, theoretically, the term of 30 days and later the term of 6 months is calculated from the moment when the debtor's money funds are insufficient for the payment of the due debts, if there are not any of the exceptions provided by law". We note that much of the doctrine adds the 6 months to the 30-day deadline stipulated by the Insolvency Code, [18] but we maintain the opinion that the 6-month deadline is strictly related to the state of insolvency and should address the presumed insolvency and not the current one, as the law does not distinguish, and *ubi lex non distinguit nec nos distinguere debemus.*

That is why, although both the literature in the field of insolvency and the one in the criminal field, go in the same direction of interpretation, the judicial practice relates in most cases to the presumed insolvency. Specifically, the insolvency judge ordered the opening of the insolvency proceedings requested by the debtor only after the expiry of the 60-day period from the maturity of the debts, [19] or rejected the request due to the impossibility of finding the 60-day deadline [20], or the debtor has not proved that he/she is in a state of presumed or imminent insolvency [21], from this final solution resulting that the insolvency judge does not even consider a third hypothesis, namely state of current insolvency.

Given the onset of this non-unitary practice and the existence of an antithetical view of doctrine on the one hand, and of judicial practice on the other hand, *de lege ferenda* a legislative clarification would be required, we are of the opinion in the sense of expressly defining and regulating the state of current insolvency by delimiting between the presumed insolvency and the imminent insolvency, based on the arguments presented above. From a criminal point of view, the effect is reflected on the consideration of the current insolvency as representing the prerequisite of the offence of simple bankruptcy, following that from its installation to be calculated mainly the term of 6 months [22] provided by art. 240 of the Criminal Code.

We mention that the new Criminal Code brought as a novelty the necessity of the existence of a criminal complaint in order to be able to initiate such a criminal action for the offence of simple bankruptcy, an element that we consider opportune in shaping the idea of exceptional criminal liability, the special law of insolvency stipulating in its turn sufficient legal means to satisfy the creditors, in a much more balanced, coordinated, collective, competition, egalitarian, unitary and general context.

3 The role of the state of insolvency in connection with the normative variants of the offence of fraudulent bankruptcy

Like the offence of simple bankruptcy, fraudulent bankruptcy was regulated prior to the entry into force of the new Criminal Code, in the content of Law no. 85/2006, art. 143 par. (2). The Criminal Code took over almost identically the legal text on the offence of fraudulent bankruptcy, the only essential difference being the introduction in

the new legal text of the need for a prior complaint for initiating criminal proceedings. Thus, according to art. 241 par. (1) of the Criminal Code, this offence has the following content: "*The deed of the person who, in the fraud of the creditors:*

a) falsifies, steals or destroys the debtor's records or hides a part of his/her assets;

b) presents non-existent debts or presents in the debtor's registers, in another document or in the financial statement undue amounts;

c) alienates, in case of insolvency of the debtor, a part of the assets is punished with imprisonment from 6 months to 5 years".

Continuing the analysis, but not in accordance with the legal scheme imposed by criminal law, we look over *the constitutive content of the offence*, but only in the aspect of *objective side*. Without developing a detailed analysis on this aspect, as it would far exceed the purpose of our research [23], we limit ourselves to specifying that the material element of the offence of fraudulent bankruptcy differs depending on the three normative variants incriminated in art. 241 par. (1) of the Criminal Code. Therefore, the first variant involves the deed of the person who falsifies, steals or destroys the records of the debtor in the fraud of creditors or who hides part of the assets of his property. The second variant concerns the presentation of non-existent debts in the debtor's registers, in another document or in the financial statement undue amounts, and the third variant aims at the alienation in case of insolvency of the debtor, of a part of the assets. As a result, the offence of fraudulent bankruptcy has a complex character, according to the majority opinion, [24] absorbing in its content the offences of forgery of official documents, intentionally false statements, thus there are no concurrent offences.

But what interests us in this interdisciplinary analysis is *the role of the state of insolvency in connection with the normative variants of the offence* regulated by art. 241 par. (1) of the Criminal Code, and we are going to nuance the way in which the state of insolvency, as a state of fact, becomes *prerequisite* of the offence, in its absence the material elements provided by art. 241 not having criminal relevance in the context of the offence of fraudulent bankruptcy. *In other words, what is the role of insolvency in the constitutive content of the offence of fraudulent bankruptcy*?

According to the older doctrine, the state of insolvency was considered to be a constituent element of the offence of fraudulent bankruptcy only in terms of the variant of alienating part of the assets [25]. Subsequently, it was noted, both at the doctrinal level, [26] and at the jurisprudential level [27], that the state of insolvency represents the prerequisite of all variants of committing the crime of fraudulent bankruptcy, with the specification that in the variant regarding the alienation of some assets the pre-existence of a court decision to open insolvency proceedings is imposed. Recent literature [28] has kept the same idea, showing that "the state of insolvency of the debtor continues to be a premise of fraudulent bankruptcy in all ways, and the opening of insolvency proceedings the special premise for the manner provided in letter. c)". Regarding the letter c) in art. 241 par. (1) of the Criminal Code, the doctrine justified the necessity of the existence of a court decision regarding the opening of the insolvency procedure on the debtor related to the text of the law, letter c) being the only variant that imposes such a requirement, in the other cases the insolvency must be considered as a state of fact and not of law, which can be ascertained even by the criminal bodies. [29]

Considering that the legislator refers to the state of insolvency expressly only in the normative variant of let. c) from the content of art. 241 of the Criminal Code, there is a

tendency to separate this hypothesis from the first two variants stipulated in letters a) and b) of art. 241 par. (1) Criminal Code, which do not specifically provide for the need for insolvency, the doctrine [30] showing that in these two ways of fraudulent bankruptcy the premise is not the state of insolvency, but the debtor-creditor relationship. And then, what is the role of the state of insolvency in the construction of this offence? The state of insolvency can be excluded from the constitutive content of variants a) and b) of art. 241 par. (1) on the offence of fraudulent bankruptcy?

A number of aspects emphasizes the fact that the state of insolvency is a condition, a *sine qua non* characteristic for the realization of the content of the offence of fraudulent bankruptcy in all its variants. However, the very place of regulation of this offence, immediately after the simple bankruptcy offence, reflects the particularity of the insolvency state in the content of the common bankruptcy offence, specific only to the debtor subject to insolvency proceedings and literally interpreted as "bankruptcy accompanied by financial irregularities to the detriment of creditors"[31]. At the same time, it can be noticed that these variants of the offence of fraudulent bankruptcy can overlap [32] over other deeds incriminated by the Criminal Code, which would lead to a double incrimination, which the legislator certainly would not have wanted. However, going into the depth of the analysis, we can understand certain nuances. Thus, as we have noticed, it is unquestionable that the state of insolvency belongs to the constitutive content of the offence of fraudulent bankruptcy. However, its quality as a prerequisite for the offence of fraudulent bankruptcy becomes questionable. Here, too, we can discuss a decision of the High Court of Cassation and Justice, which somehow clarifies this very interpretable situation, by establishing the following aspects: *"The different actions specific to the constitutive content of the committed fraudulent bankruptcy offence are grafted on the state of insolvency (default, bankruptcy) of the company. There must be no causal link between these actions and the state of cessation of payments, being sufficient for them to precede, accompany or be subsequent to this state, in order to give it a fraudulent character by distorting or hiding the real economic situation of the company".*[33]. In other words, the state of insolvency represents a condition for the consumption of the fraudulent bankruptcy crime, in the variants provided at letters a) and b) of art. 241 of the Criminal Code, but a condition that may materialize and subsequent to falsification, theft or destruction of the debtor's records, hiding part of his/her assets or the presentation of non-existent debts or the presentation in the debtor's registers, other document or financial situation of undue amounts. Consequently, in these two variants of the offence, the state of insolvency no longer represents the prerequisite of the crime of fraudulent bankruptcy.

Regarding the variant regulated by letter c) in art. 241 Criminal Code, which evokes *expressis verbis* the insolvency of the debtor, thus clearly ensuring the quality of insolvency as a prerequisite for the offence of fraudulent bankruptcy, we consider it appropriate to clarify some aspects related to *imminent insolvency*, which, unlike the offence of simple bankruptcy where only the presumed insolvency was interested in the analysis of the prerequisite, raises different problems of interpretation. The difficulty of ascertaining the actual existence of the prerequisite of the fraudulent bankruptcy offence in the hypothesis of an imminent insolvency results from the uncertain way of establishing the exact moment in time at which the imminent insolvency materializes. Imminent insolvency involves proving the impossibility of the debtor to pay the debts

that will become due, with the funds available at the due date. Or, can we hold that the imminent insolvency would also represent the premise of the fraudulent bankruptcy offence, considering that the legislator left only to the debtor the faculty, and not the obligation, to request the opening of the insolvency procedure? Within art. 241 letter c) the legislator does not distinguish between the presumed insolvency and the imminent insolvency, using only the phrase "in a state of insolvency". In order to summarize, we note and appreciate that in the situation of an imminent insolvency, which implies the fact that it has not yet materialized, the prerequisite of the normative variant regulated by letter c) will be made only following an effective finding by a decision of the insolvency judge regarding the fulfilment of the conditions for opening the insolvency procedure based on the proof of an imminent insolvency by the debtor. In this sense, the state of insolvency is seen as an *in law situation* and not *in fact,* allowing the finding also by the criminal authorities. *Per a contrario*, in case of a presumed insolvency, we consider that the prerequisite of the state of insolvency is achieved by even the finding by the criminal judicial bodies, not being necessary the existence of a decision of the insolvency judge in this respect.

We conclude by emphasizing that all normative variants of art. 241 par. (1) of the Criminal Code depend in one form or another on the occurrence of the state of insolvency, which becomes essential for the commission of the offence of fraudulent bankruptcy. For example, although letters a) and b) do not make any specification regarding the state of insolvency, as in the case of letter c), for the commission of the offence of fraudulent bankruptcy, it is necessary to initiate the state of insolvency either before or after the commission of the respective deeds, as interpreted by the High Court of Cassation and Justice, in the decision mentioned above. Otherwise, the commission of one of the deeds listed in art. 241 will give rise to criminal liability for the crime actually committed, not being absorbed in the content of fraudulent bankruptcy without meeting the condition of insolvency of the debtor, the purpose of the common elements of the three variants being to defraud creditors.

4 Conclusions

The purpose of insolvency cannot be above the criminal law, but neither can the criminal law be above the insolvency law, being necessary to find a balance between the two areas equally important for the social and economic stability of a society in general. A reflection on the choice of the way of regulation by certain legal systems, regarding the finding of insolvency exclusively by the civil court, not by the criminal court, decision based on which to allow the initiation of a criminal action in case of related offences with insolvency, it could offer us solutions in the normative interpretation, correction and prevention of non-unitary and abusive practices on the part of the criminal bodies.

The interference between the norms of civil law and the norms of criminal law has given rise to regulations that balance this coordination/subordination relationship, each of these branches trying to impose its "supremacy" and create its own legislative barriers to ensure a certain authority of the *res judicata*. We notice, on the one hand, the provisions of art. 1365 of the Civil Code, according to which "*the civil court is not bound by the provisions of the criminal law nor by the final decision of acquittal or*

termination of the criminal trial regarding the existence of the damage or the guilt of the perpetrator of the illicit deed", and on the other hand, as a response to this article, we have in mind the provisions of art. 28 of the Code of Criminal Procedure, which state that "*the final decision of the criminal court has the authority of res judicata before the civil court that judges the civil action, regarding the existence of the deed and of the person who committed it. The civil court is not related to the final decision to acquit or terminate the criminal proceedings regarding the existence of the damage or the guilt of the perpetrator of the illicit deed. The final decision of the civil court by which the civil action was resolved does not have the authority to be tried before the criminal judicial bodies regarding the existence of the criminal deed of the person who committed it and of his/her guilt".*

Following the reflection on distinct ways of interpretation, we consider it opportune to summerize by exposing the opinion we agree on, and which is a middle one, we could say. *The criminal does not replace insolvency*, *more precisely the insolvency procedure itself*. At most, the criminal court holds in place the liability action of the persons responsible for the debtor's state of insolvency, an action which constitutes an associated case [34] according to the law. In addition, we emphasize that the civil action in liability pending before the insolvency judge is suspended only if it has a legal basis identical to the one on which the criminal action is based. However, if the legal grounds are different, the suspension cannot operate, and the two procedures will run in parallel. The reasoning also follows from the interpretation of art. 27 of Criminal Procedure Code. Par. (7) of the content of this article establishes that "in the case provided in par. (1), the trial before the civil court shall be suspended after the initiation of the criminal action and until the resolution of the criminal case in the first instance, but not more than one year". As a result, par. (7) refers to par. (1) of the article, imposing a correlative analysis, in the sense that it establishes that "if they have not become a civil party in the criminal proceedings, the injured person or his/her successors may bring an action before the civil court to repair the damage caused by the offence". *Per a contrario,* it cannot operate a suspension in case of a civil action exercised for the recovery of another damage than the one caused by the offence that is the object of the criminal action. Moreover, it cannot suspend the insolvency proceedings whose main object is to recover the damages caused to the creditors and in the subsidiary, granting when possible the second chance to the debtor, the two actions, insolvency, respectively criminal, evolving in parallel. As a matter of fact, even on the criminal action initiated before the opening of the insolvency procedure, the in law suspension provided by art. 75 of the Insolvency Code [35]. Moreover, the exercise of the criminal action for the bankruptcy coffence has as a prerequisite the state of insolvency. We also note that the civil actions in the criminal proceedings are not subject to in law suspension, as it results from the analysis of the text of art. 75 of the insolvency law. Thus, the injured party in the criminal trial has at its disposal two legal ways to act offered by art. 102. Either they make a statement of claim that will be admitted to the insolvency estate under suspensive condition and with the role of preserving the creditor's right until the settlement of the civil action in the criminal case, with the risk of not having anything from where to recover his/her claim if the debtor's property is liquidated until the settlement of the civil action within the criminal trial, or he/she renounces the civil action in the criminal trial and capitalizes his/her claim by

submitting a statement of claim that will be subject to verification by the insolvency administrator/liquidator. [36]

Consequently, the decision of the insolvency judge on the opening of insolvency proceedings will have *the authority of res judicata before the criminal court regarding the existence or non-existence of the state of insolvency*, which in fact represents the prerequisite of the bankruptcy offence, accepting the interpretation in the sense that the pre-existence of a decision of the insolvency judge is not required to complete the constitutive content of the offence, the state of insolvency as a matter of fact – *ns facti* – being able to be ascertained by the criminal court in the absence of a decision of the insolvency judge.

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[2] Bentham, J. (1789). *Introduction to the Principles of Morals and Legislation,* cap. 13 - http://www.earlymoderntexts.com/assets/pdfs/bentham1780.pdf

[3] Recently, the doctrinal vision seems to be moving in a direction compatible with jurisprudence, which almost unanimously considers that liability for insolvency is a special tort liability for one's own deed (C.Ap. Bucureşti, S. a V-a com., Dec. nr. 1317/2003, în Curtea de Apel Bucureşti – *Practică judiciară comercială 2003-2004,* p. 328). Thus, the idea emerged that the legal nature of liability is exclusively tort, given that the text of the law limits the possibility of incurring liability exclusively to damages caused by the commission of illicit deeds provided by art. 169 of the law, going so far as to argue that the formulation of a request that seeks to attract contractual liability would be inadmissible, not being compatible with the legal regime specific to this form of liability. The opinion is also embraced by other authors, who argue that the insolvency liability is not aimed at repairing the debtor's damage, but on the one suffered by the creditors, reason for which there are no contractual links between the persons who contributed to the state of insolvency and the debtor's creditors, which determines a special form of tort liability, which really borrows from the characteristics of tort liability under common law, but

which is complemented by elements specific to the insolvency proceedings. In this sense, see Dimitriu, A. (2015). *Recuperarea creanțelor prin procedura insolvenței. Deschiderea procedurii. Garanțiile. Acțiunea în anulare. Atragerea răspunderii,* Ed. C.H. Beck, Bucureşti, p. 318-319, precum şi Antonache, C. (2017). *Situația contractelor în derulare, în Piperea, Gh. (Coordonator), Codul insolvenței: Note, Corelații, Explicații,* Ed. C.H.Beck, București, 2017, p. 832.

[4] Pârgaru, D. în Cioclei, V. (Coord.), *op. cit. – Prefață.*

[5] Guidet, C. (1984). *Le droit penal vu par le milieu des affaires,* Universite de Liege, p. 73, precum şi Kellens, G. (1986). *Qu as-tu fait de ton frere?,* Bruxelles, p. 157.

[6] At the time of the publication of Law no. 441/2006, the normative text was intensely criticized for an incomplete internal transposition of this principle, as the regulation aimed at protecting administrators with reference only to exercising the mandate with loyalty, not covering other professional obligations, respectively acting with caution and diligence of a good owner. However, this inadvertence was corrected in 2007 by GEO no. 82/2007 which returned to the text and supplemented with the rule of business judgment with the two obligations previously omitted.

[7] Stability Pact – South Eastern Europe Agreement for Reform, Investment, Integrity and Growth – White Paper on Corporate Governance in South Eastern Europe called the Investment Agreement – https://www.oecd.org/daf/ca/corporategovernanceprinciples/19813511.pdf

[8] For development, see Nistor (Țelea), A. *Considerații privind transplantul juridic al instituției răspunderii patrimoniale a administratorului societății aflate în dificultate economică şi business judgement rule,* https://www.universuljuridic.ro/consideratii-privind-transplantul-juridic-al-institutiei-raspunderii-patrimoniale-a-administratorului-societatii-aflate-in-dificultate-economica-si-business-judgement-rule/

[9] Bercea, L. (2006). *Regula judecății de afaceri: despre involuția instituției înainte de naşterea sa*, în Revista Pandectele Române nr. 6/2006

[10] Business judgment rule is enshrined in art. 144 of Company Law no. 31/1990, which imposes the censorship of liability actions promoted by the company or by shareholders/associates in conditions specially adapted to the circumstances of the business environment. Bercea, L. (2014). *Răspunderea pentru intrarea debitorului în insolvență,* în Radu Bufan, R. (coord. științific), *Tratat practic de insolvență,* Ed. Hamangiu, București, pp. 807-808.

[11] Puşcanu, M. (1927). *Drept falimentar român,* Ed. Cugetarea, Bucureşti, p. 12, apud Pârgaru, D. *op. cit.,* p. 55.

[12] See in this sense Cărpenaru Stanciu, D., Hotca, M.A., Nemeş V., (2017). *Codul insolvenței comentat,* ed. a II-a, revăzută şi adăugită, Ed. Universul Juridic, Bucureşti, pp. 504-506 – "Insolvența şi bancruta".

[13] It was initially regulated in the Commercial Code and will be decriminalized by the provisions of the Law. no. 64/1995 on the procedure of

reorganization and judicial liquidation. Law no. 149/2004 re-incriminated the simple bankruptcy within the same normative act, being subsequently taken over by Law no. 85/2006 on the insolvency procedure, and starting with 01/02/2014 extracted by the Special Part of the Criminal Code, in the content of Title II, "Offences against property", Chapter III, "Offences against property by disregarding trust".

[14] The literature unanimously accepts this way of calculating the term of 30 days, respectively 6 months from the appearance of the insolvency state – See Paşca, V. (2014). *Răspunderea penală pentru infracțiuni în legătură cu insolvența,* în Bufan, R. (coord.), op.cit., p. 952.

[15] Savu, C.N. (2017). *Procedura insolvenței. Concept. Organe şi participanți. Deschidere. Efecte principale,* Ed. C.H. Beck, Bucureşti, p. 22.

[16] *Idem*, p. 30.

[17] Art. 70 (1): "Any creditor entitled to request the opening of the procedure provided for in this title may file a request to open the procedure against a presumed insolvent debtor".

[18] Cioclei, V. (2017). *Drept penal. Partea specială I. Infracțiuni contra persoanei şi infracțiuni contra patrimoniului*, ed. a 2-a, Ed. C.H. Beck, Bucureşti, pp. 324-325.

[19] Suceava Law Court, Civil Section, Civil Sentence no. 1446 of 05/12/2014 – www.idrept.ro: "It is found, compared to the documents in the file, submitted according to art. of Law no. 85/2014, that the debtor registers debts of over 60 days, for the payment of which there are not sufficient funds, being, thus, fulfilled the conditions provided by art. 66 of the mentioned legislative text".

[20] Arad Law Court, Civil Section II, Civil Sentence no. 396 of 17/12/2014 – www.idrept.ro: "The debtor affirms a debt over the threshold value, but does not make any reference to its maturity. It is true that the documents show that this is due for more than 60 days, but the role of the insolvency judge is to verify, based on the documents indicated by the debtor, the fulfillment of the 60 days, and not to look for the documents from which it is deducted".

[21] Bucharest Law Court, Civil Section VII, Civil Sentence no. 9935 of 24/11/2014 – www.idrept.ro: "In this case, the court finds that the conditions provided by art. 66 par. (1) of the law, respectively the debtor has not proved that he/she is in a state of presumed or imminent insolvency".

[22] In the literature we find opinions according to which the 6-month term set by the legislator would be much too long that could lead to the inefficiency of the criminal law, as the debtor has enough time to alienate or hide assets that could be capitalized in the procedure, turning insolvency into default. See Paşca, V. *op. cit.,* p. 952. In our opinion, the legislator was prudent in this respect, by even legislating the procedure for annulment of fraudulent acts concluded by the debtor prior to entering insolvency.

[23] For development see Paşca, V. in Radu Bufan (coord.), *op. cit.,* pp. 955-957. Also, regarding the material element, the immediate consequence and the causal link, developed extensively by Cărpenaru Stanciu, D., Hotca, M.A., Nemeş V., (2017). *Codul insolvenței comentat, op. cit.,* pp. 512-525, as well as Pârgaru, D. *op. cit.,* pp. 186-210.

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[26] See Slăvoiu, R. (2006). Some aspects regarding the crime of fraudulent bankruptcy, in Law no. 3/2006, pp. 212-213 – "Falimentul (Bankruptcy) is the prerequisite for bancruta (bankruptcy), and the deeds of alienation of a significant part of the assets, defrauding the creditors, do not in themselves constitute a crime, as long as the bankruptcy is not declared".

[27] C.S.J., Criminal Section, Decision no. 4084/2003.

[28] Kuglay, I., în Bodoroncea, G., Cioclei, V., Kuglay, I., Lefterache, L.V., Manea, T., Nedelcu, I., Vasile, F.M. (2014). *op. cit.,* p. 514.

[29] Hotca M.A. (2008). *Bancruta frauduloasă*, Ed. C.H. Beck, Bucureşti, p. 108-109.

[30] Cioclei, V. (2015). *Situația premisă a infracțiunii de bancrută frauduloasă, Creditori versus debitori – Perspectiva Hexagonului,* Ed. Universul Juridic, Bucureşti.

[31] According to the Explanatory Dictionary of the Romanian Language.

[32] For example, the offence regarding the abuse of trust through creditors' fraud regulated by art. 239 par. (1) of the Criminal Code, which consists of "the debtor's deed of alienating, hiding, damaging or destroying, in whole or in part, values or assets from its patrimony or of invoking fictitious acts or debts for the purpose of defrauding creditors", can be identified with the offence of fraudulent bankruptcy in the event that the perpetrator is the debtor.

[33] I.C.C.J., Criminal Section, Decision no. 2574/2010.

[34] Pursuant to Art. 169 (3) of the Law no. 85/20140, "the request submitted pursuant to par. (1) or, as the case may be, par. (2) shall be judged separately, forming an associated file".

[35] Art. 75 par. (1) of Law no. 85/2014: "From the date of opening the procedure, all judicial, extrajudicial actions or measures of forced execution for the realization of the claims on the debtor's property shall be suspended by right. The capitalization of their rights can be done only within the insolvency procedure, by submitting the requests for admission of claims. Their reinstatement is possible only in case of annulment of the decision to open the procedure, of revocation of the decision to open the procedure or in case of closure of the procedure under the conditions of art. 178. If the decision to initiate the procedure is annulled or, as the

case may be, revoked, the judicial or extrajudicial actions for the realization of the claims on the debtor's property may be reinstated, and the enforcement measures may be resumed. On the date on which the decision to initiate the procedure becomes final, both the judicial or extrajudicial action and the suspended enforcement shall cease".

[36] See, Sorescu, I. în Piperea, Gh. (coord.) (2017). *Codul insolvenței. Note. Corelații, Explicații, op. cit.*, p. 461.

Brief considerations regarding the criterion of the appropriateness of granting conditional release by the court

Boroi A.[1], Toma G.[2]

[1] Prof. PhD, "Titu Maiorescu" University, Bucharest (ROMANIA)
[2] PhD, Assistant Professor, "Hyperion" University, Bucharest (ROMANIA)
alexandruboroi@yahoo.com, geo_toma87@yahoo.com

Abstract

Conditional release represents the most used form of post-conviction individualization, of the prison sentence, based on a good behavior on the part of the detainee during the execution of the custodial sentence.

For the granting of conditional release, the convicted person will go through two stages, an administrative stage (when the conditions and conduct are analyzed by a commission of the penitentiary where he served his sentence) and a jurisdictional one (when his conditions and behavior are examined by the court of trial).

Therefore, in order for it not to become a discretionary legal institution, conditional release will be granted according to the decision of a specialized commission set up at the penitentiary level, which will assess the conditions and behavior of each individual.

However, the court should look more closely at the conditions of legality, and not at the conditions of opportunity, which should be left to the duties of the prison commission.

Keywords: conditional release, conditions: proper conduct; court conviction.

1 Introduction

Conditional release is a way of individualizing the execution of life imprisonment and imprisonment, in a non-custodial fashion, granted by the final decision of the court, as a result of the fulfillment of the conditions imposed on the conduct of the convict during the execution of the mandatory fraction of the sentence, as well as subject to the

full fulfillment of the measures and obligations, under the control of the probation services, during the term of supervision [1].

The core of the subject of this scientific study can be found in the Criminal Code Article 99-106 [2], in Law no. 254/2013 [3], in the Code of Criminal Procedure[4]. This condition represents the reiteration, in another form, of the subjective requirement that was found in the old Criminal Code regarding the good conduct of the convicted person during the execution of the prison sentence.

Conditional release it is a criminal policy measure that has a special importance for achieving the purpose of the punishment, being conceived as an incentive for convicted persons who give signs of atonement. This consists in reducing the custodial period, being intended to accelerate the process of re-education and social reintegration of the convict [5].

Therefore, the legal institution of conditional release appears as a measure that can be ordered by the court and consists in the release of the convict, before he fully executes the life imprisonment or imprisonment sentence if the requirements imposed by the legislator are met.

It must be borne in mind that it is always optional, not a right, but only a vocation for the convicted person [6]. The European Court of Human Rights has even ruled in this regard, pointing out that Article 5 (1) a) of the Convention for the Protection of Human Rights and Fundamental Freedoms [7] does not ensure for the convicted person the right to enjoy an amnesty law, to be released on conditional release or permanently, before serving the sentence for which he was convicted [8]. This rule is developed by the legislator in the Explanatory Memorandum of the Criminal Code [9] which states that "conditional release is not a recognized right of the convict not to serve the sentence until term, but a legal instrument by which the court finds that it is no longer necessary to continue the execution of the sentence in detention until the full fulfillment of the period established on the occasion of the conviction for the convict, through his conduct throughout the enforcement period, proves that he has made obvious progress towards social reintegration and thus convinces the court that he will no longer commit offenses and his early release does not pose a danger to the community."

Therefore, the institution of conditional release can be seen as an institution complementary to the regime of execution of the sentence and a means of judicial individualization of it. The benefit of conditional release can be granted to any convict, regardless of the nature of the crime committed and regardless of whether he has previously benefited from conditional release for another sentence or not. Being a way of executing a part of the sentence, the sentence is considered executed only if in the time interval from the release until the fulfillment of the sentence, the convict has not committed an offense again [10].

2 The appropriateness of granting conditional release by the court of trial

The appropriateness to grant conditional release for a convicted person is currently a prerogative that is essentially a matter for the court. In this respect, in order to avoid

possible arbitrary solutions, it is necessary to have evidentiary aspects on which to base the solution of admitting or rejecting such a request.

The decision must be motivated, *de facto* and *de jure*, in order to ensure the fulfillment of the requirements provided by law, respectively in order to exercise a possible act of control over the sentence initially pronounced.

From the interpretation of the provisions provided for in the opportunity (Article 99 (1) d) and Article 100 (1) d) of the Criminal Code) to provide such a benefit, we note that the legislator understood to grant this attribute to the court, with the obligation to motivate, as mentioned above, the aspects that led to such a decision..

In order to reach a decision, the judge will have to analyze the behavior of the detainee during the execution of the sentence, the number and degree of involvement in educational, religious, moral, cultural, therapeutic, psychological counseling, social assistance, school training, vocational training activities, the tasks assigned to the convicted person by the administration of the place of detention; if he had the opportunity to work, how he fulfilled his responsibilities, the rewards granted by the penitentiary representatives or any disciplinary sanctions imposed as a result of antisocial offenses.

As stated above, conditional release should not be perceived as a right of the convict, but as a possibility granted to him by the court following the analysis of his behavior throughout his detention; and only after the court has formed its conviction that release is necessary, an opinion that must be motivated in relation to its effectiveness in the resocialization process. If the court considers that the period for the custody was not sufficient for resocialization or the convicted person did not constantly have a good conduct, or did not meet the conditions provided by law, they may not grant the benefit of conditional release after a period of postponement or more, until the time limit provided for in the sentence of imprisonment is reached [11].

We notice that the evaluation made by the judge includes both the aspects regarding the social reintegration, as well as those regarding the prevention of some acts of recidivism. We make this statement because conditional release involves the granting of a benefit based on trust, and the achievement of the consequences of acts that do not comply with legal requirements is particularly important. The convicted person must show that he has fully understood the significance of granting such a benefit and the obligations incumbent on him.

According to Article 97 (1) of Law no. 254/2013 The commission for the individualization of the regime of execution of custodial sentences is composed of the judge supervising the deprivation of liberty, who also holds the quality of chairman of this commission, the director of the penitentiary, the deputy director for the security of detention and the penitentiary regime, the deputy director for education and psycho-social assistance and a probation counselor competent according to the law in whose constituency the penitentiary is located. The secretariat of this commission is provided by the head of the evidence service within that penitentiary.

In most cases, the considerations set out in the minutes made by the commission for the individualization of the regime of execution of custodial sentences in the penitentiary (the commission for conditional release) are the arguments underlying the court decision. We appreciate that this aspect lies in the fact that this examination is performed by several people who have different specializations and who can present

from an objective perspective with reference to the clear possibilities of that person to socially reintegrate and prevent possible acts of recidivism. At the same time, it should be borne in mind that this commission includes persons with whom the convict has come into contact during detention and may express their opinion in an informed manner.

For example, if the convicted person is proposed for conditional release, the commission set up at the penitentiary level will be able to express assessments referring to the fact that the executed period is sufficient for his re-education, that he has acquired respect for social values for the rule of law, for the rules of social coexistence [12] these being proved by the decent, civilized attitude he had during the enforcement of the sentence, when he had a decent, civilized and respectful attitude, establishing non-conflicting relations with the other persons serving custodial sentences [13].

We note that the commission within the penitentiary has a decisive role in making the decision on conditional release, which is correct, because as stated above, the characterization of the convicted person's behavior is actually performed by persons who had him under supervision during his custodial sentence.

We consider that such a decision by the conditional release board is a fair one, as it is made up of people who were close to the convicted person during detention. In addition, the fact that a judge (the judge delegated to execute) is part of this commission ensures the objectivity and control over the legality of the minutes recorded in the documents drawn up by the conditional release board.

Conviction on the appropriateness of ordering such a measure also results from the indications referring to the general attitude of the convicted person towards the crime he committed and towards the punishment he received as a result of committing that crime, in this sense we can mention the response to the program in which the convict was integrated by the administration of the place of detention, if he complied with the rules of procedure, his attitude towards prison staff and other detainees [14], by removing or minimizing the traces of the crime or by means of evidence showing that he will engage and continue the various programs he followed in the penitentiary (retraining courses, treatment programs, etc.).

It also follows from the above that the appropriateness of the conditional release order depends to a large extent on the opinion of the members of the prison commission, as these issues can only be highlighted by them, in the current situation, as these persons are the ones who have contact with the convict, and with the activities and attitude he has during the execution of the sentence.

In many cases, the nature and gravity of the act retained by the convict may influence the conviction of the judge, although this should not be taken into account, as they were taken into consideration in establishing the legal framework, also in individualizing the sentence that was applied as a result of ascertaining of guilt.

In practice, solutions emerge from which it results that the court does not pay due attention to the recommendations of the commission within the penitentiary, motivating that the nature and gravity of the crime together with the period of detention do not allow for the reintegration of the convict [15].

In line with the above, we find that solutions of higher courts that show that in assessing the behavior of the convicted person, the court must refer to the period of time in which he is serving the custodial sentence, because only in this way can the role of

the punishment be achieved and the measure of fulfilling its functions can be observed [16].

We are of the opinion that invoking a possible danger to which society may be exposed by releasing a person convicted of a crime of a certain nature and gravity cannot in any case substantiate a decision rejecting an application with such an object. Thus, as long as all the conditions laid down by law are met and the prison commission gives a favorable opinion, the court should pay greater attention to the examination of the criteria as to the appropriateness of such a measure.

Isolation is often not the best solution for the punishment to achieve its purpose, especially in the case of less serious crimes, this aspect being amply developed by numerous specialized studies and by Recommendations from international organizations with responsibilities in this domain.

Rejection of the motion for release on the ground of undue release, as long as all other conditions are met, could prove wrong, as it is very difficult for the court to identify *de facto* and *de jure* elements by which to exhaustively motivate reasons such a decision.

From our point of view, such solutions represent a reflection of special practical situations, in which it is decided on the basis of the analysis of criteria that may exceed the object of the application brought before the court, as they were addressed once with the settlement of the case and the establishment of the guilt of the convicted person.

Another issue encountered in judicial practice is the state of recidivism which, although it should not pose an impediment to the granting of this benefit, is viewed in this way by courts that do not pay due attention to the criteria listed above.

There are many court rulings rejecting conditional release applications on the grounds that the convicted person was a repeat offender, although all the conditions were met for such an application to be granted.

In order to prevent repeat offenses, special attention should be paid to each case in order to establish the circumstances which led to the commission of said offenses, as detention without supplementary action is not a viable solution.

These cases should not stand out by virtue of their subjectivism, but instead it should emphasize the increased attention paid to these people.

We consider this approach to be erroneous, given that as long as the detainee has given solid evidence of correction and has been diligent in his work, attention should be paid in order to help him reintegrate in society as soon as possible, and not to further isolate him from society. A majority studies on this issue have shown that social reintegration becomes increasingly difficult the more time the convict in prison.

Contrary to what has been said before, in practice we find solutions that differently approach the functions and purpose of punishment. Thus, it is shown that the duration of the sentence is usually to be executed (in its entirety) in order to perform all the functions of the sentence and for it to achieve its purpose [17] or that the partial period of execution of the sentence does not help to form the conviction of the court that the purpose of the sentence sought by the legislator has been achieved [18].

We believe that such a perspective should not be generalized, because the situations encountered in judicial practice have their features by which they are differentiated. This aspect also follows from the doctrine [19] which states that with regard to the condition set out in Article 100 (1) (d) of the Criminal Code, we are in the presence of a condition of opportunity, the court having to establish, depending on the

concrete case, the fact that the person can be released, the functions of the punishment being already fulfilled through its execution up until that point.

If such a perspective were taken into account, the institution of conditional release would no longer have a purpose, and the situations of convicted persons would no longer be individualized, detainees no longer being motivated by the desire to make a supplementary effort in order to stand out only through positive aspects.

We also consider that it should be borne in mind that the specific attribute of the re-education function performed during detention does not end with the conditional release. Thus, in the case of granting such a benefit, the punishment continues to be executed without a deprivation of liberty, the revocation and annulment of the release allowing the functions of the punishment to have effects.

In connection with the personal character of the conditional release it is, as we could see, its discretionary character, in the sense that it is not granted automatically after the requirements provided by law are met, but only to the extent that the court is convinced that, from all existing data and information concerning the convicted person, a positive conclusion can be drawn regarding his reorientation and resocialization [20].

We agree that, by turning conditional release into a genuine Community measure, within the meaning of the European Recommendation in this specific matter [21], the legislator could make an additional effort to limit the situations listed and ensure an optimal framework for the application of the specific provisions of this legal institution.

Even if the doctrine had revealed these problems, the legislator did not try to find solutions to correct these issues, although in the case of the problems reported in the case of other legal institutions he reacted and corrected the deficiencies.

In order to avoid these situations, it is proposed as a solution, through a reference to the provisions of the criminal law, that those involved in the conditional release process should focus on the personal file of the convict, an aspect that should identify those who indeed deserve to be released on conditional release (forming the exception) and those who should continue to serve their sentence (the norm) [22]. This assessment is supported by the fact that once clear results have been obtained regarding the resocialization of the offender who is prepared to return to society, to appreciate its values and to procure lawful means of subsistence, it appears unnecessary to extend his deprivation of liberty [23].

In addition, as shown in the legal literature, conditional release is of a general nature [24], may be applied to any convicted person by the court, regardless of the nature, duration, gravity or personality of the offender. Conditional release is not discriminatory, so that, if the conditions provided by law are met, any convicted person serving a custodial sentence can benefit from such a measure [25].

Therefore, the appropriateness to grant such a benefit should largely lie in the personal situation of the convict, in the progress made by him in order to demonstrate the desire to reintegrate socially, and does not reside in the execution of the custodial sentence.

3 Conclusions

The legislative has made numerous changes to the institution of conditional release through the New Criminal Code.

However, as we noted earlier, from the analysis of the solutions pronounced in practice it follows that there are many discrepancies as regards the assessment of the courts regarding the appropriateness of granting such a benefit to convicted persons. Thus, the interpretation of the provisions we find in Article 99 (1) d) and Article 100 (1) d) of the Criminal Code lead to arbitrary rulings, which give rise to inequities, without having adequate support in order for them to be properly motivated.

From our point of view, a change would be required, in the sense that the court should rule primarily on the verification of the conditions of legality and less on the condition regarding the appropriateness of ordering such a measure. Therefore, we believe that it would be much more appropriate for the judge delegated with the supervision of the case to decide on the criterion of appropriateness, because in view of his position, he has the necessary training and expertise to make an objective decision.

In consequence, *de lege ferenda,* we propose to amend the text of the law, in the sense that the court should rule strictly on the verification of the issues related to the legality of ordering of such a measure.

Such a change would no longer lead to situations where the release proposal prepared by the prison commission, which has concrete data and information on the convicted person, obtained by persons specialized in the area of competence, following complex assessments, is rejected by the court with reasonings such as the aforementioned.

Granting increased prerogatives to the judge delegated with enforcement of the sentence to verify the fulfillment of the criterion of the opportunity of conditional release, or to another person, before the convict reaches the conditional release board, could provide an objective perspective on this issue.

In conclusion, we consider that this can prove to be a solution that contributes to the efficiency of the conditional release and the consequences that this legal institution implies.

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The free movement of workers during a state of emergency

Ispas G.L.

Associate professor and dean,
Law Faculty, "Titu Maiorescu" University of Bucharest (ROMANIA)

Abstract

The free movement of workers is one of the pillars of the entire construction of the Union, being clearly provided for in the treaties. The right of the citizen to look for a job, the right to receive and the possibility to accept job offers from employers in the member states are elements that shape the legal migration for a lucrative purpose. However, for the first time since the establishment of the communities, a state of medical emergency, the SARS-COVID 2 pandemic, brutally restricted not only the migration flow for lucrative purposes, but also the movement of people within the union. Without an exhaustive approach, for obvious reasons related to the evolution of the pandemic and the progressive measures taken by states, the paper will analyze the applicable regulatory framework, the elements related to workers' health rights, as well as a brief presentation of exceptions applied during this period.

Keywords: free movement, workers, European Union, equality, state, institutions, pandemic

1 The legal regulation in the treaties

The free movement of workers has, over time, been the subject of legal and political debate within the European Union. Ignoring the fact that Europe has developed in the last 2000 years under a strong migration influence, the nationalist debates only considered the elements of discomfort occasioned by the lucrative international migration within the Union (separation of families, children left in the care of grand-parents, loss of national identity, and the scarcity of labor in the state of origin). The right of European citizens to legally seek a better paid job, the right to their own choice, the right to decide their own future, the significant financial resources brought by migrant workers in their country of origin, know-how for new small businesses developed by workers after returning to their country of origin, these were all topics often ignored in the public debate.

Even if there is no definition of the concept of worker in Union law, the interpretation given by the case law of the Court of Justice of the European Union shows that a worker is any citizen of the Union who carries out a real and effective activity on a regular basis; having a salary resulting from the contract concluded with an employer, for the employment rapport [1].

The right of citizens to access employment, as workers, in the territory of another Member State is enshrined in Article 45 of the Treaty on the Functioning of the European Union (TFEU). Mobility of persons implies the elimination of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. [Article 45 (2) TFEU].[2]

Article 45 (3) TFEU, establishes that the free movement of workers implies the following correlative rights:

a) To accept offers of employment;

b) To move freely within the territory of Member States for this purpose;

c) To stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

d) To remain in the territory of a Member State after having been employed in that State, subject to conditions that shall be embodied in regulations to be drawn up by the Commission.

Free movement is a fundamental right enjoyed by both citizens and their families, in the desire to access or occupy a job according to professional training which is better paid. Article 45 TFEU prohibits both direct discrimination and conditionality on employment on the grounds of nationality and indirect discrimination where the measure does not distinguish between own nationals and nationals of other Member States, but tends to favor their own citizens to the detriment of legal migrants.[3]

2 The access to employment and equality of treatment

Regulation (EU) No 492/2011 of the European Parliament and of the Council on freedom of movement for workers within the Union it is the core of the legislation for the way in which for-profit migration is legally carried out within the European Union. As mentioned in the preamble, labor mobility is a mechanism by which citizens can improve both their living and financial conditions in order to progress socially, in a Europe of equality, balance and sustainable development.

The exercise of this right implies full equality of treatment, free access to employment, similar working conditions for nationals and nationals of other Member States, non-discrimination arising from the law, individual employment contracts or collective labor agreements. The non-discriminatory nature is absolute, having both a component of assessing working conditions for migrant citizens and a component of guaranteeing to the citizens of a state that the admission to employment of nationals of other states will not have negative consequences for them by lowering the quality standard, time worked or remuneration for the work performed [4]. Interpreting the provisions of the Regulation, a legislative act with direct effect applicable *erga omnes* in the European space [5], as well as the jurisprudence of the Court of Justice, it follows

that the common will is to achieve a space of common values, in which citizens feel that they participate in a large supranational community, directly, and the boundaries of territorial borders remain simple memories from the cold war.

The application of the specific principles of Regulation 492/2011, correlated with the provisions of Directive 38/2004, outlines the legal regime applicable to employment relationships within the European Union. It should be noted that the directive, as an atypical act specific to European law [6], implies not only the right of a citizen and his family to enter the territory of a Member State, but also the right to leave that State and to enter, without restrictions, the territory of another Member State of the Union. The right of residence, possibly for persons exceeding 3 months in the territory of a State, is granted to European citizens who are employed or self-employed in the territory of that State, for citizens who have sufficient financial and material resources for themselves and the families that accompany them and for citizens who are enrolled in studies or in a training program.

3 Regulations of the Union regarding the health of the citizens

The European citizen enjoys the right to health and, consequently, the opportunity to use the services provided by various national health systems, depending on the situation in which they find themselves. Patient mobility can be achieved, either as a result of the fact that a person has an employment contract in the territory of another state and, as a consequence, will benefit from specialized medical assistance in that state, a right which is extended to family members accompanying the worker, either as a result of European legislation seeking to bring national legislation on patients' rights closer.

The health component is seen as a distinct area of Union law as a result of recent legislative developments, also due to the enlargement of the Union to 27 states, the free movement of goods, persons and services is an engine for the development and standardization of European policy, even if the public health security component falls within the area of shared competence between the Union and the Member States. The application of Article 9 and Article 168 (1) TFEU have allowed for the development of this sector. "EU health law has also unfolded through many of the directly effective provisions of the TFEU, especially those on free movement of the factors of production, and on free and fair competition, and on the legislation that support those measures. The Court of Justice has found that the EU law on free movement of goods, services, workers, and freedom of establishment, as well as on anti-competitive agreements, and abuse of a dominant position, applies in health context. This means that EU health law has been developed through litigation, as well as through Treaty reform and EU legislation." [7]

Regulation 883/2004 on the coordination of social security systems provides, in recital 17 in the preamble that uniform rules need to be adopted in all Member States, in order to guarantee, in an effective way, equal treatment for all persons employed in the territory of a Member State, regardless of their nationality or citizenship. It is appropriate that the applicable law be that of the Member State in which the person is employed or self-employed.

Article 3 of the Regulation provides that, in the material field of action, the provisions apply, *inter alia*, to the field of sickness benefits, accidents at work and occupational diseases, respectively. Respecting the principle of equal treatment, the regulation provides that the same correlative rights and obligations shall apply to migrant workers as well as to nationals of the state in which they work. This aspect is of practical importance in order to be able to take into account the situation of migrant workers working during the period of emergency, decreed at Member State level.

Patients 'rights can also be found in Directive 24/2011 on the application of patients' rights in cross-border healthcare. The Directive states, from the first article, that its aim is to issue rules to facilitate access to cross-border healthcare and to promote cooperation in the field of healthcare between Member States, as well as to deepen the existing framework for the coordination of social security systems, Regulation (EC) no. 883/2004, in order to apply patients' rights at European level. With a two-year transposition deadline, states have taken the measures needed to adopt the specific legislation by 2014. Relevant is, in this case, the manner of establishing the reimbursement of the sums of money spent, in compliance with the general principles, but without limiting the right of states to regulate pre-authorization in order to receive medical services abroad.

Even though the field of health has received increasing attention from the Union institutions, the Member States are determined to cooperate so that the medical services provided to patients are of a high quality standard, it can be stated that situations of extreme gravity, affecting the population of all Member States, have not been taken into account in the event of pandemics developing at a global level. This shortcoming of the approach needs to be the subject of general regulation at European level, with the development of public health policy instruments and rules and procedures to be followed by Member States.

4 The SARS-COVID 2 Pandemic and its implication at European level

What was announced in early January as being only a China-specific medical problem has instead turned into a health nightmare affecting the entire world. Presented from the beginning, and until the first decade of March 2020, as a common cold, a much milder form than the flu that affects the world's population annually, SARS-COVID 2 quickly turned into a mysterious killer, which led to the suspension of the international movement of citizens, with few and limited exceptions, to the forced shutdown of the economy, to the isolation of the population and, worst of all, to the loss of at least 350,000 lives.

The pandemic, declared late, and with much hesitation by the World Health Organization, shows the weakness of the international society. The sovereign equality of states has led, step by step, to the division of leadership functions in organizations in the United Nations system between spheres of geo-strategic interests, the principle of competence falling into the background. Coupled with the withdrawal of the United States from classical international mechanisms, this approach led to an attitude of questionable professionalism of WHO representatives towards the attitudes, not always

transparent and procedural of China, as the state in which this virus first manifested. Without supporting, for lack of scientifically unequivocal arguments, theories of human guilt in releasing the virus, we find that if the international community had access to information quickly, the measures needed to combat and prevent the spread would have been more effective.

At the same time, the pandemic has shown a weakness in developed society: as economy evolves, states have given up supporting economic sectors vital to the rapid production of equipment and consumables needed by medical staff and citizens exposed to disease. At the same time, it puts us in a position to ask ourselves whether state aid could not be considered compatible with Union law, when we consider sectors with a high degree of technology, meant to produce medical devices, consumables or medicines/vaccines for immunizing the population. This question is all the more pressing as the ban on state aid was intended precisely to protect the economy and the competitiveness of companies, however, the rapid spread of the virus has been found to have significantly affected the economies of the Member States, with consequences that are still difficult to anticipate internationally or in terms of job stability.

The first European state affected by the spread of the virus was Italy, which initially took measures to isolate the Lombardy region. Subsequently, the measures were extended to the restriction of rights and freedoms of movement and the cessation of entire economic sectors throughout the state. Subsequently, all Member States have adopted measures to restrict intra- and extra-Union traffic, with commercial flights and car or rail traffic being suspended between Member States. However, the measures, justified by their nature, raise an issue which is always avoided in the Union: since the free movement of persons is expressly provided for in the Treaty, should its restriction not have been subject to prior authorization by the European Union? In our view, each state should have notified the European Commission of the measures it intends to take, and the Commission should, in an emergency procedure, have notified the Council and Parliament of the authorization issued. In reality, however, the Commission's guidelines were issued on 16 March, when the restrictive measures were already in place in most European countries. The hesitant attitude of the European institutions has shown, if there was any need for it, that the specific procedures applicable to such emergencies have not yet been identified, and the issuance of general guidelines cannot replace the regulatory obligation given in the exclusive competence of the European Union. Although criticized for excessive bureaucracy, the Union has not been able to provide a quick, effective response that could build trust among states and citizens. All the effective measures have been taken by each state, and the economic damage is largely sustained only by the states. The permission granted to exceed the agreed level of the state budget deficit and to make it more flexible is not enough to prepare for the economic recovery in the Member States.

The measures proposed and taken by the European Commission are aimed at: supporting research for treatment, diagnosis and vaccines (over EUR 400 million for the development of vaccines, treatments and competitive research), emergency measures to protect health (by allocating EUR 3 billion for the purchase of medical and protective equipment), medical guidelines for Member States, intensifying measures to ensure personal protective equipment.

To combat the economic effects of the pandemic, the European Union has adopted a series of policies involving the allocation of EUR 3.4 trillion. For the protection of jobs, each state can be supported with up to 100 billion euros, for the development or support of technical unemployment programs. Measures have been taken to support small and medium-sized undertakings, as well as initiatives to develop investment in the Member States. Most financial resources for economic protection are to be allocated by states, and economic policies have been supplemented by temporary state aid provisions and rules. Through these measures, governments are empowered to make financial resources available to the economy, to support the affected economic sectors and to maintain the jobs of its citizens[1].

Following the agreement concluded during the European Council of 23 April 2020, the conclusions of the meeting welcome the agreed roadmap. It sets out a number of important principles, such as solidarity, cohesion and convergence. In addition, it defines four main areas for action: a fully functioning and revitalized single market, an unprecedented investment effort, global action and a functioning governance system. The President of the European Union reiterated that it is of paramount importance to increase the strategic autonomy of the Union and to produce essential goods in Europe. The approval of the agreement on three important safety nets for workers, businesses and states, which together constitute a package of EUR 540 billion, is another success for the European states and institutions[2].

However, the action of the German Constitutional Court challenging the measure of redemption of the sovereign debts of the states adopted by the European Central Bank[3] as non-compliant with the provisions of the Treaties on the delimitation of competences between the Union and the States may raise serious questions as to the effective solidarity of States in the European Union. The firm reactions of the European Commission, which also mentioned the possibility of sanctioning Germany, the position of the Court of Justice as the only power to interpret the rules of European law, thus denying any jurisdiction of the national Constitutional Courts in this matter[4], have provoked a political reaction from the German Chancellor, who states that this dispute is likely to intensify and deepen European integration[5]. As a critical element, I point out that the attitude of the German Constitutional Court is not singular, in many other cases being tempted to claim that the judgments of the Court of Justice of the European Union are not opposable to it.

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[5] https://www.zf.ro/business-international/angela-merkel-cancelarul-germaniei-decizia-instantei-constitutionale-19130892

5 Practical case study. The movement of Romanian seasonal workers for profit, in an emergency situation

By Decree[6], The President of Romania established the state of emergency on the Romanian territory, for a period of 30 days, starting with March 16, 2019. The provision specifies the restriction, during this period, of the exercise of some fundamental rights, among which: free movement, the right to intimate, family and private life, the right to education, freedom of assembly, the right to private property, economic freedom. The Parliament subsequently approved the President's decree[7]. Subsequently, by military ordinances provisions were adopted with immediate applicability for the national territory, during the state of emergency. We will not make an analysis of the measures ordered, their legitimacy or their scope, but the clumsiness, reluctance, and the appearance of inconsistency dominated during this period. The use of the state of emergency to order individual administrative measures, dismissals or suspensions from office, in areas not directly related to preventing or combating the spread of the virus, was a reality of the state of emergency. Responding to referrals of unconstitutionality, the Constitutional Court also ruled on the president's decree, finding that he ruled exceeding his legal duties,[8] even if two judges, in the competing opinion presented, showed that the legal nature of the president's decree leads to an examination of it before the court, not to its assessment by the Constitutional Court.

During the period of restricting the free movement of citizens, both inside the locality, and especially outside the locality or between states, the news presented that over 1,800 Romanian citizens were waiting to board at the international airport in Cluj-Napoca[9]. Neither then, nor later was the actual legal situation presented, the way in which it was possible that, in clear violation of the measures imposed by the authorities, such a large number of people could be mobilized to build an aerial bridge so that agricultural crops in Western European countries could be saved. Even if in the public speeches the governments (especially the Romanian and the German one) avoid outright approaching the way in which this operation was agreed upon, a series of questions remain without a clear answer. The Romanian authorities have not presented, to this day, which companies were the ones that mediated between the German farmers and the Romanian citizens, just as no information was released regarding the necessary prior authorization of this operation. Even if the Union unjustifiably refrained from regulating the free movement of workers, the general guidelines of 16 March 2020 were infringed by the State of residence and the State of destination. Was the Commission informed by the States?

Returning to the national element, the authorities, although extremely involved in ascertaining the offenses committed by the citizens, did not publicly provide information on how it was possible for citizens to leave and arrive at the airport unhindered. There is still no information on the passenger transport companies that provided the transfer from the place of residence to the airport, as there is no information on a special

[6] Decree 195 of March 16, 2020, published in the Official Gazette of Romania, part I, no. 212 of 16.03.2020
[7] Decision no. 3/2020 published in the Official Gazette of Romania, part I, no. 224 of 19.03.2020
[8] Decision of the Constitutional Court no. 152/2020, sections 87-106
[9] https://www.libertatea.ro/stiri/in-plina-pandemie-12-avioane-pline-cu-muncitori-romani-decoleaza-astazi-de-pe-aeroportul-din-cluj-napoca-cu-destinatia-germania-2947465

authorization for this purpose, or a contraventional or criminal sanction of those who disregarded the special regulations on disease control. All public testimonies show that there were no measures of social distance between citizens during road transport, during the waiting period for boarding or during the flight, during which time the authorities do not exercise their duties.

Analyzing the specific component of European law, it can be seen that this operation, with a high degree of secrecy, generates a distrust at European level regarding the way in which citizens' rights and freedoms are respected. State measures, including stopping some sectors of the economy, have been put in place to protect the population from disease. In this case, were the agricultural crops of some western farmers more important than protecting the life and health of some European citizens[10]? The contracts of these citizens were registered before they left their state of residence, or after they arrived at the place where they were to exercise the quality of worker. If the second option is valid, how can the Union ensure that workers' rights have been properly provided for, and what guarantees are offered that their rights as patients are respected? Public images showed that some living conditions did not correspond to minimum sanitary norms, especially at a time when the social distance must be effective. Is the passive relationship of the authorities in the destination states generally valid, or one of disinterest and disregard for the worker coming from south-eastern Europe? What guarantees are there that people who may become ill will benefit from adequate medical treatment, as long as in many cases the unjustified withholding of identity documents by the employer is required, which in fact belong to the state of origin? The reaction of the Romanian ambassador in Germany, who made consistent efforts to identify jobs and conditions offered to Romanian citizens, confirms that the embassy was not involved in the decision-making process that led to the arrival of seasonal workers in Germany during the restriction of free movement of workers.[11].

Although legal documentation is difficult, one of the measures approved by the government is to extend the period in which information of public importance is communicated, most being open sources and public inquiries, we can conclude that people who left Romania did not have the quality of workers at the time of leaving the country. The statement of the director of the Cluj airport shows, unequivocally, that the people who showed up for boarding did not have a travel ticket, did not have employment contracts and did not know what their destination was[12]. In these circumstances, in order to ensure full equality of treatment between European citizens, who are severely affected by the shutting down of certain economic sectors, a matter of principle remains unresolved: could a citizen looking for a job in agriculture, regardless of which state he was a citizen of, be able to travel by his own means of transportation to find a job on a farm in a western state? Could he have crossed the border without a quarantine period? Could he have looked for a job and accepted a job offer, under the same salary conditions as those for whom the air travel was insured? Is this operation a flagrant violation of the basic rules of European law?

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[10] https://romania.europalibera.org/a/cum-este-văzută-culegerea-sparanghelului-într-un-ziar-din-germania-/30555819.html

[11] https://www.digi24.ro/stiri/externe/ue/mesaj-al-ambasadorului-emil-hurezeanu-pentru-romanii-care-lucreaza-in-germania-1297219

[12] https://stirileprotv.ro/stiri/actualitate/explicatiile-romanilor-care-s-au-imbulzit-la-aeroportul-din-cluj-nu-aveau-nici-macar-bilete-de-avion.html

6 Instead of conclusions

Free movement has been and continues to be one of the most important developments of the Union society since the establishment of the communities. The fact that every citizen had the opportunity to look for the best conditions, to seek personal and family comfort, has led to increased confidence in the Union and its mechanisms. At the same time, the sovereign equality of states within the Union must continue to presuppose that mutual respect, the consideration of each state, and of each citizen, are not negotiable. The right of citizens to health, which was the basis for restricting the free movement of persons, cannot be violated because a specific situation requires an immediate solution, especially if public policy is lacking in transparency. Rights and freedoms must be treated with the utmost diligence and attention at both national and Union level. The imposition of harsh measures must lead to uniform application, and exceptions must be justified and publicly argued. There is no doubt that this medical crisis has caught the Union and the states unprepared, but the common future and deeper European integration cannot be achieved without mutual trust. The case presented, of the Romanian workers, can represent a starting point for a better regulation of the field, in which the poverty and despair of the people cannot be exploited under a major medical risk.

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Contributions Regarding the Constitutional Regime of the State of Emergency

Severin A.

Professor, Ph.D. "Titu Maiorescu" University of Bucharest, Faculty of Law (ROMANIA)
E-mail: adrianseverin21@gmail.com

Abstract

The issue of the legal regime of the state of emergency was of little concern to legal research. This is normal because it refers to an exceptional situation that, as such, has not arisen in the history of Romania during the last thirty years.

When, however, it became necessary to resort to the institution of the state of emergency, it was found that the legal issues are not few, and the questions raised by them are not very simple. This study does not aim to investigate the general state of emergency, but only its constitutional framework.

The establishment of the state of emergency changes the relations between the legislative and the executive power in favor of the latter, but especially the relations between the state and the citizens.

The fundamental law institutes only the procedure of establishment, but not the legal regime.

The Parliament may not extend the powers of the President and the President may not restrict the powers of the Parliament in respect of the state of emergency.

The President has the power to "institute" the state of emergency only symbolically and in the exercise of his fundamental function of mediator between state powers, as long as his decree has no effect unless countersigned by the Prime Minister, i.e. the chief executive; after which its effects are provisional, being limited to only a few days, until the legislative approves the measure.

In the framework of the constitutional system of balance of powers and of guaranteeing the rights and freedoms of citizens, the only decision-making capacity of the President, with regard to the state of emergency, resides in the fact that without his initiative the procedure for its establishment cannot be initiated.

The refusal if the Parliament revokes by law the Presidential decree.

The President's prerogative to institute a state of emergency can only be understood in the light of his essential role as mediator.

The presidential decree is not an administrative act, but an act of constitutional law which, after being countersigned by the Prime Minister, has the character of a GEO sui generis, so that after the approval by the Parliament, it acquires the force of law. Only with the consent of the executive and the approval of the legislative does the presidential decree become binding. In their absence, it remains a simple proposal.

In the field of civil rights and freedoms, the only legal instrument that can be used is the law. However, not all fundamental rights and freedoms may be restricted during the state of emergency.

The President proposes, but not rule; he presides, but not legislate or administrate/govern. One cannot legislate by presidential decree.

In the process of instituting the state of emergency, the President cannot institute new rules – as Parliament or, in some cases, the Government could – but can only organize the application of existing rules; and this is only with regard to the transition to the implementation of the law on the state of emergency, and not with reference to the identification of the measures to be adopted on the basis of it, the organization of their application and their concrete application. The latter falls within the competence of the Government, which, as the case may be, will notify the Parliament to legislate.

All the limitations of the rights and freedoms imposed in the period after the establishment of the state of emergency other than by law, even if they were mentioned in the presidential decree, are struck by absolute nullity. Rights and freedoms may not be restricted by the President.

The presidential decree on the state of emergency is not only that, not being a law, it cannot be subject to CCR control, but it is also not susceptible to be challenged in the contentious-administrative court. The abusive Presidential decree may be sanctioned by the Parliament. It may be subject to the constitutional review after its approval by the Parliament only.

The Parliament may approve the Presidential decree only in part.

All those affected by the abusive measures enforced under the state of emergency rules should have a right of individual recourse in the court for reparation.

Keywords: state of emergency, abusive constitutionalism, control of Parliament, organic law, fundamental rights and freedoms, The Constitution of Romania, constitutional law, CCR decision, Presidential Decree 240/14.04.2020.

1 Introduction

The issue of the legal regime of the state of emergency was of little concern to legal research. This is normal because it refers to an exceptional situation that, as such, has not arisen in the history of Romania during the last thirty years.

When, however, it became necessary to resort to the institution of the state of emergency, it was found that the legal issues are not few, and the questions raised by them are not very simple. This study does not aim to investigate the general state of emergency, but only its constitutional framework.

The exceptional nature of the state of emergency as a legal regime applicable to social relations in the conditions of threats of maximum magnitude to the existential security of the population (epidemics, earthquakes, fires, floods and other natural or

caused calamities) resides in five aspects.: *i. The simplification of the legislative procedure (legislation by Governmental Emergency Ordinances/Decrees is not specific to the state of emergency); ii. the transfer of normative powers of the Parliament to public administration institutions; iii. reducing the collegial nature of administrative decisions, in favor of ad hoc operative structures; iv. the involvement of the armed forces in the supervision of law enforcement acts governing non-military relations and, where appropriate, in their concrete application; v. limiting the fundamental rights and freedoms of citizens.*

In short, **the establishment of the state of emergency changes the relations between the legislative and the executive power in favor of the latter, but especially the relations between the state and the citizens**.

In essence, the state of emergency justifies the extension of legislation through *Governmental Emergency Ordinances/Decrees* (GEO). In addition, it allows the adoption of administrative acts of a normative nature which, for a specified period, may derogate from existing laws (*quasi- GEO* or *quasi-laws*), without these derogations being subject to parliamentary scrutiny through the legislative procedure. **However, they may fall under the incidence of political control of the Parliament over the executive, which operates throughout the state of emergency and retains its character of supreme representative of the people and sole legislative authority.** (Article 61 of the Constitution).

The main change required by the state of emergency, in relation to the normal rule of law, is the restriction of the rights and freedoms of citizens. This is the most important value protected by the Constitution and the most exposed to abuses in the conditions in which the balance between the powers of the state is broken. On the other hand, if the state of emergency can be managed with relatively few deviations from the general legislation in force at the time of its establishment, restricting the exercise of civil rights is almost always indispensable, excesses being perfectly possible. This is the reason why, even during a state of emergency, these fundamental rights **retain their normal guarantees; the powers of the Parliament do not diminish as far as they are concerned.**

2 Parliament may not extend the powers of the president and the president may not restrict the powers of parliament

CCR Decision 154 of 6 May 2020 on the unconstitutionality of normative acts governing the instituting and management of the state of emergency states that The President, together with Parliament, shall share their duties with regard to the instituting of a state of emergency. "*From the analysis of the constitutional and legal normative framework, the Court found that, in the field of instituting the state of emergency, the state authorities exercise shared powers: the Parliament has the power to legislate, by organic law, the state of emergency, while* ***the President has the constitutional power to institute the state of emergency and to enforce the legal provisions of the state of emergency, as instituted by the legislator."***

There is, however, no doubt that the role of Parliament is greater; which duly reduces the importance of the role played by the President. Even the CCR states it in another paragraph. **Undoubtedly, the powers of the President are exercised under the control of Parliament.**

The Constitution provides, in Article 93 (1), that the President "*shall institute the state of emergency... according to the law*". In this sense he "carries them into execution" (which does not mean and concretely enforce) the provisions of the law that defined the state of emergency. **The fundamental law institutes only the procedure of establishment, but not the legal regime**.

The law that effectively regulates the state of emergency in all aspects, however, cannot confer on the President powers over those conferred on him by the Constitution. It can only detail how it institutes the state of emergency, but it cannot allow it to order the measures required by its administration, much less to amend, supplement or suspend laws.

Thus, for example, the Constitution entitles the President to limit the territory on which the state of emergency is to be applied, but not the fundamental rights whose exercise is to be restricted. Instead, GEO 1/1999 grants the President, in addition to the constitutional provision, the ability or even the obligation to indicate, in the decree on the establishment of the state of emergency, the rights and freedoms that will be subsequently restricted by Parliament by law (Article 14 d). This does not mean that Parliament will be required to limit those rights, nor that it will have the discretion to limit other rights and freedoms, insofar as the Constitution does not prohibit it and the concrete situation so requires.

If in terms of rights the presidential decree contains only one recommendation, in the case of the extension of the scope, it could be argued that it offers Parliament only the alternative of approving or rejecting. Even with reference to this aspect, in the absence of an explicit constitutional text, we have serious reservations. After all, "Parliament is the supreme representative body of the Romanian people" (Article 61 (1)) and, if the situation so requires and there is no express prohibition, it would be logical for him to be able to extend or restrict the territorial scope of the measure initiated by the President.

The constitutional text which touches on a content aspect of the state of emergency, without making express reference to it, is that of Article 53, on the essential issue of restricting citizens' rights. Undoubtedly, the administration of the state of emergency can impose (and usually they also impose) such restrictions. However, **in the absence of a contrary constitutional provision, the obligation to limit rights exclusively by law and only to the extent that the de facto situation makes it indispensable and the restriction is compatible with the democratic order, remains valid even in case of emergency. The texts of Article 93 and 53 cannot be separated.**

In exercising its "*power to legislate, by organic law, the state of emergency*", Parliament may not confer on the President powers which go beyond the limits set by Article 53, nor prerogatives to grant him powers beyond that of instituting the state of emergency, respectively of initiating the process leading to the application of the regime of this special state.

The phrase "the President shall institute" must be received with caution because its literal interpretation is misleading. **In practice, the President has the power to**

"institute" the state of emergency only symbolically and in the exercise of his fundamental function of mediator between state powers, as long as his decree has no effect unless countersigned by the Prime Minister, i.e. the chief executive; after which its effects are provisional, being limited to only a few days, until the legislative approves the measure.

In the framework of the constitutional system of balance of powers and of guaranteeing the rights and freedoms of citizens, **the only decision-making capacity of the President, with regard to the state of emergency, resides in the fact that without his initiative the procedure for its establishment cannot be initiated.** The consequences of the state of emergency are too important to allow its initiation to the decision of one of the competing state powers. The President-mediator is therefore called upon to exercise his function of moderating or being the catalyst. Furthermore, everything is regulated, however, by laws that cannot even be initiated by the President.

3 The refusal of the parliament revokes by law the presidential decree

The approval of the Parliament has the nature of a resolutive condition, which means that its refusal extinguishes the effects already produced, followed by the return to the situation prior to the issuance of the rejected presidential decree. The provision of Article 13 of GEO 1/1999 amended in 2004, according to which "*in the event that the Parliament does not approve the instituted situation, the President of Romania shall immediately revoke the decree, the measures ordered ceasing to be applicable*" is debatable (not to mention pathological from a constitutional point of view and from the perspective of legal logic), it would mean that, although he is required to comply with the decision of the legislative, the President has been able to act validly, even for a few days, despite its opinion. Moreover, if the state of emergency was instituted recklessly and unnecessarily by the President, and Parliament does not approve it, what is the point of maintaining the effects of such an act, even if only for the past?

Article 13 of GEO 1/1999 adds to the Constitution, as it, without further specification, requests that the Presidential Decree be referred to Parliament for approval (Article 93), specifies that the President decrees *ad referendum*, and the invalidation of his option, by the body entitled to do so, extinguishes the act in its own right (without the need, therefore, for any revocation) taking effect from the very moment of its issuance. **Unfortunately, this article has not been subject to the review of the CCR, nor do we want to think about what would happen if, in line with unfortunate recent practice, the President refused to revoke the decree not approved by Parliament. There would be a legal conflict of a constitutional nature which, until resolved by the CCR, would deprive citizens of the full exercise of their rights.** This, provided that the CCR decision is respected. (In fact, the Parliament's decision approving, under certain conditions, the extension of the state of emergency according to Presidential Decree 240/14.04.2020, was largely ignored by the Government, the President declaring that the legislative was illegitimate.).

4 In instituting the state of emergency, the president remains a mediator

The President's prerogative to institute a state of emergency can only be understood in the light of his essential role as mediator, which circumscribes his status, the various constitutional rules applicable in this case being perfectly consistent. Thus, like any mediator, the President has the right to warn the parties he mediates about opportunities, vulnerabilities or threats that require reaction and therapy on their part, to propose solutions to them and to encourage them to take certain measures. Noticing one of the dangers provided by the Constitution as a reason for instituting a state of emergency, the "constitutional mediator" summarizes his opinion in a decree on which he first tries to obtain the consent of the Government, expressed by the countersignature of the Prime Minister. At this stage we are dealing with mediation between the state, represented by the executive, and society, the holder of the public interest to be protected. Then, by handing over the decree of the Parliament, the President mediates between the legislative and the executive, convincing the former to agree, for the good of the society affected by an exceptional danger, to the temporary increase of the latter's powers. In all these stages, the President does not apply the "organic law of the state of emergency" concretely, as a simple civil servant, subject to administrative law, would do *stricto sensu*, but instead he concretely applies the Constitution, provided that this constitutional competence was detailed by the respective law. It is the reason for which I believe that **the presidential decree is not an administrative act, but an act of constitutional law which, after being countersigned by the Prime Minister, has the character of a GEO *sui generis*, so that after the approval by the Parliament, it acquires the force of law. Only with the consent of the executive and the approval of the legislative does the presidential decree become binding. In their absence, it remains a simple proposal.**

Once Parliament decides to approve the presidential proposal, accepted by the government, on the establishment of the state of emergency, the appropriate measures to manage this state, which cannot be taken by applying existing laws, will be ordered either by GEO, if possible, or by law, if necessary. ***In the field of civil rights and freedoms, the only legal instrument that can be used is the law,* as expressly required by Article 115 (6) of the Constitution.** Therefore, the Parliament has, with regard to the state of emergency, much greater powers than the mere adoption of the law on its regime, while the powers of the President are limited to the initiation of its establishment.

5 The president proposes, but does not order; presides, but does not legislate or govern

CCR also states that: "*Organic Law, transposing Article 93 of the Constitution, empowers the President to institute, by presidential decree, a state of emergency, which* ***also includes instituting concrete first emergency measures to be taken and the identification of fundamental rights and freedoms the exercise of which will be restricted.***

The President's Decree is only a normative administrative act, therefore an act of secondary regulation, which implements an act of primary regulation. ***The restriction of the exercise of certain rights is not achieved by the decree of the President****, the provisions of Article 14 letter d) of the Government Emergency Ordinance no. 1/1999 constituting the norm by which the primary legislator empowers the administrative authority (the President of Romania)* ***to order the execution of the law****, respectively of the provisions of Article 4 of the same normative act which expressly provide for the possibility of restricting the exercise of fundamental rights.*

In the present case, the President, acting within the limits of his legal powers, ***identified the rights and freedoms the exercise of which was to be restricted****."*

The text calls for explanations, especially to make it accessible to non-specialists (including from the Government) and to avoid, as far as possible, both unfounded criticism and its unfair application.

Therefore, the instituting of the state of emergency would imply, according to the special organic law, "*also the establishment of concrete* ***first emergency measures*** *to be taken and the identification of fundamental rights and freedoms, the exercise of which shall be restricted"*. The state of emergency, as a matter of fact, requires, of course, measures which are ... urgent. It is natural, therefore, that they be made prior to the expiry of the few days required to notify Parliament (maximum five), to convene it (maximum two) and to make the decision within the emergency procedure (approximately three). It is a matter of common sense.

However, these measures become enforceable only because the presidential decree is accepted by the prime minister. Neither the Constitution nor any other law obliges the chief of the executive to countersign the presidential decree; which is an absolutely understandable fact if we remember that the relationship between the two signatories of the decree is that between a power and a mediator.

As CCR rightly observed, the idea of including, in the presidential decree, the first emergency measures (and not all the measures imposed by the administration of the state of emergency) were legislated by Article 14 c) section 1 of GEO 1/1999, according to the amendment made in 2004. It is debatable how felicitous this change was. It is hard to imagine that the President of a parliamentary republic, with the limited means at his disposal, can devise a plan of measures, even urgent ones, to deal, for example, with a pandemic. If he wants to do it, he must use the instruments of the Government.

However, it could solve the problem on its own. If the measures are in line with existing legislation, there would be no difficulty. If they call for legislative changes, they could resort to a GEO, once the executive agrees that the instituting of a state of emergency is necessary and special measures of first necessity would not require a change in power relations between state institutions and between state and citizens. In any case, **one cannot legislate by presidential decree.**

However, the unnecessary provision of Article 14 of GEO 1/1999, mentioned earlier, has the disadvantage of requiring the President to do more than the Constitution allows, the measures to be taken for the administration of the state of emergency being something other than its establishment. And, we repeat, if the law to which the Constitution itself refers can detail the way in which the President fulfills his constitutional attributions, it cannot confer other attributions on him.

However, the CCR notes pertinently that the President's decree is not an act of primary regulation, i.e. it does not have the value of a law, but of a decree that "*enforces an act of primary regulation*". This in the sense that, **in the process of instituting the state of emergency, the President cannot institute new rules – as Parliament or, in some cases, the Government could – but can only organize the application of existing rules; and this, I add, only with regard to the transition to the implementation of the law on the state of emergency, and not with reference to the identification of the measures to be adopted on the basis of it, the organization of their application and their concrete application. The latter falls within the competence of the Government, which, as the case may be, will notify the Parliament to legislate.**

That CCR also ascertains the same, results from the *per a contrario* interpretation of the following sentence in the decision we are analyzing.: "*Since no provision of Government Emergency Ordinance No. 1/1999 entitles the President to act beyond his constitutional powers, the constitutional court cannot sanction ... the legal norms criticized by the author of the exception*". In other words, **if the Ordinance in question had extended the constitutional powers of the President, it would have been annulled as unconstitutional**.

6 Rights and freedoms may not be restricted by the president

With regard to fundamental rights, the CCR is even more explicit when it states that "***The restriction of the exercise of certain rights is not achieved by the decree of the President***" which is empowered only "*to order the enforcement of the law*", respectively to identify only the rights and freedoms whose exercise, only afterwards, is to be restricted ... by law.

The word "*orders*" is not the most appropriate, as one's right to order also presupposes the obligation of another to enforce the order. However, who does the President order? First to the Government, which is not obliged to countersign, and then to the Parliament, which is even less obliged to approve. That this word should not be read literally is shown even by the CCR when it says that, in any case, **what is provided is the transition to the execution of a law that under normal conditions and without the presidential initiative cannot be applied.** Moreover, **rights and freedoms are not restricted by the President, he only identifies the rights that may be restricted later, by normative act at the level of the law** (Article 53 corroborated with Article 115.6 of the Constitution), and this only if it is absolutely necessary and within limits to be established, proportional to the magnitude of the problem to be solved.

This means that all the limitations of the rights and freedoms imposed in the period after the establishment of the state of emergency other than by law, even if they were mentioned in the presidential decree, are struck by absolute nullity. *A fortiori* struck by absolute nullity are the limitations of certain rights not provided for there, such as religious freedom (which in any case could not be limited "in any form" – Article 29.1 of the Constitution).

The only reservation I have is related to the qualification of the President of the Republic as "administrative authority", his decrees being, consequently, "administrative acts"; that is, acts by which the application of the law is organized and the law is applied in concrete terms. As I have already said, the President is an institution of constitutional law and his acts are manifestations of will in the application of the Constitution, be it complemented, by virtue of the permission it also granted, by special laws. Which is why, for example, **the presidential decree on the state of emergency is not only that, not being a law, it cannot be subject to CCR control, but it is also not susceptible to be challenged in the contentious-administrative court.**

7 The abusive presidential decree may be sanctioned by parliament

Three other important conclusions follow from the CCR decision.

First of all, **indirect restrictions on rights and freedoms are prohibited.** Thus, for example, **religious freedom cannot be limited by restricting the right to free movement. The prohibition of the external manifestation of the faith also affects its internal manifestation, as long as the canonical ritual is intrinsic to the faith, and not only its symbolic layer.** The CCR points out that the President has ordered (by decree on the establishment of a state of emergency) measures "*having an impact on fundamental rights and freedoms (right to work, economic freedom, free access to justice, etc.)"*, which is illegal.

Secondly, **the measures with direct application that could be included in the presidential decree, must be "*of first emergency*"**. Which in this case did not happen, because the CCR ascertained that: ".*measures which the President considered to be **"of first emergency with direct applicability"** (direct purchase of goods by public authorities, suspension from the management positions of civil servants, failure to start the lapse of time of prescriptions and forfeiture terms, suspension of prescriptions and forfeiture terms, full suspension of civil and criminal cases, interruption of time limits for the formulation of a challenge etc.) constitutes, expressly or implicitly, derogations from the legislation in force at the time of the establishment of the state of emergency."* And so it is. Those measures were not immediately urgent, and could await Parliament's approval.

Thirdly, **the measures in question, provided that, under the urgency, they would be immediately applicable, may not amend, supplement or suspend laws, but only enforce existing laws.** In this concern, the CCR ascertained that: "*The President ordered, on the one hand, the suspension or non-application of legal provisions, or, on the other hand, the amendment and completion of laws*"; which led to the conclusion that: "***The president exercised his legal attribution, however exceeding the legal framework**."*

CCR is not, however, a court and therefore does not have the power to sanction violations of the law. On the other hand, it implicitly acknowledges that the presidential decree on the establishment of the state of emergency could not be subject to the control of the administrative contentious court, as would have happened in the case of a purely normative administrative act. In fact, even if, together with the CCR, we consider it an

administrative act, the Constitution also exempts from judicial control administrative acts "*regarding relations with the Parliament*" (Article 126 (6)). However, the decree in question must be submitted to parliamentary approval. Thus, how could the act of the President (an act that does not have the feature of law) be corrected when it is committed in violation of the constitutional boundary of his powers?

The CCR expressly states: "...***The Court found that the legislative had an obligation to submit it to parliamentary review*** (The Presidential Decree – nn)***, and by the decision adopted to sanction the ultra vires exercise of legal powers by the President of Romania."***

Only this decision, having the same regime as the law, was ***"subject to challenge in the Constitutional Court"***. Hence two other conclusions, namely: **i. Parliament had the right to amend the presidential decree to ensure its compliance with the constitutional and legal order; ii. By approving, without amendment, the Presidential Decree, adopted by its author beyond his legal powers, by its decision having the same power as the law, the Parliament covered the defect of illegality and thus, constitutionally, took over responsibility for the entire content of the unfair act.**

The way of notifying the CCR for resolving a legal conflict of a constitutional nature between the Parliament and the President was useless and even inadmissible, as long as the Parliament had the possibility to resolve the issue simply by rejecting or amending the unfair act.

On the other hand, in so far as the President considered that, by partial approval, Parliament had unjustifiably restricted his powers, he could have referred the matter to the CCR. But he had no reason to do so. MPs did not lift a finger in defense of the rule of law, saying inaction rather than the breach thereof would be "*an act of responsibility*" (sic!).

Which forces us to end with an obviously rhetorical question: ***Is responsibility for combating a pandemic defined within the responsibility for complying with the Constitution (the law in general) or outside it?***

8 Parliament may approve the presidential decree only in part

In an incipient and non-unitary doctrine, suspected of political *parti pris*, the opinion was expressed according to which the Romanian Parliament can only approve or reject the decree of the President of the Republic for the instituting of the state of emergency, but not to modify it.

What such a thesis wants to induce in the consciousness of public opinion is that, if we do not want to expose ourselves further to the devastating action of a phenomenon, such as a pandemic, we must accept the state of emergency in terms of the presidential decree, even if it would indicate an unjustified and excessive restriction of civil liberties. This is because the Parliament, insofar as it finds the abuse or the danger of the abuse of state of emergency, cannot throw the baby out, namely the indispensable measures for saving the lives of Romanians, together with the constitutional bathwater.

Things are far from that. Health security is not necessarily bought with the currency of civil security. It is precisely for this reason that ***The Romanian***

Constitution has reserved to the Parliament, as the supreme representative of the people, and the only legislative authority of the country (Article 61 of the Constitution), the power to supervise and censor the management of the state of emergency (Article 100 (1) of the Constitution). In the exercise of this power, Parliament may adopt (as such or with amendments) or reject the decree in question.

In support of such a conclusion there are arguments about both the legal nature and the appropriateness thereof. Here are a few that we consider essential.

Argument 1: fundamental rights may be restricted only by law and not by presidential decree (Article 53 of the Constitution); therefore the restriction is the effect of the law adopted by the Parliament, and not of the presidential decree, in the conditions in which the legislative cannot be forced by the President to legislate. It is noteworthy in this context that ***the grounds for declaring a state of emergency by the President (Article 100 (1) of the Constitution, correlated with Article 3 and Article 10 of GEO 1/1999, approved with amendments by law 453/2004, on the state of siege and the state of emergency) are included in the grounds that may justify the limitation of fundamental rights exclusively by law (Article 53 of the Constitution), therefore exclusively by the sole legislative authority of the country (Article 61 of the Constitution); in particular, Article 3 of GEO 1/1999 summarizes the reasons set out in Article 53 (1) of the Constitution, the latter being set out in the chapter on fundamental rights and freedoms, and not in the chapter on the attributions of the President.***

Argument 2: if the presidential decree is excessive or insufficient, and Parliament justifiably rejects it on this basis, but the situation nevertheless calls for the declaration of a state of emergency, the President will have to redo the decree, which takes valuable time; if he doesn't, this means that the ***Parliament is blackmailed by the President through the misuse of a pressing objective circumstance, which further pushes the state, found in times of crisis (e.g. a pandemic), into a legal conflict of a constitutional nature***. The constituent legislator could not have imagined the hypothesis of a regulation leading to such a blockage.

Argument 3: The president decrees *ad referendum*, Parliament is obliged, according to the constitutional text, to "*approve*" not the decree, but the "*measure*" which is the subject of it and which usually consists of a set of provisions called to define, concretely and in a complex context, but without direct binding force (except for measures of immediate necessity and even this only with the consent of the delegated legislator and the title of an ephemeral provisional) the legal content of the state of emergency (Article 93 (1) of the Constitution); ***as it concerns a plurality of provisions and not a unitary legal instrument, it is obvious that approval, can also take place selectively.***

Argument 4: ***The Constitution does not distinguish between Parliament's approval in whole or in part***, that is, whether it is expressed with amendments or not, as there is no distinction made between amending by amputating and amending by supplementing; thus, when the law (all the more so the fundamental law) does not distinguish, neither do we have the right to distinguish – *ubi lex non distinguit nec nos distinguere potemus*. In this context, reference may also be made to the *qui potest majus potest minus* adage, according to which ***the one with more power, namely the one who can reject the decree in its entirety, and also use less of its power, namely to only reject it in part.***

Argument 5: there is no parallel between the approval of the list and the program of the government by a vote of confidence and the approval of the presidential decree on the instituting of the state of emergency; when the question of a vote of confidence for the government is raised, the offer of the Prime Minister to be appointed is either approved or rejected (however not the presidential decree regarding the appointment thereof), which is unilateral and cannot, therefore, be amended by Parliament; ***the presidential decree for the instituting of the state of emergency is not an offer, but an urgent provisional regulation, resembling a GEO, and Parliament has the ultimate role in binding regulations***.

Argument 6: a presidential decree cannot contain normative provisions, as the President is neither the main legislator nor the delegated legislator, the Constitution only giving him, in exceptional situations that require urgent reactions, the attribute of initiating a legislative procedure; ***if Parliament finds that the President has ruled beyond what is required by force majeure, it must have the right to intervene in order to restore the entirety of its constitutional powers.***

Argument 7: the main role of the Parliament is not to sanction the exceeding of the legal attributions of the President of the Republic in the formulation of the presidential decree regarding the instituting of the state of emergency, but to appreciate the appropriateness of its establishment, its scope and the administrative and legislative measures necessary for the administration of the exceptional de facto situation which imposed it; ***lawmaking is not only a constitutional procedure but also an act of political volition, the exercise of which cannot be limited by the President; all the more so as he is not part of the powers of the state, being a mere mediator between them.***

9 The decree establishing the state of emergency may be subject to constitutional review after its approval by parliament

The decree on the regulation of the state of emergency, through its effects (which are born after the approval by the Parliament), redefines the competences of the state institutions in the conditions of restricting the exercise of certain fundamental rights. This is its role, not policy-making. In other words, **it is designed by the Constitution to amend – with the subsequent approval of Parliament, of course – power relations between state institutions (especially between the executive and the legislative), as well as those between the state and citizens (which include legal persons under private law) in the context of serious danger. How does one get there? By implementing the special organic law on the state of emergency.**

The policies necessary for the concrete protection against that objective danger (the de facto state of emergency) are the responsibility of the executive, within the competences, i.e. the exceptional powers, conferred on it. When the aforementioned policies require additional legislative support, the issue is resolved by Parliament.

Specifically, by presidential decree 240/2020, the rights to be restricted were indicated, without establishing the limits of the power of the administrative authorities to do so in concrete terms. Instead, the capacity of the executive to act within the given

normative framework was limited, being issued all kinds of political tasks. At the same time, the activity of the judiciary, the guarantee of legality, was restricted, without showing exactly what is exempt from the respective restrictions. (It is not specified, therefore, whether among the urgent cases which justify the continuation of the activity of the courts are also those concerning appeals against unfair acts of administrative authorities).

If not even Parliament could amend such a decree, given that it would be aware of its potential danger to the current constitutional order, it would mean that the last stronghold of democracy would also be abandoned. Thus, all power would be concentrated in the hands of the one to whom the Constitution did not confer any effective decision-making power, but only the role of administrator of procedures as a mediator. For this is the attribution conferred by the Constitution on the President of the Republic, who is not part of any of the powers of the state: to be like engine oil which facilitates the operation of the gear, but does not propel the vehicle; the engine does not carry the car further with oil, but with petrol, and woe to the one who puts the oil in the place of petrol.

Also, concerning the measures of first emergency, in the opinion of the Parliament, correctly identified but incompletely defined, or about measures completely ignore, it is inconceivable that in such a race against the clock with exceptional threats, one would have to wait until the issue reaches the legislative agenda through bills or subsequent legislative initiatives. As the presidential decree is countersigned by the Prime Minister, as the representative of the executive, the Parliament will be able to detail or supplement it as needed, including by virtue of its exclusive capacity for political control over the Government.

The only thing left to the discretion of the President is the assessment of the circumstance in which a factual situation requires the triggering of the state of emergency. This, in the sense that, to use another metaphor, ***The president has the absolute right to put the ball in play, but he does not have the right to play***. Without the presidential initiative, no state power can address the issue of the state of emergency. Once this initiative is taken, ***it is up to the other powers to make the necessary decisions, the action of the president being used exclusively in the legal perimeter outlined by the right to be consulted, the right to warn and the right to encourage.***

10 Not all fundamental rights can be restricted

We have already shown that Article 93 (Exceptional measures) and Article 53 (Restriction of rights and freedoms) of the Constitution are inextricably linked. Why? Due to the fact that it is common sense that the management of the state of emergency requires the restriction of the exercise of certain fundamental rights of citizens. In addition, the provisions of Article 115 (6), which prohibit the violation of the rights and freedoms provided for in the Constitution by the GEO, are also concerned.

Does the factual situation, characterized by defiance, danger, crisis, and disasters requiring rapid action justify the adoption of a simpler procedure than that provided for in Article 53 in order to reach those restrictions? Definitely not! In the face of the explicit form of the constitutional texts, nothing remains to be discussed. **Admitting the restriction of the exercise of fundamental rights by ordinance would not only be an**

inadmissible addition to the Constitution, but also a violation of the constitutional logic that requires that, when the issue of limiting such rights is raised, the interpretation of the reasons, but also of the applicable procedural rules, be as restrictive as possible.

This is one of the reasons why the Constitution provides that during the state of emergency Parliament must be in session and at the same time prohibits its dissolution. Being in office, the parliamentarians can adopt in the emergency regime, compatible with the general state of the nation, all the legal restrictions that are imposed.

In such conditions, the definition given by the ECHR to the law, as "any normative act that is accessible and predictable" is inapplicable. In this case, the "law" is only the normative act adopted by the Parliament. **The aspect under which the ECHR definition remains relevant is that of "predictability". This criterion, as observed by the People's Advocate, then confirmed by the CCR, is not observed when the norm is not sufficiently clear and precise; which is also what happened with the normative acts regulating the state of emergency, or the measures adopted for its administration.**

The introduction of Article 53 in the constitutional mechanism for declaring and organizing the state of emergency requires, on the one hand, the analysis of constitutional texts defining citizens' rights and freedoms, and setting the limits of their restriction, and, on the other hand, the observance of international human rights treaties, to which Romania is a party and which, according to Article 20 of the Constitution, take precedence over national law.

According to Article 53 (2) "*Such restriction shall only be ordered if necessary in a democratic society.* ***The measure shall be proportional to the situation having caused it****, applied without discrimination, and* ***without infringing on the existence of such right or freedom***".

Summarizing, we can say that in the context of the state of emergency the restriction of rights can be done with the observance of five conditions: *i. the restriction must be instituted by law; ii. the restriction has a legitimate cause, this being limited by the provisions of Article 53 (1) to the protection of public health and safety; iii. the restriction should be proportional to the size of the threat/pressure, respectively to the goal to be achieved; iv. the restriction must be compatible with the principles of a democratic society (limitation cannot go so far as to turn the democratic order into a dictatorship); v. the restriction has as its object only the exercise of a right or a freedom, and not their substantive annulment.*

The fourth condition, in the order of the above enumeration, determined the constituent legislator to exclude some rights considered to be the essence of democracy from any limitation. In our opinion, these are the ones mentioned by the fundamental law in the following terms, which we reproduce as such, as they are so explicit that they no longer require comments: a) **ARTICLE 22 –** (1) The **right to life**, as well as the **right to physical and mental integrity** of person are **guaranteed**. (2) *No one may* ***be subjected to torture*** *or to* ***any kind of inhuman or degrading punishment or treatment****.* (3) ***The death penalty is prohibited.***; b) **ARTICLE 24 –** (1) ***The right to defence is guaranteed.***; c) **ARTICLE 29 –** (1) *Freedom of thought, opinion, and* ***religious beliefs shall not be restricted in any form whatsoever****. No one shall be compelled to embrace an opinion or religion contrary to his own convictions*; d)

ARTICLE 30 – *(1)* ***Freedom of expression*** *of thoughts, opinions, or* ***beliefs****, and freedom of any creation, by words, in writing, in pictures, by sounds or other means of communication in public are* ***inviolable****. (2)* ***Any censorship shall be prohibited.*** *(3) Freedom of the press also involves the free setting up of publications. (4)* ***No publication shall be suppressed.***; e) **ARTICLE 31 –** *(1) A person's right of* ***access to any information of public interest shall not be restricted***; f) **ARTICLE 33 –** *(2)* ***A person's freedom to develop his/her spirituality and to get access to the values of*** *national and universal* ***culture shall not be limited****.*

On the other hand, GEO 1/1999, as amended in 2004, in Article 3 index 2 provides that "*During the state of siege and the state of emergency the following are prohibited:* ***a) limiting the right to life****, except when the death is the result of legal acts of war;* ***b) torture and inhuman or degrading treatment or punishment; c) conviction for crimes not provided for as such****, according to national or international law;* ***d) restricting free access to justice****.*" At the same time, Article 4 of GEO 1/1999 provides that "*During the state of siege or the state of emergency, the exercise of certain fundamental rights and freedoms may be restricted,* ***with the exception of human rights and fundamental freedoms as set out in Article 3 index 2****, only insofar as the situation requires it and in compliance with Article 53 of the Romanian Constitution, republished."*

Add to this the prohibitions of any limitations on fundamental rights, including during the state of emergency, instituted by the provisions of the European Convention on Human Rights and which include: **the right to life; the right not to be subjected to torture or to inhuman or degrading treatment or punishment; the right not to be convicted of any unintended offense under national or international law; the right not to have the free access to justice restricted; the right not to be subjected to slavery and forced labor; the right not to be tried and punished more than once.**

What can be observed is that **GEO 1/1999 has fully adopted the provisions of the ECHR** (slavery and forced labor can be considered as included in the category of inhuman or degrading treatment), **but it does not cover all the prohibitions instituted by the Romanian Constitution**. Among those left out we mention the right to defense (which could be argued, however, that it is included in the concept of "free access to justice".), ***religious freedom, the prohibition of censorship*** and ***free access to information of public interest***. We consider that **these rights and freedoms complement the enumeration in Article 3 index 2 of GEO 1/1999 and cannot be excluded from it, as a law, be it organic, cannot derogate from the provisions of the Constitution, and the ECHR, on the one hand, sets only minimum standards, which can be exceeded by any member state of the Council of Europe and the EU, and on the other hand, it is sovereign only in relation to national laws, but not to national constitutions.**

Finally, both the Constitution and the infra-constitutional legislation allow the limitation of the exercise of certain civil rights and freedoms only if this does not lead to the effective extinction of the right. The best example that allows noticing the boundary between the two is that of religious freedom.

On the one hand, the Constitution prohibits the restriction of this freedom by resorting to the strengthening formula "**in any form**". On the other hand, in strengthening that prohibition, it is added that **the act of coercing a person to adhere to a religion contrary to his beliefs** is not permitted. However, this is precisely what is

happening when Orthodox believers, for whom the communion liturgy and the Eucharist during the liturgy are not symbolic rituals and practices, but an intrinsic part of the exercise of their faith, are obliged to transfer their "church" to buildings without grace, and to practice their faith alone and without access to fellowship with the body and blood of the Lord, according to neo-Protestant practices. Finally, the Constitution adds that the **freedom of expression of faith** is also inviolable. Which refers to the external dimension of faith, which can only be expressed in contact with others. Closing believers' access to places of worship does just that. **Freedom of expression of faith is thus not only limited, but abolished.**

11 Instead of conclusions

All this being stated, another question remains: how can citizens defend themselves against the limitation or abolition of rights that, according to the Constitution, cannot be limited, and even less abolished?

The state, through its authorities, is the one that assesses the need for restrictions, having a large margin of appreciation. **Its decisions, in so far as the exercise of fundamental rights and freedoms has been unjustifiably restricted, disproportionate or discriminatory, and thus prejudiced their holders, may, however, be challenged in court by the persons concerned.** When the act by which the limitation was ordered has been adopted by a public authority subject to administrative law and can therefore be considered as a normative administrative act, it can be challenged in the administrative contentious court. To the extent that it can be regarded as having the nature of a law (be it *sui generis*), challenging/the complaint may be raised by way of the exception of unconstitutionality, either through the common law court or directly by the public persons empowered to make such notifications, including the Ombudsman. Where appropriate, criminal prosecution of those guilty of excessive use of their power to violate the alleged rights and fundamental freedoms of citizens, by abusing the exceptional conditions of the state of emergency, cannot be ruled out.

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Transnational Action and the International Legal System

Oanta G.A.

Associate professor of public international law
Director of Instituto Universitario de Estudios Europeos "Salvador de Madariaga"
University of A Coruña (SPAIN)
E-mail: gabriela.oanta@udc.es

Abstract

Current international society is characterized, among other things, by the coexistence of States with international organizations and various transnational actors and forces, such as transnational corporations, non-governmental organizations, individuals, migratory flows, networks of influence and transnational opinion, international religious movements, illegal clandestine structures of a criminal or terrorist nature, etc. This article aims to analyse the place occupied by this transnational action in the contemporary international law.

Keywords: International society, international legal system, international non-governmental organizations, transnational corporations, individuals, international public opinion

1 General Considerations on the Transnational Action in the Framework of the International Legal System

Traditionally, the international society has been articulated around territorially based political entities endowed with sovereignty, which enjoy completeness, exclusivity and independence in the performance of their functions. We are referring to States, namely entities that have occupied a privileged position that has given them a special protagonist paper to the point of characterizing the international Society as an inter-State one.

The evolution of the international Society reflects the persistence of the State's central place in spite of the multiple factors that, as we will see throughout this article, have been eroding its sovereignty for years. It is considered that States have not been able to escape from the complex reality prevailing in the contemporary international arena. Therefore, gradually, they have begun to share the international scenario, first,

with international Organizations and, later with a series of transnational actors and factors.

In this context, despite their still preponderance, States coexist with international organizations and other actors, such as: transnational corporations, non-governmental organizations, individuals, migratory flows, transnational networks of influence and opinion, international religious movements, illegal clandestine structures of a criminal or terrorist nature, etc.[1] The emergence of these subjects, actors and international forces, as well as their capacity to act and influence in the international sphere, has been substantially increased, above all in line with the changes that have accompanied the process of globalisation and, more recently, the process of de-globalisation that has been identified in recent years in certain spheres of international society. The transnationality of the activities of many of these international subjects, actors and forces as well as the increase in interconnectivity between them has been made clear, if there were still any doubt about it, with the publication, in April 2016, of the Papers of Panama[2]

Indeed, events such as the terrorist attacks on September 11th, 2001 in the United States, avian influenza in 2004, Influenza A in 2009, the serious economic and financial crisis that began in 2008, the successive Ebola crises since 2014 and, subsequently, the threat of jihadist terrorism, cyber threats, or the interruption of fake news and alternative events to interfere in the democratic demonstration during elections held in various democratic states, the pandemic caused by the COVID-19 virus, exemplify the new dimensions of contemporary international society to which the international legal system must offer solutions.

Based on these considerations, we will divide our work into four parts. In Part One, we will present the place of international non-governmental organizations in the international legal system *(2)*. In Part Two, we will address the relevance of transnational corporations in the current international legal landscape *(3)*. In Part Three, we will refer to the humanization of the current international legal system *(4)*. Finally, in Part Four, special attention will be paid to international public opinion and its role in contemporary international society *(5)*.

[1] In this regard, see Drain, M.; Dubernet, C. (2018). *Relations insternationales*. 23e éd., Bruylant, Bruxelles, pp. 28-32.

[2] *The Panama Papers* represent about 11.5 million encrypted internal documents of the Panamanian law firm Mossack Fonseca. These documents contained information on the activity of 214,000 offshore companies, including data referring to the actual owner of each of the companies, scanned passports, emails, as well as bank vouchers. In many cases, this information has been the trigger for the judicial investigation of some individuals, has caused changes in the composition of the governments of some States, etc. For a detailed overview of this phenomenon and its consequences at the international, regional and domestic level, see Footer, M.E. (2017). "The Panama Papers, corporate transnationalism and the public international order". *ESIL Reflection* 6(1).

2 International Non-Governmental Organizations and the International Legal System

The complex configuration of International Non-Governmental Organizations (hereinafter, international NGOs)[3] generates mistrust and makes difficult for them to obtain legal status.[4] However, this has not prevented the international NGOs from taking on an enormous role,[5] despite the lack of precision regarding their definition and legal status in public international law. Paradoxically, as DUPUY has pointed out, their undecided status can be seen by these NGOs as a weapon, while States see them rather as a weakness, which they do not necessarily want to make disappear.[6]

As a result of these initiatives, it has been possible to identify certain obligations that international law recognises for NGOs, always of a bilateral nature, as the consent of the NGOs themselves to be bound by them is necessary. This reality clearly distinguishes NGOs from States, which do not have the possibility of not assuming their own international responsibility for acts carried out.[7]

There are also worth mentioning some regional attempts that have sought to establish the conditions that an international NGO would have to meet in order to be recognized an international legal personality. This is the case, for example, with the Council of Europe, where the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations was adopted on 24 April 1986. This treaty entered into force on 1 January 1991, although it has been poorly received by the Member States of the Council of Europe.[8] Under article 1 of this treaty, a NGO is considered to be of an international nature, to which the provisions of the treaty would apply, if (1) its objectives are non-profit making of international utility, (2) it has been established by a legal instrument provided for in the national law of a Party to this Convention, (3) the effects of its activities are felt in at least two States, and (4) it

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[5] On the relevant influence of the NGOs in the current international society, see Hafner, G. (2011). "The Emancipation of the Individual from the State under International Law". *Recueil des Cours/Collected Courses of The Hague Academy of International Law* 358, pp. 304-311.

[6] "*Paradoxal, leur statut indécis est aussi considéré, par ellas, come une arme, par les Etats, come une faiblesse qu'ils ne souhaitent pas nécessairement éliminer"*. Dupuy, P-M. (2018). *Ordre juridique et desordre international*. Pedone, Paris, p. 324.

[7] In this regard, see Lindblom, A.-K. (2010). *"The responsibility of other entities: Non-governmental organizations",* Crawford, J.; Pellet, A.; Olleson, S. (eds.). *The Law of International Responsibility*, Oxford University Press, Oxford, p. 352.

[8] ETS No. 124. At present, 12 States have ratified this Convention, namely: Austria, Azerbaijan, Cyprus, France, Greece, Liechtenstein, The Netherlands, North Macedonia, Portugal, Slovakia, Switzerland, and the United Kingdom.

has its statutory office in the territory of a Party and central management and control in the territory of that Party or of another Party to this legal instrument.

In relation to this, it should be noted that, in view of the silence of the Convention itself,[9] the Declaration made by France in November 1999 when ratifying this legal text provides clarity on how to interpret the first two above-mentioned requirements for an NGO to be considered as international and thus to have international legal personality. It would therefore be either an international NGO with consultative status with the Council of Europe or with an international organisation of the United Nations system or with observer status with the Council of Europe's Steering Committee for Intergovernmental Cooperation; or a private non-profit-making organisation operating in at least two countries or recognised as having international status under the national law of one of the States Parties in which it operates.

Undoubtedly, this role of international NGOs has certainly not been without misgivings, which have, however, especially in the last decade, given way to an increasing presence of NGOs in international dispute settlement procedures. This presence is still exceptional today, but there are more issues in which international NGOs are involved regarding dispute resolution.

In this connection, mention should be made of: the case of arbitration between Greenpeace and France in 1987;[10] the participation as *amicus curiae* when, in November 2013 and March 2014, the NGO 'World Wild Fund' (WWF) submitted its Reports to the International Tribunal for the Law of the Sea in case No. 21 on the request for an advisory opinion submitted by the Sub-regional Commission for Fisheries;[11] the submission of written or oral testimony to the International Criminal Court under article 15(2) of the Rome Statute;[12] before the International Criminal Tribunal for the former Yugoslavia by virtue of Article 18(1) of its Statute[13] and before the International Criminal Tribunal for Rwanda in accordance with Article 17(1) of its Statute;[14] representation and advice in the proceedings of the World Bank's Inspection

[9] The Preamble of this Convention underlines the work that international NGOs usually do; these would be cultural, charitable, and philanthropic, health and educational activities through which they would contribute to the achievement of the objectives and principles of the Charter of the United Nations and the Statute of the Council of Europe. In relation to this, see COUNCIL OF EUROPE (1986). "Explanatory Report to the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations". European Treaty Series No. 124, Strasbourg, p. 2.

[10] See "France Must Pay Greenpeace $8 Million in Sinking of Ship", *New York Times*, 3 October 1987; available on https://www.nytimes.com/1987/10/03/world/france-must-pay-greenpeace-8-million-in-sinking-of-ship.html

[11] In this regard, see https://www.itlos.org/cases/list-of-cases/case-no-21/

[12] *'The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or nongovernmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court'.*

[13] *'The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organisations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed'.*

[14] *'The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed'.*

Panel;[15] participation as mediators in conflicts between States and armed opposition groups;[16] and their contribution to the development of the case law of the Court of Justice of the European Union (hereinafter, CJEU).

With regard to the latter aspect, it should be mentioned that the CJEU has ruled in the judgment of 20 December 2017 that NGOs must have access to justice in environmental matters[17] and that, in addition, under certain circumstances, they must be granted active legitimation before the national courts of a EU's Member State in respect of certain provisions of secondary EU law.[18]

It is considered that we are currently on a path that will not be reversed, which would do justice to the legal recognition of NGOs in the international legal order in the sense made long ago by the International Court of Justice – in its Advisory Opinion of 11 April 1949 in the case of *Reparation for Injuries suffered in the service of the United Nations* – and which seems to have been denied to them until very recently. It should be recalled that this international judicial body had stated that in any legal system the subjects of law were not necessarily identical in nature and rights, and that their nature depended on the needs of the community. It added that, throughout its existence, developments in international law had been influenced by the demands of international life itself.[19]

In short, although it is difficult for NGOs to obtain international legal status, nothing in this panorama prevents them from having a large influence and contributing to the identification of collective values and interests.

3 Transnational Corporations and the International Legal System

It should be noted that transnational corporations operate in two or more States and have a unified system of decision-making that influences the activities of all.[20] Despite the fact that there is no international treaty containing a definition of the concept of

[15] Although in this case the NGOs are not listed among the entities that could fill out an application before this Panel, it is easily deduced that they have such capacity. In this regard, see Noortmann, M., *op. cit.*, p. 215.

[16] In this regard, see Taulbee, J.L.; Creekmore, M.V. (2003). "NGO Mediation: The Carter Center". *International Peacekeeping*, p. 156.

[17] For example, article 2(5) of the Aarhus Convention defines the expression 'the public concerned' as *'the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest'*.

[18] Decision of the CJEU of 20 December 2017, *Protect Natur-, Arten- und Landschaftschutz Umweltorganisation*, C-664/15, ECLI:EU:C:2017:987.

[19] "*The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life"*. In this regard, see: *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports* 1949, *p.* 174.

[20] Casanovas, O.; Rodrigo, A.J. (2018). *Compendio de Derecho internacional público*. 7th ed., Tecnos, Madrid, p. 263.

'transnational corporations',[21] some international organizations, such as the OECD for example, describe what a 'transnational corporation' means, without considering it necessary to adopt a precise definition in this regard.

Thus, according to the OECD, *'[t]hese enterprises operate in all sectors of the economy. They usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, State or mixed'*.[22]

The growing economic weight of these entities, as well as the development of international society and the challenges it is facing after the fall of the Berlin Wall, have determined the creation of the opinion that transnational corporations should assume greater responsibilities in the international sphere,[23] especially when their activities are carried out in different countries and could involve the commission of human rights violations or environmental attacks, etc. For this reason, various codes of conduct have been drawn up and guiding principles – not legally binding at present – have been adopted in order to guarantee the commitment of transnational corporations in relation to the above-mentioned matters. Likewise, the responsibility of transnational corporations will be linked to the fight against corruption, as is made clear in the United Nations Convention against Transnational Organized Crime.[24]

For decades, they were no more than small steps towards the recognition of transnational corporations as one of the most relevant actors of the international Society.[25] Therefore, they should be the object of their own specific legal regulation in public international law, which would recognize them as an international legal personality, even if it were a limited and functional one. One of the transcendental repercussions of the globalisation phenomenon is precisely connected with the rise and new predominance in some areas of these international actors, who concentrate economic power.

At that time, the emergence and consolidation of the phenomenon of transnational corporations was interpreted as a real powerlessness of the State, at least as far as underdeveloped States were concerned, to account for the involuntary loss of their sovereignty. Well, this gradual breakdown of the State has to be understood in a much broader context, in which these international actors have brought with them high human, political, social, ecological and other costs. This is an inevitable process in a globalised society with global risks, such as today's international society, which has seen the deregulation of markets and in which we have seen in recent decades a

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[21] See Kerbrat, Y. (2017). "Les manifestations de la notion d'enterprise multinationale en droit international". Dubin, L.; Bodeau-Livinec, P.; Iten, J-L.; Tomkiewicz, V. (dirs.). *L'entreprise multinationale et le droit international*, Pedone, Paris, pp. 57-69.

[22] 'OECD Guidelines for Multinational Enterprises' (2011 edition), OECD, 2011, p. 19.

[23] UNCTAD: *The social responsibility of transnational corporations,* United Nations, New York/Geneva, 1999.

[24] This Convention was adopted by the UN General Assembly Resolution 55/25 of 15 November 2000. It contains provisions on the fight against corruption (articles 8&9) as well as the responsibility of legal persons for such acts committed (article 10). It is also known as the Palermo Convention.

[25] In this line, see also Cutler, A.C. (2001). "Critical reflections on the Westphalian assumptions of international law and organization: a crisis of legitimacy". *Review of International Studies* 27, p. 133.

weakening of national autonomy in the face of the predominance and concentration of financial power.

Undoubtedly, the complex issues raised by these international actors are transnational in nature, and the response to them must be clearly international. Indeed, since the 1970s, States and various international organisations have worked together to give visibility to this phenomenon and its implications in international society, and also to the lack of clear recognition of its international subjectivity. Most of the doctrine considers that transnational corporations lack international legal personality because international law does not grant those rights and obligations.[26]

However, a small part of the doctrine considers that transnational corporations are already international legal subjects as they have significant participation at the international level and given the privatization of international law in various fields, such as investment law and international arbitration.[27] It is not our intention to position ourselves in this article on whether or not transnational companies are subjects of current international law. Hence, in the following lines, we will focus on what the rights and obligations of these entities are at present in various sectors of public international law. As KLABBERS stated, international legal personality should not be understood as a threshold to be crossed before an entity can participate in international legal relations since once it participates in an international environment it may be useful for it to be considered as having a certain international legal personality.[28]

At present, multinational companies are entitled to certain rights in the international sphere, particularly in the framework of international human rights and investment law.[29] Although the problems of their obligations in relation to human rights, international environmental law and international criminal law have attracted the greatest interest in recent years, particularly the attention received by the 'business and human rights' tandem. Indeed, the first attempts to deal with the 'business – human rights' tandem took shape with the adoption, within the framework of some international organisations, of a series of Codes of Conduct and Guidelines. The Guidelines for Multinational Enterprises adopted by the Organization for Cooperation and Development in Europe (2000) and the United Nations Global Compact (1999) are particularly noteworthy in this regard.[30]

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[26] See, amongst others, Crawford, J. (2012). *Brownlie's Principles of Public International Law*. Oxford University Press, Oxford, p. 122; Cassese, S. (1986). *International Law in a Divided World*. Oxford University Press, Oxford, p. 103; Muchlinski, P. (2010). "Corporations in International Law". Wölfrum, R. (ed.). *Max Planck Encyclopedias of Public International Law*, Oxford University Press, Oxford.

[27] In this regard, see Carreau, D.; Marrellla, F. (2012). *Droit international*. Pedone, Paris, p. 66; Zambrana Tévar, Z. (2012). "Shortcomings and Disadvantages of Existing Legal Mechanisms to Hold Multinational Corporations Accountable for Human Rights Violations". *Cuadernos de Derecho Transnacional* 4, p. 400.

[28] "*Personality is by no means a threshold which must be crossed before an entity can participate in international legal relations; instead, once an entity does participate, it may be usefully described as having a degree of international legal personality*". Klabbers, J. (2009). *An Introduction to International Institutional Law*. Cambridge University Press, Cambridge, p. 52. See also: Sur, S. (2012). "La créativité du droit international. Cours général de droit international public». *Recueil des Cours/Collected Courses of The Hague Academy of International Law* 363, pp. 58-59.

[29] See Wouters; Chané. *Op. cit.*, pp. 230-236.

[30] See Heinemann, A. (2011). "Business Enterpriises in Public International Law: the Case for an International Code on Corporate Responsibility". Fastenrath, U. *et al.* (eds.). *From Bilateralism to*

It should be mentioned that a significant advance in this area has been determined by the adoption, in 2003, by the United Nations Sub-Commission on the Promotion and Protection of Human Rights, of the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*.[31]

On this occasion, with regard to the promotion and protection of human rights as set out in international and national legal instruments, while States have the primary responsibility in this area to ensure that they are complied with, to respect them and to ensure that they are respected *'including by ensuring that transnational corporations and other business enterprises respect human rights'*, transnational corporations have the obligation to *'within their respective spheres of activity and influence'* to promote and protect those rights, to ensure that they are complied with, to respect them and to ensure that they are respected.[32] However, this text was subsequently rejected by States and the companies themselves,[33] perhaps because of its broad scope and the possible scope of this general obligation they did not support it.

Almost a decade later, on 21 March 2011, the Human Rights Council adopted the *Guiding Principles on Business and Human Rights: Implementing the UN Framework to 'Protect, Respect and Remedy'*, also known as the 'UN Ruggie Report on the Guiding Principles on Business and Human Rights'.[34]

Currently, these UN Guiding Principles represent the broadest legal framework that explicitly refers to the tandem 'business and human rights', providing the international community with the necessary mechanisms to address human rights violations by transnational corporations. It consists of thirty-one principles grouped into three pillars,[35] of which the second focuses on the responsibility of companies to respect

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Community Interest. Essays in Honour of Judge Bruno Simma. Oxford University Press, Oxford, pp. 719-725. Currently, around 10,000 companies from 160 countries have joined the UN Global Compact, making it a truly international forum.

[31] E/CN.4/Sub.2/2003/12/Rev. 2, 26 August 2003.

[32] Ibidem, point 1, at p. 4.

[33] In this regard, see Wallace, R.M.M.; Martin-Ortega, O. (2016). *International Law*. 8th ed., Sweet & Maxwell, London, p. 101.

[34] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, Human Rights Council, 21 March 2011, A/HRC/17/31. For a detailed overview of this instrument, see Laine, A.L. (2015). "Integrated Reporting: Fostering Human Rights Accountability for Multinational Corporations". *George Washington International Law Review* 47, pp. 649-667; Márquez Carrasco, C.; Buhmann, K. (2016). "The Corporate Responsibility to Respect Human Rights. The Emerging European Union Regime". *Human Rights & International Legal Discourse* 10(1), pp. 2-17; Mccall-Smith, K.L (2016). "Tides of Change. The State, Business and Human Rights". Barnes, R; Tzevelekos, V.P. (eds.). *Beyond Responsibility to Protect. Generating Change in International Law*. Ed. Intersentia, Cambridge/Antwerp/Portland, pp. 226-230; Mccorquodable, R. (2012). "International Human Rights Law and Transnational Corporations: Responsibilities and Cooperation". Hestermayer, H.P. *et al.* (eds.). *Coexistence, Cooperation and Solidarity. Liber amicorum Rüdiger Wolfrum*. Martinus Nijhoff Publishers, Leiden, pp. 453-475; Zenkiewicz, M. (2016). "Human Rights Violations by Multinational Corporations and UN Initiatives". *Review of International Law & Politics* 12(1), pp. 141-155; Weissbrodt, D. (2014). "Human Rights Standards Concerning Transnational Corporations and Other Business Entities". *Minnesota Journal of International Law* 23, pp. 141-171.

[35] The other two pillars concern, on the one hand, the obligation of States to protect individuals from corporate abuse, and, on the other hand, the access of victims whose rights have been violated by corporate activities to appropriate and effective remedies.

human rights in the context of their activities.[36] It should be noted that, unlike the Norms adopted in 2003 on the responsibilities of transnational corporations and other business enterprises with regard to human rights, these Guiding Principles contain for transnational corporations only the responsibility to respect human rights, with the States having obligations to protect human rights, but without introducing new duties for the primary subjects of international law.

The UN Guiding Principles on Business and Human Rights were designed as a *soft law* legal instrument. However, their welcome by the international community and their widespread use by companies themselves to act ethically allow us to say that perhaps in the not-too-distant future they could become legally binding. The European Union, the Council of Europe and the Organization of American States have expressed their support for these Guiding Principles almost from the outset, while calling for their implementation by their Members through national action plans.[37]

Moreover, the Association of Southeast Asian Nations and the African Union have begun to explore ways to introduce business activities and their potential impact on the promotion and protection of human rights into their respective work agendas, in line with the UN Guiding Principles on Business and Human Rights.[38] This is in addition to the negotiations that have been taking place, especially in the last five years, within the UN Human Rights Council on a future international treaty on transnational corporations and human rights.[39]

The forth meeting of the Intergovernmental Working Group adopted a draft treaty – known as the *Zero Draft* – on 16 July 2018, on which States and stakeholders have had to submit their comments and proposals by the end of February 2019. This document determined the EU delegation – represented by the European External Action Service – not to participate practically in any working meeting celebrated in Geneva in October 2018. The EU expressed its concerns in relation to the scope as well as regarding the consistency of the *Zero Draft* with the UN Guiding Principles on Business and Human Rights.

Firstly, the EU considers that the future binding treaty shall not be limited to transnational corporations and other business enterprises involved in transnational

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[36] It should be recalled in this respect that these Principles do not create new obligations under international law, but neither do they preclude more important legal developments in this area in the future. They are characterised by their complementarity with the existing international legal framework, while facilitating an interactive dynamic between the obligations of States and companies to protect and respect the rights of individuals against abuses committed by corporate activities, and also facilitating access to appropriate and effective redress for those individuals and groups affected by corporate activities.

[37] Spain adopted the Draft Plan on Business and Human Rights on 26 June 2014. On 28 July 2017, Spain adopted its National Plan of Action on Business and Human Rights (BOE nº 222, 14.09.2017, p. 90384).

[38] In this regard, see "Frequently Asked Questions about the Guiding Principles on Business and Human Rights", Office of the High Commissioner for Human Rights, New York and Geneva, 2014, p. 15.

[39] 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights', Human Rights Council, 14 July 2014, A/HRC/RES/26/9. 20 members of the Human Rights Council, with 14 votes against and 13 abstentions approved the text of this document. For more information, see De Schutter, O. (2015). "Towards a New Treaty on Business and Human Rights". *Business and Human Rights Journal* 1, pp. 41-67.

operations, but it should also cover local companies; otherwise, the future treaty would be incoherent as local companies commit many human rights violations. Thus, according to Article 3(1) of the *Zero Draft*, the future treaty *'shall apply to human rights violations in the context of any business activities of a transnational character'*. The EU position was interpreted as being the result of the pressure on it made by the most relevant companies settled in the Member States, which have huge interests in the field. The European Commission, which acts on behalf of the EU during this negotiating process, has maintained this position for months, both at domestic level and on the international stage, being contrary even to the opinions expressed by various European Parliament members in this regard.[40]

As a result of the non-assistance of the EU delegation to the most relevant meetings of the 2018 OIWG annual session, in the following months all the parties involved in the negotiation process worked on finding tangible solutions for. As a result, on 16 July 2019, a revised draft of the legally binding instrument was presented by the OIWG Chairmanship. In the author's view, the new version of the draft treaty contains the EU requirements on its scope. Thus, the Article 3(1) refers, 'except as stated otherwise, to all business activities, including particularly but not limited to those of a transnational character'. In addition, a new paragraph has been introduced in order to clarify that a business activity is of a transnational character if *'a. It is undertaken in more than one national jurisdiction or State; or b. It is undertaken in one State through any contractual relationship but a substantial part of its preparation, planning, direction, control, designing, processing or manufacturing takes place in another State; or c. It is undertaken in one State but has substantial effect in another State'*.

Secondly, the EU estimates that the future treaty should not undermine the implementation of the UN Guiding Principles on Business and Human Rights. In the EU view, this soft law instrument has allowed for tangible progress on better protecting human rights in relation with business activities. Unlike the 2018 *Zero Draft*, the revised draft presented in 2019 refers to these Guiding Principles into its Preamble, recognizing the role played in relation to the protection, respect and remedy in the field of business and human rights. The new version of this text has been discussed extensively during the 5th meeting of the Intergovernmental Working Group on 14-18 October 2019.[41]

[40] See: Questions for written answer P-000335/2019 to the Commission, Judith Sargentini (Verts/ALE), Anne-Marie Mineur (GUE/NGL) and Heidi Hautala (Verts/ALE); and Answer given by Ms Mogherini on behalf of the European Commission on the written question P-000335/2019, 14.03.2019. In addition, see also: European Parliament Resolution of 4 October 2018 on the EU's input on a UN binding instrument on transnational corporations and other business enterprises with transnational characteristics with respect to human rights, P8_TA(2018)0382.

[41] In this regard, see Human Rights Council, "Draft report on the fifth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights", A/HRC/43/XX, XX January 2020. For more details, see Oanta, G.A. (forthcoming). "Access to Remedy in the European Union in Case of Breaches of Human Rights at Sea by Private Actors'. *International Community Law Review*.

4 The Humanization of Current International Legal System

In the last decades, there has been a growing presence of the individual on the international scene. This has meant an important humanization of the current international legal system. Furthermore, the growing recognition of the individual's role in today's international society has been confirmed.

In addition, the promotion of human rights and humanitarian law also leads to a substantial limitation of State's sovereignty. The most significant example, despite the limitations of its scope,[42] is the development of international criminal justice and access to it by an increasing number of persons, who can be prosecuted as active subjects – before international human rights courts – or as passive subjects – before international criminal courts.[43]

In this connection, it should be noted that the establishment by the Security Council of two *ad hoc* international criminal tribunals, one for the former Yugoslavia (1993)[44] and the other for Rwanda (1994)[45], and the adoption, after intense negotiations, of the Statute of the International Criminal Court (1998)[46] are historical milestones in this field. Some authors consider that these milestones should be taken into account in a future reform of the UN Charter. In addition to these courts, there are a number of other so-called 'international', 'hybrid' or 'mixed' courts, such as: the Special Court for Sierra Leone,[47] the Extraordinary Chambers in the Courts of Cambodia to try the crimes of Democratic Kampuchea and the Serious Crimes Unit,[48] the Special Courts of East Timor, the creation of an international tribunal to try the assassinations of senior officials in Lebanon,[49] and the Specialist Chambers and the Office of the Special Prosecutor in Kosovo[50].

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[42] The fact that the United States or China – which are proven violators of human rights – stand aside from progress, specifically from the International Criminal Court, significantly tarnishes any positive consideration we make in the next few lines.

[43] Cançado Trindade, A.A. (2017/2018). "La misión de los tribunales internacionales contemporráneos en la humanización del Derecho internacional". *Revista do Instituto Brasileiro de Direitos Humanos* vol. 17/18, p. 288.

[44] UN Security Council Resolution of 21 October 1993, S/RES/827 (1993).

[45] UN Security Council Resolution of 8 November 1994, S/RES/955 (1994).

[46] This International treaty was adopted in Rome and entered into force on 1 July 2002. See the Final Act of the Diplomatic Conference for the Establishment of an International Criminal Court, A/CONF.183/10, 17 July 1998. For a review of the twenty years since the adoption of the Rome Statute, see Escobar Hernández, C. (2018). "20º aniversario del Estatuto de Roma: la Corte Penal Internacional en construcción: nuevos retos veinte años después de la Conferencia de Roma". *Revista Española de Derecho Internacional* 70(2), pp. 209-215.

[47] UN Security Council Resolution of 14 August 2000, S/RES/1315. The agreement between the UN and the Government of Sierra Leone for the establishment of this special tribunal took place on 16 January 2002.

[48] UN General Assembly Resolution of 13 May 2003, A/RES/57/228B.

[49] The agreement on the establishment of this special tribunal was signed between the UN and the Lebanon Government on 23 January and 6 February 2007.

[50] They were created on 3 August 2015 once the Kosovo's Assembly adopted the interchange of letters of April 2014 between the President of Kosovo and the EU's High Representative for External Action and Security Policy in relation to the ratification of the international agreement between Kosovo and the EU for the establishment of the EU's Mission on the Rule of Law in Kosovo. They have jurisdiction over crimes against humanity, war crimes and other offences under Kosovo law in relation to matters identified by the Parliamentary Assembly of the Council of Europe in its Report published on 7 January 2011 ('Inhuman treatment of people and illicit trafficking in human organs in Kosovo', Report Doc. 12462, 7.01.2011), committed between 1 January 1998 and

These courts and tribunals are unique and independent, have their own rules, composition, working methods, and, despite their short existence, have a specific legal community of lawyers and researchers, who, through their activity, highlight the humanization of current international law.[51] The coexistence of these international courts and tribunals has led, in the words of CANÇADO TRINDADE, to a quiet expansion of international jurisdiction, ensuring that each of them contributes effectively to the evolution of international law in the context of the achievement of international justice.

Each of these international courts and tribunals has also contributed in a particular way to determining the responsibility of the perpetrators of serious violations of human rights and international humanitarian law, determining an expansion not only of the individual's international legal personality (and capacity), but also of international jurisdiction and international responsibility (of States, international organisations and individuals).

This has led, in the end, to a prominent role in the fight against impunity, with the current configuration of a true right to law (*droit au droit*) for victims. In this connection, we would like to mention that, in recent decades, with the advent of international human rights courts and international criminal tribunals, the individual is considered to have been recognized as a subject of international law, being considered the ultimate recipient of the *jus gentium* norms.[52]

5 International Public Opinion and the International Legal System

Finally, among non-State actors as well, it has to be recognized that the process of globalization has led to the emergence, in a particularly striking way in recent years, of an international public opinion.[53] This type of public opinion makes its voice heard through demonstrations held in the places where international summits or even planetary events are held. Increasingly, public opinion has block reaction through social networks, involving various sectors of the society in different States.

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31 December 2000). Thus, in accordance with article 162 of the Kosovo Constitution, as amended on 3 August 2015, Kosovo has been able to establish Special Chambers and a Specialist Prosecutor's Office as integral parts of its judicial system, with its seat in The Hague, under the Headquarters Agreement signed with the Netherlands on 15 February 2016. It is a temporary judicial institution, composed of judges, prosecutors, investigators, analysts, security experts, witness protection specialists and administrative staff from the member States of the European Union and the five non-contributing countries of the European Union (Canada, Norway, Switzerland, Turkey and the United States).

[51] During the annual session of the European Society of International Law celebrated in Oslo in 2015, professor Phillipe Sands presented interesting reflections on the judicialization of different issues of interest for the current international society. In this regard, see Sands, P. (2017). "Reflections on International Judicialization". *The European Journal of International Law* 27(4), pp. 885-900.

[52] Cançado Trindade, A.A. (2017). "Les tribunaux internationaux et leur misión commune de réalisation de la justice: développements, état actuel et perspectives". *Recueil des Cours/Collected Courses of The Hague Academy of International Law* 391, pp. 38-53.

[53] In relation to this complex issue, see Von Bogdandy, A.; Goldmann, M.; Venzke, I (2017). "From Public International to International Public Law: Translating World Public Opinion into International Public Authority". *The European Journal of International Law* 28(1), pp. 115-145.

In recent years, various events on the international scene have highlighted the vulnerability of this global public opinion because of the dissemination of misleading, manipulated and ill-intentioned information through the Internet and new communication and information technologies, known as fake news. This has been clearly identified with the bursting in of *fake news* in presidential campaigns and legislative elections in different countries (Mexico in 2012, Argentina in 2015, United States in 2016, Brazil and France in 2017 ...) through the manipulation of the truth.

This new phenomenon occurs in a context of post-truth. This term has recently been defined in the Dictionary of the Spanish Royal Academy as the *'deliberate distortion of a reality, which manipulates beliefs and emotions in order to influence public opinion and social attitudes'*.[54] Undoubtedly, *fake news* and post-truth are doing a disservice to quality journalism and the right of citizens to be properly informed.

To this another international actor that has emerged at the beginning of the 21st century in the digital era or the third industrial revolution should be added. We are referring to *GAFAM*, which is the acronym of the giants of the web – Google, Apple, Facebook, Amazon and Microsoft – that, at present, have an enormous sphere of influence at international level in the political, economic, and fiscal and competition, social and cultural fields. Given the enormous implications of GAFAM in practically all sectors of current international society, more and more voices are saying that certain limits should be set for the companies that dominate the digital market, including their dismantling.

Faced with the new and complex challenges of the digital era, some States and international organizations have adopted digital diplomacy strategies, which include measures to seek, represent, negotiate, protect and promote their respective interests in the digital era.[55]

Therefore, digital diplomacy is emerging as an extension of traditional diplomacy, which uses social networks and information and communication technologies to transform the usual methods of diplomacy and the international status quo of recent decades in order to defend its interests in a digital environment. Digital diplomacy is more than just a mean of transmitting information. It is also a tool for defending the interests of States and international organizations by influencing multilateral diplomacy, managing information, knowledge and public service issues, and a paradigm shift in current international relations.

[54] See FEDERACIÓN INTERNACIONAL DE PERIODISTAS (FIP) (2018). "¿Qué son las *fake news*? Guía para combatir la desinformación en la era de posverdad". Available on: https://www.ifj.org/fileadmin/user_upload/Fake_News_-_FIP_AmLat.pdf The International Federation of Journalists represents 600,000 journalists all over the world, who see how their work is considerably and negatively affected by the *fake news* and the phenomenon of post-truth.

[55] For a general overview of the digital diplomacy and its challenges for the current international society, see Manfredi, J.L. (2014). "El desafío de la diplomacia digital". *Real Instituto Elcano* 15; Rodríguez Gómez, A.A. (2015). "Diplomacia digital, ¿adaptación al mundo digital o nuevo modelo de diplomacia". *Opción* 31(2), pp. 915-937.

6 Some Final Considerations

This diverse range of transnational actors and forces – such as transnational corporations, international NGOs, individuals, transnational networks of influence and international public opinion, etc. – has eroded the *Westphalian* model and state sovereignty, while causing the emergence of new alternatives to traditional methods of formation and adoption of international norms, rules and principles.

It is our conviction that States have lost some of their powers in the international arena, yet they continue to enjoy the fullness of their international legal personality.

For its part, the current international legal system seems to have the necessary means to adapt to the challenges that this international Society, which is now heading towards a *Worldfalia* and perhaps, in the future, towards an *Eastfalia*, is posing to it.

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Considerations regarding the incidence of Decision no. 581/2019 of the Constitutional Court on precautionary measures in criminal proceedings

Uzlău A.S.

"Titu Maiorescu" University, Faculty of Law (ROMANIA)

Abstract

The paper analyzes a topic of interest, based on the confluence between the fiscal administrative procedure and criminal procedure, regarding the possibility of maintaining the precautionary measures ordered by the tax authorities during the criminal process, following the intervention of the Decision of the Constitutional Court no. 581/2009, by which the provisions of art. 213 para. (8) of the Fiscal Procedure Code were declared unconstitutional.

The subject-matter is dealt with in the light of the effects of that decision on precautionary measures ordered before its publication, both in the event that the tax authorities have not notified the competent judicial authorities of the findings made during the tax inspection and which may constitute elements of an offense, as well as in the situation where such a notification took place.

Also, there is analyzed the issue of the effects of the Decision of the Constitutional Court no. 581/2009 during the term of 45 days in which the legal provisions declared unconstitutional are suspended, as well as from the perspective of the fact that, until now, the legislator has not intervened to bring the unconstitutional provisions in line with the Romanian Constitution.

Keywords: precautionary measures; fiscal procedure; penal trial; finding bodies; act of notification

1 Introduction

By Decision no. 581/2019 [1], the Constitutional Court admitted the exception of unconstitutionality and *found that the provisions of art. 213 para. (8) of Law no. 207/2015 on the Fiscal Procedure Code [2], both in the wording prior to the*

amendment by Government Ordinance no. 30/2017 for the amendment and completion of Law no. 207/2015 on the Fiscal Procedure Code, as well as the form amended by Government Ordinance no. 30/2017 for the amendment and completion of Law no. 207/2015 on the Fiscal Procedure Code are unconstitutional.

In its reasoning, the Constitutional Court held, in essence, that the criticized legal text exempts the tax authorities from the obligation to lift precautionary measures in the event that within 6 months, respectively one year at most, the debt title was not issued and communicated, under the condition that they have notified the criminal investigation bodies. In this case, the precautionary measure taken by the fiscal bodies ceases only if precautionary measures have been taken according to Law no. 135/2010 on the Code of Criminal Procedure.

The Court found that the analyzed text concerns a point of contact between the administrative-fiscal procedure and the criminal one, each of them having a well-determined regulation. This interference between the two procedures is represented by the prolongation in time of a measure taken during the administrative-fiscal procedure and its maintenance during the criminal process until an indefinite time, with the consequence of excluding the opportunity analysis of the precautionary measure taken by the prosecutor/the court according to the data of the case. Thus, there is an impermissible confusion between the two procedures, and the administrative precautionary measure acquires the valences of a true procedural measure specific to the criminal process. Or, within the criminal process, the procedural measures, such as the precautionary ones, are taken by the judicial bodies.

The Court decided that the legal rules concerning criminal proceedings must be clear, precise and predictable, which implies, *inter alia*, the obligation of the legislator to regulate a coherent normative framework in which the enacted rules complement and develop each other in a harmonious way, without creating antinomies between the normative act that constitutes the general headquarters of the matter and those that regulate its particular or special aspects (Decision no. 72 of January 29, 2019, published in the Official Monitor of Romania, Part I, no 332 from 2nd of May 2019, paragraph 51). Thus, *the Fiscal Procedure Code cannot regulate in principle, discordant aspects and in clear contradiction with the philosophy of the Criminal Procedure Code in the sense of diminishing procedural guarantees enacted precisely in order to respect the right to a fair trial of the person*.

The Court found that the analyzed normative text is not predictable and coherent, as (i) *it allows the translation and application of the administrative precautionary measure in the criminal process, thus substituting the precautionary measure that can be ordered under the Code of Criminal Procedure [3]* and (ii) *distorts the role and competence of the judicial bodies in the criminal process. At the same time, it affects the legal security of the person, as it relativizes the procedural guarantees contained in the Code of Criminal Procedure regarding the holder of the right to order precautionary measures, as well as their legal regime in criminal proceedings.*

Regarding the provisions of art. 213 para. (8) of Law no. 207/2015 on the Fiscal Procedure Code, as amended by Government Ordinance no. 30/2017 for the amendment and completion of Law no. 207/2015 on the Fiscal Procedure Code, *although it establishes a time limit until which the precautionary measures subsist, namely until the date of settlement of the case by the criminal investigation bodies or by the court, the*

Court finds that this time interval cannot be qualified as a reasonable time within which the judicial bodies would be obliged to act. The Court noted that, in reality, the precautionary measures taken in the administrative-fiscal phase in the new regulation are more intrusive, as they are maintained *de jure* until the case is resolved. Or, as it was shown regarding art. 213 para. (8) of Law no. 207/2015 on the Fiscal Procedure Code, in the wording prior to the amendment brought by Government Ordinance no. 30/2017, maintaining the administrative-fiscal precautionary measure during the criminal process for a long period of time, and not as a transitional measure to ensure the transition in good conditions from the administrative-fiscal to the criminal procedure, is, in principle, a violation of the provisions of art. 1 para. (5), art. 21 para. (3) and art. 44 of the Constitution. Thus, the analyzed text enshrines an intrusion of the fiscal body in the development of the criminal process, creating a normative tension between the provisions of the Fiscal Procedure Code and those of the Criminal Procedure Code and denies the competence of judicial bodies to order themselves precautionary measures, being kept this way by the precautionary measure ordered by the fiscal body, which means that the procedural guarantees that characterize the taking of the precautionary measure by the judicial body are removed. Therefore, the constitutional requirements regarding the quality of the law and the legal security of the person are violated, respectively the right to a fair trial provided by art. 1 para. (5) and art. 21 para. (3) of the Constitution. At the same time, the taxpayer's private property right over the good, subject to the aforementioned measure, is irreparably affected, contrary to art. 44 of the Constitution. It is, therefore, up to the legislator to identify the appropriate procedural mechanisms to comply with the requirements of the rule of law that demand the adoption of an integrated legislative framework that can be able to allow the effective and efficient application of legal provisions, so that the rights and/or measures provided are not theoretical and illusionary.

2 The relevant normative framework

According to the provisions of art. 213 para. (7) of Law no. 207/2015 on the Fiscal Procedure Code, in case the precautionary measures were taken by the fiscal bodies before the issuance of the debt title, they cease if the debt title was not issued and communicated within maximum 6 months from the date of which precautionary measures have been ordered. In exceptional cases, this period may be extended by up to one year by the competent tax authority, by decision. The fiscal body has the obligation to issue the decision to lift the precautionary measures within maximum two days from the fulfillment of the term of 6 months or one year, as the case may be, and in case of precautionary seizure to release the guarantee.

By exception from these provisions, art. 213 para. (8) of the Fiscal Procedure Code provides that, in the event that the tax authorities notify the competent judicial authorities in connection with the findings made during the tax inspection and which could fulfill constitutive elements of an offense, the precautionary measures instituted by the tax authorities subsist on all the duration of the criminal trial, until the date of settlement of the case by the criminal investigation bodies or by the court.

This provision corresponds to an amendment to the text brought by Government Ordinance no. 30/2017. In the previous form, the text did not provide for the

maintenance of precautionary measures until the completion of the criminal process, but until the date on which the judicial bodies instituted precautionary measures according to the Code of Criminal Procedure, but without establishing an obligation for the judicial bodies.

3 The need for legislative intervention

The decision of the constitutional review court establishes, in our opinion, an obligation of the prosecutor to analyze the need to institute precautionary measures according to the Code of Criminal Procedure and obviously calls into question the need for legislative intervention to establish the time frame for which the precautionary measures are maintained, after the notification of the criminal investigation bodies by the fiscal bodies in connection with the findings made on the occasion of the fiscal inspection and which could meet the constitutive elements of a crime.

From the interpretation of the provisions of art. 249 of the Code of Criminal Procedure, it results that precautionary measures may be ordered during the criminal proceedings to avoid hiding, destroying, alienating or evading the pursuit of goods that may be subject to special confiscation or extended confiscation or that may serve to guarantee the enforcement of the punishment of a fine or of the judicial expenses or of the reparation of the damage caused by the crime [4].

However, precautionary measures may be ordered only on the assets of the suspect or defendant, except for the cases regulated by art. 249 para. (4) and (5) of the Code of Criminal Procedure, when they may be instituted on the property of other persons in the property or possession of which are the property to be confiscated, respectively the property of the civilly liable person to recover the damage caused by crime and to ensure the enforcement of legal costs.

Thus, as a rule during the criminal proceedings, precautionary measures may be instituted *on the assets of the suspect or defendant*.

The current Code of Criminal Procedure brings a number of changes related to the procedure of starting the criminal investigation in relation to the old code, as it requires that the first stage be aimed exclusively at investigating the deed in a criminal investigation started *in rem*.

The criminal investigation is structured in two stages: a stage of investigation *in rem*, which starts with the beginning of the criminal investigation and ends at the order of further investigation against the suspect, and a stage of investigation *in personam*, which ends by solving the case by the prosecutor. [5]

According to art. 77 of the Code of Criminal Procedure, the suspect is the person in respect of whom, *from the existing data and evidence*, it results the reasonable suspicion that he committed a crime.

Also, according to 1st thesis of art. 305 para. (3) from the Code of Criminal Procedure "*when there is evidence that conducts to a reasonable suspicion that a certain person committed the act for which the criminal investigation was initiated"* and there is not one of the cases provided by art. 16 para. (1), the criminal investigation body orders that the criminal investigation is continued against him, acquiring the quality of suspect.

Thus, from the moment of receiving the notification made by the fiscal inspection bodies under the conditions of art. 132 of the Fiscal Procedure Code, the judicial bodies have the obligation to gather the necessary evidence regarding the existence of the notified crimes, the identification of the guilty persons and the establishment of their liability.

In these circumstances, it is necessary to regulate in the Fiscal Procedure Code a period of time for which the precautionary measures ordered by the fiscal bodies are maintained after the notification of the criminal investigation bodies, in order to gather the necessary evidence for the prosecutor to order the further investigation against the suspect and institute precautionary measures.

During the criminal investigation, the prosecutor is the one who can order precautionary measures by ordinance. The prosecutor's ordinance ordering a precautionary measure must be motivated, providing the necessary explanations on the necessity and scope of the measure.

Thus, by reference to the considerations of the Decision of the Constitutional Court *("The Fiscal Procedure Code cannot regulate in principle, discordant aspects and in clear contradiction with the philosophy of the Criminal Procedure Code in the sense of diminishing procedural guarantees enacted precisely in order to respect the right to a fair trial of the person")*, precautionary measures may be instituted during the criminal proceedings only if the conditions provided by the Code of Criminal Procedure are met.

In these circumstances, the parties, the main subjects of the proceedings and the lawyers must have the time and facilities necessary to prepare the defense specific to the criminal proceedings.

The Constitutional Court also ruled that given the negative effects that would result from the termination of precautionary measures ordered in the administrative phase in the conditions of notification of criminal prosecution bodies, therefore, in the conditions of transition from administrative to criminal procedure, *the Court does not deny that the precautionary measures ordered in the administrative procedure remain de jure valid for a short and transitional period precisely in order to leave sufficient time for the prosecutor to assess whether or not to order precautionary measures depending on the specific circumstances of the case.*

From this point of view, it was rightly held, in our opinion, by the court of constitutional contentious that, according to the current conception of the Code of Criminal Procedure, the acts concluded by the finding bodies represent acts of notification of the criminal investigation bodies, and not means of proof, as provided by the previous Code of Criminal Procedure. Thus, it was noted that the fiscal body, notifying the criminal investigation body, behaves as a finding body within the meaning of art. 61 of the Code of Criminal Procedure, and the report concluded by it, when there is a reasonable suspicion regarding the commission of a crime, constitutes an act of notification of the criminal investigation bodies, according to art. 61 para. (5) of the Code of Criminal Procedure. However, to accept that, in the absence of the appropriate procedural document issued by the competent judicial body, a precautionary measure ordered by a finding body in a pre-trial procedure subsists throughout it, means that the competence of the finding body to order procedural measures regarding the conduct of the criminal trial would be recognized, which is unacceptable. Therefore, *the legislator does not have the competence, during the criminal process, to substitute the action of*

the judicial bodies regarding the disposition of the precautionary measure with that of the fiscal bodies.

4 Transitional situations

In the application of Decision no. 581/2019 of the Constitutional Court, the analysis of the situations in which the fiscal bodies instituted precautionary measures before the publication in the Official Monitor of Romania of the decision is also required.

The first hypothesis is the one in which the term of 6 months (or 1 year exceptionally), provided by art. 213 para. (7) of the Fiscal Procedure Code, since the establishment of precautionary measures by the fiscal bodies, was fulfilled in the time interval between the date of publication of the Decision of the Constitutional Court in the Official Monitor and the expiration date of the 45 days provided by art. 147 para. (1) of the Romanian Constitution, republished [6], in which the provisions declared unconstitutional were suspended by law.

We cannot agree with the interpretation that, in this situation, the fiscal bodies did not have the obligation to lift the precautionary measures until the fulfillment of the 45 days from the publication of the Decision in the Official Monitor. In our opinion, during this time, the unconstitutional norm, although it did not come out of force, being suspended by law, did not produce legal effects.

As shown in the literature [7], the effects of the decisions of the Constitutional Court to admit an exception of unconstitutionality include the obligation of law enforcement bodies to comply with its decisions, in the sense of not applying the provisions declared unconstitutional for as long as they are suspended by law. In other words, even within the 45 days from the publication of the Court's decision, the public administration and judicial bodies must give effect to the Constitution and remove from the application the text declared unconstitutional, the effect of such a decision being the paralysis of laws that are not in accordance with the Constitution.

In other words, for the precautionary measures instituted and in respect of which the terms provided by art. 213 para. (7) of the Fiscal Procedure Code were about to be fulfilled, it was mandatory for the fiscal bodies to intervene, in the sense of ordering the lifting of the precautionary measures, as it is not possible to maintain them.

Another hypothesis is the one in which, as an effect of the application of the provisions of art. 213 para. (8) of the Fiscal Procedure Code, the precautionary measures had been maintained prior to the pronouncement of the Decision, as a consequence of the notification of the judicial bodies by the fiscal control bodies.

As is apparent from the recitals in the preamble of the Decision, considering the negative effects of the termination of the precautionary measures ordered in the administrative phase in the context of the referral addressed to the criminal prosecution bodies, therefore, in the conditions of the transition from the administrative procedure to the criminal one, the Court showed that does not deny the possibility that precautionary measures ordered in the administrative procedure remain *de jure* valid for a short and transitional period, precisely in order to allow the prosecutor sufficient time to assess whether or not to order precautionary measures depending on the specific circumstances of the case.

Given the effects of the publication of the Court's Decision, which we mentioned earlier, we consider that in the time between the date of the Decision and its publication, it was the duty of the judicial bodies to have an active role, in order to assess whether precautionary measures should be taken. Otherwise, the precautionary measures ceased on the date of publication of the decision under review.

Therefore, within 2 days from the publication of the Court's Decision, the tax authorities were obliged to lift the precautionary measures, both in the situation where the judicial bodies ordered the taking of precautionary measures according to the Code of Criminal Procedure, and in the situation when they did not take such measures.

A last working hypothesis in case of imposition of precautionary measures by the fiscal bodies before the publication of the Decision in the Official Monitor, concerns the case when the term of 6 months (or exceptionally 1 year) is fulfilled after the term of 45 days from the publication in Official Monitor.

In this situation also, the precautionary measures ceased at the end of the term of 6 months (or in exceptional cases 1 year), the fiscal body being obliged to withdraw them within 2 days from the fulfillment of the term of 6 months/1 year.

5 The current regulatory framework

After the 45-day interval from the publication of Decision no. 581/2019 of the Constitutional Court, the provisions of art. 213 para. (7) of the Fiscal Procedure Code have become out of force.

The conclusion follows from the fact that the Decision under review is a simple decision declaring the unconstitutionality of a text of law. [8]

As shown in the special literature [9], the effect of the expiration of the time interval of 45 from the publication of the Court's decisions admitting the exception of unconstitutionality is the exit from the legislative circuit of the provision that does not comply with the fundamental law, as an effect of its non-modification by the legislator.

Therefore, the conclusion that emerges is that in the current regulatory framework there is no provision to allow the maintenance of precautionary measures after the notification of the criminal investigation bodies by the tax authorities. The criminal investigation will start *in rem* in all cases in which the notification was made legally, immediately after receiving the notification [10]. Obviously, according to the considerations set out by the contentious constitutional court in the Decision, it is not acceptable to continue the application of measures ordered by the tax authorities during the criminal process, except the case when this possibility is provided by an express legal provision, in which the duration of the reasonable term granted to the judicial bodies to analyze the need to order criminal procedural measures should be provided.

As we have shown, the need for legislative intervention in this regard is obvious, given the consequences arising from the termination of precautionary measures in court, a circumstance that makes it impossible for the prosecutor to prevent the alienation, disappearance or destruction of goods by the future suspect or defendant. However, as it has been shown in the special literature [11], precautionary measures justify their presence in procedural measures precisely because until the final settlement of the case the suspect or defendant or the civilly liable party could alienate the assets or become

insolvent, which would leave without content a possible disposition of the court of admitting the civil action or confiscation.

From this point of view, the reasons that imposed the legislative consecration of the safety measures must also be taken into account, respectively the need to remove a state of danger and to prevent the commission of the acts provided by the criminal law [12], a goal that is obviously affected by the non-existence of the goods subject to confiscation at the time of execution of the criminal judgment.

6 Conclusions

The intervention of Decision no. 581/2019 of the Constitutional Court brings novelty elements regarding the interference between the administrative fiscal and criminal procedure. However, the conclusions reached by the constitutional court are not surprising, if we refer to the vision of the Romanian legislator and the Constitutional Court itself regarding the landmarks that currently circumscribe the criminal process in Romania. Thus, it is fully understandable why the Court considered inadmissible the option of the Romanian legislator to substitute, during the criminal proceedings, the action of the judicial bodies regarding the disposition of the precautionary measure with that of the fiscal bodies, given that the same legislator provided in the current Code of Criminal Procedure, the possibility of conducting acts and administering evidence only in criminal proceedings and by the judiciary [13], removing a number of issues that have generated criticism, related to the stage of preliminary acts and the acts drawn up by bodies other than the judiciary [14].

At the same time, the negative effects that the inactivity of the legislator continues to generate are noteworthy, the lack of a legal basis for maintaining the precautionary measures ordered by the tax authorities after notifying the judicial bodies raising serious doubts about the effectiveness of precautionary measures ordered during the criminal process, the time interval inherent in the attribution of the quality of suspect being an impediment regarding the purpose of preventing the alienation, disappearance or destruction of the goods by the future suspect or defendant.

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The appeal regarding the duration of the criminal trial – an inefficient remedy for the observance of the right to a fair trial

Sima C.

"Titu Maiorescu" University, Faculty of Law (ROMANIA)
E-mail: constantin.sima17@gmail.com

Abstract

In 2000, the Council of Europe's Committee of Ministers began monitoring the effectiveness of national remedies in the event of a breach of the reasonable length of proceedings. On 26 April 2000 the European Court of Human Rights (ECHR) issued a decision in Kudla v. Poland, imposing the need for effective remedies to protect the right to settling a case within a reasonable amount of time. Romania included the principle of a reasonable duration of solving the case in art. 21 of the Constitution, on the occasion of the revision of 2003, and in 2013 introduced in the Code of Criminal Procedure (CPC) a chapter entitled "Appeal regarding the duration of the criminal process". And yet, the Romanian criminal procedure does not offer an effective remedy to ensure the reasonable duration of the criminal trial.

Keywords: fair trial, trial duration, remedies, criminal trial duration.

1 Preliminary considerations

According to art. 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, "everyone is entitled to a fair and public hearing within a reasonable time…".

The reasonable term has become a component of the right to a fair trial with the considerable increase in the number of complaints regarding the violation of art. 6§1 of the Convention, in terms of the reasonable duration of the trial. In this context, on April 26, 2000, the Strasbourg Court, reunited for the trial of Kudla v. Poland, decided to extend the scope of art. 13 of the Convention, which gives the right to the person whose rights and freedoms have been violated, to effectively address a national court also regarding the reasonable duration of the proceedings [1]. The Court has ruled that the

right of any person to stand trial within a reasonable time would be ineffective if there were no possibility of first submitting to a national court a complaint concerning the right guaranteed by the Convention.

In other words, the meaning of art. 13 is to establish a national control mechanism, independent of European control, the purpose of which is to remedy, at national level, violations of the European convention [1].

If prior to the Kudla decision, after observing the violation of art. 6(1), the judges from Strasbourg resumed the examination of the violation of art. 13, by this decision the national states were instructed to establish in their national judicial system a right to effective action[1]. Italy, for example, undertook to establish a right of action, based on art. 13 of the Convention, by the Pinto decision, from 2001; France, through cases Editions, Periscope, Kemmache and Tomasi, since 1992.

The first decision against Romania, through which the European court sanctioned the excessive length of the proceedings, was the Pantea v. Romania case, of June 3, 2003, a decision which was followed by a long series of convictions for non-compliance with the reasonable duration of criminal proceedings: Stoianova and Nedelcu v. Romania (4 August 2005), Aliuta v. Romania (11 April 2006), Bragadireanu v. Romania (6 December 2007), Rosengren v. Romania (24 April 2008), Georgescu v. Romania (13 May 2008), Temesan v. Romania (June 10, 2008) etc.[2]

Through the 2003 revision of the Romanian Constitution, art. 21 was supplemented with paragraph 3: *The parties have the right to a fair trial and to the settlement of cases within a reasonable time.*

It was thus recognized that *the reasonable term* expresses the reality that justice must not be done late which would compromise its efficiency and credibility, as it results from two frequently used adages: justice delayed, justice denied and justice rètive, justice fautive (slow justice, faulty justice)[3].

Unfortunately, the mere constitutional provision of the right to settle cases within a reasonable time did not solve the problem of the delay of the criminal process in Romania. Thus, on February 24, 2009, in the case of Abramiuc against Romania, the Strasbourg Court found a violation of the provisions of art. 13 of the Constitution, after noting that the Romanian legislation does not include any specific remedy in case of exceeding the reasonable duration of the procedures. The Romanian Government's claim that the applicant had the possibility to notify the Supreme Council of Magistracy in order to establish the disciplinary violation provided by art. 99 lit. h) of Law no. 303/2004, regarding the status of judges and prosecutors or to formulate a complaint to the hierarchically superior prosecutor, based on art. 278 of the previous Code of Criminal Procedure were not considered effective solutions to combat the delay of proceedings[2].

The fact that the Romanian government did not consider it a priority to find a solution to guarantee the swiftness in the criminal process is proven by the fact that the new Code of Criminal Procedure (Law no. 135/2010) did not contain any provision in this regard. Only after 3 years, by Law no. 255/2013 for the implementation of the Code of Criminal Procedure and for amending and supplementing some normative acts containing criminal procedural provisions, the Romanian government understood the need to solve this issue, by introducing in Title IV dedicated to special procedures, a chapter entitled "Appeal regarding the duration of the criminal trial".

Evidently, in taking this decision, the following have played a part: Recommendation Rec (2004) 6 regarding the improvement of internal remedies, especially in the case of excessive duration of criminal proceedings on taking this decision, adopted by the Committee of Ministers of the Council of Europe, in the 114th session, on 12 May 2004, as well as the report of the Venice Commission regarding the effectiveness of national remedies concerning the excessive duration of criminal procedures, adopted at the 69th plenary session of the Venice Commission, 15-16th of December, 2006 (http://www. venice.coe.int).

2 The appeal regarding the duration of the criminal trial. Legal nature

In the doctrine it has been appreciated that the introduction in the criminal procedural legislation of the appeal regarding the duration of the criminal trial is the option of the Romanian legislator for an accelerating appeal[4].

The appeal is a remedy against any non-final court decision, regulated by law[5]. The appeal regarding the duration of the criminal trial cannot be considered an appeal, because it is not directed against a court decision[2]. We would rather say that it is an accessory action, similar to the appeal regarding the delay of the process, provided by art. 522-526 of the Code of Civil Procedure, which seeks to invigorate the criminal investigation or trial. The introduction of the appeal is not conditioned by the prior introduction of a delay complaint to the prosecutor or of a request to urgently resolve the case to the president of the court, requiring only the fulfillment of at least one year from the beginning of the criminal investigation, one year from the decision to go to trial, for cases in the first instance and at least 6 months from the notification of the court, in the appeals.

3 Appellants

According to art. 488^1 alin. (2), in the criminal investigation phase, the appeal regarding the duration of the criminal trial may be introduced by the suspect, defendant, the victim, the civil party and the party liable civilly. During the trial, the appeal can also be introduced by the prosecutor. It can be noted that the legislator has fairly regulated both the right of the victim to file an appeal and the right of the suspect, defendant, civil party and civilly liable party.

4 Jurisdiction

In this regard, the legislator did not choose a solution to be applied as a principle, which, in our opinion, should have been, for the criminal investigation phase, the court that is to judge the case in the first instance, and in the trial phase, the superior court that has the cause on role. In this way, the right of the hierarchically superior court to control the hierarchically inferior courts is respected and, at the same time, the right of the court of first instance to resolve the complaints regarding the criminal investigation phase.

The doctrine held that, again, the standard imposed by national legislation is higher than that established by art. 13 ECHR, knowing that art. 13 does not necessarily imply that the appeal be opened before a court, being sufficient that the domestic law allows the notification of an administrative body, as long as this body presents certain guarantees of independence, impartiality and procedural guarantees[4].

Two remarks are necessary. First, an administrative body could be, in the phase of criminal prosecution, the hierarchically superior prosecutor, but the solution proved to be totally ineffective under the previous criminal procedure code, which regulates such verification. In the case of the courts, an administrative body could only be the Superior Council of Magistracy, with the specification that it, like the Judicial Inspection, does not examine pending cases. The second remark refers to the content of ECHR decisions, which require an effective remedy, yet it is well known that the verification of courts and prosecutor's offices by an administrative body has not proved effective.

5 The procedure for resolving the appeal

It is conceived under the sign of speed: a) The file is sent to the judge of liberties within 5 days of the request; b) Not transmitting the requested point of view, within the term established by the court, does not prevent the settlement of the appeal; c) The judge of rights and freedoms resolves the appeal within 20 days of the registration; d) The appeal is solved by settling in the council chamber, without the presence of the parties and the prosecutor.

The absence of the parties and the prosecutor from the settlement of the appeal was settled by the Constitutional Court in decision 423/2015 which established that the criminal procedural law must provide the possibility for the parties, the main procedural subjects and the prosecutor to effectively debate the arguments supported by regarding the reasonable or unreasonable nature of the duration of the criminal trial[6].

As for the other aspects regarding the swiftness of solving the appeal, the Romanian legislator overlooked the fact that a procedure that is too fast can be, in equal measure, contrary to art. 6. It is a matter of finding a point of balance, a just and moderate solution, so that justice is pronounced in a full, satisfactory way[1].

6 Settlement of the appeal

In the doctrine it was appreciated that the reasonable duration of the judicial procedures cannot be determined exactly with general title, and the criteria considered by the text of art. 488^5 CPC are those provided by the jurisprudence of the ECHR[7]. Even if the criteria provided by art. 488^5 are detached from the jurisprudence of the ECHR, this does not mean that they are sufficient. In our opinion, the law must provide more accurate guidelines regarding the assessment of the efficiency of the prosecutor or judge. The above-mentioned text does not distinguish between cases without detainees and cases with detainees, cases in which complex evidence must be administered, such as forensic, technical-scientific or financial accounting expertise, in which it is necessary to hear hundreds of people (as was the case of the files that had as object ponzi schemes), and especially does not establish the principle of rhythmic activity of

the magistrate regarding the solution of the case, not being permitted that periods of two, three weeks, a month or sometimes even more, the cases are left idle

7 Solutions

Some authors remarked "the solution of admitting the appeal, although regulated *de jure*, is *de facto* ineffective. More precisely, the conclusion by which the appeal is admitted appears as a court decision of recommendation, as long as it provides only the possibility of establishing a term in which the prosecutor or the court must solve the case, not being regulated any sanction if the term is not respected. Practically, the prosecutors or the members of the panel of judges, who do not respect the term established after the admission of the appeal, can answer, at most, from a disciplinary point of view, according to art. 9 lit. h) of Law no. 303/2004 regarding the status of judges and prosecutors, although it is debatable, because the finding of this deviation requires repetition[2].

In foreign doctrine, three possibilities were considered. In the first case, if the evidence exists and the exercise of the right to defense has not become impossible, it is necessary to apply a penalty to the special minimum. In the second case, if the gravity of the violation cannot be compensated by applying a punishment to the special minimum, the punishment can be reduced below this minimum. In the third case, if the violation of the guarantee of the reasonable duration of the criminal trial cannot be remedied by applying a sentence below the minimum, then the court may issue a conviction, which does not involve the application of a sentence, but allows the defendant to pay costs and refund goods[2].

In the Romanian doctrine, more pragmatic solutions have been proposed, namely the acts performed beyond the term indicated by the court that resolves the appeal regarding the duration of the criminal trial to be struck by nullity[8].

In France, this solution was considered illegal, the French Court of Cassation ruling that the unreasonable duration of a procedure could not determine its nullity, or that of the criminal investigation[9].

Regarding Romania, we did not intend to find sanctions for non-compliance with the term indicated by the court. It is the duty of the legislator to do so. In this regard, the European Court of Human Rights was unequivocal: "In order to prevent further findings of violation of the right to a trial within a reasonable time, the Court encourages the state to either modify the existing set of remedies or add new remedies, such as a compensatory, specific and clearly regulated compensatory reparation, in order to ensure an effective, authentic reparation, in case of violations of these rights"[10].

Regardless of whether or not the legislator will grant compensatory reparations, the excessive duration of the proceedings will continue, if those guilty of not working will not be sanctioned. Obviously, the legislator has also the obligation to ensure the appropriate legislative framework for the application of sanctions that do not affect the independence and professional status of the magistrate.

In our opinion, it is not the compensatory measures that can ensure the speed of the criminal process and this is not the meaning of the appeal provided by art. 488^1 CPP. The right to take action against the delay of the case must ensure a procedural remedy and not compensations, nor the annulment of the acts performed beyond the established

term, nor any attenuated sanctioning regime for the defendants who benefit from the delay.

The delay in establishing the truth cannot be compensated with anything, the court having the obligation to identify the guilty and apply sanctions or, as the case may be, notify the competent bodies to apply such sanctions. *Poena unius est multorum metus* (The punishment of one is the fear of many).

8 Conclusions

The appeal regarding the duration of the criminal trial is a big step forward, regarding the establishment at a national level of some effective remedies, which would guarantee the reasonable duration of the criminal trial. Unfortunately, the mere adoption of rules, without sanctions for violating them, is not likely to serve the purpose. The institution of the appeal regarding the duration of the criminal trial cannot become an effective remedy without the introduction of sanctions for non-compliance with the term indicated by the court that settles the appeal.

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Agricultural Policy-Making by Using European Legal Acts

PhD Associate Professor Diaconu C.M.

"Ion Ionescu de la Brad" University of Agricultural Sciences and Veterinary Medicine of Iași – Faculty of Agriculture – Department of Agro-Economics
E-mail: avocatcarmendiaconu@gmail.com

Abstract

This article, in the context of Romania being a member state of the European Union, aims to approach the European regulatory mechanism that has a direct impact upon public agricultural policies, area of shared competence between the Union and the Member States. There is a way in which the national state, through various decision-makers, can lobby in the area of shared competencies.

Keywords: public policies, decision-making, legal acts, European Union.

In the context of the current economy, we believe that the agrarian law is an independent branch of law, given the complexity of the social relations specific to the agricultural field and the actors that govern this activity.

There are public and private law subjects involved in specific agrarian legal relations. The issues of agricultural law have a certain specificity in the book if we refer *ab initio* to the land law, that is law no. 18/1991, amended and republished, designed as an act of reparation for all former owners of agricultural land that was either seized by the state or donated to it forcefully in a time any other decision was impossible. The famous collectivization that characterized the socialist period was an attack against the right of ownership and against the rural peasant communities qualified by the regime as *chiabur* in Romanian and *kulak* in Russian.

1 Ordinary legislative procedure

Also called the codecision, it is defined by art. 294 of the TFEU and consists in the adoption of legislation (normally a regulation, directive or decision) jointly and on an equal footing by Parliament and the Council.

The procedure starts with a legislative proposal from the Commission normally for a regulation, directive or decision. The Parliament examines the proposal as a first

reading and sends it to the Council. After the Parliament has adopted its position, the Council may decide to accept its position, in which case the legislative act is adopted, or it may adopt a different position at first reading and communicate it to Parliament for a second reading.

If, within three months of the date of transmission, the European Parliament shall:

- approve Council's position at first reading or has not delivered an opinion, the act is adopted in the form corresponding to Council's position;
- reject, by a majority of members, Council's position at first reading, the proposed act is not adopted;
- propose, by majority of members, amendments to Council's position at first reading. The text thus amended shall be forwarded to the Council and the Commission, which shall deliver an opinion on such changes.

If, within three months from the reception of the amendments of the European Parliament, the Council, acting by a qualified majority:

- approves all such amendments, that act is approved;
- does not approve all the amendments, the President of the Council, in agreement with the President of the European Parliament, shall convene the Conciliation Committee within six weeks.

The Council shall act unanimously regarding the amendments which have been the subject of a negative opinion by the Commission.

The conciliation procedure between the Council and Parliament is carried out by the Conciliation Committee, which reunites the members of the Council or their representatives and as many members representing the European Parliament, with the mission to reach an agreement on a joint project, with a qualified majority of Council members or their representatives and with a majority of the Parliament members, within six weeks from the convening date, on the basis of the positions of Parliament and the Council at second reading.

The Commission shall take part in the Conciliation Committee's proceedings and shall take all necessary initiatives with a view to promoting rapprochement between the positions of the European Parliament and the Council. If, within six weeks from the convocation, the Conciliation Committee does not approve any joint project, the proposed act is not adopted.

If, within that period, the Conciliation Committee approves a joint project, the European Parliament and the Council shall each have six weeks from the date of its approval to adopt that act in agreement to this project, and the European Parliament shall decide by a majority of votes and the Council by a qualified majority. Otherwise, the proposed act shall not be adopted.

The periods of three months and six weeks provided for in this Article are extended by no more than a month and two weeks at the initiative of the European Parliament or Council.

The special legislative procedure covers specific cases provided for in Treaties, on the basis of the necessity either for the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council or by the Council with the participation of the European Council.

As special provisions of the co-decision procedure, for the situations provided for in the Treaties, a legislative act is subject to the ordinary legislative procedure at the

initiative of a group of Member States or on the recommendation of the European Central Bank or at the request of the Court of Justice. Paragraph (2)[1], comma (6)[2] second thesis and paragraph (9)[3] of art. 294 TFUE do not apply.

In such cases, the European Parliament and the Council shall forward the draft project and their positions at first and second reading to the Commission. The European Parliament or the Council may request the opinion of the Commission at any stage of the procedure, which the Commission may issue on its own initiative, with the possibility of participating in the conciliation procedure.

2 Non-legislative Act Procedure

The Commission may adopt non-legislative acts in a delegated act regime as laid down in Article 290 par. 3 TFEU. These acts define the objectives, content, scope and duration of the delegation of competence, establishing the conditions of application of the delegation, specifying that the European Parliament or Council may decide upon revoking them. The delegated acts come into effect at the time set by the legislative act, provided that there be no objection raised by the European Parliament or Council, the Parliament acting by a majority of members and the Council by qualified majority.

However, there is also a category of acts, according to art. 296 of the TFEU, in respect of which the Treaties do not specify the type, leaving the institutions to select it on a case-by-case basis, in compliance with the applicable procedures and the principle of proportionality.

3 European Legislation Publication and Coming into Effect

At present, in the light of the case law of the European Court of Justice, the principle of EU act publication has been established as a fundamental principle for the Community legal order, in the sense that an act issued by a Community public authority becomes valid for judicial bodies only if they could get informed of its contents. As a clarification, prior to the Maastricht Treaty, it was mandatory to publish in the Journal of the European Union only regulations, decisions and directives even if they concerned all Member States being exempted from publication.

In this respect, the text argument is given by art. 254 TEC in the form given by the Maastricht Treaty, which established that the obligation to publish concerns:

- regulations, directives and decisions adopted jointly by the European Parliament and the Council under the co-decision procedure;
- Council and Commission directives addressed to all Member States; as a sanction, their non-publication made them inapplicable, the European Court of

[1] The Commission submits a proposal to the European Parliament and Council.
[2] The Commission keeps the European Parliament fully informed of its position.
[3] The Council decides with unanimity of members on the amendments that received Commission's negative opinion.

Justice stating that non-publication has effect only regarding the binding nature of the text and not its legality, and if the institutions cannot apply an unpublished regulation they can prepare its application taking all the necessary measures in this respect, conditioned for coming into effect by the enforceable character of the main text.

For the other acts of the Council and the Commission which are usually part of the category of decisions, their implementation was conditioned by their notification, the publication being only a way to inform the public, in other words of opposability.[4]

The Treaty of Lisbon introduces the concept of legal acts and distinguishes between legislative and non-legislative acts, with the classification of different rules relating to their signing, publication and coming into effect. Legislative acts are adopted according to the ordinary legislative procedure by the European Parliament and the Council, they are signed by the presidents of each institution.

For legislative acts adopted according to special legislative procedures, these must be signed by the President of the institution which adopted them (Council or European Parliament, as the case may be). Legislative acts (regulations, directives, decisions) shall be published in the Official Journal of the European Union and shall come into effect at the date set out in their text or in the absence of such provision on the twentieth day following that of their publication.[5] In the case of non-legislative acts which are usually applicable, if they do not indicate the addressee, they shall be signed by the President of the institution which adopted them.

According to the provisions of art. 297, last paragraph of the TFEU, the directives to Member States and decisions addressed to an addressee shall be notified to their addressees and shall take legal effect by such notification, the notification being through registered letter or hended over to a person authorized to receive it in exchange for a receipt.[6]

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[4] Art. 17 TCE.

[5] "Publication day" means the day on which the Official Journal becomes available at the seat of the Office for Official Publications of the Union in Luxembourg, which coincides with the date of the official journal containing the text of the published European regulatory act; the immediate coming into effect, in the sense that the European regulatory act produces legal effects on the same day as its publication in the journal, must be used in case of urgent necessity in order to avoid either a legislative vacuum or divergent interpretations of Community texts; as a rule, this type of coming into effect is under the judicial control of the European Court of Justice, which will always ask the author of the act to prove the need for such decisions. As a rule, in the practice of the Union, the immediate coming into effect concerns, as a rule, regulations fixing as amounts the agricultural product import and export duties; the inconvenience of immediate coming into effect is usually mitigated to the extent that the Commission communicates by telex, either the day before or in the evening or on the same day as the Official Journal of the European Union.

[6] The notification to Member States shall in principle be made through their permanent representatives in Brussels, and for individuals or legal persons in particular, it shall in principle be made by post, the Union institutions nevertheless preferring to use diplomatic channels through their accredited ambassadors; this option is preferred for undertakings falling under the jurisdiction of third countries. Regarding the language regime for notifications, the language of the Member State concerned or of the individual shall be used; if the company has its registered office in a third country, the choice of official language depends on the relations established by that company in the common market with a Member State, the decisive factor being the location of the office in a Member State of the European Union.

4 Unwritten sources

The *custom* is not taken within the European Union as a possible source of law, as there is no real possibility through the mechanisms of the Treaty that the failure to fulfill, for example, a long-term obligation taken by a Member State to acquire such a character, as a possible source of law. Two situations can illustrate this in the activity of the European Court of Justice:

– failure to recognize the legal force of the custom in an institutional practice, such as the European Parliament's practice of holding several sittings in Luxembourg, with a view to establishing a custom for Member States to do so;

– failure to accept a practice not regulated by any Community text by which the Commission could examine the existence of force majeure events, such as, for example, the waiver of EAGGF financial competition or the European Agricultural Guidance and Guarantee Fund replaced by Council Regulation (EC) No. 1290/2005 of the Council regarding the financing of the common agricultural policy by the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD).

5 Jurisprudence

In the European Union, this is an informal source of law through the role that the European Court of Justice can play in setting questions referred by national judges in order to clarify how European legal rules are to be interpreted and applied, rules that are prioritary in terms of applicability, in the light of art. 20 of the Romanian Constitution which states its primacy if the national law is more unfavorable. This jurisdiction of the European Court of Justice results from the content of art. 267 TFEU.[7]

The European Court of Justice, according to art. 196 of the Rules of Procedure of the Court, in conjunction with the provisions of art. 218 par. 11 of the TFEU, may give opinions on the compatibility of an agreement with the provisions of the Treaties and on the competence of the Union or one of its institutions to conclude this agreement at the request of a Member State, the European Parliament, the Council or the European Commission[8].

[7] The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: a) the interpretation of the Treaties; b) the validity and interpretation of acts adopted by the institutions, bodies, offices or agencies of the Union. If such a question is raised before a court of a Member State, that court may, if it considers that a decision in that regard is necessary for it to give judgment, to request to the Court a ruling on this issue. If such a matter is raised in a case pending before a national court whose decisions are not subject to appeal under national law, that court shall be required to refer the matter to the Court of Justice. If such a matter is raised in a case pending before a national court concerning a person subject to a measure of deprivation of liberty, the Court shall rule as soon as possible.

[8] G.L. Ispas, *The European Parliament and the United States Congress, fundamental institutions in international development. A comparative analysis, in the Journal of Public Law no. 3/2011 and Free movement of persons in the European Union,* in Judicial Courier no. 9/2011; G.L. Ispas, Interparliamentary union, Parliamentary organization with universal vocation, in Journal of Juridical Studies no. 1-2/2011, year VI; G.L. Ispas, *The role of national parliaments in the construction of the*

6 General notions and features

The concept of law[9] is grafted onto a set of regulations and rules of conduct aimed at influencing and guiding the behavior of individuals in society, organized in a unitary system and applicable to a given territorial area, governed by a number of bodies chosen differently from one state to another, depending on the form of government.

Other doctrinaires[10] define law as the legal order of human behavior, established by state bodies through the force of a coercive relationship marked by sanctions applicable to the situation of breaching the conduct imposed by the rule of law. A rule or regulation may be defined as a compulsory principle governing conduct or procedure within a particular area of activity or a provision of the law.[11]

Agricultural regulations can be defined as a set of rules of conduct inserted in the text of a legal act in the socio-legal agriculrural field, with the aim of establishing conduct by the coercive force of the state regarding the way in which a series of specific agricultural activities take place, these types of activities are authorized or financed by the state, etc.

7 Features of Agricultural Regulations

They regulate social relations that appear between state authorities at central and local level, laying down regulatory aspects in the agricultural area. We consider the access to various national and European funds by agricultural producers obliged to meet certain conditions starting with the legal status, types of crops, turnover, etc. This category also includes various types of authorizations, licenses and approvals given by the Ministry of Agriculture and Sustainable Development as well as by public institutions subordinated to or related to it.

Agricultural regulations are characterized by the diversity of social relations in the agro-socio-legal area, being embedded in organic laws[12], government ordinances, government decisions[13], ministerial orders[14] etc.

European Union, in Law no. 7/2011. G.L. Ispas, *The European Parliament and the United States Congress, fundamental institutions in international development. A comparative analysis,* in the Journal of Public Law no. 3/2011 and Free movement of persons in the European Union, in Judicial Courier no. 9/2011.

[9] In legal doctrine, agricultural law is seen as a distinct area by authors, such as M. Djuvara, *Teoria generală a dreptului* (Enciclopedia Juridică, Drept raţional, izvoare şi drept pozitiv, p. 122-123).

[10] I.N. Militaru, Dreptul Uniunii Europene, 3rd edition as revized and added, Universul Juridic Publishing House, Bucharest, 2017, p. 18-20; I. Jinga, A. Popescu, *Integrarea europeană. Dicţionar de termeni comunitari,* Lumina Lex Publishing House, 2000, p. 7.

[11] Dicţionarul explicativ al limbii române, Academia Publishing House, Bucharest, 1975.

[12] For example, Law no. 17/2014 regarding the procedure for the sale of agricultural lands outside the built-up area.

[13] Government Decision no. 1186/2014 on the organization and functioning of the authority for the Administration of the National Anti-Hail and Precipitation Growth System, with subsequent amendments and completions.

[14] Order of the Minister of Agriculture and Rural Development no. 21/2017 for the approval of the specific procedure for establishing the measures, methodology and percentage by which the related allocation provided in the NRDP may be exceeded.

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Aspects regarding the competence of the President of Romania in the Government's investiture and the Ministers' appointment

"Une Constitution, c'est un esprit,
des institutions et une pratique"
Ch.de Gaulle

Safta M.

PhD Associate Professor at "Titu Maiorescu" University of Bucharest, Faculty of Law (ROMANIA)
E-mail: marietasafta@yahoo.com

Abstract

Recent practice has shown that the problem of constitutional procedures circumscribed to the Government's investiture, the Ministers' appointment and dismissal, still require analysis and reflection with reference to the role of the authorities involved. This is because, at various times, political actors and representatives of public institutions have understood to interpret the constitutional norms, a way that seems to substantiate the misconception that everything not expressly prohibited by the Constitution would be constitutional. The recent decisions of the Constitutional Court delivered in this matter firmly emphasize in this sense the importance of observing the spirit of the fundamental law, of the Constitution as a whole, sanctioning conducts consisting in detachment of rules or their interpretation against others, contained in the same fundamental law. The present study emphasizes benchmarks of the mentioned issue, underlining the idea, which we believe that both the doctrine, as well as the specialized practice should continue to support, of priority of interpreting the constitutional and legal provisions with the emphasis of their spirit, of the necessity of producing the legal effects for which norms were established, complying with the general regulatory framework and avoiding disputes. Only in this way can the coherence of an increasingly complex legal system be ensured, in order to achieve a goal for legal security that is becoming increasingly difficult to achieve.

Keywords: Government's investiture, Ministers' appointment, Ministers' dismissal, appointment of interim Ministers, legal disputes of a constitutional nature

1 Introduction

We have approached with other occasions [1] the issue of the Government's investiture and the Ministers' appointment, from the perspective of the competence of the authorities involved – the President and the Parliament of Romania. The experience of the last years shows that the issue is still topical, requiring analysis and reflections, with reference to the role of both mentioned authorities, given the way in which, at various times, political actors and representatives of public institutions have understood to interpret the constitutional norms, a way that seems to substantiate the misconception that everything not expressly prohibited by the Constitution would be constitutional. Thus, in Romania, during the period 2017-2018, we attended the succession of several Governments, supported by the same political alliance, which granted and withdrew the confidence with a frequency and in ways that could be analyzed from the perspective of the incidental constitutional mechanisms [2], as well as, more recently, in the year 2020, at steps that may determine, through the constitutional procedures for appointing the Government, the dissolution of the Parliament and the organization of early elections. [3] Likewise, the conflicting relationships between the President of Romania and the incumbent Prime Minister regarding the appointment of certain Ministers, as well as the appointment of interim Ministers, have determined legal disputes of a constitutional nature and, consequently, the intervention of the Constitutional Court, which requested the authorities to observe the principle of Constitutional loyalty, of the Fundamental Law, meaning both the letter and its spirit.

As the aforementioned disputes concerned, in particular, the extent of the competence and obligations of the President of Romania in the mentioned procedure, we shall develop, in the continuation of our studies, the constitutional landmarks regarding the competence of the President of Romania in the procedure of the Government's investiture, as well as in the particular situations caused by certain Ministers' appointment/ dismissal, as well as the appointment of interim Ministers.

2 Considerations regarding the Government's investiture procedure

2.1 *General aspects*

We noted in the previous studies, in general, that the appointment of the Government, according to the Constitution of Romania, includes several stages, as follows: consultation, by the President of Romania, with the party that has obtained absolute majority in Parliament or, unless such majority exists, with the parties represented in Parliament [Article 103 (1) of the Constitution]; the appointment by the President of Romania, following consultations, of a candidate to the office of Prime Minister [Article 85 (1) and Article 103 (1) of the Constitution]; the candidate designated to the office of Prime Minister shall, within ten days of his designation, seek the vote of confidence of the Parliament upon the program and complete list of the Government [Article 103 (1) of the Constitution]; the programme and list of the

Government shall be debated upon by the Chamber of Deputies and the Senate, in joint sitting [Article 103 (3) the first sentence of the Constitution]; granting (not granting) the confidence by the Parliament, by a majority vote of the Deputies and Senators [Article 103 (3) the second sentence of the Constitution]; the appointment of the Government by the President of Romania, on the basis of the vote of confidence granted by Parliament [Article 85 (1) of the Constitution]; taking the oath of allegiance by the Prime Minister, the Ministers and the other members of the Government, before the President of Romania [Article 104 (1) of the Constitution].

Therefore, the appointment of the Government implies the exercise of a shared competence between the President of Romania and the Parliament. As for the role of the President of Romania, analyzed here, it is found that it materializes in initiating the procedure, by designating the candidate to the office of Prime Minster, and completing it, by appointing the Government on the basis of the vote of confidence granted by Parliament. The completion of the procedure did not provoke significant debates, both the case-law of the Constitutional Court and the doctrine [4] expressing the idea that it is in question a legal competence of the President which he is obliged to exercise, the appointment having a solemn character, without involving any act of appreciation, of opportunity or otherwise. It is true that the decision of Parliament to invest the Government is subject to constitutional review, but under Law no. 47/1992 on the organization and functioning of the Constitutional Court, which gives the vocation to appeal this decision only to Deputies, Senators, Presidents of both Chambers of Parliament and to parliamentary groups. Instead, the initiation of the investiture procedure and, from this perspective, the extension of the President's competence, provoked lively controversy and, finally, a legal dispute of a constitutional nature in the settlement of which the Constitutional Court proceeded to interpret the constitutional framework, as we shall refer to the following.

2.2 Designation of the candidate to the office of Prime Minister

The basis of the matter in this respect is constituted by Article 85(1). *Appointment of the Government* and Article 103 (1) of the Constitution – *Investiture.* Analyzing these texts in a case in which the Presidents of the two Chambers of Parliament requested the finding of a legal dispute of a constitutional nature determined by the action of the President of Romania to designate the candidate to the office of Prime Minister with the intention of not obtaining the Government's investiture and thereby causing the dissolution of Parliament, the Court held that the designation of the candidate to the office of Prime Minister requires **consultation** as well as an **assessment** by the President in order to achieve the purpose of that constitutional procedure [5].

As concerns the **consultation**, the Constitutional Court distinguished between two hypotheses. The first hypothesis concerns the situation in which there is a political party/ political alliance that holds an absolute majority of parliamentary seats, when, according to the Court, "the President has only the power to designate as a candidate to the office of Prime Minister the person proposed by the party/ respective alliance" [6] The second hypothesis of Article 103 (1) of the Constitution – under discussion within the legal dispute of a constitutional nature in 2020, is that of the lack of such a majority,

when "*The President of Romania designates a candidate to the office of Prime Minister, as a result of his consultation (....) with the parties represented in Parliament*". Interpreting the constitutional norm of reference, the Court had already established, prior to this dispute, that in this situation, the President "has only the competence to designate as a candidate (...) the representative proposed by the political alliance or political party who can provide the necessary parliamentary support for obtaining the Parliament's vote of confidence". [7] By Decision no. 85/2020, the Court further outlined the above-mentioned normative hypothesis, from the perspective of the fair conduct of the parties involved in the consultations, emphasizing that the consultation procedure must be carried out honestly and responsibly, so that towards the person designated by the President following the consultation it shall be formed the conviction that he will succeed in obtaining the support of the majority of parliamentarians, therefore, the vote of confidence for the new Government. On this occasion, the Court also specified that "any consultation imposed by the Constitution is that of real dialogue, assumed by both parties. Another vision determines that the consultation procedure becomes derisory, reducing it only to the simple completion of a mandatory stage, but lacking in content and, therefore, in the role assigned by the constituent legislature". In conclusion, "the consultation referred to in the constitutional norms is not an act of courtesy; it is not a simple exchange of opinions, but a real and responsible dialogue, which produces important effects in the economy of the procedure provided for by Article 103 (1) of the Constitution, in the sense that it objectively substantiates the assessment and the decision of the President to designate the Prime Minister."

As regards the **assessment** which, together with the consultations, substantiates the designation by the President of Romania of the candidate to the office of Prime Minister, the Court also established a number of points based on the letter and spirit of the Constitution, noting that this assessment must take into account the importance of the role that the candidate designated to the office of Prime Minister has in the continuation of the investiture/appointment procedure of the Government, being excluded the designation of a candidate to the office of Prime Minister who does not assume the responsibility of forming a new Government, and who does not act in order to obtain the vote of confidence of Parliament. With regard to the factual situation in question, that of the designation by the President of Romania, as a candidate to the office of Prime Minister, even of the Prime Minister of the Government dismissed by motion of censure just one day before, the Court also emphasized that the assessment and appointment must therefore take into account "the sanctioning effect of the motion of censure, the number of votes in favour of the motion of censure, and the time when it occurred, in relation to the time when the candidate to the office of Prime Minister is designated". It is therefore about the formation of a conviction of the President of Romania that the designated person shall be able to coagulate a parliamentary majority in view of the Government's investiture, "on the basis of objective elements arising, on the one hand, from consultations with parliamentary political parties, and, on the other hand, from the political composition and the acts of Parliament".

Substantiating, in conclusion, the competence of the President of Romania at this stage, the Court held that it is determined, on the one hand, by its role as mediator, established by Article 80 (2) of the Constitution, according to which "*The President of Romania shall guard the observance of the Constitution and the proper functioning of*

the public authorities. To this effect, he shall act as a mediation between the Powers in the State, as well as between the State and society", and, on the other hand, it is limited by the requirements deriving from the principle of separation and balance of Powers in the State, regulated by Article 1 (4) of the Constitution, which require the observance of the powers of Parliament, in this case of the control over the Government, as well as the exercise of all duties of the public authorities with constitutional loyalty. Accordingly, "all acts that the President of Romania adopts within this procedure must observe, on the one hand, his position as mediator and arbitrator between political forces, and, on the other hand, the preeminent role of Parliament, determined by the specific relationships of this authority with the Government."

3 Considerations on Ministers' appointment and dismissal, as well as the appointment of interim Ministers

3.1 *Ministers' Appointment [8]*

In the case-law developed over time, the Constitutional Court has established that Article 85 of the Constitution "**provides for three cases** in which the President of Romania appoints the Government [paragraph (1)] or only on some members of the Government" [paragraphs (2) and (3)]". [9]

In **two cases**, the President implements an act of Parliament, without being able to refuse the appointment of Ministers. It is about the one provided for in Article 85 (1), when the appointment takes place on the basis of the vote of confidence granted by Parliament in accordance with the provisions of Article 103 of the Constitution and the one provided for in Article 85 (3), when the appointment takes place on the basis of the approval of Parliament, granted at the proposal of the Prime Minister (when the reshuffle proposal changes the political structure or composition of the Government). In these situations, "the legal act based on which the President of Romania makes the appointments is the Resolution of Parliament, adopted under the conditions of Article 85 (1), of Article 103 (3) of the Constitution and of the corresponding provisions of the Rules of Procedure of the joint sittings of the Chambers of Parliament. It results from the text of the Constitution that, in the cases provided for in Article 85 (1) and (3), the appointment by the President of Romania of the Ministers is an act of execution of the Resolution of Parliament and of investiture, on this basis, of the Ministers, by the President of State. The resolution of the supreme representative body of the Romanian people [Article 61 (1) of the Constitution of Romania] is a mandatory act, which the President could not refuse except by committing serious acts of violation of the Constitution". **In one case, the President has a right of discretion, and may under certain conditions refuse the appointment of Ministers**. It is about the situation provided for in Article 85 (2) according to which "*the President shall dismiss and appoint, on the proposal of the Prime Minister, some members of the Government*". The *ad litteram* interpretation of the text requires the conclusion that, in this case, "The President does not enforce a Resolution of the Parliament, but he is in the situation of deciding himself the appointment of some Ministers, on the proposal of the Prime Minister. The act of decision in this phase being by definition an act of will, it is

obvious that the President has the freedom to receive the proposal of the Prime Minister or to ask him to make another proposal".

As concerns **the conditions regarding the refusal of the appointment of Ministers by the President of Romania**, the Constitutional Court distinguished as follows: The President has the right to refuse, **on grounds**, the proposed appointment, whenever he finds that the legal conditions for the appointment as a member of the Government are not met [10]; The President may refuse only once, on grounds, on criteria related to the correspondence of the person to the proposed office; "The President of Romania does not have the right to his own option within the existing constitutional appointment mechanism; in his turn, the Prime Minister cannot reiterate the appointment proposal to the office of Minister, in the sense that he cannot designate the same person to the same office, at the same Ministry ". [11]. According to the same case-law, **the grounds of the refusal by the President of Romania** must be expressed clearly and unequivocally, in writing, as soon as he has publicly announced the decision to reject the proposed appointments [12].

3.2 *Dismissal of Ministers*

With regard to the extension of the powers of the President of Romania, on the one hand, and of the Prime Minister, on the other hand, within the procedure for dismissing Ministers, the Court ruled that "The President may not censure the grounds why the Prime Minister has proposed the dismissal of a member of the Government and may not oppose the decision of the Prime Minister to make certain changes in the composition of the Government, this being the exclusive and undivided power of the Head of Government." This is because, "if at the act of appointment as a member of the Government, the President has a certain margin of appreciation (…) he does not have the same freedom of appreciation, the Prime Minister being the only one able, in his capacity as Head of the Government, to assess the need and appropriateness of dismissing a member of the government team. (…) The fact that he proposes to the President to dismiss a certain member of the Government cannot have the meaning of a condition or an agreement from the President of State, the dismissal decree of the President representing, by virtue of the principle of symmetry, the act correlative to the act of appointment, issued by the same authority, which establishes the termination of office." (Decision no. 875/2018, paragraph 78). According to the Court, "dismissal is a legal means made available to the Prime Minister to vacate an office in the Government, a measure that the Prime Minister proposes to the President of Romania exclusively in the sense of respecting the formalism and principle of symmetry governing the regime of legal acts in public offices and towards which, without having his own right of assessment, the President must comply within a legal period of fifteen days from the date of the Prime Minister's proposal ". (Decision no. 504/2019, paragraph 108)

3.3 *Appointment of interim Ministers*

The appointment of interim Ministers is regulated by the provisions of Article 107 (3) and (4) of the Constitution, according to which: "*(3) If the Prime Minister finds*

himself in one of the situations stipulated under Article 106, except for him being dismissed, or if it is impossible for him to exercise his powers, the President of Romania shall designated another member of the Government as Interim Prime Minister, in order to carry out the powers of the Prime Minister, until a new Government is formed. The interim during the Prime Minister's impossibility to exercise the powers of the said office shall cease if the Prime Minister resumes his activity within the Government. 4. Provisions under paragraph (3) shall apply accordingly to the other members of the Government, on proposal by the Prime Minister, for a period of 45 days, at the most."

With reference to the constitutional frame of reference, the Court distinguished between the interim is made on the basis of Article 107 (3) and (4) of the Constitution and the hypotheses regulated by Article 85 of the Constitution, noting that "in the procedure of appointing an interim Minister, **the President no longer has the same margin of appreciation as in the case of proposing the appointment of a new member of the Government, as Minister holder, therefore he will not be able to refuse the proposal on the grounds of non-compliance in office nor of the non-fulfilment of the legal conditions**". This is because "the person designated as interim Minister does not apply for the office in order to require an analysis of his professional correspondence on the specifics of the activity of that Ministry", and "the duties of an interim Minister are, in essence, to ensure the continuity of the activities of the Ministry, to maintain the carrying out of all specific routine activities, for a maximum period of 45 days". As a result, "only the candidate to the office of Minister Holder shall be able to be subjected to an examination in terms of correspondence and appropriate professional training, as well as the fulfilment of the conditions of legality", the Court also stated in Decision no. 504/2019, paragraph 132, with reference to the precedents in the same matter. Grammatically interpreting the constitutional norms, the Court held that «By using the verb "*shall designate*" in Article 107 (3) of the Constitution, and, implicitly, in paragraph (4) of the same article, the constituent legislature took into account the obligation, and not the possibility of the President to act in the sense of appointing an interim Prime Minister, respectively an interim Minister». In addition, "the lack of a text in the Fundamental Law establishing an imperative deadline for issuing the decree of the President of Romania appointing a Prime Minister/ interim Minister cannot be interpreted in the sense of delaying *sine die* the fulfilment of this constitutional obligation (see, *mutatis mutandis*, Decision No 875/2018, paragraph 88)». (paragraph 133) The appointment of interim Ministers must be made "urgently" to ensure the continuity of the functioning of Ministries: "the procedure for reconfiguring the political composition of the Government requires time for analysis and a specific procedure, and throughout this period permanent functioning and in conditions of normality of the Government must be ensured, so that the circumstance of changing the political composition of the Government cannot represent a valid argument for the refusal of the appointment by the President of State of the interim Ministers, on the proposal of the Prime Minister ". (paragraph 134)

In conclusion, as in the case of the Ministers' dismissal, the appointment of interim Ministers does not imply a right of appreciation on the part of the President, so that the refusal of the appointment is likely to violate the provisions of the Constitution. Likewise, the delay of this appointment violates the invoked constitutional norms, the

spirit of which is to ensure the continuity of the Government's activity, taking into account the obvious general interest.

4 Conclusions

Beyond the analysis, in itself, of the constitutional norms that configure the role of the President of Romania in the procedure of Government' s investiture and the Ministers' appointment, we consider that the recent decisions of the Constitutional Court to which we referred have the merit to strongly emphasize the importance of complying with the spirit of the Constitution as a whole, sanctioning conduct consisting in detaching from the context certain rules or interpreting them against others, contained in the same fundamental act.

With reference to the cases analyzed here, the Court highlighted the fact that **the stage of initiating the Government's investiture procedure, respectively the exercise of the President's competence regarding the designation of the candidate to the office of Prime Minister aims, as a result, to obtain the Parliament's vote of confidence:** "only in this way can the constitutional provisions be interpreted, namely in the sense of achieving the goal for which they were regulated, and not of not achieving it". **The common goal of the public authorities involved in the procedure of Government's investiture/ appointment is, logically, the appointment of a new Government, which implies the appointment of a candidate to the office of Prime Minister to enter into this logic of constitutional norms**. According to the Court "the entire procedure of appointing the Government was configured by the constituent legislature in order to quickly establish the new Government, in order not to prolong a political crisis determined by the functioning of a dismissed Government, with a limited legal capacity, respectively to avoid an even larger political crisis, leading to the possible dissolution of Parliament. This is the reason for the consultations that precede the appointment of the candidate to the office of Prime Minister and only in achieving this goal, namely the appointment of the Government, and not the blocking of his appointment, the entire constitutional procedure developed under the provisions of Article 85, Article 103 and Article 104 of the Constitution is built, provisions which the President of Romania must also take into consideration. **Accepting a strictly literal and fragmented interpretation of the Constitution could lead to the conclusion that anything not expressly prohibited by the constitutional text is allowed by it**, even if it would obviously contradict the logic and spirit of the Constitution, and such **a conclusion is unacceptable, as it does not comply with the principles of the rule of law**". (Decision no. 85/2020, cited above, paragraph 121)

We consider that an effect of this/these decisions, subsumed by the complex process of constitutionalization of law, is to guide the interpretation of constitutional and legal provisions highlighting their spirit, the need to produce legal effects for which rules were established, complying with the general regulatory framework and avoiding disputes. This is all the more so in the situation where the scale of such disputes – legal disputes of a constitutional nature also fall into this category – could produce destabilizing effects at the general social and economic level. Both judicial doctrine and practice must give priority to this way of interpretation, in order to ensure the coherence

of an increasingly complex legal system, in order to achieve a goal of legal security that is increasingly difficult to achieve. [13]

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[2] We are considering the Government of Sorin Grindeanu from 4 January to 29 June 2017, faced with the situation of withdrawal of political support by the PSD and ALDE parties, with the consequence that all Ministers resigned, except for the Prime Minister and the Minister of Communications. This was followed by the Government of Mihai Tudose with the same political support. Mihai Tudose took over the office of Prime Minister of Romania on 29 June 2017 and resigned on 16 January 2018, as a result of a political conflict. Viorica Dăncilă's Government followed, having the same political support, from 29 January 2018 to 10 October 2019, when the Government was dismissed by a motion of censure.

[3] We are considering the designation by President Klauss Iohannis of the ousted Prime Minister Ludovic Orban as a candidate to the office of Prime Minister, just one day after his dismissal, by a motion of censure, of the Government led by him.

[4] I. Muraru, M. Constantinescu, *Parliamentary Law,* All Beck Publishing House, Bucharest, 2005, p. 260.

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Hard law versus *soft law* in international law

Maxim F.

PhD Associate Professor, "Titu Maiorescu" University,
Faculty of Law (ROMANIA)
E-mail: maxfel2006@yahoo.com

Abstract

The use of *hard law* and *soft law* instruments in international relations has led to the need to clarify the relationship between them, the advantages and disadvantages of each category of instruments, but also their effectiveness in the relations between the subjects of international law. In the doctrine of international law, the term *hard law* refers to binding international legal instruments, while the term *soft law* includes non-binding international legal instruments. In the analysis and delimitation of the two concepts (*hard law* and *soft law*) we start from the research of the sources of international law, especially the content of Article 38 of the Statute of the International Court of Justice (ICJ). However, research into traditional mechanisms for drafting international law, ie the list of sources of international law listed in Article 38 of the ICJ Statute, must take into account that they have not evolved at the same pace as international law. Therefore, a reassessment of traditional sources is needed.

Keywords: hard law, soft law, Treaty, custom, recommendation

1 Introduction

The evolution of the contemporary international society has determined the appearance of major challenges for states in different fields of activity, which has led to the need to identify the best forms of cooperation between states to ensure their involvement in achieving an appropriate regulatory framework. Thus, the traditional controversy over the choice of *hard law* or *soft law* instruments by states has become more and more current. The use of these instruments in international relations has led to the need to clarify the relationship between *hard law* and *soft law*, the advantages and disadvantages of each category of instruments, but also to clarify their effectiveness in relations between bodies operating internationally. Therefore, the specialized doctrine focused its research on general issues, but also on specific issues, analyzing the role of *hard law* instruments or *soft law* instruments in various fields of activity, such as:

protection of human rights, protection of the environment, the health sector, international trade, etc. Human rights refer to rights and values that are universal and inalienable. States are obliged to respect and protect these rights and to ensure that they are achieved. The sources of international human rights law are treaties, standards, recommendations, etc. States sign and ratify the treaties and must ensure that the rights covered by the treaties are realized internally, as the commitments made in the treaties are binding. Guidelines, principles, recommendations or standards agreed upon by states are considered *soft law*. These, although officially negotiated by the states, are not ratified in the way the treaties are. There are both international and regional guidelines, principles, rules and standards. Although not legally binding, they provide excellent human rights guidelines. Each treaty includes a provision establishing a body to monitor the implementation of the provisions of the treaties. States must report to treaty monitoring bodies on their compliance tot eh aforementioned. The reports and responses of the various committees provide useful information on what the rights mean and how they should be applied in practice. These reports are also useful for obtaining information on the human rights situation in a country. Treaty monitoring bodies often comment on how specific rights may be applied, which can be a valuable source for the practitioner. Therefore, the relationship between *hard law* and *soft law* instruments highlights their complementary nature, which proves useful in shaping the rules of international law. In the face of global environmental concerns, international entities need to develop their capacity to monitor global climate change and reconfigure their practices. However, it is not clear whether *hard law* or *soft law* instruments are better able to increase such capacity.[1] It has become clear that the parties to the negotiating table are trying to identify the advantages and disadvantages of the various international legal instruments adopted, or following to be adopted, in the field of environmental protection. Multilateral environmental agreements can take the form of *hard law* instruments as well as *soft law* instruments. States often oscillate between the two categories of instruments, arguing that *soft law* instruments are ineffective because they do not have binding legal force, an efficiency that is present in *hard law* instruments [2]. In a study of international efforts to protect the North Sea, reduce transboundary air pollution and regulate fisheries subsidies, the authors argue that ambitious commitments are easier to achieve through *soft law* instruments than *hard law* instruments, but not because they eliminate the complex process of ratification, but due to the flexibility offered by *soft law* instruments.[3]

The transnational spread of disease has led to new approaches to global health security.[4] The regulatory strategies of the World Health Organization (WHO) must aim at the use of formal and informal sources from state and non-state actors, the use of *hard law* and *soft law* instruments in global health governance.[5] The World Trade Organization (WTO) is based on *hard law* instruments, but is increasingly using *soft law* instruments to make the negotiation process more flexible...[6]

2 The Identification of *hard law* and *soft law* instruments

In the doctrine of international law, the term *hard law* refers to binding international legal instruments, while the term *soft law* includes non-binding international legal instruments. [7]

International legal instruments of the *hard law* type apply when there has been a breach of the obligations assumed by the states and the application of the corresponding sanctions. According to those expressed in the literature, the qualification as an instrument of *hard law* is achieved by fulfilling three conditions, namely: the existence of an obligation, precision in presenting the content of the obligation and the existence of a body in order to hold the state which does not fulfill its obligation[8] accountable.[9] We define *soft law* as those non-binding rules or instruments that provide an interpretation for the understanding of binding legal norms or that represent behaviors recommended to states in their future conduct.[10]

The use of *hard law* or *soft law* instruments must take into account the advantages presented by each category. In the specialized doctrine, the specialists in the field have found, regarding the *hard law* instruments, a series of advantages, namely: they allow states to engage more credibly in fulfilling the provisions of international agreements, which makes state commitments more credible; they produce legal effects in national jurisdictions, which provides a guarantee of the fulfillment of international commitments; they clarify the content of the rules by creating interpretation mechanisms; they give states the opportunity to monitor the fulfillment of their commitments, including through dispute resolution bodies. Regarding *soft law* instruments, the specialized doctrine has identified the following advantages: they create the framework of flexible negotiations; they impose lower "sovereignty costs"; they allow states to engage more easily in international cooperation than in the case of *hard law* instruments where they are bound by enforcement and the application of appropriate sanctions in the event of non-enforcement; they respond much better to the diversity of international society. In conclusion, *hard law* and *soft law* instruments offer special advantages for different contexts.[11]

The analysis and delimitation of the two concepts (*hard law* and *soft law*) starts from the research of the sources of international law, in particular the content of Article 38 of the Statute of the International Court of Justice (ICJ). However, research into traditional mechanisms for drafting international law, ie the list of sources of international law listed in Article 38 of the ICJ Statute, must take into account that they have not evolved at the same pace as international law. It has therefore become increasingly clear that, in the face of the multiplicity of processes for the adoption of rules in "contemporary" international law, the understanding that Article 38 exhausts the methods of drafting international law has proved inadequate. A new range of international commitments that do not have the necessary normative content to create enforceable rights and obligations or do not fall into the "traditional" categories of "treaty" or "custom" or "general principles of law" occupy an unprecedented place in the international normative process. That is why a reassessment of traditional sources and the theory of the subjects of international law is necessary. Consequently, it must be borne in mind that *soft law* has developed in response to the coverage of regulatory activities that do not strictly comply with "traditional" sources of international law.[12]

The reassessment of traditional sources of public international law involves an analysis of the content of Article 38 of the ICJ Statute, a normative provision that contains both elements of *hard law* and elements of *soft law*. According to a majority of literature in the domain, the treaty and the custom are included in the category of *hard law* instruments, invoking their binding legal force. However, there are authors who identify, in the content of the treaty, elements of *soft law* as well, and in the case of custom it is appreciated on the one hand that it is between the treaty and *soft law*, and on the other hand it is argued that it would be an instrument of *soft law*.

The Treaty represents the legal act that expresses, in writing, the agreement of will between subjects of international law in order to create, modify or extinguish rights and obligations in the relations between them, being governed by international law (Article 2 (1) of the Convention Vienna Convention of 1969 on the Law of Treaties). Therefore, the treaty is the most important instrument of *hard law.* As stated in the doctrine, it is the essence of any international treaty and the very existence of the treaty that states assume legal obligations. For example, communiqués from heads of state or documents outlining the results of international conferences, however important, will not rise to the level of the international treaties. [13] However, authors of international law have identified a number of issues that have led to the conclusion that a treaty may contain elements of *soft law* or may be a *soft law* instrument. Thus, the operation of identifying the *soft law* elements of the Treaties refers to agreements and provisions specific to them which do not have the effect of creating firm obligations, despite their legally binding form and which are imprecise or flexible and therefore lack a peremptory nature. From this perspective, treaties and treaty provisions can be either *hard law*, *soft law* or both. In dispute settlement proceedings it can be ascertained whether a treaty or a provision of a treaty is *hard law* or *soft law*. States conclude treaties in order to develop the best policies and strategies in a conventional way. Similarly, some provisions of the Treaty may provide guidance for the interpretation and application of the rules in force. In general, political treaties are traditionally known as *soft law.* In conclusion, the *hard law* or *soft law* character of the provisions of a treaty cannot be identified on the basis of the legally binding nature of the legal instrument, but must take into account the nature and specificity of the obligation to which Member States undertake.[14] Many authors of international law argue that this use of the term "*soft law*" in reference to treaties would not be appropriate. Treaties are binding, even if specific commitments are drafted in general terms.[15] In international jurisprudence, the agreement signed, but not ratified, was considered an agreement that was a faithful expression of the intention of the parties existing at the time of signing the treaty. In the case of the maritime and territorial delimitation between Qatar and Bahrain, the ICJ assessed the legal effect produced by several invoked international legal instruments, including the effects produced by the 1913 Anglo-Ottoman Convention. The Court has ruled that the signing of a treaty without ratification may be an expression of the will of the parties at the time of signature. Therefore, the fact that the United Kingdom and the Ottoman Empire have not ratified the Convention is without prejudice to the view expressed at the time of signature.[16] In these circumstances, a signed treaty, not followed by ratification, should be included in the category of *soft law* instruments and not *hard law*, as states have not expressed their consent to it and therefore have no binding legal force for them. It is true that the definitive signing of the treaty means the solemn attestation by

the negotiating states that the negotiations have been concluded and that the text on which they sign, through their representatives, constitutes the definitive form of the treaty, which can no longer be modified unilaterally by any of the States participating in the negotiations, but this stage of concluding the treaties does not produce the same effects as the stage of expressing consent, unless there is a provision to that effect. The final signature obliges the State concerned to refrain from any act contrary to the purpose or object of the treaty, until the moment when it expresses its intention not to become a party.

The custom is defined as a general practice, relatively long, repeated and uniform, considered by states as expressing a rule of conduct with binding legal force in the relations between them. As it is shown, what characterizes the custom, besides the unwritten form, is the tacit expression of the consent of the states, regarding the recognition of a certain rule as having a binding character in the relations between them. The manifestation of will is reflected in the long practice of states. [17] From the definition of custom results a distinction between the material element and the subjective element, which must be cumulatively met in order for there to be a customary norm. The cumulative combination of the two elements gives it binding legal force. The literature shows that although custom has the same legal force as treaties, custom is seen as a less credible commitment because it does not go through the same steps as when treaties were concluded. It is argued that it is not the result of the negotiation process, that it does not go through the procedures for expressing consent, and that the consent of the states is expressed tacitly, which could create uncertainty. In other words, the custom is invoked in the case of international dispute settlement procedures similar to the rules set out in the Treaties. It is appreciated that this source of international law is not precise, does not benefit from clarity, thus reducing the ability to generate clear future behaviors. Given the evoked features, in the literature it is argued that this source of law lies between treaties and *soft law*. Custom has binding legal force and can be invoked in resolving disputes like treaties, but it can offer a lot of flexibility like *soft law* instruments. [18]

Being the oldest source of international law, custom has proven its status and efficiency in the evolution of international law. The analysis of the two elements of the custom highlights the intention of the states to accept and apply the norms formed by way of custom. States must demonstrate a uniform practice, frequently applied in their relations. Uniformity which is ensured by the conduct of States acting in the same way each time the promoted practice is engaged. The practice applied uniformly, repeatedly and for a long time is supplemented by the belief that it represents the right or the necessity, thus determining the existence of an obligation from a legal point of view. In other words, custom has a significant role in the process of codification of international law, it is a way of applying conventional rules by third countries, but also a way to give binding legal force to international legal instruments of a recommendatory nature (the provisions of the Resolutions/Declarations adopted by the UN General Assembly may constitute elements in the formation of the custom), which demonstrates the stability it confers on international relations. *Soft law* instruments can be drafted to reinforce customary behavior or to clarify conflicting positions in the application of customary rules. The arguments presented are the basis for the qualification of the custom in the category of *hard law* instruments.

The general principles of law recognized by civilized nations are applied by the ICJ to resolve disputes before it. In order to identify their qualification in the category of *hard law* or *soft law* instruments, it is necessary to understand the notion used in Article 38 paragraph 1 point c of the ICJ Statute. In this regard, we will draw on existing comments in studies conducted by the UN International Law Commission (ILC). The ILC decided at its 2018 session to include the topic General Principles of Law in its work program. The opening remarks focus on the elements of the definition and origin of general principles of law. The general principles of law are the principles common to the great systems of domestic law. General principles are necessary to cover certain shortcomings of international law and should not be confused with fundamental principles of international law. [19] Therefore, with regard to the nature of these principles, their characterization as principles accepted internally and forming part of the national law of all states prevails. Part of the literature has shown that the interpretation of the text it follows that these are principles common to both the domestic legal order and the international legal order. [20] The issues that have caused controversy in the literature of international law have come to the attention of ILC. From the comments made so far by the ILC, it can be concluded that the term "general principles of law" in Article 38 (1) (c) of the Statute of the International Court of Justice refers to rules which are of a general and fundamental nature. They are general in the sense that in terms of their content it has a certain degree of abstraction and fundamental in the sense that they are the basis of specific rules or embody important values. In addition, it is often suggested that, after identifying a principle common to national legal systems, it should be further established that it is applicable in the international legal system. This process is called transposition. The reason that lead to this statement relates to circumstances specific to international law that are different from those of domestic law. So, the rules applied internally [21] may be less appropriate in the international context. A key issue in this regard is whether the requirement for recognition is relevant in determining whether a common principle for national legal systems is applicable at international level and, if so, how. Despite the different approaches in the literature, it seems that there is agreement that recognition within the meaning of Article 38 (1) (c) can take place at international level, without the need to examine the national legal systems of States. It can be concluded that recognition within the meaning of Article 38 (1) (c) is the essential condition for the existence of a general principle of law. The precise forms that such recognition may take may depend on the category of general principles of law in question. General principles of law within the meaning of Article 38 (1) (c) of the Statute of the International Court of Justice include not only principles of law derived from national legal systems, but also general principles of law formed within the international legal system. Therefore, there are principles of law derived from national legal systems, which means that recognition has been achieved within those systems, it is important to clarify how the recognition of these principles is achieved internationally or whether recognition within domestic legal systems is sufficient in the case of transposition.[22]

The identification by the doctrine of the general principles of law formed within the international legal system determines the clarification of the methods of their recognition. In the case of legal principles derived from national legal systems, recognition has been achieved by the major domestic law systems, but in order to ensure

transposition, international recognition must also be achieved. In the case of general principles of law formed within the international legal system, their recognition is achieved at the international level. In both cases, recognition is achieved through international legal instruments, treaties, custom, and documents of a recommendatory nature. An important role in the recognition of general principles of law is played by the decisions of arbitral and judicial courts. Regarding their quality as *hard law* or *soft law* elements, we appreciate that this qualification depends on the category of international legal instrument in which they are used. Therefore, a distinction must be made between the recognition of the principles of law which confirm their application at international level and the legal value of the international legal instrument in which they are used. Recognition of principles leads to their becoming binding when they are invoked to cover gaps in international law. The international legal instrument in which they are used to cover the gaps in international law, leads to their qualification in elements of *hard law* or *soft law.*

Referring to the auxiliary means provided in Article 38 (paragraph 1 point d) of the ICJ Statute, we pay attention to the role of international court decisions and doctrine in debating the concepts of *hard law* and *soft law*. With regard to the judgments of international courts and arbitral tribunals, we emphasize that they are binding on the parties to the dispute. From this perspective, we show that they have *hard law* value for them. At the same time, the value of the judgments of international courts and arbitral tribunals can be appreciated for the other entities acting at international level, especially for the subjects of international law. Judgments of international courts and arbitral tribunals are *soft law* instruments for other subjects of international law, which are not parties to the dispute, because they are means of interpretation and application of the rules, so recommendations for future conduct. From the point of view of the content of the judgments of international courts and arbitral tribunals, the international judge applies *hard law* instruments with binding legal force between the parties to the dispute, but can use *soft law* instruments in the interpretation of the rules. Obviously, the doctrine is a benchmark that underlies the development of *hard law* or *soft law* instruments or even a *soft law* instrument, given that it includes: the work of the most qualified specialists in international law; documents resulting from the activity of bodies and institutions empowered to research new and controversial aspects of international law; individual or separate opinions of ICJ judges or other international bodies. The role of the doctrine in the process of codification and progressive development of international law, the criticisms, analyzes and syntheses made, underlying the proposals of draft legal instruments of an international nature, as well as the clarification of their content, regardless of their binding or recommendation nature. In addition, the individual or separate opinions of ICJ judges or other international bodies may constitute *soft law* instruments underlying the future conduct of subjects of international law. The projects developed by the ILC, for which the UN General Assembly has decided to have the value of a recommendation, constitute *soft law* instruments (the Guide to Practice on Reservations to Treaties).

Equity is a procedural way of applying a set of principles and ideas that can be used to distinguish between just and unjust in the international legal order. Equity is used to adapt the rule to individual situations, to fill in gaps or even to replace the application of the law. The classification of equity in the category of elements of *hard*

law or *soft law* is determined by the legal nature of the international legal instrument in which it is used. The use of principles and ideas by which a distinction can be made between just and unjust in treaties gives it the status of an element of *hard law*, a characteristic determined by the legal nature of the treaty, of a binding international legal instrument. The settlement of an international dispute by the international judge by reference to the specific principles of equity determines its classification in *hard law* for the parties to the dispute, but also its classification in *soft law* for other entities that are not parties to the dispute.

As stated, the content of Article 38 of the ICJ Statute does not cover the whole area of the sources of international law, with international practice and jurisprudence adding unilateral acts to this category. In this case, the quality of unilateral acts of states and international organizations of *hard law* or *soft law* instruments must be analyzed. A unilateral act is an act committed by a subject of international law, which is likely to produce legal effects in international relations, either by engaging the subject from which it emanates or by (also) creating obligations in relation to other subjects of international law. The analysis of the unilateral acts of the states starts from the Guide of principles applicable to the unilateral acts of the states which give rise to the international obligations adopted by the ILC. ILC distinguished between unilateral acts, whose possibility is provided for in the Treaty and which produce the effect provided for therein, and unilateral acts committed independently of a treaty or other source of international law, the research carried out having as its object the last category. In the case of unilateral acts, whose possibility is provided for by the Treaty, examples may be: denunciation or withdrawal from a treaty, reservations or interpretative declarations, acts relating to the recognition of the jurisdiction of the ICJ. If we refer to this category and analyze the characteristics of *hard law* instruments, ie the existence of an obligation, the accuracy of the content of the obligation and liability for non-compliance, we can say that they can be identified in the case of unilateral acts whose possibility is provided by the treaty. The denunciation of a treaty presupposes a unilateral manifestation of the state that wants the effects of the bilateral treaty to no longer occur in relation to it. In this case, the effects of the treaty cease. Thus, there is an obligation not to apply the treaty in relations between the two states, the content of the obligation is easy to identify, and in the event of a dispute over the application of the treaty after its termination, one can resort to peaceful means of resolving international disputes. The same shall apply to the withdrawal of a Party from a multilateral treaty. With regard to reservations to the Treaty, it is necessary to analyze the relationship that arises between the States which have made the reservation and the States which have accepted the reservations, a relationship with binding legal value, in which there is an obligation to comply with content that is correctly specified, but also the possibility to resort to international courts in case of non-compliance with commitments resulting from reservations. Therefore, unilateral acts whose possibility is provided for by the Treaty and which produce the effect provided for by it may be classified in the category of *hard law* instruments. Difficulty in classifying instruments of *hard law* or *soft law* arises in the case of unilateral acts of States independent of a treaty or other source of international law. For this reason we will refer to the features characteristic of unilateral acts of states independent of a treaty or other source of international law highlighted in the guide prepared by ILC. Thus, in light of the work of

the ILC, a unilateral act independent of a treaty or other source of international law is characterized by: the unilateral manifestation of will formulated in clear and precise terms in order to produce legal effects, to create obligations at international level, the autonomy of the act, the publicity of the act, the formulation of the act by those who have this capacity by virtue of the functions held in the state. From the analysis of the stated features, we can appreciate that we are in the category of *hard law* instruments, because there are international obligations that are assumed, conditioned by a clear and precise presentation of the content, and advertising ensures the possibility of access to an international court, in the case of non-compliance with the obligation created by the unilateral act. Therefore, it is essential to show that an act formulated by a state must be public, to be known at least by the addressee. In this regard, we must keep in mind that a declaration can be addressed to a single state, to several states, to the international community as a whole, but also to other entities. In view of this clarification, we can appreciate that an independent unilateral act can be considered an instrument of *hard law* towards the states to which it is addressed, ie towards a single state, towards a group of states or towards the international community as a whole. It is important to emphasize that the behavior of the addressees must also be taken into account, a behavior which must result in the express or tacit acceptance of the effects produced by the unilateral act. In the category of *stricto sensu* unilateral acts, ILC included recognition, waiver, protest and promise.

With regard to unilateral acts of international organizations, the qualification of their legal value is made according to what is established in the act of constitution, as well as in other acts adopted at the level of the organization. Thus, we may be in the presence of documents with mandatory legal value, which leads to their qualification in the category of *hard law* instruments, but we can also have documents with legal value of recommendation, which leads to their qualification in the category of *soft law* instruments.

Referring to the UN, we show that the acts that form the internal law of the organization are binding on Member States, the resolutions adopted by the UN Security Council have binding legal value, the decisions of the UN General Assembly have only the character of recommendations[23], Economic and Social Council initiates studies, prepares reports, presents recommendations, prepares draft conventions.

In the case of the International Labor Organization (ILO), the activities of the organization are organized in three main directions: the adoption of international rules by conventions or recommendations to achieve the organization's objectives, the adoption of employment programs, and the preparation of studies for documentation and information. Reports by States parties to ILO conventions on measures taken at the national level to implement the provisions of the conventions may be added.

The World Health Organization acts as an authoring and coordinating institution. WHO proposes conventions to be implemented after expressing the consent of states and their entry into force. The World Health Assembly (WHO's main body) adopts conventions, regulations, but can also address recommendations to member states.

In order to achieve its objectives, the World Intellectual Property Organization (WIPO) adopts legal instruments for the coordination of intellectual property activities and pursues the application of the treaties concluded in the field. The WIPO Conference

discusses general issues arising from the work of the organization and adopts the necessary recommendations.

In the legal order of the European Union, primary, original legislation includes the founding treaties, amending treaties and accession treaties of the states to the EU, including the annexes, protocols and declarations added to these treaties. Any rules of conduct at EU level must be adopted with the observance of the treaties in force.[24] The acts adopted by the institutions on the basis of the Treaties fall into two categories: legal acts governed by Article 288-292 TFEU and atypical normative acts, most of which fall into the *soft law* category. Article 289 TFEU governs legislative acts adopted by legislative procedure, Article 290 TFEU lays down the rules governing delegated acts of the Commission, and Article 291 governs acts implementing the binding legal acts of the Union by the Commission.[25] Legislative acts are defined as those legal acts adopted by ordinary or special legislative procedure. Non-legislative acts are legal acts that are not adopted by legislative procedure, but by other specific non-legislative procedures. Non-legislative acts represent a comprehensive category of legal acts of the European Union, which include both unique, atypical and optional *soft law* acts, such as recommendations, opinions, conclusions, own-initiative resolutions, guidelines, reports, green papers, white papers, communications, interinstitutional agreements ("which may be binding" in accordance with Article 295 TFEU), as well as binding Commission delegation and implementing acts. [26]

The examples cited reinforce the statement made above that the legal nature of acts adopted by the bodies of international organizations is generally established by the constitutive acts or other acts adopted at the level of these subjects of international law; which leads to the identification of *hard law* or *soft law* instruments. However, for the most part, the unilateral acts of international organizations are *soft law* instruments.

In addition to the international legal instruments analyzed, we can also add that the acts adopted as a result of the work carried out during the conferences and international reunions have an important role, acts which may have binding legal force or only the value of a recommendation.

According to the literature, three categories of *soft law* instruments can be identified, namely: *soft law* produced by international organizations and other similar bodies; the second category includes non-binding bilateral or multilateral agreements; the third category includes agreements produced by non-governmental organizations.[27]

In conclusion, we note that although the true value of *soft law* instruments is not recognized internationally, they exist and occupy a central place in the international regulatory system.

3 The relationship between *hard law* and *soft law*

The doctrine of international law highlights three trends that have expressed their opinion on the relationship between *hard law* and *soft law*, namely: positivist, rationalist and constructivist. The positivist trend supports the existence of *hard law* instruments, denying the importance of *soft law* instruments, which can lead to legally binding instruments. The rationalist trend shows that *hard law* and *soft law* have distinct attributes that lead to their use in different contexts. Constructivists favor *soft law*

instruments for their flexibility and lack of coercion. Theoretical justifications and analysis of international practice lead to the identification of different forms of interaction between *hard law* and *soft law*: as alternatives, complementary or antagonistic. [28] The complementary nature of these instruments is obvious, if we refer to the work of the ILC, which has developed a series of papers on guidelines for clarification of some institutions of international law. For example, the institution of reservations to treaties is governed by the Vienna Convention on the Law of Treaties between States of 1969, but clarifications of the application of normative provisions determined by existing cases in international practice were considered necessary. Thus, ILC has developed the Guide to Practice on Reservations to Treaties, an international legal instrument that sets out recommendations for their use by identifying the features of the Treaty reservation, the cases in which they have been identified, by making distinction between reservations and interpretative declarations. Codes of conduct, recommendations, reports, summaries and studies developed through international organizations are ways of implementing the measures necessary to achieve the objectives of organizations. The establishment of the purposes for which the international organizations were established by their constitutive acts, the conclusion of international agreements, the formation of the norms by customary way require some adaptations in accordance with the evolution of the international society. It is true that there are procedural ways to modify and adapt *hard law* instruments, but the advantages offered by *soft law* often lead states to choose these instruments. In other words, *soft law* can lead to the formation of *hard law* instruments. Referring to the ILC, we note that some of the projects promoted by it in areas of utmost importance at the international level lead the UN General Assembly to recommend their adoption in the form of conventions. In the field of international accountability, for projects developed by the ILC in the case of State liability or the liability of international organizations, the UN General Assembly recommended their adoption in the form of conventions. UN General Assembly resolutions are an additional argument for the complementary nature of *hard law* and *soft law* instruments, but also evidence of alternative uses. Thus, the first rules on the use of outer space were established by resolutions of the UN General Assembly, which have the value of a recommendation and which were the first variants for establishing rules in a field unknown to states, the level of knowledge not allowing for the elaboration of acts with binding legal value. Subsequently, the first resolutions adopted in this field formed the basis for the adoption of treaties in this field. The example presented gives certainty in the case of invoking the complementary character, but also the alternative of the two categories of instruments. Therefore, the alternative character of the two categories of instruments appears in two situations. The first would take into account the situation of insufficient knowledge of the field, which determines the adoption of a legal instrument with a recommendatory character, as a variant of the formation of norms by custom or by conventional means. The *soft law* instrument provides greater clarity of the content of the rule than in the case of custom and a possibility of faster modification, than in the case of treaties. The second situation considers those areas that do not require regulation by legally binding acts, being sufficient to recommend future behaviors that respond much better to the will of subjects of international law, especially states. As for the antagonistic interaction of the two categories of instruments, it can be said that it can be an exaggeration. In public

international law, the agreement of will is the foundation of international law. Thus, in the case of the relationship between *hard law* and *soft law*, the conclusion of a treaty leading to the need to adopt *soft law* instruments to ensure their proper application does not necessarily mean an antagonistic position. The fact that the treaty is a legally binding act adopted by States on the basis of their agreement of will limits the interpretations made by *soft law* instruments to the rules set out in the Treaty for Member States. There is a possibility that the development of a *soft law* instrument will determine the need to amend the treaty. In this case, the procedures established at international level shall be followed in compliance with the rules of general international law. The adoption of *soft law* instruments by the bodies of international organizations can only follow the objectives set by the organization. With regard to the relationship between *soft law* and *hard law*, the development of *soft law* instruments which subsequently lead to the adoption of a *hard law* instrument only provides certainty as to the outline of the content of conventional rules. It is true that there are states that do not intend to become parties to the treaties, because their content does not correspond to the vision of that state, but regardless of the situation these states must respect the rules of general international law and must establish their conduct in that field, if not by conventional means, then by customary means, which means a practice between at least two states. In conclusion, the two categories of instruments are complementary, alternative and are the result of the will of the subjects of international law.

4 Conclusions

In conclusion, the analysis of the sources listed in Article 38 of the ICJ Statute is a necessity in order to identify the instruments of *hard law* or *soft law*, even if it is considered that research into traditional mechanisms of international law must take into account that they have not evolved at the same rate as international law. It is true that Article 38 of the ICJ State has an incomplete content, but we must keep in mind that these sources are still applied today by the most important international court. In other words, the analysis of traditional sources leads to the identification of both *hard law* and *soft law* instruments, which demonstrates that *soft law* instruments exist in the normative tradition of international law, as well as *hard law* instruments, their topicality being determined by the frequency of their use in contemporary international society. It is obvious that the treaty and custom are instruments of *hard law*, the treaty being a binding legal act by its nature, and the binding nature of custom being determined by the combination of the two elements. General principles of law are rules whose application is internationally recognized, and they can be used in both *hard law* and *soft law* instruments. Judgments of international courts are *hard law* for the parties to the dispute and *soft law* for third parties, while the doctrine can be a benchmark for *soft law* or even a *soft law* instrument. The classification of equity in the category of elements of *hard law* or *soft law* is determined by the legal nature of the international legal instrument in which it is used. The qualification of unilateral acts in the category of *hard law* or *soft law* instruments must take into account the analysis of the specific features of unilateral acts of states and the provisions of constitutive acts and other regulations in the case of international organizations. Regarding the relationship between *hard law* and *soft law*, we emphasize their use as alternatives or complementary.

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Interception of communications or any type of remote communication seen as a special method of forensic investigation

Associate Professor, PhD. Moise A.C.

Spiru Haret University (ROMANIA)
E-mail: adriancristian.moise@gmail.com

Abstract

The special investigation techniques and methods are important tools in the fight against serious crime. This study provides a detailed analysis of the method of surveillance or investigation of the interception of communications or any type of remote communication, provided by the Romanian Criminal Procedure Code. In this regard, the analysis carried out took into account both the presentation of legal and technical-tactical aspects regarding the interception of communications or any type of remote communication..

Keywords: interception, special method, investigation, forensic.

1 Introduction

The special methods of investigation are found in the Romanian Criminal Procedure Code, in Title IV of the General Part a in Chapter IV, entitled *The special methods of supervision or research* and in Chapter V, entitled *Retention of computer data*. The Article 138 par. (1) (a) of the Romanian Criminal Procedure Code sets out the special method of supervision or investigation of interception of communications or any type of remote communication. Interception of communications or any type of remote communication refers to the interception, access, monitoring, collection or recording of communications made by telephone, computer system or any other means of communication.

The use of the special method of supervision or research which is stipulated by the Article 138 par. (1) letter (a) of the Romanian Criminal Procedure Code, together with the methods provided by the letters (b), (c) and (d) is included in the name of *technical supervision*, according to Article 138 para. 13 of the Romanian Criminal Procedure

Code. According to the Recommendation (2005) of the Committee of Ministers of the Council of Europe, the notion of *special methods of investigation* means the methods applied by the competent authorities in criminal investigations, aimed at detecting or investigating serious crimes and suspects in order to gather information, in such a way that the persons concerned are not aware of it.

2 Legal aspects regarding the interception of communications or any type of remote communication

The measure of technical supervision of the interception of communications or of any type of remote communication is ordered by the judge of rights and freedoms in the situation when the following conditions are cumulatively fulfilled, according to Article 139 para. (1) of the Romanian Criminal Procedure Code:

a) To have a criminal prosecution file registered at the judicial body that carries out the criminal investigation;

b) There is a reasonable suspicion of the preparation or commission of offences against national security under the Romanian Criminal Code and special laws, as well as in the case of offences of drug trafficking, illegal operations with precursors or other products likely to have psychoactive effects, offences concerning non-compliance with the regime of weapons, ammunition, nuclear materials and explosives, offenses concerning trafficking and exploitation of vulnerable persons, acts of terrorism, money laundering, counterfeiting of coins, stamps or other valuables, counterfeiting of instruments electronic payment, in the case of offences committed by means of computer systems or electronic means of communication, against property, in the case of offences of blackmail, rape, unlawful deprivation of liberty, tax evasion, in the case of corruption offenses and offences assimilated to corruption offences, offences against the financial interests of the European Union or in the case of other offences for which the law provides the imprisonment of 5 years or more;

c) The measure must be proportionate to the restriction of fundamental rights and freedoms, given the particularities of the case, the importance of the information or evidence to be obtained or the seriousness of the offence;

d) Evidence could not be obtained otherwise or obtaining them would involve particular difficulties which would prejudice the investigation or there is a danger to the safety of persons or valuables.

According to the provisions of Article 140 para. (1) and para. (2) of the Romanian Criminal Procedure Code, the measure of technical supervision of the interception of communications or any type of remote communication is ordered during the criminal investigation, for a maximum of 30 days, at the request of the prosecutor, by the judge of rights and freedoms from the court which would have jurisdiction to adjudicate the case at first instance or from the court corresponding to its rank in the district in which the headquarters of the prosecutor's office of which the prosecutor who made the request belongs is located.

The request made by the prosecutor must include: indication of the technical surveillance measure requested to be ordered, name or other identification data of the person against whom the measure is ordered, if known, indication of evidence or data

from which the reasonable suspicion when committing an offence for which the measure may be ordered, the indication of the deed and the legal classification, the motivation of the proportional and subsidiary character of the measure. The prosecutor must submit the case to the judge of rights and freedoms.

According to Article 140 para. (5) of the Romanian Criminal Procedure Code, this request requesting the approval of the measure of technical supervision of interception of communications or any type of remote communication is resolved on the same day, in the council chamber, without summoning the parties, the participation of the prosecutor is mandatory. The judge of rights and freedoms when he considers that the request is well-founded, orders by conclusion, the admission of the prosecutor's request and immediately issues the mandate of technical supervision of the interception of communications or any type of remote communication, the preparation of the minute being mandatory. The decision of the judge of rights and freedoms and the mandate must include: the name of the court; date, time and place of issue; the name, surname and capacity of the person who gave the conclusion and issued the warrant; indication of the technical supervision measure of the interception of communications or any type of remote communication; the period and purpose for which the measure was authorized; the name of the person subject to the technical supervision measure or his/her identification data, if known; indication, if necessary in relation to the nature of the measure approved, of the identifying elements of each telephone and of any data known to identify the means of communication; the judge's signature and the court stamp. The conclusion by which the judge of rights and freedoms decides on the measure of technical supervision of the interception of communications or of any type of remote communication is not subject to appeals.

There is also the situation in which the prosecutor may authorize the method of technical supervision of the interception of communications or any type of remote communication, through an ordonnance, when the following conditions are met, according to Article 141 para. (1) of the Romanian Criminal Procedure Code:

a) There is an urgency, and obtaining the technical supervision mandate under the conditions of Article 140 of the Romanian Criminal Procedure Code would lead to a substantial delay in the investigation, to the loss, alteration or destruction of evidence or would endanger the safety of the injured person, the witness or their family members;

b) The conditions provided by Article 139 para. (1) and para. (2) of the Romanian Criminal Procedure Code are fulfilled.

The ordonnance of the prosecutor authorizing the measure of technical supervision of the interception of communications or any type of distance communication must include the mentions stipulated by Article 140 para. (5) of the Romanian Criminal Procedure Code, according to the provisions of art. 141 para. (2) of the Romanian Criminal Procedure Code. Within a maximum of 24 hours from the expiry of the measure, the prosecutor has the obligation to refer to the judge of rights and freedoms from the court which would have jurisdiction to judge the case in the first instance or from the corresponding court in its degree in which constituency is the headquarters of the prosecutor's office of which the prosecutor who issued the ordonnance is part, in order to confirm the measure, submitting at the same time a summary report of the technical supervision activities performed and the case file, according to Article 141 para. (3) of the Romanian Criminal Procedure Code.

In the situation where the judge of rights and freedoms considers that the conditions provided by para. (1) of Article 141 of the Romanian Criminal Procedure Code are fulfilled, he will confirm within 24 hours the measure ordered by the prosecutor, by conclusion, pronounced in the council chamber, without summoning the parties, according to the provisions of Article 141 para. (4) of the Romanian Criminal Procedure Code.

If the judge of rights and freedoms finds non-compliance with the conditions provided by para. (1) of Article 141 of the Romanian Criminal Procedure Code, he will overturn the measure taken by the prosecutor and will order the destruction of the evidence obtained under it. The prosecutor will destroy the evidence thus obtained and will draw up a report in this respect, according to the provisions of Article 141 para. 6 of the Romanian Criminal Procedure Code.

According to Article 8 para. (2), thesis I of Law no. 14/1992 on the organization and functioning of the Romanian Intelligence Service, the National Center for Interception of Communications (N.C.I.C.) within the Romanian Intelligence Service is designated by law with the role of obtaining, processing and storing information in the field of national security, within the relationship with electronic communications providers intended for the public. At the request of the criminal investigation bodies, the N.C.I.C. ensures their direct and independent access to their own technical systems in order to execute the technical supervision measure stipulated by Article 138 para. (1)(a) of the Romanian Criminal Procedure Code. In accordance with the provisions of Article 8 para. (2), thesis III, of Law no. 14/1992, the check-out of the implementation method within the N.C.I.C. of the execution of these technical supervisions is carried out according to Article 30^1 of the Law no.304/2004 regarding the judicial organization.

The Prosecutor's Office attached to the High Court of Cassation and Justice, the National Anticorruption Directorate (N.A.D.) and the Directorate for the Investigation of Organized Crime and Terrorism (D.I.O.C.T.) have purchased, installed and configured the necessary technical equipment for the implementation of technique surveillance measures of interception of communications or any type of remote communication, being from the point of view of this aspect, completely autonomous and independent of N.C.I.C..

Thus, N.A.D. is authorized to possess and use adequate means for obtaining, verifying, processing and storing information regarding the acts of corruption provided in Law no. 78/2000 for the prevention, discovery and sanctioning of acts of corruption, with subsequent amendments, in accordance with the law. Any information of other operative value shall be transmitted immediately to the authorities empowered by law, for its verification and capitalization. [1].

D.I.O.C.T. is authorized to possess and use adequate means for obtaining, verifying, processing, storing and discovering information regarding the crimes given in its competence, in accordance with the law. Any data and information that exceeds the competence of D.I.O.C.T. are transmitted to the authorities empowered by law [2].

The three judicial authorities mentioned above have specialized technical staff to carry out operations specific to the technical procedures for implementing the warrant for interception of communications or any type of remote communication, and through the purchased equipment, judicial authorities can access only the content of the intercepted sessions belonging to their own targets.

3 Technical and tactical aspects regarding the interception of communications or any type of remote communication

From a technical-tactical point of view, there are a series of issues that must be clarified by the criminal investigation team, through the method of technical supervision, provided by Article 138 para. (1)(a) of the Romanian Criminal Procedure Code, these being the following: [3] the illicit activity carried out; the ways, methods and means used; the place and time of the crimes; the identity and quality of the victims, in the situation in which they exist; the consequences of the crimes committed; the identification of criminals, their quality and the contribution that each one has to the commission of crimes; the forms of guilt, the motive and the purpose of the illicit actions.

The prosecutor implements the method of technical supervision of the interception of communications or any type of remote communication or may order that it be carried out by the criminal investigation body or by specialized workers within the police department.

For the accomplishment of the technical supervision method stipulated by Article 138 para. (1)(a) of the Romanian Criminal Procedure Code, the prosecutor, the criminal investigation bodies or the specialized police personnel shall make direct use of the appropriate technical systems and procedures, such as to ensure the integrity and confidentiality of the data and information collected. The providers of public electronic communications networks or the providers of electronic communications services intended for the public or of any type of communication are obliged to cooperate with the prosecutor, the criminal investigation bodies or the specialized police officers, within the limits of their competences, for the execution of the mandate of technical supervision of the interception of communications or any type of remote communication.

The data obtained by the method of technical supervision of the interception of communications or any type of distance communication that does not concern the fact that forms the object of investigation or that does not contribute to the identification or location of persons, if not used in other criminal cases, is archived at the prosecutor's office, with the assurance of confidentiality.

Because this activity requires specialized knowledge, as well as complex equipment and technical means, in some situations, the prosecutor or the criminal investigation body may call on the technical assistance of some persons who carry out their activity within some institutions in the Romanian judicial system. [4]. The persons called to give technical assistance to the execution of the interception of communications or any type of remote communication are obliged to keep the secret of the activities performed, the violation of this obligation being punished by the criminal law.

The interception activities are performed by using technical means and devices, such as the electronic equipment, software or apparatus through which the interception of communications is performed, these bearing in the literature the name of *operative technique*. [5]. The technical means and devices used in communications interception activities, such as microphone transmitters, spyware or even satellites, may be used in the computer systems through which communication takes place, such as mobile phones, computers, or may be used in an enclosed space (a room in a building), or can

be used in an open space (a sports field, a public garden, a restaurant), where conversations between two or more people take place. The method of interception by means of micro-transmitters (*wireless microphones*) is used by some people, who are present in the places where the discussions or conversations are to be intercepted. [6]. Typically, micro-transmitters can be mounted in small, unobtrusive objects, such as plates, pens, pens, or other office items, or they can be mounted under any furniture in a room.

Investigators use various instruments and devices to detect wireless electronic devices, such as: field detector, VLF receiver, spectrum analyzer and microwave cluster detectors.

The recording of conversations or communications made by any type of telephone or by any electronic means of communication is done with the knowledge of one of the communicators, controlling the means of communication used by this person [7]. Thus, the recording of telephone communications made from the stations of the fixed or mobile telephony networks can be performed by:

a) connecting a technical means to the circuit of the fixed telephone station which is being monitored, or to another additional circuit, which is added to the primary one;

b) connecting a device (*hands-free type*) to the mobile phone that ensures the reception and transmission of the audio signal to the recording device;

c) placing the microphone of the recording device near the speaker of the microphone receiver of the classic telephone, or the speaker of the mobile phone, so that the microphone records both ambient sounds (voice of the person using the device) and those transmitted over the telephone network (voice of the other party).

Please note that the telephony network servers provide investigators valuable sources of evidence: the IMEI (*International Mobile Equipment Identifier*) code corresponding to the mobile phone device and the IMSI (*International Mobile Phone Subscriber Identity*) code. The SIM (*Subscriber Identity Module*) card contains the IMSI code, which uniquely identifies the subscriber in the mobile network and contains the information needed to encrypt the connections on the radio interface [8]. Please note that without the SIM card, calls to and from the Mobile Station are not allowed.

Thus, all those codes mentioned above contribute to the identification of the mobile device, the person using that device and of the area in which the person is currently located [9].

The authenticity of the audio recordings is verified by means of a forensic expertise, which according to the relevant standards, must carry out an analysis on: [10] the physical integrity of the medium on which the recording is located; the waveform and spectrograms of the recorded audio signals; the technical characteristics of the equipment used for registration. Thus, in order to perform this expertise it is important to present to the experts both the original audio recording and the technical recording system that was used during the recording.

Following the ordering and carrying out of the measure of technical supervision of the interception of communications or any type of remote communication, the investigators may obtain the following evidence: [11] the content of the telephone calls, the date, time and place from which they were made; the holders of the other telephone stations that came into contact with the suspects; the content of text messages that were sent from the suspects' mobile phones; the date of access of the Internet network from the mobile pone; the content of some e-mails sent from the mobile phone of the suspect;

the date, time, and place from which certain websites were accessed by suspects; the content of conversations between suspects and others in discussion groups or forums, etc.

4 Conclusions

Like any special method of investigation, the method of criminal investigation of the interception of communications or any type of remote communication involves by the way of accomplishment, interferences with the right to privacy, being absolutely necessary to comply with the European standards of protection contained in Article 8 of the European Convention on Human Rights, as well as in the jurisprudence of the European Court of Human Rights. The interference exercised by authorities or third parties is a restriction on the exercise of the rights to privacy and family life, home or correspondence, and in order to comply with the provisions of the European Convention on Human Rights, it must cumulatively meet the following criteria: the interference must be provided for by law; the interference must serve a legitimate purpose; the interference must be necessary in a democratic society; the interference must be proportionate to the aim pursued.

We therefore consider that by arranging and carrying out the method of technical supervision of the interception of communications or any type of remote communication, it must not infringe in any way the fundamental rights or freedoms of citizens, their private life, honor or reputation or to subject them to illegal fencing.

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The finding of fact report drawn up pursuant to article 172 (9) of the Code of criminal procedure and the observance of the right to a fair trial in the case of tax evasion offenses

Vîrjan B.

PhD, Assistant Professor, Faculty of Law, "Titu Maiorescu" University of Bucharest (ROMANIA)
lawyer, Bucharest Bar (ROMANIA)
insolvency practitioner, UNPIR (ROMANIA)
E-mail: bogdan.virjan@scva.ro

Abstract

In this article, the provisions of Article 172 (9), (10) and (12) of the Code of Criminal Procedure are analyzed, which governs the evidentiary process of finding of facts, in particular from the perspective of the investigation of tax evasion offenses. The finding of facts can be made during the criminal investigation by specialists who work, as a rule, under the judicial authorities. Given that these specialists work under the direct leadership, supervision and control of prosecutors, this circumstance may raise some suspicions about their impartiality. At the same time, unlike the expert report, the administrating the evidence of the finding of facts does not involve a contradictory procedure and is usually performed by the specialist appointed by the judicial body, without the possibility of participation of independent specialists appointed on the recommendation of the parties.

However, in many cases where tax evasion offenses are investigated, the prosecuting authorities order a finding report. However, the finding report is a means of proof, and in case of contesting the conclusions of the finding report, the provisions of Article 172 (12) of the Code of Criminal Procedure leaves it to the discretion of the judicial body to decide if it admits the appeal and orders the conducting of an expert report.

Under these conditions, I have carried out an analysis of the implications of the provisions of Article 172 of the Code of Criminal Procedure on the finding of fact on the right to a fair trial, in accordance with Article 6 (1) of the European Convention on

Human Rights and Fundamental Freedoms as regards the contradictory nature of the proceedings in the criminal trial.

Keywords: Finding of facts, administering evidence, finding report, contradictoriness, tax evasion

1 Legal regulation of the evidentiary process of the finding of facts

1.1 *Evidence, methods of proof and evidentiary processes*

The location of the matter in the case of the evidentiary process of the finding of facts can be found in the Code of Criminal Procedure, more precisely in Title IV – "Evidence, methods of proof and evidentiary processes ". According to Article 97 (1) Code of Criminal Procedure *Any factual element serving to the ascertaining of the existence or non-existence of an offense, to the identification of a person who committed such offense and to the knowledge of the circumstances necessary to a just settlement of a case, and which contribute to the finding of the truth in criminal proceedings represents evidence*. According to paragraph (2) e) of the same article, *one of the means though which evidence can be obtained in the criminal proceedings is through the fact finding report* and paragraph (3) shows that *an evidentiary process is the legal method for obtaining evidence*.

Article 100 (1) of the Code of Criminal Procedure shows us that during the criminal investigation, the criminal investigation body is obliged to gather and administer evidence both in favor and against the suspect or defendant, both on request and *ex officio*. We must not forget that, according to Article 99 of the Code of Criminal Procedure, the suspect or defendant has the presumption of innocence, the burden of proof falling mainly on the prosecutor, who must overturn this presumption. The suspect or defendant is not obliged to prove his innocence or to contribute to his own incrimination, but they have the right to propose to the courts the administering of evidence, as it results from both the provisions of the Code of Criminal Procedure and the provisions of Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) and Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. Article 100 (4) of the Code of Criminal Procedure provides for express cases in which the courts may reject a request for the administering of evidence.

1.2 *The fact finding reports*

With regard to reports of findings, Article 172 (9) of the Code of Criminal Procedure provides that *when there is a danger related to the disappearance of evidence or to the change of a factual situation, or when the urgent clarification of facts or circumstances of the case is necessary, criminal investigation bodies may order,*

through a prosecutorial order, the conducting of a finding of fact. At the same time, according to paragraph (10) of the same Article, such finding of fact is conducted by a specialist working with the judicial bodies or by an external one.

According to Article 172 (12) of the Code of Criminal Procedure, *following completion of a fact finding report, when judicial bodies believe that an expert opinion is necessary or when the conclusions of the fact finding report are challenged, the development of an expert report is ordered.*

As a general observation, we find that, unlike the old regulation, the legislator no longer divides the findings into two categories, technical scientific and forensic legal, given that regardless of the object of the finding, the method by which the actual finding operation is carried out is always the scientific one, the term specialist used in the text of the law referring to a person who has specialized knowledge in the field in which the expert report was ordered, which makes all findings to be considered scientific papers[1].

1.3 *The specialists who have the competency to conduct finding of facts*

Regarding the specialists competent to carry out these fact finding reports, we show that in Article 1201 of Law no. 304/2004 on judicial organization provides that *Within the prosecutor's offices, specialists in the economic, financial, banking, customs, IT, as well as in other fields can carry out their activity, in order to clarify some technical aspects in the criminal investigation activity.* Also, according to Article 11 of the Government Emergency Ordinance no. 43/2002 on the National Anticorruption Directorate, within NAD, by order of the chief prosecutor of this directorate, with the approval of the line ministries, highly qualified specialists in the economic, financial, banking, customs, IT, as well as in other fields are appointed to clarify some technical aspects in the criminal investigation activity. These specialists have the quality of civil servant and carry out their activity under the direct leadership, supervision and direct control of the prosecutors from the National Anticorruption Directorate. NAD operates with a maximum of 65 specialist positions.

1.4 *The notion of finding of fact*

We can define the finding of fact as an evidentiary process through which a specialist, appointed by order of the criminal investigation body, investigates a specific problem in a certain field in order to establish a conclusion on the problem to be clarified when there is a danger of the disappearance of evidence or a change of facts, or there is an urgent need to clarify certain facts or circumstances of the case [2].

2 Brief comparison between expert report and finding of fact

Both the expert report and the finding find their primary regulation in the Article 172 Code of Criminal Procedure, with the marginal name **"Ordering an expert report**

or of a finding of fact". Both are evidentiary processes. They are carried out by experts and specialists, respectively, and end with the preparation of an expert report, respectively a fact finding report. They are means of proof regarding acts or circumstances of importance to the prosecutor for finding out the truth [3]. The doctrine has correctly shown that the fact finding or expert report constitutes a means of proof and the conclusions contained in this fact finding report constitute evidence[4]. Evidence is the objective element by which the judicial body makes the correct determination of the factual situation, both with regard to the circumstances of the case and with regard to the suspect or defendant. [5]. Therefore, the legal consequences, from an evidentiary point of view, of the conclusions contained in the content of the two categories of evidence are the same.

However, we will continue to show that between the fact finding and the expert report there are several differences, which have been emphasized many times in the doctrine and under the old regulation, differences that are still relevant today[6]. Thus, it follows from the analysis of Article 172 (9) of the Code of Criminal Procedure that, unlike expert report, which can be ordered both during criminal proceedings and during trials, the finding of fact can be made only during criminal proceedings. Expert report is mandatory in certain situations, while finding of fact is always optional. At the same time, unlike the expert report, the finding of fact can be ordered by the criminal investigation body only when there is a danger of disappearance of evidence or change of the de facto situation, or if it is necessary to urgently clarify some acts or circumstances pertaining to the case. Therefore, we consider that expert report is the rule while the finding of fact is the exception and can be ordered only when the conditions strictly provided by law are met. The finding of fact is made by a specialist who usually works in the judiciary, while the expert report is carried out by an expert who always works outside the judiciary.

The most important difference between expert report and finding of fact, which results from the way they are regulated in the Code of Criminal Procedure, is that expert report involves a contradictory procedure, as opposed to finding of fact, which is devoid of contradiction. [7]. Thus, unlike the finding of fact, which is made unilaterally, only by the specialist appointed by the criminal investigation body, in the case of performing the expert report, the main parties and procedural subjects have the right to request that an expert recommended by them participate in its performance. Moreover, incompatibility (Article 174 of the Code of Criminal Procedure), the rights and obligations of the expert (Article 175 of the Code of Criminal Procedure), the replacement of experts (Article 176 of the Code of Criminal Procedure) and the procedure for conducting the expert report(Article 177 of the Code of Criminal Procedure) are applicable only in the case of expert reports, not in the case of a finding of fact, in which case the provisions of Article 181 of the Code of Criminal Procedure govern only the object and content of the fact finding report.

Moreover, we point out that, although at the time of the entry into force of the current Code of Criminal Procedure there was an obligation to order an expert report when the conclusions of the finding of fact were challenged, these provisions were amended by Government Emergency Ordinance no. 18/2016 for the amendment and completion of Law no. 286/2009 regarding the Criminal Code, Law no. 135/2010 on the Code of Criminal Procedure, as well as for the completion of Article 31 (1) of Law

no. 304/2004 regarding the judicial organization. In these circumstances, the obligation of the criminal investigation body to order the performance of an expert report is no longer provided when the conclusions of the finding of fact report are contested, the order of the performance of the expert report remaining at the discretion of the judicial body.

3 The criticisms formulated regarding the method of regulating the finding of fact

In view of the above, the question of whether the rules governing the finding of fact procedure infringe the right to a fair trial, governed by Article 6 of the European Convention on Human Rights and Fundamental Freedoms, has been raised in judicial practice, especially in the case of expert report ordered by specialists in tax evasion cases, given that the procedure regulated by the Code of Criminal Procedure regarding the preparation and administration of this means of proof does not comply with the adversarial requirements imposed by the right to a fair trial, as the defendant's right to defense may also be affected. In general, the criticisms made addressed the following issues:

i) the lack of adversarial nature of the evidentiary process of the finding of fact regulated by the Code of Criminal Procedure. In this respect, the regulations of the Code of Criminal Procedure regarding incompatibilities, rights and obligations of experts, replacement of the expert and the procedure of performing the expert report are not applicable to the finding of facts made by specialists. Therefore, although the fact finding report is a means of proof, it does not benefit from the contradictory character specific to the expert report or other means of proof in the criminal process. It is true that the conclusions of the fact finding report can be challenged, but on the one hand let us not forget that it remains at the discretion of the judicial body to order the performance of an expert report, and, on the other hand, we draw attention to the fact that in the absence of a qualified defense in the more complex financial-fiscal field specific to tax evasion offenses, there is the possibility that the suspect or defendant does not contest the fact finding report and the judicial body considers that an expert opinion is not necessary. However, in such situations, there is a risk that the scientific evidence obtained through the evidentiary process of the finding does not meet the conditions of quality and impartiality imposed by the guarantees established by the criminal procedure rules in the case of expert report, with the consequence of violating the principle of equality of arms; as an important element of the broader notion of a fair trial, which also includes the fundamental right to adversarial proceedings [8], affecting, in the end, the principle of finding out the truth.

ii) lack of impartiality of the specialists designated by the criminal investigation body to carry out the fact finding reports. Thus, according to the Code of Criminal Procedure, the specialists appointed by order of the criminal investigation body to carry out the finding may function even within the judicial body that ordered the finding. Moreover, as we have shown above, Article 11 of the Government Emergency Ordinance no. 43/2002 on the National Anticorruption Directorate stipulates that within the NAD there are specialists who have the quality of civil servant and carry out their

activity under the direct leadership, supervision and direct control of the prosecutors from the National Anticorruption Directorate. Also, Article 120[1] of Law no. 304/2004 on the organization of the judiciary stipulates that within the prosecutor's offices, specialists in various fields can carry out their activity in order to clarify some technical aspects in the criminal investigation activity.

iii) the manner in which the finding is regulated in Article 172 par. (9) of the Code of Criminal Procedure allows the judicial body to circumvent the evidentiary process of the expert report, which ensures all the guarantees of the contradictory administration of the means of proof in the criminal process, resorting instead to the evidentiary process of finding, which is devoid of adversarial proceedings and is carried out by a civil servant who carries out his activity under the direct direction, supervision and direct control of the prosecutor. Therefore, the criminal investigation body is not obliged to turn to an independent specialist, who operates outside its supervision, to carry out the fact finding report.

iv) The provisions of Article 172 (12) do not allow for an effective mechanism for challenging the fact finding reports, as it also remains at the discretion of the court whether it admits the challenge to the conclusions of the fact finding report and orders an expert opinion or maintains the conclusions of the fact finding report.

4 The decisions of the court of constitutional review regarding the constitutionality of the provisions regarding the evidentiary process of the finding of fact

In view of the issues raised by the provisions of the Code of Criminal Procedure regarding the fact finding report, the Constitutional Court has been invested with resolving several exceptions of unconstitutionality of the legal provisions governing the evidentiary process of the finding. In general, the authors of the exceptions of unconstitutionality considered that the contested texts of law violated the provisions of Article 21 (3) of the Constitution on the right to a fair trial, Article 24 of the Constitution on the right to defense and Article 20 of the Constitution on international human rights treaties, in relation to the provisions of Article 6 on the right to a fair trial in the European Convention on Human Rights and Fundamental Freedoms.

Thus, by CCR Decision no. 835/2017 [9] the exception of unconstitutionality of the provisions of Article 3 (3) of GEO no. 74/2013 on some measures for improving and reorganizing the activity of the National Agency for Fiscal Administration and for amending and supplementing some normative acts, which allowed the secondment within the prosecutor's offices, as specialists, of the anti-fraud inspectors within the Anti-Fraud Directorate, which operated within the NAFA, and provide specialized technical support to the prosecutor in conducting criminal prosecution in cases involving economic and financial offenses. In the reasoning of the decision, the Constitutional Court referred to the provisions of Article 172 of the Code of Criminal Procedure, which allows criminal prosecution bodies to order a finding to be made by a specialist, working within or outside the judiciary body, pointing out that the prosecuting authorities have an obligation to gather and administer evidence both for and against the suspect or defendant and that the trial is conducted by an independent

and impartial court, in conditions that ensure the observance of the principles of publicity, orality and adversarial nature of the criminal process, meaning that the CCR also ruled by Decision no. 791/1016 [10]. The Court's reasoning is substantially correct and is also supported by the case law of the European Court of Human Rights, which has shown that compliance with the principle of adversarial proceedings and other guarantees provided for in Article 6 (1) of the European Convention on Human Rights and Fundamental Freedoms concerns proceedings before a "tribunal", without being able to deduce from this provision a general and abstract principle, according to which, when the court has appointed an expert, the parties must be able in all cases to assist in its investigations or to analyze all the material before it, it being important that the parties are able to participate appropriately in the proceedings before a "tribunal" [11]. The European Court of Human Rights has also stated that the right to an adversarial procedure implies the possibility for the parties to a criminal trial to hear all acts and observations submitted to the judge, including those from an independent magistrate, which may influence the decision, and to discuss them [12]. However, we cannot fail to note that the evidentiary process of the finding does not have the same guarantees as other evidentiary process, such as expert report, with which it is very similar. Therefore, we consider that the lack of such safeguards should be justified only by situations of danger concerning the disappearance of evidence or change of *de facto* situations, or the need for urgent clarification of certain facts or circumstances of the case, situations which should form the conviction of the judicial body that there is not enough time to carry out an expert report with the procedural guarantees that this evidentiary process implies. This is all the more so as in another decision [13], The Court rightly notes that the reports of findings drawn up by these specialists constitute, in accordance with Article 97 (2) e) of the Code of Criminal Procedure, a means of proof. It is true that according to Article 5 (2) of the Code of Criminal Procedure, the prosecuting authorities have the obligation to gather and administer evidence both in favor and against the suspect or defendant, but let us not forget that the criminal investigation body and the suspect or defendant are in opposite positions in a criminal investigation procedure.

Also in Decision no. 791/2016, the Constitutional Court showed that with regard to the phrase "specialist working within the judiciary bodies", the activity of these specialists under the direct leadership, supervision and control of prosecutors does not equate with their lack of objectivity or impartiality. Although we do not intend to criticize the decisions of the Constitutional Court, we cannot fail to note that this assessment of the Court has in view an ideal situation, but which in some cases may prove to be utopian, in which the specialists employed in the prosecutor's office and under the direct leadership and control of a prosecutor, have sufficient objectivity and verticality not to think about the possible variant in which the conclusions of the reports they prepare may adversely affect or even dismantle a whole criminal investigation file that their direct superior has been working on for maybe even years.

In another facet, the same decision shows that the legislator has established by subsequent normative acts both the competences and the status of specialists who can carry out their activity in the judicial bodies, and the fact finding reports made by them are evidence that can be challenged both in the preliminary chamber procedure regarding the legality and validity of the criminal investigation acts, as well as at the trial stage, according to the criminal procedural provisions regarding the administration

of evidence. At the same time, the Court observes that in the deliberation process the judge verifies and evaluates the evidentiary material and bases his solution on the entire evidentiary material administered in the case, corroborating and assessing all the evidence, therefore the court does not refer exclusively to findings drawn up by specialists. In conclusion, the information in the fact finding reports cannot create the risk of abuse of procedure [14]. What the Court does not examine, however, is the fact that, in general, in a tax evasion case, the conclusions of a fact finding report can very rarely be correlated with other evidence of the same scientific value. Therefore, the reality is that, in general, the conclusions of fact finding reports and expert reports are of particular importance in all the evidence administered in tax evasion cases, and it is very rare for the conclusions of such reports to be contradicted by other evidence capable of changing the opinion of a judge.

By Decision no. 112 of 28 February 2019, however, the Constitutional Court observes the essential differences between expert report and finding, emphasizing that, unlike expert report, which can only be performed by authorized official or independent experts, the finding is made by specialists, from judicial bodies or from outside of them, and the provisions of Article 173-177 of the Code of Criminal Procedure on expert report are not applicable to the finding [15].

Analyzing in detail the two evidentiary proceedings, the Constitutional Court concludes correctly that from the teleological interpretation of the criminal procedural regulations it results that, for the criminal investigation bodies, the rule must be the order to carry out an expert report and not a finding. Ordering a finding will always be the exception, and it can only be done when the conditions set out in Article 172 (9) of the Code of Criminal Procedure are met. In other words, findings may be ordered only in exceptional cases, when there is a danger of the disappearance of evidence or a change in facts or if there is an urgent need to clarify certain facts or circumstances of the case. We consider that this conclusion of the constitutional court is very important in terms of the conditions that should be met in order for the judicial body to be able to order a finding.

5 Minutes drawn up by the tax control bodies in the case of tax evasion offenses

Regarding another aspect, we restate the fact that, according to the provisions of Article 172 (10) of the Code of Criminal Procedure, specialists who conduct finding of facts may operate both within and outside the judiciary. In these circumstances, the question arose as to whether the minutes drawn up by the fiscal control bodies under Article 233^1 of the old Fiscal Procedure Code is a means of proof, the Constitutional Court correctly establishing that the minutes drawn up by the fiscal bodies under Article 233^1 from the old Fiscal Procedure Code before the beginning of the criminal trial cannot have the quality of means of proof [16].

At present, with the entry into force of the new Fiscal Procedure Code, Article 150 of this normative act regulates the regime of acts of notification of criminal prosecution bodies drawn up by the central fiscal body, meaning that two categories of minutes are regulated:

a) Minutes by which the tax authorities ascertain facts which may comprise the constituent elements of an offense. These minutes are the basis for the notification of the criminal investigation bodies by the fiscal control body, but they do not represent fiscal administrative acts within the meaning of the Fiscal Procedure Code. Also, these minutes do not represent any means of proof within the meaning of the Code of Criminal Procedure because they are drawn up before the start of the criminal investigation and are not ordered by the criminal investigation body during the criminal investigation activity. Instead, as we have shown, they have the value of an act of notification of the criminal investigation body by the fiscal body.

b) The minutes concluded by the fiscal bodies at the request of the criminal investigation bodies, through which the committed damage is evaluated. These minutes do not represent fiscal administrative acts within the meaning of the Fiscal Procedure Code, but they have the role of establishing the amount of damage caused to the state, as it is assessed by the civil party. In this regard, the jurisprudence has shown that in the case of tax evasion offenses, the criminal action must be joined by the civil action, by introducing the injured party *ex officio* as a civil party [17]. Moreover, the supreme court established in an appeal in the interest of the law that in cases having as object the offenses of tax evasion provided by Law no. 241/2005, the court, when resolving the civil action, orders the defendant, convicted for committing these crimes, to pay the amounts representing the main tax liability due, as well as to pay the amounts representing the ancillary tax obligations due, under the Code of Fiscal Procedure [18]. Of course, the suspect or defendant may challenge the amount of damage requested by the tax authority on the basis of the drawn up minutes.

6 Conclusions

Having regard to the current rules on the procedure for finding of fact in Article 172 the Code of Criminal Procedure and the provisions of the Code of Fiscal Procedure as regards the powers of the tax inspection body, to which the consolidated and constant jurisprudence of the Constitutional Court is added by which the constitutionality of the provisions of Article 172 of the Code of Criminal Procedure regarding the procedure of finding is retained, but also the jurisprudence of the European Court of Human Rights, ruling that the right to be heard as well as the guarantees contained in Article 6 (1) on the right to a fair trial are ensured, provided that the parties may participate in an appropriate manner in proceedings before a "tribunal", We believe that, at present, issues of unconstitutionality or violation of the right to a fair trial within the meaning of Article 6, paragraph 1, of the European Convention on Human Rights and Fundamental Freedoms can no longer be successfully sustained, in terms of the method of regulation of the finding procedure, as a means of proof.

However, the criminal investigation bodies should use this evidentiary process with great care, only in exceptional situations, as provided for in the decisions of the Constitutional Court. In this sense, the rule will always be expert report, as a means of proof. The finding will always be an exception, in the sense that the judicial body will order it only when the following conditions are cumulatively met:

– i) there is a danger of the disappearance of evidence ii) there is a danger of changing some *de facto* situations, or iii) it is necessary to urgently clarify some facts or

circumstances of the case; as can be seen, what will justify this evidentiary process will always be danger or urgency;

– it is not possible to carry out an expert report in the conditions of adversarial proceedings, and in the conditions of ensuring all the guarantees imposed by the right to a fair trial, given the situation of danger or urgency shown above.

If the criminal investigation body orders an finding to be made without both of the above requirements being met, we consider that both the provisions of Article 172 (9) of the Code of Criminal Procedure, and the right to a fair trial within the meaning of Article 6 (1) of the European Convention on Human Rights and Fundamental Freedoms are violated. These violations can however only be invoked in the preliminary chamber proceedings, which allows for the legality control of the administering of evidence and the performance of acts by the criminal investigation bodies, as follows from the provisions of Article 342 Code of Criminal Procedure. According to Article 172 (12) of the Code of Criminal Procedure, the suspect or defendant may challenge during the criminal investigation only the conclusions of the fact finding report, and not the legality of its disposition by the judicial body.

We consider it very important that the judicial bodies give up the practice of ordering findings in situations where there is no danger of disappearance of evidence or change of facts and there is no need for urgent clarification of facts or circumstances, findings that in many cases have bizarre objectives, which practically aim at solving the case by the designated specialist, such as, for example, to establish whether the suspect violated the provisions of Law no. 241/2005 for preventing and combating tax evasion (ie that the specialist should state whether or not the suspect has committed a tax evasion offense), or if the suspect has evaded the payment of tax obligations due to the general consolidated budget (and in such a situation, we wonder if the specialist is a judicial body, so that he can say in place of the prosecutor investigating the case, if he identifies an evasion from payment of tax obligations).

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Admissibility of the request for temporary suspension of the administrative act

Tinu A.[1], Popescu M.A.[2]

[1] *PhD Lecturer, Faculty of Law, "Titu Maiorescu" University of Bucharest*
[2] *seconded judge within the National Authority for Citizenship*
E-mails: andrei_tinu@yahoo.com, mirelapopescu@just.ro

Summary

As long as an administrative act is in a process of judicial evaluation, it is rightful that it does not produce its effects on the subjects concerned. Therefore, in order to respect *the principle of legality*, the legislator, through art. 14 and 15 of Law no. 554/2004 of the administrative contentious, created a procedural instrument providing the court with possibility to suspend the administrative act. However, it often happens that the time spent from the investiture of the court to the issuance of a solution is quite long, and the main purpose to suspend the administrative act – the prevention of imminent damage, is no longer achieved.

The fact that, according to art. 28 of Law no. 554/2004, the provisions of the Law on administrative contentious are supplemented with the provisions of the Civil Code and the Code of Civil Procedure, created the possibility that the subject concerned by an administrative act may request, based on art. 719 para. (7) of the Code of Civil Procedure, the temporary suspension of the execution of the contested administrative act, until the settlement of the request for suspension. Considering that to the present date there is no uniform practice of administrative contentious courts on the admissibility of this procedure, this study aims to analyze both jurisprudential approaches, with pros and cons, and finally to come up with a solution de *lege ferenda*.

Keywords: temporary suspension, administrative act, enforcement appeal, administrative contentious.

1 The legal framework of the request for temporary suspension of the administrative act

According to art. 28 of Law no. 554/2004, the provisions of the Law on administrative contentious are supplemented by the provisions of the Civil Code and the

Code of Civil Procedure, insofar as they are not incompatible with the specifics of power relations between public authorities, on the one hand, and the people touched in their legitimate rights and interests, on the other hand. Furthermore, according to art. 719 para. (1) of the Code of Civil Procedure, "*the competent court may suspend the execution until the settlement of the enforcement appeal or another request regarding the enforcement, upon the request of the concerned party and only for solid reasons. The suspension may be requested together with the enforcement appeal or through a separate request*".

In a first jurisprudential interpretation [1], [2], these provisions apply not only to the enforcement appeal, but also to other claims for enforcement, such as those relating to the suspension of the enforcement of an administrative act. In other words, starting from the rule *executio ex officio* of the administrative act, it is considered that its ex officio execution is equivalent to an enforcement, which gives the debtor the instrument of temporary suspension of execution until the suspension request is solved, based on art. 719 para. (7) of the Code of Civil Procedure, which stipulates that: "*If there is an emergency and if, in the cases provided in para. (2), respectively para. (3), the bail has been paid, the court may order, by conclusion and without summoning the parties, the temporary suspension of the execution until the settlement of the request for suspension. The conclusion is not subject to any appeal. The submitted bail in accordance with this paragraph shall remain unavailable even if the application for temporary suspension is rejected and is deductible from the final bail established by the court, if the case"*.

As can be noticed from art. 719 para. (1) of the Code of Civil Procedure there is the possibility to suspend the execution not only until the settlement of the enforcement appeal, but also until the settlement of another request regarding the enforcement, as, in our case, is the request for the suspension of the execution of an administrative act. Thus, art. 10 Code of Civil Procedure stipulates that "*laws derogating from a general provision (...) apply only in the cases expressly and exhaustively provided by law"*.

Finally, by its nature, the temporary suspension of the execution, provided by art. 719 para. (7) of the Code of Civil Procedure, produces effects until the settlement of the request for suspension of execution, provided by art. 14 or 15 of Law no. 554/2004, which means that, in view of the conditions in art. 719 para. (1) of the Code of Civil Procedure, falls within its scope. On the other hand, the case of suspension of the provisional execution provided by art. 719 para. (7) of the Code of Civil Procedure involves the adoption of urgent measures, of a provisional nature, respectively until the solution of the request for suspension of the actual execution. [1]

2 Procedural and opportunity issues

In order to accept the request for temporary suspension, according to art. 719 para. (7) of the Code of Civil Procedure, two conditions must be met cumulatively: the existence of a request for actual suspension, the deposit of the bail and the existence of emergency. It shall be settled by a decision which is not subject to any appeal and without the parties being summoned. This procedural means was also found in the Code of Civil Procedure in 1865 at art. 403 para. (4), which stated that "*in urgent cases, if the bail has been paid, the president of the court may order, by conclusion and without summoning the parties, the temporary suspension of execution until the request for*

suspension is solved by the court. The conclusion is not subject to any appeal. The bail to be submitted represents 10% of the value of the object of the request or 500 lei for the requests that cannot be assessed in cash. The submitted bail is deductible from the bail established by the court, if applicable".

The current legal provisions, as well as those of the Code of Civil Procedure in 1865 have been the subject of constitutionality checks on several occasions, as it was considered that the request for the solution of the request for temporary suspension of enforcement by conclusion not subject to any appeal and without the summoning of the parties would contravene the principle of adversarial proceedings, the right to defense and the right to an effective appeal. The Constitutional Court of Romania found the constitutionality of this procedure as provided in the old regulation (Decision no. 459/08.05.2012, published in the Official Gazette in Romania, Part I, no. 522/2012, or Decision no. 236/2006, published in the Official Gazette in Romania, Part I, no. 276/2006), as well as in the new regulation (Decision no. 325/10.05.2018, published in the Official Gazette in Romania, part I, no. 835/2018). The constitutional contentious court highlighted the fact that that no appeal could be made against the conclusion of the court ordering the provisional suspension of enforcement until the application for suspension was solved, it was not possible to defeat the constitutional provisions related to free access to justice, to the use of appeals and to the management of justice, because the legislator, by virtue of the prerogatives conferred by art. 126 para. (2) of the Constitution, may establish different rules of procedure, appropriate to each legal situation, and, on the other hand, the constitutional provisions do not guarantee the use of all appeals. On the one hand, consideration has been given to the emergency of temporarily suspending enforcement – an emergency which does not allow delays generated by exercising an appeal against the decision of the court and, on the other hand, the fact that the interim measure ordered by the court does not prejudice the creditor in the capitalization of his claims, as the creditor can benefit from all procedural rights and guarantees, being defended by a guarantee designed to cover any damages caused to him by the temporary suspension of enforcement. [3]

Regarding emergency, in its practice, the HCCJ noted that "*there is emergency when the execution of the administrative act clearly affects the public interest, the plaintiff's situation or the interests that he intends to defend. It is the duty of the administrative contentious judge, who is responsible for solving a request for suspension, to assess concretely, in the light of the arguments put forward by the plaintiff, whether the effects of the act in question are able to justify the emergency"*. [4]

Unfortunately, in practice it has been found that, many times, the time spent from the investiture of the judge to the solution is quite long. This is due to art. 14 para. (2), which, despite providing that "*the court solves the request for suspension, in an urgent and prioritised manner"*, the trial is made with the summoning of the parties, and the objection is mandatory and is submitted to the case at least 3 days before the trial term. For this reason, and taking into account the excessive workload of many courts in the country, we appreciate that on several occasions the main purpose to suspend the administrative act – the prevention of imminent damage – is no longer achieved. In this context, the only real and effective remedy seems to be the temporary suspension of the execution of the administrative act based on art. 719 para. (7) of the Code of Civil Procedure.

The assessment of justified reasons cannot be subject to abstract standards, but must be analyzed in relation to the specifics of each factual situation, as there are cases where the suspension of the administrative act must be analyzed as a matter of urgency, without summoning the parties, as this involves a period of time which, although reasonable, may have permanent negative consequences for the petitioner. This analysis involves balancing the interests of the issuer of the act, on the one hand, and the interests of the person concerned by the contested administrative act, interests that may be limited to other areas, in which the state has agreed to provide high protection to the petitioner's rights (family rights, the right to housing, the right to health, the right to privacy). Apparently without any connection, several times the loss of some rights by issuing the administrative act, as they are individualized in the content of the act, directly affects other correlative rights of the petitioner, who is in an unfavorable situation *ex tempore*, even if in a different context, the same right would benefit from a higher protection from the legislator (*exempli gratia*, after dismissal, a senior civil servant loses the right to the housing granted by the state, being forced to leave it s soon as he loses the quality based on which it was given to him, opposed to the situation in which he would be a simple tenant and would benefit from a notice period).

Last but not least, it should be emphasized that Recommendation no. R (89)8 on 15.09.1989 by the Council of Ministers of the Council of Europe states that it is desirable to provide people with provisional judicial protection. The Recommendation considered that administrative authorities act in several areas and that their activities are likely to affect the rights, freedoms and interests of individuals and thus the immediate and full execution of contested administrative acts causes irreparable harm to people which equity imposes as avoidable as much as possible.. The court called upon to decide on interim protective measures must take into account all the present circumstances and interests, such measures being granted especially where the execution of the administrative act is likely to cause serious damage, which is difficult to repair. [5]

3 Arguments on the inadmissibility of the request for temporary suspension of the administrative act

In another opinion outlined at the jurisprudential level, it is considered that the provisions of art. 719 para. (7) of the Code of Civil Procedure, applicable in the matter of enforcement, cannot be invoked in order to obtain the temporary suspension of the execution of an administrative act, since, unlike the temporary suspension of the enforcement, in the case of the measure provided by art. 14 and 15 of Law no. 554/2004, the court has to analyze the cumulative fulfillment of specific conditions by the plaintiff (well-justified case and imminent damage), the suspension of execution being an exceptional measure and derogatory from the executory character of the administrative act. According to art. 14 para. (1) of Law no. 554/2004, "*in well-justified cases and for the prevention of an imminent damage under the conditions of art. 7, after the notification, of the public authority which issued the act or of the hierarchically superior authority, the injured person may request the competent court to order the suspension of the execution of the unilateral administrative act until the pronouncement of the court of first instance"*. Also, according to art. 2 para. (1) letter ș) from the same normative act,

the imminent damage represents the future and foreseeable material damage or, as the case may be, the serious foreseeable disturbance of the functioning of a public authority or of a public service. In accordance with art. 2 para. (1) letter t), well-justified cases represent the circumstances related to the state of fact and law, which are likely to create a serious doubt regarding the legal character of the administrative act.

As it results from the logical, systematic and literal interpretation of the provisions of art. 719 of the Code of Civil Procedure, the procedure regulated by the legal text, regarding the measure of suspension, including the measure of temporary suspension from para. (7), aims at suspending the enforcement until the settlement of an enforcement appeal formulated under the conditions of art. 711 of the Code of Civil Procedure, against the enforcement, of the conclusions given by the bailiff, as well as against any act of execution.

This supposes that, in order to request the suspension of the execution under the conditions of art. 719 of the Code of Civil Procedure, we must be in the presence of an enforcement procedure, in which the contestation for execution was formulated by a person interested or affected by the enforcement. The same conclusion results, unequivocally, from the provisions of art. 719 para. (8) of the Code of Civil Procedure, according to which the conclusion by which the suspension of the enforcement was ordered is communicated ex officio and immediately to the bailiff.

Even if the subject concerned by an administrative act has filed an action for annulment against that act, it cannot lead to the conclusion that the requirement provided by art. 719 of the Code of Civil Procedure is fulfilled, since it is not about the contestation to the enforcement formulated in the conditions of art. 712 of the Code of Civil Procedure, but about an appeal filed against a unilateral administrative act issued by a public authority that is limited to an action for annulment, as regulated in general by the provisions of art. 1 and art. 8 of Law no. 554/2004. Therefore, we exclude any analogy between an enforcement procedure carried out through the bailiff, according to art. 624 of the Code of Civil Procedure and the situation in which a unilateral administrative act produces its natural effects, by virtue of its executory character, where the regulations of the Code of Civil Procedure in the matter of contesting the enforcement cannot be applied, *mutatis mutandis*, regarding the suspension of the execution of a unilateral administrative act.

On the other hand, *de lege lata*, the suspension of the execution of an administrative act, as an exceptional measure, can be ordered only under the conditions of art. 14 and art. 15 of Law no. 554/2004. It is true that art. 28 para. (1) of this normative act stipulates that "*the provisions of this law are supplemented with the provisions of the Code of Civil Procedure, insofar as they are not incompatible with the specifics of power relations between public authorities, on the one hand, and the people touched, their rights or legitimate interests, on the other hand. The compatibility of the application of the procedural norms is established by the court, when the case is solved*". However, the provisions of art. 719 of the Code of Civil Procedure cannot be applied in addition, as they are not compatible with the provisions of art. 14 and art. 15 of Law no. 554/2004, which regulates the suspension of the execution of an administrative act as an exceptional measure that can be ordered only if there is a well-justified case and an imminent damage, these being mandatory cumulative conditions

that cannot be analyzed within the procedure provided by art. 719 para. (7) of the Code of Civil Procedure.

Thus, it is not possible to order the suspension of execution, even provisionally, without the parties being legally summoned and having the possibility to formulate conclusions and defenses regarding the requirements of the well-justified case and the imminent damage. Or, it is obvious that the procedure regulated by art. 719 para. (7) does not meet these requirements, provided that the court pronounces on the provisional suspension without summoning the parties. [6]

The existence of a derogatory regulation, based on the provisions of the Law on administrative contentious, obliges the allegedly injured party to follow the procedure regulated by this normative act and not the procedure provided by the common law rules on enforcement.

The incompatibility of the provisions of art. 719 para. (7) of the Code of Civil Procedure with the institution of suspension of the execution of the administrative act is given especially by the regulatory matter (art. 719 of the Code of Civil Procedure is applied in the phase of enforcement), the court in charge of solving such cases, the reasons behind each measure, the requirement of summoning the parties, the requirement of bail, the time until which each measure may be taken, the type of judgment and the appeal. Therefore, the request for the temporary suspension of the execution of administrative acts cannot be considered admissible in the present procedural framework, the court being called to pronounce on the request being one of administrative contentious, and not an enforcement court within an enforcement procedure governed by the provisions of the 5th Book of the Code of Civil Procedure. [7]

In conclusion, the suspension of the execution of an administrative act cannot be requested based on the provisions of art. 719 para. (7) of the Code of Civil Procedure, since the provisions of this text of law are incompatible with the specifics of the institution of suspension of the execution of the administrative act, the provisions of art. 28 of Law no. 554/2004. [8]

4 Conclusions

Compared to what was exposed *ante*, we consider that it is necessary to notify the High Court of Cassation and Justice with an appeal in the interest of the law, according to art. 514 of the Code of Civil Procedure, which shall rule in the unitary interpretation and application of the provisions of art. 719 para. (7) of the Code of Civil Procedure, in the sense that they also refer to the particular situation of the execution of administrative acts. This decision shall become binding for all administrative courts, according to the provisions of art. 517 para. (4) of the Code of Civil Procedure.

Another solution, this time *de lege ferenda*, is to amend Law no. 554/2004 in the sense that, in case of special emergency, the court may order the suspension of the administrative act without summoning the parties, similar to the procedure of the presidential ordinance, at art. 999 para. (2) of the Code of Civil Procedure. This legislative improvement shall ensure a fair and efficient procedure for the protection of the rights of the person concerned by the administrative act. Thus, on the one hand, the analysis of the reasons for suspension shall be done only once, in order not to burden the activity of the courts, and, on the other hand, shall have the expected effect, to

ensure a high protection of human rights, correlating these provisions with those protecting other categories of rights (presidential ordinance, temporary suspension), given the situations in which these rights are interdependent.

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The evolution of the reparation of moral damages in doctrine and jurisprudence. Criminal, civil and comparat law issues

Truichici A.M.[1], Neagu L.[2]

[1]Assoc. PhD at the Faculty of Law of the "Titu Maiorescu" University, associate scientific researcher, Institute of Legal Research "Acad. Andrei Radulescu" of the Romanian Academy; lawyer – Bucharest Bar (ROMANIA)
[2]Doctor of Laws, lawyer – Bucharest Bar (ROMANIA)
E-mails: adrian_truichici@yahoo.com, cabinetavocatura@yahoo.com.

Abstract

Moral prejudice, defined in the doctrine of law and in jurisprudence as "any violation of one of the prerogatives that constitute the attribute of human personality and which is manifested by physical or moral suffering, which the victim feels", protects values without economic content and is an element of privacy, which falls within the scope of art. 8 of the European Convention for the Protection of Human Rights. Representing values defended by the Constitution and national laws, the existence of the damage is limited to the condition of reasonable assessment, on an appropriate fair basis of the real and effective damage caused to the victim. The evolution of the reparation of the moral damage in legislation, doctrine and jurisprudence has undergone changes, in certain periods not being recognized the right to repair it.

Keywords: moral damages, damage reparation, appreciation of moral damage.

1 Introduction

The reparability of moral damages is one of the classic controversies of any legal system, regardless of whether it enshrines, rejects or, in most cases, does not offer coherent solutions, leaving room for endless doctrinal and jurisprudential disputes. Viewed in its evolution, the controversy recorded opinions expressed in a wide register, from hostile reactions, motivated by the impossibility of "repairing the irreparable", to the most convincing pleadings, where the jurisprudence proved to be reluctant. Progress in elucidating it is relative, and legislative solutions remain questionable, because the

discussion concerns a delicate area in its substance, that of human personality values, where human sensibilities, by definition subjective and unsustainable to quantify, can not be caught in the standards legal norms. On the other hand, the civil law of a new millennium, dominated by the world movement for the protection of human rights and fundamental freedoms, cannot remain indifferent in the face of increasingly refined moral aggression, in an increasingly complicated society [1].

Since Roman law, we meet the institution of tortious civil liability, the so-called private crimes that were sanctioned with fines (actio in injuriarum) [2]. This liability continued to be exclusively tortious in medieval law, in which crimes were combined with sins (delictum et pecatum), being sanctioned, as in Roman law, also with fines [3].

2 Civil law

As a result of the doctrinal opinions, in the period 1865-1952, the Romanian jurisprudence promoted the admission of the monetary reparation of the moral damages. The legal provisions invoked for the admissibility of the monetary reparation of the moral damages were those of art. 998 of the Civil Code (1865). According to this text of law, any act of man, which causes harm to another, obliges the one whose mistake has occurred to repair it. At the same time, art. 999, of the same Civil Code, provided that the man is responsible not only for the damage caused by his deed, but also for that caused by his negligence or recklessness. An interesting aspect to mention is the fact that the legal texts shown do not distinguish as the damage is patrimonial or non-patrimonial. In this situation, it is understood that both are likely to be repaired in money, in application of the principle "ubi lex non distinguit, nec nos distinguere debemus" (where the law does not distinguish, nor is the interpreter called to do so) [2].

The French case – law of that period also provided for non – pecuniary damage. For example, we find in French jurisprudence, "worldly" prejudice. In 1937, compensation was granted to a lady from Parisian society because the scar that had been produced forced her, for 2 years, not to wear low-cut dresses. Such an impairment was considered to be a "worldly" injury [4].

In our doctrine [1], it has been shown that if a property damage is always the same, regardless of the victim who bears it, a moral injury is always different, from case to case, in relation to the affected personality of the victim. What, for some people, the destruction of a family memory can be a trauma of the soul, for others, the incident may go unnoticed. Likewise, while a scar caused by an accident can be a tragedy for a famous actress, whose physical appearance is essential, the same consequence can be ignored by another ordinary person, less interested in her physical appearance. This opinion is also adopted by the jurisprudence, the High Court of Cassation and Justice[5], showing that: when establishing the amount of moral damages, for the damage suffered, which consists, generically, in the violation of the values that define human personality, are taken into account the negative consequences suffered mentally, the importance of the injured moral values, the extent to which these values were harmed and the intensity with which the consequences of the injury were perceived by the plaintiff.

Returning to the Civil Code of 1864, as we have shown above, the possibility of non-pecuniary damage was not expressly regulated, but constituted a creation of

doctrine and jurisprudence. This aspect was also pointed out by the Constitutional Court [6] which ruled that: the existence of real legal protection cannot be retained by the possibility recognized by the courts for persons injured by the mentioned crimes, to obtain moral damages in the civil process, because such a form of legal protection is not explicitly regulated, but is established by jurisprudence. On the other hand, the recourse to the civil process, based, by analogy, on the provisions of art. 998 of the Civil Code (1865) – which regulated the patrimonial liability for damages caused by illicit deeds – did not constitute an adequate legal protection in the analyzed case because dishonor is by its nature irreparable, and human dignity cannot be valued in money nor compensated by material benefits.

3 Criminal law

In the Romanian Criminal Code of 1936, the possibility of granting moral damages was provided by art. 92, which stated the following: The convict, in addition to restitution of things to the injured party (injured person, according to the current Code of Criminal Procedure), which may be ordered ex officio, may be obliged to other damages, if requested.

Compensation to the injured party (injured person, according to the current Code of Criminal Procedure) must always be a fair and comprehensive reparation of material or moral damages suffered as a result of the crime and can be established, according to the principles of civil law, in a lump sum. They may also consist of a fixed-term annual annuity, when this would satisfy the interests of the parties more equitably.

The court cannot approve the award of compensation or restitution for another purpose, even if the injured party (injured person, according to the current Code of Criminal Procedure) would require it.

In the event of competition with the fine and the costs of the proceedings for damages, if the convicted person's property is not sufficient to pay them, preference shall be given to damages. "

Regarding the term for requesting moral damages, art. 94 of the Criminal Code (1936), stated that the civil action for damages, as well as any claim of the injured party (injured person, according to the current Code of Criminal Procedure) resulting from an offense or a final judgment, regarding damages caused by offenses, are subject to the prescription provided by the Civil Code. "

The need for compensation to the injured person to always constitute a fair and comprehensive reparation of material or moral damages suffered as a result of the crime is also provided by current legislation, as we find that they can be established according to the principles of civil law. What is found in the current civil jurisprudence is the fact that the damages can be established in a global amount, but they cannot consist in amounts paid periodically, for a determined time. This possibility of paying periodic sums is, however, encountered in criminal law, the courts granting the payment of periodic annuities [7].

It should be noted that we identified 3 different periods, in which the courts interpreted in a completely different way the possibility of establishing and granting moral damages.

The first period is the one immediately after the Second World War, when the national courts totally rejected the possibility of monetary reparation of non-pecuniary damage, arguing that no equivalence can be established between moral pain and a certain amount of money, or that material compensation feelings of affection is immoral.

The second period is that of the '70s, when it was proposed to provide monetary compensation for non-pecuniary damage, which are consequences of injury to the health or bodily integrity of a person. Such an injury can materialize not only in a patrimonial damage (ex: medical expenses). This damage can be mitigated by granting compensations, in addition to those established to cover the patrimonial losses suffered, compensations that ensure a proper ambiance in the family or outside it. This injury was called recreational injury. The compensation offered would rather aim to alleviate the living conditions of the victim.

The old Criminal Code (1969) protected moral values through art. 205 (Insult) and, respectively, art. 206 (Slander), repealed by the provisions of art. I point 56 of Law no. 278/2006. The legal object of the crimes of insult and slander was the dignity of the person, his reputation and honor. These crimes could be committed directly, orally, through texts published in the written press or through the audiovisual media. Regardless of how they could be committed, the facts that formed the content of these crimes seriously harmed the human personality, dignity, honor and reputation of those thus assaulted. Therefore, the mentioned values, which were protected by the Criminal Code (1969), have a constitutional status, the human dignity being enshrined by art. 1 para. (3) of the Romanian Constitution as one of the supreme values. Thus, the text quoted in the Basic Law states that "Romania is a rule of law, democratic and social, in which human dignity, rights and freedoms of citizens, free development of human personality, justice and political pluralism are supreme values, in the spirit of democratic traditions of the people. and the ideals of the Revolution of December 1989, and are guaranteed ".

Considering the special importance of the values that were protected by the provisions of art. 205, 206 and 207 of the Criminal Code (1969), the Constitutional Court found that the abrogation of these texts of law and the decriminalization, in this way, of the crimes of insult and slander contradict the provisions of art. 1 para. (3) of the Romanian Constitution.

The Court also found that the repeal of art. 205, 206 and 207 of the Criminal Code (1969) violate the principle of free access to justice, enshrined in art. 21 of the Romanian Constitution, the right to a fair trial and the right to an effective appeal, provided in art. 6 and, respectively, art. 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the principle of equal rights provided in art. 16 of the Constitution, contravening, at the same time, the prohibition of damaging the dignity, honor, private life and the right to one's own image as a result of exercising the freedom of expression, as this freedom is limited by the provisions of art. 30 para. (6) and (8) of the Romanian Constitution.

Although the decriminalization of the crimes of insult and slander was declared unconstitutional, as we have previously shown, by the Decision of the United Sections of the High Court of Cassation and Justice no. 8/2010 (regarding the examination of the appeal in the interest of the law and the notification of the board of the Prosecutor's

Office attached to the Bucharest Court of Appeal regarding the consequences of the Decision of the Constitutional Court no. 62 of January 18, 2007 regarding the exception of unconstitutionality of the provisions of art. 56 of Law No. 278/2006 on amending and supplementing the Criminal Code, as well as on amending and supplementing other laws on the activity of the provisions of Articles 205, 206 and 207 of the Criminal Code), did not re-incriminate them, since subsequently repeal, insults and slander have not been recriminated.

It is significant that by the very provisions of the current Criminal Code, regulating the principle of legality of incrimination, it was included in art. 1 para. (1) that "the criminal law provides for the deeds that constitute crimes". Therefore, as long as the acts of insult and slander, decriminalized by art. I point 56 of Law no. 278/2006, have not been re-incriminated by the legislature, the only one empowered in a state governed by the rule of law to do so, it cannot be considered that those acts constitute crimes and that the repealed legal texts in which they were incriminated.

Therefore, the failure of Parliament to exercise its prerogative to re-examine the text of the law, which is considered unconstitutional, cannot unequivocally lead to the solution of this essential power within the rule of law and to the issuance on its behalf by another authority of a repealing provision, such a procedure being inadmissible also in relation to the provision inscribed in art. 64 para. (3) of Law no. 24/2000, republished, by which it was established, with inalienable value for the legislative technique, that "it is not allowed that by repealing a previous act of repeal to re-enter into force the initial normative act".

4 Reglementation of moral damages in the New Civil Code

Currently, the reparation of moral damages by awarding monetary damages is shared not only by doctrine and jurisprudence, but also by the legislator, who admitted the possibility of repairing moral or non-pecuniary damage in certain special matters, both contractual and non-contractual, and the New Civil Code confirms this conception [8], following the model of the Civil Code of Quebec (which, in art. 1457 provides that "he who is liable for the damage caused to another by his deed is required to repair any damage, bodily, moral or material"). In our Civil Code, we find this provision in art. 1349 para. (2) which provides that "he who, having discernment, violates this duty (it is the duty not to prejudice the rights or legitimate interests of others, moral imperative expressed by the adage alterum non laedere) is liable for all damages…".

The discrepancy between these two texts of law (art. 1457 Quebec Civil Code and art. 1349 paragraph (2) Romanian Civil Code), was analyzed in the doctrine, the possible explanation of this gap being the fact that, according to those who drafted the text, the damage bodily injury would not be a kind of reparable injury, which is obviously an unfortunate mistake. This explains, perhaps, why, whenever it is a question of reparable damage, references to its types are avoided (see, in this sense, the amendment to art. 1381 para. (1) of the Civil Code of the New Project Civil Code) [9].

In conclusion, regarding the moral damages, the Romanian law in the period of 30 years, after the fall of communism, underwent major changes, the most important being that it benefits from a legal regulation, which did not exist in the previous period. At the same time, from a jurisprudential point of view, we encounter a tendency of unification,

in the sense that the courts unanimously admit the possibility of granting moral damages.

In the context of solving the civil action in the criminal process having as object a crime of bodily injury through fault, only the victim of the crime, who suffered a damage, is entitled to obtain compensation for restricting the possibilities of family and social life. Therefore, the exclusive holder of the right to moral damages can only be the injured person, a victim of crime (we have in mind the situation in which the injured person, victim of the crime of bodily injury through guilt became a civil party in question). no. 12/2016 pronounced by the High Court of Cassation and Justice, the Panel for resolving legal issues in criminal matters, which established the following: "analyzing the legal provisions evoked – para. (1) and (2) of art. 1,391 of the Civil Code, it is concluded that the victim of the injury is the sole holder of the right to compensation, ie the person who suffered bodily trauma caused by committing an unlawful act or other event for which a person is called to answer and only in the situation where the death of the victim occurs, the right to compensation belongs, under the conditions stipulated by the incident legal norm, to the persons invoked in art. 1,391 para. (2) of the Civil Code. In the present situation, the provisions of art. 1,391 para. (1) of the Civil Code must be corroborated with the provisions of art. 1,386 alin. (1) of the Civil Code and with those of art. 1,387 alin. (1) of the Civil Code, which regulates the forms of reparation (for the purpose of restoring the victim to the situation prior to committing the wrongful act or event likely to bring the guilty person liable) and the extent of compensation, in case of injury to bodily integrity or health, rules which refer strictly to the victim who suffered a bodily injury, and not to the deceased, the victim of the wrongful act causing the damage. "

5 Conclusions

If compared to the jurisprudential part, given the multitude of lawsuits having as object the request to oblige the defendant to pay moral damages, we will launch an analysis, in a future material, towards the legislation, we can punctually raise two issues that we consider them useful.

We adopt the opinions of the Constitutional Court according to which the impairment of dignity is irreparable through civil sanctions, so that, de lege ferenda, we believe that it is necessary to re-incriminate the crimes of insult and slander, this measure being appropriate to restore legal order, in case of violation constitutional right.

The reason for the recrimination of the crimes of insult and slander was that if such acts were not discouraged by criminal law, they would lead to the de facto reaction of those offended and to permanent conflicts, likely to make social coexistence impossible, which requires respect for by each member of the community and the fair appreciation of each person's reputation.

In civil matters, considering the summary regulation of dignity in the Civil Code, *de lege ferenda,* we propose to complete the legal texts, in the sense of providing a definition of the notion of dignity, but also to draw some directions that the national judge should take into account. appreciation of facts and statements likely to violate dignity. As we have shown, a moral injury is always different, from case to case, in relation to the affected personality of the victim. Thus, the legislator must provide

criteria for estimating such compensation and highlight the limits of appreciation of their amount. Although the legislation lacks these clear provisions for assessing non-pecuniary damage, the High Court of Cassation and Justice noted that in the matter of non-pecuniary damage, given the nature of the damage they cause, judicial practice and literature have stressed that there are no precise criteria for quantification. respectively, that the issue of establishing non-pecuniary damages should not be seen as an economic quantification of non-patrimonial rights and values (such as dignity, honor, or mental suffering experienced by the claimant), but as a complex assessment of the aspects in which damages products are externalized, subject to the discretion of the courts.

Determining the amount of compensation equivalent to non-pecuniary damage includes a dose of approximation, the court must take into account a number of criteria, such as: the negative consequences suffered by the person concerned physically and mentally, the importance of injured moral values, the extent to which these values were damaged and the intensity with which the consequences of the injury were perceived, the extent to which his family, professional and social situation was affected. At the same time, the court must strike a certain balance between the non-pecuniary damage suffered and the compensation awarded, able to allow the injured party certain benefits to alleviate the moral suffering, without reaching the situation of unjust enrichment [10].

Principle deriving from the case law of the European Court of Human Rights (Iatridis v. Greece, application no. 31107/96, Cocchiarella v. Italy, application no. 64886/01, Stan v. Romania, application no. 6936/03) in matters of non-pecuniary damage, which the national courts are obliged to apply, is that of ruling in equity on the compensation granted to the victim, in relation to the particular circumstances of each case. Also, according to the same case-law, the compensation awarded must maintain a reasonable ratio of proportionality to the damage suffered, meaning that the principle of proportionality of the damage to the compensation awarded has been enshrined.

The amount of money awarded as non-pecuniary damage must not become a source of enrichment for the victim, but must not only be purely symbolic, but must represent only as much as is necessary to alleviate or compensate him, as far as possible. the sufferings he has endured or may still have to endure.

In assessing the importance of non-pecuniary damage, the age, profession, level of training and general culture of the injured person must be taken into account, precisely due to the fact that each individual gives values a different value depending on his aspirations. In Swiss law, it is emphasized that the requirement of a significant injury is met when the physical or mental integrity suffers, regardless of the decrease in earning capacity, an obvious or serious impairment. Mental integrity, health, life expectancy, feelings of affection, etc., are the most precious moral values of the human being. Being considered by society moral values, they are regulated and recognized as part of the system of non-patrimonial rights of every human being. The importance of the non-pecuniary damage depends on the non-patrimonial value that was harmed, on the extent to which this value was harmed and on the intensity with which the consequences of the injury were perceived by the injured person. If moral values have been greatly altered, then the moral damage caused is extremely important. If, on the contrary, these values have been harmed to a lesser extent, the moral damage will also be less significant. Depending on the importance of the injured value for the injured person, the judge may assess the importance of the moral damage caused. This assessment of the

importance of non-pecuniary damage is necessary in order to proceed with its correct reparation. Therefore, the importance of the damaged moral value is a criterion for assessing the moral damage, because any moral damage involves the damage of non-patrimonial values [11].

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Recent Interpretations by the CJEU in the Field of Unfair Terms

PhD, Assistant Professor Iliescu M.G.

Abstract

One of the most recent judgments of the Court of Justice of the European Union on unfair terms, the Marc Gómez del Moral Guasch judgment, demonstrates, once again, the Court's substantial contribution to ensuring the uniform application and interpretation of legislation throughout the European Union. The main legal issues on which the Luxembourg Court will rule in the Marc Gómez del Moral Guasch case concern: the scope of application of the *ratione materie* of Directive 93/13, respectively the exclusion concerning terms reflecting "mandatory statutory or regulatory provisions", provided for in Article 1 (2) of the Directive; the possibility for a national court to determine whether a term such as the term at issue, according to which the variable rate of interest to be paid by the consumer varies according to the IRPH of Spanish savings banks, fulfills the transparency requirement of that directive, even in the absence of a transposition of Article 4 (2) of Directive 93/13 into national law; whether that contractual term must be accompanied by information on the method of calculating the index on the basis of which the interest rate is calculated, as well as the evolution of that index in the past and how it may evolve in the future; the possibility for the national court to replace the benchmark for calculating the variable interest of a loan provided for in an unfair term sanctioned with nullity, with a legal index, in the absence of an agreement to the contrary between the parties.

Keywords: consumer, unfair terms, mortgage loan, interest rate, benchmark, pre-contractual information, transparency of the terms.

1 Introductory considerations

The multitude of judgments handed down in recent years by the Court of Justice of the European Union in the field of unfair terms, demonstrates, on the one hand, the truth of the statements of the doctrine on Directive no. 93/13/EEC[1], in the sense that it is

[1] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993, L 95, p. 29, Special edition, 15/vol. 2, p. 273). Directive 93/13/EEC has achieved only partial and minimal

going through a kind of "second youth", being, metaphorically said, "awakened to life by the Court",[2] and, on the other hand, the Court's substantial contribution to ensuring the uniform application and interpretation of legislation throughout the European Union. Also in the literature, it is rightly appreciated about the mentioned directive, that "at least, considering the content of the preliminary questions, its mobilization demonstrates, if necessary, its relevance to answer certain contemporary issues".[3]

One of the most recent judgments of the Court of Justice of the European Union on unfair terms, Judgment of 3 March 2020, Marc Gómez del Moral Guasch, C-125/18, ECLI:EU:C:2020:138, brings to the fore a wide range of legal issues confined to such a current field, not only in our country, but also at European level, that of unfair terms.

In the following, we shall begin by listing the main questions of law inferred from the questions referred to the Court of Justice for a preliminary ruling; in the case of Marc Gómez del Moral Guasch, and we will then analyze each of them in the light of the Court's decisions.

A first question of law on which the Luxembourg Court will rule concerns the *ratione materie* scope of Directive 93/13, respectively the exclusion concerning the reflecting terms "mandatory statutory or regulatory provisions", provided for in Article 1 of the Directive.[4] The Court's second question of law concerns the possibility for a national court to determine whether a term such as the term at issue, according to which the variable rate of interest to be paid by the consumer varies according to the IRPH of Spanish savings banks, fulfills the transparency requirement of that directive, even in the absence of a transposition of Article 4 (2) of Directive 93/13 into national law. The third legal issue that the Court will clarify concerns whether that contractual term must be accompanied by information on the method of calculating the index, on the basis of which the interest rate is calculated, as well as the evolution of that index in the past and how it might evolve in the future. A final issue on which the Court will turn concerns the possibility for the national court to replace the benchmark for calculating the variable interest of a loan provided for in an unfair term which was sanctioned with nullity, with a legal index, in the absence of an agreement to the contrary between the parties.

Before proceeding to the analysis of the issues raised, some clarifications are needed in connection with the circumstances in which they arose and which gave rise to the preliminary questions. The Marc Gomez del Moral Guasch Judgment is the result of the reference for a preliminary ruling made by the Court of First Instance no. 38 of Barcelona, Spain, in a dispute concerning the allegedly unfair nature of a contractual term inserted in a mortgage loan for the purpose of financing the purchase of a dwelling,

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harmonization of national laws on unfair terms, while recognizing the possibility for Member States to provide consumers with a higher level of protection than included in the provisions.

[2] H.-W.Micklitz, N. Reich, *The Court and the Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD),* Common market law review*,* 2014*, Vol.* 51*, No. 3, pp.* 771.

[3] C. Toader, F. Lecomte**,** *Ultimele evoluţii în materia dreptului consumatorului în jurisprudenţa Curţii de Justiţie,* in the "Romanian Journal of European Law" no. 3/2015, p. 36.

[4] For a detailed analysis of this legal issue found in another form in the Andriciuc Judgment, see M.G. Iliescu, *Recent Jurisprudence of the CJEU on Abusive Clauses: The Andriciuc Ruling,* in Proceedings Of The International Conference Of Law, European Studies And International Relations, 6th Edition, Romanian Law, Tradition And European Vocation, Bucharest, May 17-18, 2018, pp. 37-49.

contract concluded between a consumer – Marc Gomez del Moral Guasch and a professional – Caja de Ahorros y Monte de Piedad de Madrid, later Bankia. Relevant for the proposed analysis is the term inserted in such a contract which stipulated that the variable interest rate to be paid by the consumer varies according to the IRPH (index based on the average rate of mortgage loans of Spanish savings banks) of Spanish saving banks.[5] Mister Gómez del Moral Guasch brought an action before the referring court, seeking a declaration that that term was invalid, holding that it was an unfair term.

In order to have a complete picture of the facts, we should add the finding of the referring court that, in the present case, the indexation of the variable interest rates on a mortgage loan calculated on the basis of the IRPH of Spanish savings banks is less favorable than that calculated on the basis of the average rate on the European interbank market ("Euribor index"), which is used in 90% of mortgage loans in Spain. The use of the IRPH of Spanish savings banks would lead to an additional cost of approximately 18,000-21,000 euros per credit. This is, therefore, the context in which the Court of First Instance no. 38 of Barcelona, Spain, decides to stay the proceedings and to refer the questions to the Court for a preliminary ruling.[6]

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[5] This disputed clause reads as follows: "The agreed interest rate shall be calculated for periods of six months, running from the date of signature of the agreement, the interest rate for the first six-month period being that appearing in financial clause 3. For subsequent six-month periods, the rate to be applied shall be the average rate of mortgage loans of a duration greater than three years granted by savings bank for the purpose of acquiring a residential property on the open market, in force at the time of the review, which the Bank of Spain publishes officially and periodically in the Boletín Oficial del Estado for variable-rate mortgage loans for the purpose of acquiring a residential property, rounded up to the next higher quarter-percentage point and increased by 0.25 of a percentage point."

[6] 1) The IRPH of Spanish savings banks must be subject to control by the court, in that it must examine whether it is intelligible to the consumer, without prejudice to the fact that it is governed by laws, regulations or administrative provisions, as it is not one of the situations referred to in Article 1 (2) of Directive [93/13] whereas is this not a mandatory provision, with variable and remunerative interest being optionally included in the contract by the professional? 2) a) In accordance with Article 4 (2) of Directive 93/13, which has not been transposed into [Spanish] legal order, it is contrary to Directive 93/13 and Article 8 thereof that a Spanish court invokes and applies Article 4 (2) of the Directive, whereas this provision has not been transposed into Spanish law as a result of the will of the legislator, who wished to ensure a complete level of protection with regard to all clauses which may be included by the professional in a contract with consumers, including those which affects the main object of the contract, even if they are drafted in a clear and intelligible manner? 2) b) In any event, in order to understand the main clause in the present case of the IRPH [of the Spanish savings banks], it is necessary to transmit or make public information on the following facts or data or part of them: i) explaining how to set the reference rate, in other words communicating that the index includes fees and other nominal interest costs, that this is a simple unweighted average, that the professional must know and convey that a negative margin must be applied and that the information provided is not public, unlike the other usual index, [the Euribor index]; ii) explaining how the index has evolved in the past and how it could evolve in the future, by communicating and publishing graphs that clearly and intelligibly explain to the consumer the evolution of this special rate, in relation to the [Euribor index], what is the average rate for mortgage loans? 2) c) If the Court finds that it is for the referring court to examine the abusive nature of the contractual terms and to draw all the consequences in accordance with national law, the Court is asked to determine whether the failure to provide information on all these aspects does not lead to a lack of intelligibility of the clause, as it is not clear to the average consumer within the meaning of Article 4 (2) of Directive 93/13, or if their omission would entail unfair treatment of the consumer by the professional and, therefore, so that, if the consumer had been properly informed, he would not

Before examining the issues of law found in those questions, it should be noted that, by virtue of its jurisdiction in proceedings between the national courts and the Court of Justice established in Article 267 TFEU,[7] in order to provide the national court with a useful answer to enable it to resolve the dispute before it, the Court may reformulate the questions referred to it.[8] The Court has therefore held that the first question must be understood as meaning that the national court must determine whether Article 1 (2) of Directive 93/13 must be interpreted as excluding, from the scope of this Directive, a term in a mortgage agreement between a consumer and a professional which provides that the interest rate applicable to the loan is based on one of the *official benchmarks provided by national law, which may be applied by credit institutions to mortgage loans.*

The first question of law therefore concerns the scope *ratione materie* of Directive 93/13, namely the exclusion concerning terms which reflect "mandatory statutory or regulatory provisions", provided for in Article 1 (2) of Directive[9]. With regard to this exclusion from the scope of the Directive of terms which reflect mandatory statutory or regulatory provisions, the Court has already ruled[10], In the sense that, on the one hand, that exclusion having the character of an exception is to be interpreted strictly[11], and on the other hand, it presupposes the cumulative fulfillment of two conditions: the contractual term must reflect an statutory provision or a regularoty norm, and, the respective statute or norm must be mandatory[12]. Then, in order to determine whether a contractual term is excluded from the scope of Directive 93/13, *it is for the national court to determine* whether that term reflects the provisions of national law which apply between the Contracting Parties independently of their choice or those which are of a

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have accepted the application of the IRPH [of Spanish savings banks] as a benchmark for the loan? 3) If the IRPH [of Spanish savings banks] is declared null and void […] which of the following two consequences, in the absence of an agreement between the parties or if it is more detrimentalc to the consumer, would be in conformity with Article 6 (1) and Article 7 (1) of Directive 93/13: i) revision of the contract, by applying a usual substitute index, [the Euribor index], as it is a contract based essentially on a pecuniary interest of the [credit institution], [which has the quality of] professional; ii) non-application of interest, with the sole obligation of the lender or the debtor to repay the borrowed capital within the prescribed time limits?

[7] In connection with the competence of the CJEU, according to Article 267 TFEU, see G.-L. Ispas, Daniela Panc, *Drept instituțional al Uniunii Europene,* Hamangiu Publishing House, Bucharest, 2019, pp. 237-247.

[8] Judgment of 7 August 2018, Smith, C-122/17, EU:C:2018:631, section 34.

[9] According to this Article of the Unfair Terms Directive, the provisions of this Directive do not apply to *contractual terms reflecting mandatory statutory or regulatory provisions* or the provisions or principles of international conventions to which the Member States or the Community are parties, in particular in the field of transport.

[10] See, to that effect, the RWE Vertrieb Judgment, C-92/11, EU:C:2013:180, section 26, the Kušionová Judgment, C-34/13, EU:C:2014:2189, section 79, the Asbeek Brusse and Man Gabarito Judgment, C-488/11, ECLI:EU:C:2013:341, *the* Schulz and *Egbringhoff* Judgment, joint case C-359/11 and C-400/11, EU:C:2014:2317, section 40, the Barclays Bank Judgment C-280/13, ECLI:EU:C:2014:279, sections 30 and 31.

[11] See in this regard the Judgment of September 20, 2017, Andriciuc and others, C-186/16, EU:C:2017:703, sections 27 and 31; the Kušionová Judgment, C-34/13, EU:C:2014:2189, section 77.

[12] the Kušionová Judgment, C-34/13, EU:C:2014:2189, section 78.

supplementary nature[13]. Following these general clarifications, the Court will point out that, in particular, it is clear from the referring court's description of the national rules applicable in the main proceedings (Order of 5 May 1994) that *this regulation did not require, for variable interest rate loans, the use of one of the six official benchmarks, including the IRPH of Spanish savings banks,* but limited itself to establishing the conditions that had to be met by "benchmarks or reference rates" in order to be used by credit institutions.[14] Therefore, the reference to the IRPH of the Spanish savings banks in the case in dispute, for the purpose of calculating the interest due under the contract at issue in the main proceedings does not result from a mandatory statutory or regulatory provision, therefore, *that term falls within the scope of Directive 93/13.* In conclusion, the CJEU will answer this first question: *Article 1 (2) of Directive 93/13 must be interpreted as meaning that a contractual term in a mortgage loan agreement concluded between a consumer and a seller or supplier, which provides that the interest rate applicable to the loan is based on one of the official reference indices provided for by the national legislation that may be applied by credit institutions to mortgage loans, falls within the scope of that directive, where that national legislation does not provide either for the mandatory application of that index independently of the choice of the parties to the agreement or for the supplementary application thereof in the absence of other arrangements established by those parties.*

The second question of law under consideration in the second question (a) concerns, in particular, the possibility for a national court to review whether a term such as the term at issue satisfies the requirement of transparency laid down in that directive, even in the absence of a transposition of Article 4 (2) of Directive 93/13 into national law. According to that article, "the assessment of the unfairness of the terms does not concern either the definition of the object of the contract or the adequacy of the price or remuneration, on the one hand, in relation to the services or goods provided in exchange for them, on the other hand, *to the extent that these terms are expressed clearly and intelligibly*" (the exception to the mechanism of substantive control of unfair terms). As has been pointed out in the doctrine, the extent of the control of terms is as delicate a matter as the control of the "essence of the contract".[15] The Court's answer will be clear cut on this issue. In arguing its answer, the Court will first recall its settled case-law[16] In the sense that the system of protection implemented by Directive 93/13 is based on the idea that, as regards both bargaining power and the level of information, the consumer is inferior to the seller or supplier, a situation which causes the consumer to comply with the conditions laid down in advance by the seller or supplier, without being able to exert

[13] In this regard, the RWE Vertrieb Judgment, C-92/11, EU:C:2013:180, section 26, the Kušionová Judgment, C-34/13, EU:C:2014:2189, section 79, as well as The Judgment of 20 September 2017, Andriciuc and others, C-186/16, EU:C:2017:703, sections 29 and 30.
[14] In accordance with the Opinion of the Advocate General in the case, M. Szpunar, sections 78-83.
[15] C.Toader, F. Lecomte**,** *Ultimele evoluţii în materia dreptului consumatorului în jurisprudenţa Curţii de Justiţie,* in the Romanian Journal of European Law no. 3/2015, p. 37.
[16] See among others The Judgment of 3 June 2010, Caja de Ahorros y Monte de Piedad de Madrid, C-484/08, EU:C:2010:309, section 27 and the cited jurisprudence, as well as The Judgment of 26 March 2019, Abanca Corporación Bancaria and Bankia, C-70/17 and C-179/17, EU:C:2019:250, section 49.

an influence on their content[17] and therefore Member States are obliged to provide for a mechanism to ensure that any contractual term which has not been the subject of individual negotiation can be checked for the assessment of its unfair nature. It is for the national court to determine, in the light of the criteria laid down in Article 3 (1) and Article 5 of Directive 93/13, whether, in light of the circumstances of the case, such a term satisfies the requirements of good faith, balance and the transparency provided for in this Directive.[18]

Continuing the reasoning set out, evoking the Caja de Ahorros y Monte de Piedad de Madrid Judgment[19] and the Kásler and Káslerné Rábai Judgment[20], The Court will conclude that Article 4 (2) of Directive 93/13, in conjunction with Article 8 thereof, allows Member States to provide, in the legislation transposing that directive, that 'assessment of unfairness' does not refer to the terms referred to in this provision, *to the extent that these terms are drafted in a clear and intelligible manner.* In other words, the requirement of clear and intelligible wording of the term is imposed even in the situation where the respective term falls under the notion of "main object of the contract". Furthermore, the Court will also point out that the same requirement for clear and intelligible wording is laid down in Article 5 of Directive 93/13, which provides that written contractual terms must 'always' comply with that requirement.[21] Therefore, this requirement applies in all cases, including where a term falls within the scope of Article 4 (2) of that Directive and even if the Member State concerned has not transposed that provision.

Finally, the Court will conclude that *Directive 93/13, and in particular Article 4 (2) and Article 8 thereof, must be interpreted as meaning that the court of a Member State is required to verify that a contractual term relating to the main subject matter of the agreement is plain and intelligible, irrespective of whether or not Article 4(2) of that directive was transposed into the legal order of that Member State.*

This answer will be the connection, and at the same time the introduction that the Court will make to answer the next legal issue contained in letters b) and c) of the second question referred. In essence, the referring court calls for a determination of whether Directive 93/13, in particular Article 4 (2) and Article 5 thereof, must be interpreted as meaning that, in order to comply with the requirement of transparency of a contractual term in a mortgage loan agreement, which sets a variable interest rate, the method of calculation of which is considered complex for the average consumer, the professional must provide the consumer with information on the method of calculating the index on the basis of which the interest rate is calculated, as well as the evolution of this index in the past and how it could evolve in the future. In summary, the Court is

[17] See The Judgment of 3 June 2010, Caja de Ahorros y Monte de Piedad de Madrid, C-484/08, EU:C:2010:309, section 27 and the cited jurisprudence, as well as The Judgment of 26 March 2019, Abanca Corporación Bancaria and Bankia, C-70/17 and C-179/17, EU:C:2019:250, section 49.

[18] See in this regard the Judgment of 21 March 2013, RWE Vertrieb, C-92/11, EU:C:2013:180, sections 42-48, The Judgment of 30 April 2014, Kásler and Káslerné Rábai, C-26/13, EU:C:2014:282, section 40, and The Judgment of 26 March 2019, Abanca Corporación Bancaria and Bankia, C-70/17 and C-179/17, EU:C:2019:250, section 50.

[19] C-484/08, EU:C:2010:309, section 32

[20] C-26/13, EU:C:2014:282, section 41.

[21] See in this regard the Judgment of 30 April 2014, Kásler and Káslerné Rábai, C-26/13, EU:C:2014:282, sections 67 and 68, as well as The Judgment of 20 September 2017, Andriciuc and others, C-186/16, EU:C:2017:703, section 43.

therefore required to answer if that *contractual term must be accompanied by information* on the method of calculating the index on the basis of which the interest rate is calculated, as well as the evolution of this index in the past and how it could evolve in the future.

In drawing up its answer, which leaves no room for divergent interpretations, the Court will make a broad analysis of the requirement for transparency of contractual terms (the requirement of clear and intelligible wording), basing the reasoning on the basis of its previous jurisprudence. Referring to this jurisprudence, we note that the Andriciuc Judgment[22] will be raised in all the recitals concerning this question. As a preliminary point, it should be noted that according to its settled case-law, for a consumer, pre-contractual information, regarding the contractual conditions and the consequences of concluding the contract *is of fundamental importance* and involves the effective analysis by the consumer of all terms.[23] The consumer will decide, *in particular on the basis of that information,* if he wishes to bind himself according to the conditions drafted in advance by the professional.[24] Next, according to the same case-law, since the system of protection implemented by that directive is based on the idea that, as regards, *inter alia*, the level of information, the consumer is inferior to the professional, *the requirement for clear and intelligible wording of contractual terms* and therefore on transparency, imposed by the same directive, *must be understood extensively,* without being reduced only to its intelligible character formally and grammatically.[25] Specifically, the Court finds that the term which provides, in the context of a mortgage loan agreement, for the remuneration of such a loan by means of interest calculated on the basis of a variable rate, the requirement of transparency must be understood as requiring *not only* that the term be formally and grammatically intelligible to the consumer, *but also as an average consumer,* reasonably well-informed and reasonably observant and circumspect, *should thus be able to assess, on the basis of clear and intelligible criteria, the potentially significant economic consequences resulting from such a term on their financial obligations*.[26] In other words, the requirement for clear and intelligible wording of contractual terms presupposes *communication by the professional of all elements* which may have an effect on the extent of his obligations and which, at the same time, enable the consumer to assess the economic consequences of those terms on his financial obligations.[27] It

[22] For a broad analysis of this Judgment, See Gh. Piperea, *Francul elveţian. Concluziile după speţa Andriciuc*, https://www.piperea.ro/articol/francul-elvetian-concluziile-dupa-speta-andriciuc/

[23] In the same regard, the Opinion of the Advocate General, sections 106-109.

[24] See in this regard the Judgment RWE Vertrieb, C-92/11, EU:C:2013:180, section 44, Judgment Kásler and Káslerné Rábai, C-26/13, EU:C:2014:282, sections 66-70, as well as Judgment Gutiérrez Naranjo and others, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, section 50, as well as The Judgment of 20 September 2017, Andriciuc and others, C-186/16, EU:C:2017:703, section 48.

[25] See in this regard the Judgment Kásler and Káslerné Rábai, C-26/13, EU:C:2014:282, sections 71 and 72, as well as Judgment Bucura, C-348/14, unpublished, EU:C:2015:447, section 52, as well as Judgment Andriciuc and others, C-186/16, EU:C:2017:703, section 44.

[26] See in this regard and by analogy Judgment Kásler and Káslerné Rábai, C-26/13, EU:C:2014:282, section 75, as well as Judgment Andriciuc and others, C-186/16, EU:C:2017:703, section 51.

[27] The omission of the information considered essential in the credit agreement has a decisive role in assessing the fulfillment by the professional of the obligation to communicate all these elements.

should be noted here that the Court refers to the fact that, in its attempt to assess whether all these elements have been communicated to the consumer, the court *a quo* must take into account the level of attention that can be expected from an average consumer[28], reasonably well-informed and reasonably observant and circumspect.[29]

For the reasons given by the Court, it follows that the requirement for transparency of contractual terms must be understood in relation to three other subsidiary requirements:

a) the requirement to write the term clearly and intelligibly, so that it is understood by the consumer not only formally and grammatically, but also with regard to its concrete effects, such as the concrete operation of the method of calculating the variable interest rate under a mortgage loan agreement and the assessment of the economic consequences resulting from such a term.;

b) the requirement of pre-contractual information that the bank must make regarding the conditions of the contract as well as the consequences of concluding it;

c) the need to assess the first two requirements according to the standard of the average consumer.

In this context, the Court, in agreement with the Advocate General[30], will apply this line of case-law to the specific case of the contractual term which sets a variable interest rate in a mortgage contract, which is at issue in the main proceedings. Thus, it will point out that, as regards the verification of the requirement of transparency of a term in a mortgage loan agreement, which provides for the remuneration of that loan by means of interest calculated on the basis of a variable rate, whose exact value cannot be determined for the entire duration of this contract, it is relevant to note that the main elements relating to the calculation of the IRPH of Spanish savings banks were easily accessible to any person intending to take out a mortgage loan, since those elements were set out in Circular 8/1990 published in *Boletín Oficial del Estado*.[31] Regarding the obligation to inform the consumer of all the factors which may have an effect on the extent of his obligations and which are of such a nature as to give him an objective indication of the economic consequences arising from the application of such an index, the Court points out in its recitals the obligation of credit institutions, in accordance with the national rules in force at the time of the conclusion of the contract, to inform consumers of the evolution of the IRPH of Spanish savings banks, *during the two calendar years preceding the conclusion of the loan agreements,* as well as *on the last available amount*. Such information is a useful comparison between the calculation of

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See in this regard the Bucura Judgment, C-348/14, unpublished, EU:C:2015:447, section 66, as well as Judgment Andriciuc and others, C-186/16, EU:C:2017:703, section 47.

[28] For a doctrinal analysis of the concept of *average consumer,* See C. Toader, F. Lecomte, *Ultimele evoluţii în materia dreptului consumatorului în jurisprudenţa Curţii de Justiţie,* in the Romanian Journal of European Law, no. 3/2015, p. 34.

[29] See in this regard the Kásler and Káslerné Rábai Judgment, C-26/13, EU:C:2014:282, section 74, as well as the Matei Judgment, C-143/13, EU:C:2015:127, section 75.

[30] See sections 122 and 123 from the Opinion of the Advocate General, M. Szpunar.

[31] In the Court's view, this circumstance is such as to enable a sufficiently careful and knowledgeable consumer to understand that the index in question was calculated on the basis of an average of mortgage lending rates, for a period of more than three years for the purchase of a dwelling, thus including the average margins and expenses incurred by those institutions, and that, in the mortgage agreement in question, that index was rounded to a quarter of a percentage point which added another 0.25% margin.

the variable interest rate based on the IRPH of Spanish savings banks and other formulas for calculating the interest rate.

The Court will rule, on the basis of the arguments set out, that, *Article 4(2) and Article 5 thereof, must be interpreted as meaning that, with a view to complying with the transparency requirement of a contractual term setting a variable interest rate under a mortgage loan agreement, that term not only must be formally and grammatically intelligible but also enable an average consumer, who is reasonably well-informed and reasonably observant and circumspect, to be in a position to understand the specific functioning of the method used for calculating that rate and thus evaluate, on the basis of clear, intelligible criteria, the potentially significant economic consequences of such a term on his or her financial obligations. Information that is particularly relevant for the purposes of the assessment to be carried out by the national court in that regard includes the fact that essential information relating to the calculation of that rate is easily accessible to anyone intending to take out a mortgage loan, on account of the publication of the method used for calculating that rate, and the provision of data relating to past fluctuations of the index on the basis of which that rate is calculated.*

A final issue that the Court will be asked to address concerns the possibility for the national court to replace with a legal index the benchmark for calculating the variable interest rate, established by an unfair contractual term and sanctioned with nullity. The answer to this last question was predictable, given its established case law.

In constructing the legal reasoning, for the first time, the Court will reiterate, in general, its decision regarding the sanction of terms found to be unfair[32], provided for in Article 6 (1) of Directive 93/13, namely that national courts must remove the application of unfair terms so that they do not produce binding effects on the consumer, unless the consumer objects.[33] In extending this idea, the Court will refer to its case law in teh case of Banco Español de Crédito[34], Kásler and Káslerné Rábai[35], Abanca Corporación Bancaria and Bankia[36], according to which national courts have only the obligation to exclude the application of an unfair contract term, so that it does not produce binding effects on the consumer, without being able to change its content[37]; the contract must continue to exist, in principle, without any change other than that resulting from the removal of unfair terms, in so far as, in accordance with the rules of national law, such maintenance of the contract is legally possible. Also based on its previous jurisprudence[38], The Court goes on to recall that in the event that a contract

[32] Regarding the sanctions applicable to the unfair terms, See S. Angheni, *Drept comercial. Tratat,* C.H. Beck Publishing House, Bucharest, 2019, pp. 425-427.
[33] See in this regard the Pannon GSM Judgment, C-243/08, EU:C:2009:350, section 35, the Banco Español de Crédito Judgment, C-618/10, EU:C:2012:349, section 65 and the Abanca Corporación Bancaria and Bankia Judgment, C-70/17 and C-179/17, EU:C:2019:250, section 52.
[34] C-618/10, EU:C:2012:349, section 73.
[35] C-26/13, EU:C:2014:282, section 77.
[36] EU:C:2019:250, section 53.
[37] For an analysis of the possibility for the national court only to remove the unfair terms and the prohibition to modify its content, see. L. Bercea, notes on Kásler v. OTP Jelzálogbank. The key to reading a ruling of the Court of Justice of the European Union on unfair terms in consumer credit agreements, Romanian Journal of Business Law, no. 5/2014.
[38] See in this regard the Kásler and Káslerné Rábai Judgment, C-26/13, EU:C:2014:282, sections 80-84, Judgment Abanca Corporación Bancaria and Bankia, C-70/17 and C-179/17,

containing an unfair term can no longer survive its removal, Article 6 (1) of Directive 93/13/EEC must be interpreted as not precluding a rule of national law which allows the national court to remedy the invalidity of unfair terms, *by replacing them with a supplementary statutory law provision, in the situations where the national court would be obliged to annul the contract as a whole and the consequences would be particularly unfavorable to the consumer*, penalizing him rather than the professional.[39] Thus, if the national court were required to annul the loan agreement as a whole, the consequence of its annulment would have been the immediate maturity of the loan amount which remains due in proportions which risk exceeding the consumer's financial capacity.[40] Specifically, the Court will then find that, in the present case, although the disputed term provides that the variable interest rate is calculated on the basis of the IRPH of Spanish savings banks, the Court's file shows that this legal index, provided by Circular 8/1990, was replaced, by amending Law no. 14/2013 of September 27, 2013, with a substitution index, which the Spanish government describes as "supplementary". Thus, this amending legal provision provides for the application of the substitution index, in the absence of a different agreement between the contracting parties. We consider essential the conclusions set out in paragraph 66 of the judgment, the Court establishing the steps and at the same time the conditions that must be covered, respectively met, so that the national court can replace the unfair term with the substitution index provided by national law. Thus, we can deduce from these that a first stage is the finding by the national court of the unfair nature of the disputed term, then, in the next stage, the court must ascertain that the mortgage loan contract that is the subject of the dispute could not survive without this term and, in a third stage, the annulment of this contract would expose the consumer to particularly unfavourable consequences. To these conditions that must be fulfilled cumulatively, a fourth condition is added, namely, the supplementary character of the legal index. Thus, the national court could replace the mentioned term with the substitution index referred to by Law 14/2013 of 27 September 2013, *only if* it can be considered as having a *supplementary character* in relation to the national law, ie the respective legal index is applicable, unless otherwise agreed by the contracting parties.

In conclusion, the Court will rule that *Article 6(1) and Article 7(1) of Directive 93/13 must be interpreted as not precluding the national court, where an unfair contractual term setting a reference index for calculating the variable interest of a loan is null and void, from replacing that index with a statutory index applicable in the absence of an agreement to the contrary between the parties to the contract, in so far as the mortgage loan agreement in question is not capable of continuing in existence if the*

EU:C:2019:250, sections 56 and 64, as well as the Dziubak Judgment, C-260/18, EU:C:2019:819, section 48.

[39] The Court has also held that such a replacement is fully justified in the light of the purpose of Directive 93/13, in accordance with the purpose of Article 6 (1) of Directive 93/13, as this provision seeks to replace the formal balance established by the contract between the rights and obligations of the contractors with a real balance which is likely to restore equality between these parties and not to annul all contracts containing unfair terms.

[40] See in this regard the Judgment Kásler and Káslerné Rábai, C-26/13, EU:C:2014:282, sections 83 and 84, as well as Judgment Abanca Corporación Bancaria and Bankia, C-70/17 and C-179/17, EU:C:2019:250, section 58.

unfair term is removed and annulment of that agreement in its entirety would expose the consumer to particularly unfavourable consequences.

2 Conclusions

It is undeniable that the Court 's answers to the questions referred in the Case of Marc Gómez del Moral Guasch are once again particularly useful to national courts in resolving unfair terms disputes and enrich its considerable contribution in ensuring the uniform application and interpretation of legislation throughout the European Union. The national courts have an overwhelming role to play in the correct application of these mandatory clarifications, in order to achieve both the general purpose proposed by consumer protection legislation, respectively to provide the consumer with a high level of protection in his relations with professionals, in particular to remedy the imbalance existing between the parties at the time of concluding the contract, as well as the special purpose proposed by Directive 13/93, which is to prevent the application of unfair terms in consumer contracts.

In this context, we note with disappointment that in Romania, the unequivocal answers of the CJEU, favorable to the consumer, pronounced in the Andriciuc Judgment – one of the most important decisions on unfair terms – have generated divergent interpretations and applications, a large part of the court solutions being pronounced to the detriment of consumers.

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Theft of food for subsistence is not a crime*

Lect. univ. dr. Burduşel R.

"Titu Maiorescu" University, Faculty of Law (ROMANIA)

Abstract

The court ruling acquitting a person for the crime of theft of food for subsistence, handed down by the Italian Supreme Court in 2016, presented a wide interest in the press, which described it as a historical decision and a precedent for similar situations.

However, the case raises, especially, a special legal interest in the light of basis of the justifying cause of the state of necessity, retained by the supreme court in solving the concrete case.

Keywords: theft, food, survival, acquittal, precedent

1 Introductory considerations

States constantly refer in their criminal codes to certain causes (self-defense, state of necessity, consent of the injured person, exercise of a right or fulfillment of an obligation, physical or moral coercion, the minority of the perpetrator, unimputable excess, irresponsibility, intoxication, error, unforeseeable circumstances) to whom they attributed the effect of removing the criminal character of the deed, of excluding the criminal liability of the person who committed the deed and, at the same time, the effect of defending him, even though his conduct is prohibited and sanctioned by law.

This constant presence in the legal systems of European and non-European countries, especially of self-defense and the state of necessity, has a unanimously accepted motivation, namely, the laws of human nature, which justify deviations from the state norm.

We do not know communities, starting from the archaic to the modern day society, where the need for security, defense, rescue, solidarity, charity, thirst, hunger, cold was opposed by the positive law.

On the contrary, the legal order of the community recognized the primacy of the natural in relation to the law and allowed man to behave, in extreme situations, in the

* Throughout the span of the paper, I deliberately did not present in detail the justifying cause of the state of necessity or other institutions, because I wanted the paper to be a paper on ideas and not a substantive one.

sense of satisfying his existential needs generated by the law of nature, violating, if necessary, the positive law. Thus, the law of nature became the cause of deviant behavior, which only had to be ascertained and not legislated by the state.

However, although the state accepted that the Law of Nature ("natural law") is above it, it was not always the only substantiation of the exemption from criminal liability and punishment, because the one who defends or saves rights reacts in various social situations with dangerous potential.

The diversity of situations in which the state of necessity can be met (the justifying cause that we will tackle below) has led to multiple theoretical justifications for accepting the illicit as licit, which the doctrine has grouped into objective theories and subjective theories. These theories can explain the divergent solutions of the three Italian courts (two convictions and one acquittal), although the starting point was common: Article 54 of the Italian Penal Code regarding the state of necessity.

2 The *de facto* situation

During 2011, a Ukrainian immigrant, named Roman Ostriakov (R.O.), in a supermarket in Genoa to buy food, he tried to leave the store paying only for bread, while two pieces of cheese and a packet of sausages were hidden in his jacket.

Being seen by another buyer, who informed the store guards, he is detained before leaving the supermarket, and the stolen food, in the amount of 4.07 euros (18 lei at that time), were found on him and returned to the store.

Other facts about R. O. show that he is a 30-year-old homeless man who sleeps on the streets of Genoa and has a history of stealing little amounts of food to quench his hunger.[1]

3 *De jure* considerations

R.O. was sued and the first court of trial, the Court of Genoa, convicted him, in 2012, for committing the crime of theft in the form provided in Article 624 in conjunction with Article 626 (2) Of the Italian Penal Code to 6 months in prison and a fine of 100 euros[2].

The Court of Appeal of Genoa, in 2013, admitted the appeal against the judgment of the Court of Genoa and maintained the conviction sentence of the first instance.

The case is retried in 2016 by the Supreme Court of Cassation, in view of the appeal, and the court annuls the sentences of conviction, because the deed is not a crime, being committed under the conditions of necessity provided in Article 54 of the Italian Penal Code, which it results from the "condition of the defendant and from the

[1] https://cursdeguvernare.ro/italia-decizie-de-impact-a-curtii-de-casatie-furtul-unor-mici-cantitati-de-alimente-de-catre-infometati-nu-e-infractiune.html;
https://www.studiocataldi.it/articoli/34110-cassazione-il-furto-per-fame-resta-reato.asp;
https://www.lastampa.it/cronaca/2016/05/02/news/rubare-per-fame-non-e-reato-la-cassazione-assolve-un-clochard-1.34996554.

[2] https://www.marieclaire.ro/furtul-motivat-de-foame-nu-e-infractiune/.

circumstances in which he committed the deed, namely, the appropriation of a small amount of food to satisfy his need for immediate and indispensable food"[3].

The Supreme Court also ruled that "the right to survival prevails over the right to property and that in times of economic hardship, in a civilized country, not even the worst people should be deprived of food".

We believe that the acquittal decision based on the state of necessity is based on the court's assessment that the application of a penalty in the specific case would not have been necessary, otherwise several institutions, which were discussed in the appeal phase and are mentioned in the decision, could lead to a solution of mitigated conviction.

We consider the application of mitigating circumstances [Article 62 (4) of the Italian Penal Code], the exclusion of the punishment for minor offenses, under certain conditions (Article 131 bis of the Italian Penal Code) or the mild punishment for thefts sanctioned upon the prior complaint of the injured person [Article 626 (2) of the Italian Penal Code].

The main criminal institutions incident in this case, to which the Romanian courts refer in similar cases, (crime, theft offense, theft on prior complaint, attempted, recidivism, mitigating circumstances, state of necessity), whose concrete application we will not present, as we follow the decision pronounced from the perspective of the basis of the state of necessity, have a common regulation with the ones also present in the Romanian Criminal Code.

Thus, the state of necessity is stated in Article 54 of the Italian Penal Code[4]: "*(The state of necessity)*. The perpetrator cannot be punished for being compelled by the need to save himself or to save others from the real danger of serious harm to the person, a danger caused by him involuntarily, which otherwise could not have been avoided, provided that the act is proportionate to the danger (Article 384).

This provision does not apply to those who have a special legal duty to expose themselves to danger.

The provision in the first part of this article also applies if the state of necessity is determined by the threats of another; but, in this case, the person liable is the one who obliged the threatened person to commit the act. (Article 55, 59, 111, 611; 2045 of the Civil Code; 41 of the Peacetime Military Penal Code)"[5].

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[3] http://m.luju.ro/dorel-i-ar-fi-dat-3-ani-cu-executare-curtea-suprema-de-casatie-a-italiei-a-anulat-condamnarea-unui-roman-prins-la-furat-pe-motiv-ca-fapta-nu-e-infractiune-a-sustras-putina-mancare-pentru-a-face-fata-nevoii-imediate-si-esentiale-de-a-se-hrani-actionand-ast

[4] "Art. 54. Stato di necessità. Non è punibile chi ha commesso il fatto per esservi stato costretto dalla necessità di salvare sé od altri dal pericolo attuale di un danno grave alla persona, pericolo da lui non volontariamente causato, né altrimenti evitabile, sempre che il fatto sia proporzionato al pericolo.
Questa disposizione non si applica a chi ha un particolare dovere giuridico di esporsi al pericolo.
La disposizione della prima parte di questo articolo si applica anche se lo stato di necessità è determinato dall'altrui minaccia; ma, in tal caso, del fatto commesso dalla persona minacciata risponde chi l'ha costretta a commetterlo.

[5] https://baixardoc.com/download/codul-penal-italian-5ccdf67664fe4?hash=ceaff44a753f44ecdc379126c72f9aea

4 The reception of the decision of the Supreme Court of Cassation in the Italian press

The decision of the Italian supreme court was quickly taken over by the Italian press, but also by publications around the world[6].

This was presented as:

a) a precedent for similar situations, given immigrants;
b) a fair and relevant decision;
c) a decision of historical importance;
d) a decision that will bring about social change.

The decision was also appreciated for giving a definitive legal solution to a social problem, namely – poverty – "when statistics show that 615 people reach the category of poor in Italy every day, and it would be unimaginable that the law does not account of this reality".

5 The legal solution according to the Romanian Criminal Code

If the interest shown by the press in criminal justice anywhere in the world, has long been a common occurrence and the media coverage is a widespread act of information, all the more so does this draw attention to the legal issues in this case, because incidental legal institutions are regulated in most criminal codes.

Specifically, the Italian Supreme Court upheld a justifiable cause, namely – the state of necessity – by which the decision to acquit the defendant R.O. for committing the crime of stealing necessary food was motivated, and the previous convictions of the courts of first instance and that of the court of appeal were annulled.

The decision of the Italian court is of interest, on the one hand, as a legal solution based on the justifying cause of necessity, a case present in the Romanian Criminal Code, but with a different regulation, however similar, and, on the other hand, for the concrete situation in which the state of necessity was applied, similarly to situations in which the Romanian courts also ruled, however the rulings were condemnatory.

In the Romanian criminal law, to the cases of low severity, as is the case solved by the Italian courts, are applicable institutions from the Criminal Code and from the Code of Criminal Procedure that come with alternative procedural solutions, either in the sense of avoiding conviction, or in the sense of avoiding the application of the punishment, in case the sentence is pronounced.

We take into consideration the following institutions:

1. waiving the criminal investigation (Articles 17, 18, 318, 319 Code of Criminal Procedure);

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6 http://totb.ro/furtul-de-hrana-nu-e-infractiune-daca-a-fost-motivat-de-foame-a-decis-justitia-italiana/; http://cursdeguvernare.ro/italia-decizie-de-impact-a-curtii-de-casatie-furtul-unor-mici-cantitati-de-alimente-de-catre-infometati-nu-e-infractiune.html; http://www.altalex.com/documents/news/2016/05/06/furto-stato-di-necessita. https://www.ilgiornale.it/news/cronache/cassazione-rubare-reato-anche-quando-si-ha-fame-1365049.html;

2. waiving the enforcement of the sentence (Articles 80-82 of the Criminal Code, Articles 396 (3) of the Code of Criminal Procedure);

3. postponing the enforcement of the sentence (Articles 83-90 of the Criminal Code, 396 (4) of the Code of Criminal Procedure).[7]

5.1 *Brief evolution in time of the justifying cause – the state of necessity*

The evolution in time of the regulation concerning the state of necessity, consisting in knowing the various theories that have admitted or rejected, with or without certain reservations, this case in the state criminal legislation, shows, on the one hand, the constant and continuous preoccupation of lawyers to find the most rational foundation justifying the state of necessity, and, on the other hand, the moral, material, legal, ethical unpreparedness of society to accept it, ranging from challenging it, even when a final judgment legally imposes it, to recognizing it as a natural right.

The same history of regulating the state of necessity, but enshrined in law, shows, at present, that the concern to legitimize it legally ceased with the unanimous acceptance of the *concept of necessity*, which gave the name of the justifying state, but continues in terms of justification of necessity.

Both objective and subjective theories have competed in displaying a wide range of diversity in justifying the need to commit the act in order to exonerate the person from criminal liability and the application of the sentence.

Thus, the following were proposed as justifying reasons for the need to commit the act: removal of a serious danger, force majeure, fortuitous event, physiological needs, poverty, human solidarity, duty of mutual assistance, close connection with family, friendship, forgiveness, community of goods, heroism, altruism, the duty of charity towards one's fellow man, the saving of an interest protected by law, the absence of the social utility of punishment, the conflict between rights and goods.[8]

The impossibility of limiting reality to a controllable number of reasons, homogeneous and exclusive, determined the consecration in canon law of the principle that necessity has no law, because "it does not obey any command"[9]

In conclusion, the jurists started from different premises, so that a general theory of the basis of the state of necessity does not exist, which explains the legal solutions that differ from country to country although the basis of the necessity of committing the act is a commonly accepted one.

In such a context is the decision of the Italian Supreme Court when motivating the solution based on physiological necessity (hunger), tilting the balance in favor of social, and to the detriment of law, triggering widespread public reactions to the solution, embodied in the media coverage and comments on the case.

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[7] https://www.laleggepertutti.it/119441_rubare-per-fame-non-e-reato.

[8] I. Tanoviceanu, *Curs de drept penal*, Atelierele Grafice Socec & Co. Publishing House, Bucharest, 1912, pp. 460-465; T. Pop, *Drept penal comparat, partea generală*, Institutul de Arte Grafice "Ardealul" Publishing House, Cluj, 1923, pp. 539-548; V.A. Ionescu, *Legitima apărare și starea de necesitate*, Ştiinţifică Publishing House, Bucharest, 1972, pp. 161-172.

[9] I. Kant, *Metafizica moravurilor*, Antaios Publishing House, Bucharest, 1999, p. 73.

In this general framework of satisfaction generated by the act of justice, the doubt of the Italian press takes shape: did the supreme court solve a legal case by a legal decision or did it solve a social case and gave a social answer dressed in legal clothes, case in which the legal solution is debatable.

We believe that the second part of the question is closer to reality, because the solution of the Italian court could not be pronounced on the basis of the present regulation of the state of necessity, from the Romanian Criminal Code, although its regulations are similar.

5.2 *The substantiation of the state of necessity*

There is currently no single scientific theory in legal doctrine to explain the basis of the state of necessity. The conclusions reached by jurists over time are found in two theories, namely, objective theories and subjective theories...

A. Objective theories justify the deed committed in a state of necessity by the general interest of the rule of law to save social values (rights) threatened in accidental, dangerous social situations. Because all values are subject to the same danger, there being a risk that they all disappear, theories have resorted to the criterion of assessing their importance.

Thus, these values can be equal in importance, and then the save will only relate to some of them, if not all can be saved.

Values can be unequal in importance and then the most important will be saved to the detriment of others.

In the event that the saved value is lower than the sacrificed value, the deed will no longer be justified by the state of necessity, but will be unimputable to the rescuer according to the case the unimputable excess.

In conclusion, the act by which some values are saved and others sacrificed is not a crime, does not attract criminal liability or sanction, because it is not contrary to the rule of law, thus being justified.

The premise of objective theories is given by the conflict of equal values, or different in importance, whether or not always exposed to a common danger, values equally entitled to protection, but for which the law cannot guarantee the salvation of all, nor condemnation of some for the salvation of the others. The social interest of the rule of law is then satisfied if at least one of the values is saved.[10]

B. Subjective theories are based on the constraint of the will of the perpetrator of the act of salvation, from a grave danger, which prevents him from acting according to his conviction, forcing him to commit an act provided by criminal law.

[10] V. Dongoroz, *Drept penal*, reeditarea ediţiei din anul 1939, Societăţii Tempus Publishing House, Bucharest, 2000, pp. 354-356; George Antoniu, *Vinovăţia penală*, Academiei Române Publishing House, Bucharest, pp. 286-288; Florin Streteanu, Daniel Niţu, *Drept penal, partea generală*, curs universitar, vol. I, Universul Juridic Publishing House, Bucharest, 2014, p. 375; Viorel Pașca, *Drept penal*. *Partea generală*, Universul Juridic Publishing House, Bucharest, 2014, p. 208.

Thus the savior does violate the criminal law, but lacks guilt, because he does not act freely, and the deed loses its criminal character by the permission of the law.

In conclusion, the state of necessity is either a justifiable cause, based on the interest of the rule of law, or a cause of innocence, based on coercion.[11]

Based on the two theories, the states defined the state of necessity differently, opting either for one or the other of the theories or even for a mixed solution.[12]

In the Italian Criminal Code, the legislator opted for the mixed solution, the state of necessity being based on both the constraint of the savior and the social interest[13], which explains the different solutions pronounced in identical or at least similar situations, such as that of food theft motivated by the quenching of hunger.

In the system of the New Romanian Criminal Code, the legislator gave up the substantiation of the state of necessity on coercion, proper to the subjective theories and aimed to the objective theories.

But the doctrine notices that these theories are not covered in their entirety in the definition of the state of necessity, because when the saved value is lower than the sacrificed one, it can no longer operate the justifying cause of the state of necessity, this being conditioned by the non-production of obviously more serious consequences than those that could have occurred if the danger had not been removed, a situation in which either the unimputable excess can intervene, if the rescuer did not realize the occurrence of manifestly more serious consequences than those that could have occurred if he had not acted, or the mitigating circumstance of exceeding the state of necessity, if he noticed the difference between the values saved and those sacrificed[14].

From this perspective, it was proposed in the doctrine that the state of necessity be based on the lack of a significant prejudice to the social order[15].

In the current conditions of globalization of law, it is possible that the Italian Supreme Court has opted for this basis, and noting that there was no harm brought to society or that it was insignificant if it existed, so that the legal order was not disturbed, it pronounced the acquittal of the accused.

Such an approach to the theft of food for the purpose of appeasing hunger, in the current conditions of regulation of the state of necessity in Article 20 of the Penal Code cannot lead to the issuance of an acquittal.

The solution of conviction followed by recourse to instruments such as waiving the criminal investigation, waiving the application of the sentence, postponing the application of the sentence or suspending under supervision its execution or ascertaining the mitigating circumstances, cannot be removed by invoking the state of necessity, as we consider that the theft of food for subsistence is a social problem whose approach must not be legal, but also social.

We list, in this respect, the following arguments:

1. The state of necessity is not based on the subjective theory of coercion (hunger);

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[11] *Ibidem*.
[12] G. Antoniu, *op. cit.,* p. 288.
[13] A se vedea nota 4.
[14] V. Pașca*, Drept penal. Partea generală*, Universul Juridic Publishing House, Bucharest, 2014, pp. 208-209; M.-C. Ivan, G. Ivan, *Cauzele justificative*, Universul Juridic Publishing House, Bucharest, 2016, pp. 120-121.
[15] Fl. Streteanu, Nițu D., *op. cit.,* p. 375.

2. The Romanian legislator based the state of necessity on the *need to save* certain social values from an immediate and unavoidable danger by committing a criminal act, provided that the consequences of the criminal act are not manifestly more serious than the consequences that could have occurred if the criminal act had not been committed to remove the danger;

3. The state of necessity must not legitimize what is unjust;

4. The act committed is reprehensible, although it causes a small damage, because it violates a right, without there being (or without having) "another right" to allow such a thing. One right must be opposed by another right as an obligation;

5. The act is an offense of theft because a provision of law is violated (Article 228 of the Criminal Code), and the legislator does not justify the violation in the conditions of the case and neither does the owner express his consent;

6. Physiological needs (hunger) must not legitimize minor thefts unless there is the will of the legislator in this regard. Theft is a misappropriation, the right can only be given by the state by law, recognizing the "right" to take limited ownership of another person's property;

7. The deed committed in a state of necessity must be necessary to save a value. Eating stolen foods (bread, sausages, cheese) does not save any value, just as eating only bread does not bring damage to any value;

8. The act of rescue (food theft) does not present any danger which, in the given circumstances, could not have been removed by other means;

9. The sacrifice of property is not the only possible solution to removing the immediate danger of hunger. But sacrificing the right of another is justified when the danger is due to causes such as fire, the attack of a rabid dog, flood, the collapse of a wall, because the imminent violation of the protected right does not offer alternatives of salvation;

10. In the new Criminal Code, the social danger of a deed is no longer an essential feature of the crime, any deed provided by criminal law can be considered a crime, regardless of the degree of social danger

However, for not sanctioning acts with a low level of danger, the legislator should express his will expressly and extensively;

11. The state of necessity imposes the condition that the immediate danger (of hunger) cannot be removed otherwise than by committing the act of rescue. But the state of hunger is naturally present in every person, and the danger of hunger is removed only temporarily after eating food. The return of hunger leads to committing new criminal acts; which shows that it is not the commission of acts justified by law and subsequently acquitted that is the way to remove the state of danger of hunger;

12. The duty to preserve ourselves is imposed naturally and is common to all people, but at the same time we are obliged to work to sustain ourselves;

13. The right to subsistence must be opposed by another right as an obligation to respect it (the right to property);

14. In all states that have recognized and protected property rights, theft has been a criminal offense and the perpetrator has been punished. Only where the theft was expressly motivated, the act was not a crime;

15. No store owner, large or small, would agree to accept the theft of even small amounts, but the law must be obeyed;

16. Hunger can justify the criminal act, but only in conditions of extreme necessity. In fact, the examples retained in the doctrine come from distant periods, when mankind was hard pressed by famine. Theft was considered the crime of misery and despair, and the one without means of existence was unable to abide by the law[16];

17. States know that there are people who ensure their livelihood only through crime, but not all of these acts are of grave seriousness, so states can decriminalize them (i.e. begging);[17]

18. Cases that lead to the moderate application of criminal law must intervene only in exceptional situations of law, which the legislator must provide;

19. The state of necessity is a random, dangerous situation from which a right can be saved only by committing a deed provided in the penal law. In the present case, neither his life, nor his health, nor his bodily or mental integrity were in that dangerous situation, which would have led to their loss if it were not for the stolen food and from which he could have been saved only by committing theft;

20. Accepting the saving of one value by sacrificing another in the interest of the rule of law can be an exceptional solution, such as that of the Italian court, but not always and only once, not when the deed becomes a habit;

21. The repetition of the need for food insurance shows that the problem is not a criminal one, but rather a social one, and the solution is not a legal one, but requires social measures (social canteens, public donations, job offers, the organization of a free food space for such cases inside stores, granting financial exemptions for this purpose);

22. The Romanian court would be wrong to rule on an acquittal, on the one hand, because it lacks legal support, and, on the other hand, because it would not discourage the commission of food theft in order to satisfy hunger. Such criminality decreases through the development of effective social policies;[18]

23. In such cases it would be wrong to compare the income of the injured party with the damage caused to him by the deed committed, because we would arrive at different solutions. Thus, in the case of theft causing harm to a person with high income, the solution would be decriminalization or impunity based on a justifiable cause, whereas in the case of the same theft, but committed to the detriment of a person with low income, the solution would be sanction, but with a reduced sentence.

6 Conclusions

I believe that the theft of food in small quantities, for subsistence, should not remain a crime, but should be reconsidered and qualified as a social act and for all minor crimes, not only those related to property, the legislator should create a general and distinct text of law in which to show the conditions of non-sanctioning or decriminalization of the deed and not to leave the ascertainment of the nature and gravity of the deeds to the subjective assessment of the court.

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[16] C. Beccaria, *Despre infracţiuni şi pedepse*, Rosetti Publishing House, Bucharest, 2001, pp. 84-85.
[17] M.G. Losano, *Marile sisteme juridice*, All Beck Publishing House, Bucharest, 2005, p. 108.
[18] A. Filipaș, *Drept penal român. Partea specială*, Universul Juridic Publishing House, Bucharest, 2008, p. 344.

The impunity of the facts that infringe the rights of other persons is an exceptional situation, which requires exceptional solutions.

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The Role of the Consent in Differentiating the Crimes of Rape and Sexual Intercourse with a Minor

Nour A.

Lecturer, PhD., Faculty of Law, Hyperion University of Bucharest (ROMANIA)
E-mail: andrada_nour@yahoo.com

Abstract

Respecting the provisions of the international conventions on human rights to which our country is a party, it is assumed that domestic law would contain all necessary measures for the efficient protection especially of vulnerable people and children, to prevent maltreatment and to discourage any form of abuse.

Although there is a fairly wide margin of appreciation for the prevention and punishment of very serious criminal offences, including rape, however, according to the European Convention on Human Rights and other international documents, the regulated criminal provisions must be very efficient, and their implementation should be tailored so that children and all vulnerable people benefit from increased and effective protection, while respecting and guaranteeing the best interests of the child.

In order for justice to be done in the best interests of the child and for their protection against any form of sexual abuse, we believe that the most complex and efficient criminal law is necessary, the application of which should be done through a unified judicial practice and effective.

Keywords: criminal law, victim's consent, minors, rape, sexual intercourse with a minor

1 Relevant International and European Instruments in the Field of Child's Protection – Victim of Sexual Offences

Under Article 19 of the Convention on the Rights of the Child [1], an international document with binding legal force on both signatory countries and members of the Council of Europe, "(1) States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s),

legal guardian(s) or any other person who has the care of the child. (2) Such protective measures should, as appropriate, include effective procedures for the establishment of social programs to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement".

Article 34 of the same document also states that "States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent: (a) The inducement or coercion of a child to engage in any unlawful sexual activity; (b) The exploitative use of children in prostitution or other unlawful sexual practices; (c) The exploitative use of children in pornographic performances and materials".

At the same time, we consider it necessary to mention the fact that, in the General Comment no. 13 (2011) on the right of the child to protection against all forms of violence, the United Nations Committee on the Rights of the Child, which is responsible for monitoring compliance with the Convention and its protocols, states the following: "Investigation of instances of violence, whether reported by the child, a representative or an external party, must be undertaken by qualified professionals who have received role-specific and comprehensive training, and require a child rights-based and child-sensitive approach. Rigorous but child-sensitive investigation procedures will help to ensure that violence is correctly identified and help provide evidence for administrative, civil, child-protection and criminal proceedings. Extreme care must be taken to avoid subjecting the child to further harm through the process of the investigation. Towards this end, all parties are obliged to invite and give due weight to the child's views."

According to Article 3 of the European Convention on Human Rights, "No one shall be subjected to torture or to inhuman or degrading treatment or punishment", and in accordance with Article 8, "Everyone has the right to respect for his or her privacy."

The Council of Europe Convention for the Protection of Children against Sexual Exploitation and Sexual Abuse[2] is the responsibility of States Parties to provide the necessary regulatory framework at the national level to discourage and prevent the sexual exploitation and sexual abuse of children. In this regard, Article 18 (Sexual Abuse), regulated in "Chapter VI – Substantive Criminal Law", provides that "(1) Each Party shall take the necessary legislative or other measures to ensure that the following intentional conduct is criminalized: a. engaging in sexual activities with a child who, according to the relevant provisions of national law, has not reached the legal age for sexual activities; b. engaging in sexual activities with a child where: – use is made of coercion, force or threats; or – abuse is made of a recognized position of trust, authority or influence over the child, including within the family; or – abuse is made of a particularly vulnerable situation of the child, notably because of a mental or physical disability or a situation of dependence". The content of this article also states that it will be up to each state to establish the age limit until which it is forbidden to engage in sexual activity with a child, noting that the provisions cited are not incidental when it is about consensual sexual activities between minors.

The Convention on Preventing and Combating Violence against Women and Domestic Violence[3], in terms of sexual violence, and implicitly rape, provides in

Article 36 that "(1) Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalized:

a). engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object;

b). engaging in other non-consensual acts of a sexual nature with a person;

c). causing another person to engage in non-consensual acts of a sexual nature with a third person", and regarding the consent emphasizes that it must be "voluntary, as a result of the person's free will, assessed in the context of the surrounding circumstances".

The Convention further provides for the need for the signatory States to adopt, in addition to legislative measures, any other measures so that investigations and judicial proceedings in relation with all forms of violence covered by the application field of this Convention are carried out effectively, without undue delay and respecting the rights of the victim during all stages of criminal proceedings and in accordance with the fundamental principles of human rights[4]. Member States must also take all necessary measures to ensure that evidence of the victim's sexual history and sexual conduct is approved only when it is necessary and relevant in a civil or criminal case brought before the court[5], and of children who are victims or witnesses of domestic violence or directed against women, to be granted special protection measures, respecting the best interests of the child[6].

It should also be noted that the annex to Recommendation Rec (2002) 5 of the Committee of Ministers of the Council of Europe on the protection of women against violence stipulates in point 35 that signatory countries must penalize all acts with sexual character committed without the consent of the victim, even if there are no signs that the victim has resisted, as well as any abuse of authority by the perpetrator, especially when he is abusing his position towards a child.

Last but not least, Directive 2011/93/EU of the European Parliament and of the Council on combating the sexual abuse, sexual exploitation of children and child pornography[7] expressly emphasizes that sexual exploitation of children and child pornography are serious crimes whose approach must include the criminal prosecution of criminals, the protection of child victims, as well as the prevention of the phenomenon. At the same time, it is stated that "the best interests of the child shall be a key element in the conduct of any measures to combat such crimes in accordance with the Charter of Fundamental Rights of the European Union and the United Nations Convention on the Rights of the Child." The Directive also emphasizes that any child who is the victim of such crimes must be heard either by or with the help of professionals specialized for this purpose.

2 Incrimination of Crimes of Rape and Sexual Intercourse with a Minor in National Law

In the version of the new Criminal Code, the crime of rape provided in article 218, has the following wording:

(1) Sexual intercourse, oral or anal intercourse with a person, committed by coercion, making it impossible to defend himself or to express his will, or taking

advantage of this state, shall be punished by imprisonment from 3 to 10 years and the prohibition of exercising certain rights.

(2) With the same punishment shall be sanctioned any other acts of vaginal or anal penetration committed under the conditions of par. (1).

(3) The punishment is imprisonment from 5 to 12 years and the prohibition of exercising certain rights when:

a) the victim is in the care, protection, education, guarding or treatment of the perpetrator;

b) the victim is a direct relative, brother or sister;

c) the victim is a minor;

d) the deed was committed for the purpose of producing pornographic materials;

e) the deed resulted in bodily injury;

f) the deed was committed by two or more persons together.

(4) If the deed resulted in the death of the victim, the punishment is imprisonment from 7 to 18 years and the prohibition of the exercise of certain rights.

(5) The criminal action for the deed provided in par. (1) and (2) shall be initiated upon the prior complaint of the injured person.

(6) The attempt to the offenses provided in par. (1)-(3) shall be punished.

The offence of sexual intercourse with a minor has been defined in Article 220, with the following wording:

(1) Sexual intercourse, oral or anal intercourse, as well as any other acts of vaginal or anal penetration committed with a minor between the ages of 13 and 15 years is punishable by imprisonment from one to 5 years.

(2) The deed provided in par. (1), committed on a minor who has not reached the age of 13, shall be punished by imprisonment from 2 to 7 years and the prohibition of the exercise of certain rights.

(3) The deed provided in par. (1), committed by an adult with a minor aged between 15 and 18, shall be punished by imprisonment from 2 to 7 years and the prohibition of exercising certain rights if:

a) the minor is a family member of the adult;

b) the minor is in the care, protection, education, guarding or treatment of the perpetrator or he has abused his position of trust or authority over the minor or his particularly vulnerable situation, as a result of a mental or physical disability or as following an addictive situation;

c) the act endangered the life of the minor;

d) was committed for the purpose of producing pornographic materials.

(4) The deed provided in par. (1) and par. (2) shall be punished by imprisonment from 3 to 10 years and the prohibition of the exercise of certain rights, when:

a) the minor is a family member;

b) the minor is in the care, protection, education, guarding or treatment of the perpetrator or he has abused his position of trust or authority over the minor;

c) the act endangered the life of the minor;

d) was committed for the purpose of producing pornographic materials.

(5) The facts provided in par. (1) and par. (2) shall not be sanctioned if the age difference does not exceed 3 years.

(6) The attempt to the offenses provided in par. (1) and (2) shall be punished.

3 Controversial Issues Concerning the Assessment of the Minor's Consent

The incriminating formulas of the two acts show that the essential difference between the crime of rape and that of sexual intercourse with a minor relates to consent, in the sense that rape involves sexual intercourse or oral or anal intercourse committed without consent, as opposed to sexual intercourse with a minor which involves committing the same acts, but with the consent of a minor who has not reached the age of 15.

The crime of rape involves the lack of consent of the victim and when there are no signs of violence, this is very difficult to prove. However, we believe that the courts should interpret the attitude of minor victims towards the deed, especially in relation to their very young age, and less towards the expression of consent, especially when the age difference between the perpetrator and the victim is considerable.

The court is responsible for the correct legal classification of the deed, regardless of the classification made by the injured party or the defendant, as any case is characterized by the facts that make up its object, not only by the arguments and legal bases invoked, as in the case of complaints submitted to the European Court of Human Rights[8].

From the analysis of the text of article 218 of the Penal Code, we note that the legislator did not condition the existence of the crime of rape by the physical resistance of the victim, remaining at the discretion of the court and of the criminal investigation body the interpretation of the notions of coercion and impossibility of the victim to defend or to express the will for the legal classification of the act in rape or sexual intercourse with a minor, when the victim has not reached the age of 15, considered as legal to consent to the involvement in a sexual act or intercourse. Therefore, the existence of the consent will be established by the court, depending on the circumstances of the case brought before the court.

We agree that, in the absence of direct evidence that would undoubtedly lead to the legal classification of the deed in the crime of rape, it is often very difficult to prove the lack of consent. Therefore, there may be situations in which it is not possible to prove beyond any doubt that the victims would not have consented to engage in sexual activities.

In the practice of the courts, there was a general tendency to include an act in the sphere of the crime of rape only if it was committed with violence. Another general tendency at court level has been the interpretation of victims' attitudes, such as the fact that they did not confess their incidents to their parents or did not cry for help, as consent, although such reactions are specific to children in traumatic experiences. Also, there are quite a few cases in which the courts have requested psychiatric medical forensic examinations to assess the validity of the consent and just as there are few in which the courts have found that the very young age of minors (usually under 11 years) prevented them from knowingly consenting[9].

It is very true that, in the most of the cases, children have been sexually abused by people from social environments close to them, or even from the family environment, which has led them to confess with great difficulty that they have been sexually abused, either because they were induced by feelings of fear, or because they were induced by

feelings of shame. It is also true that most of the time such abuses were committed by threatening acts of physical violence that could break the tendency of children to self-defense, so it is not surprising that in many of the medical forensic reports there are no signs of violence on the victims' bodies. Moreover, perpetrators often invoke in court that they resorted to committing such acts because they were provoked by the attitude of the minors or by the fact that they were summarily dressed, aspects which, we are convinced, blame the minors after committing the act, manipulating them psychologically so as to cultivate feelings of shame and guilt that would cause them to remain silent about the abuses they were subjected to. Often these children end up being the victims of repeated abuse without anyone knowing what is happening to them. Sometimes, such abuses manage to emerge as an effect of pregnancy. We must keep in mind that there are a lot of circumstances in which the perpetrators of sexual abuse are elderly adults with life experience, which makes it easier for them to manipulate human beings as vulnerable and naive as children.

Often, in the psychiatric medical forensic examinations prepared at the request of the courts for such cases, it is found that the victims are affected by post-traumatic stress, having vivid memories of the events experienced, that minors speak ashamed of the abuses they were subjected to, that they chose to remain silent and to hide that they have been the subjects of such incidents of fear for personal safety or even for the safety of the family. At the same time, during the preparation of medical forensic examinations, it was found that, as a rule, when the victims are minors under 14 years of age, they showed a diminished discernment due to age, as well as difficulties in anticipating the consequences of the actions they were subjected to, even if they initially consented to their involvement in those sexual activities.

Unfortunately, there are situations when criminal investigation bodies do not sufficiently analyze the circumstances of the crime, precisely because they ignore the vulnerability of minors and the extremely traumatic effects of the experience of these children by committing the rape.

Judicial practice shows that there are many cases in which the courts choose to classify the act in the crime of sexual intercourse with a minor, and not in the crime of rape, considering, when there are no traces of violence on the victim's body, that they have expressed consent to engage in various sexual activities with older partners, taking into account a number of issues such as not disclosing to parents what happened, not crying for help, accompanying offenders in certain places where carried out those activities or that there were inconsistencies in the victims' statements during the criminal proceedings[10]. Sometimes, in the case of repeated sexual activities, the courts reasoned that since, after the supposed sexual assault, the victims continued to frequent the same places where they came in contact with the perpetrators, risking being subjected to the same actions again, they did not it may call into question the hypothesis of coercion or that of taking advantage of the minor's inability to defend himself or to express his will, essential requirements for the incidence of the crime of rape. We emphasize once again that it often happens that the courts do not order the preparation of psychiatric forensic examinations or, in the event that they still exist in the file, are almost ignored.

A solution given by the court, which is based in particular on the statements of the defendant, on the fact that the minor did not confess to the parents, a solution given by

ignoring the reports of psychiatric medical forensic expertise, can not be considered an impartial solution, nor the consent for engaging in sexual activities given by a minor aged 9 years, 10 years, 11 years, cannot be considered valid, the deed undoubtedly representing a rape.

Justice should be done in the best interests of the child, taking into account the best interests of the child, but, unfortunately, in Romania things are completely different, in the sense that, in most cases, the rights of the child are not properly protected, even being completely ignored. This is how it often happens that children become revictimized. They are deprived of the necessary psychological counselling as a result of such traumas suffered, regardless of their degree of vulnerability and mental damage. During the hearings they end up being confronted with the perpetrators, they end up being humiliated and assaulted by prosecutors, by the perpetrators' lawyers, who address their questions directly, not through the court as they should, or even in court, most of the time not specializing in juvenile cases. And, in this context, we also wonder why there are inconsistencies in the statements of abused minors or the fact that they even end up not appearing at the next hearings.

Judicial authorities should conduct thorough and efficient investigations to establish the facts and circumstances of the cases, as well as to gather all evidence, and where there is no direct evidence, the authorities should focus their investigations on the statements of the parties, but especially on evidence of paramount value, such as psychiatric medical forensic reports, without ignoring the victim's vulnerability and naivety due to his very young age. When such a report states that the victim is suffering from post-traumatic stress disorder or is unable to anticipate the implications and consequences of his actions, it is clear that there is no question of the existence of a valid consent, even if there is no trace of violence on the victim's body. We also consider that the credibility of the witnesses, when they exist, must be analyzed very well, especially if they are in a family relation or a friendship relation or even enmity with the supposed aggressor.

A legislation that allows interpretations, a legislation on the basis of which a consent to an act or sexual intercourse, expressed by a minor under the age of 14, can be considered valid, a deficient criminal investigation, with errors and omissions and a non-unitary judicial practice are not such as to ensure the necessary protection of children against rape.

National law sets the age of consent to sexual activity at 15, but as long as the criminal liability for rape is limited in practice to the circumstances in which there are traces of physical violence on the victims' bodies, as a sign that they have opposed to such abuses, indicates that the intervention of the legislator is necessary to ensure the efficient protection of children against rape and any sexual assault directed against them.

It is very true that our legislation does not set a minimum age limit for the ability of a minor to validly consent to an act or sexual intercourse, a situation encountered, moreover, at the international level, in the case of other states. However, we believe that it is impossible to conceive that a child under the age of 14 can understand so well what a sexual act means, to understand objectively and really what the implications of engaging in sexual activities are, so to be able to appreciate that he has expressed a valid consent.

On the other hand, at court level, as long as the analysis of the evidence is not always adapted to the contextual circumstances of the case, as long as behavioral attitudes specific to the young age of minors are ignored, as long as the perpetrators are criminally liable for rape mainly when there is evidence that the victim has offered physical resistance, we can not talk about justice in the best interests of the child. Most of the time, the courts included the facts in the crime of rape, either when physical violence or the threat was used, or when the minors were under 11 years old, considering that the young age prevented them from expressing a valid consent[11].

Therefore, in addition to the fact that the normative provisions are not strong enough and have many procedural shortcomings, unfortunately, very often, even the existing ones are also disregarded. Thus, in the absence of a uniform practice at court level regarding the differentiation of the two crimes, when the victims are minors at a very young age, rape and other sexual abuse of minors are not punished accordingly. In such circumstances, we express the opinion that the obligations assumed by our country by signing the European Convention on Human Rights regarding the respect of the right to privacy and the protection against inhuman and degrading treatments as well as the other documents we have presented at the beginning of this study are seriously violated.

4 Conclusions

In our view, both the law and the practice of the courts are not such a manner as to provide minors with the necessary protection against rape and other sexual assault.

We note that there is no unitary practice at the national level regarding the analysis of the consent of minors who have become victims of sexual abuse. We believe that any act or sexual intercourse in which consent is lacking must be punished accordingly, regardless of whether or not the victim has offered physical resistance.

In our opinion, in order to differentiate the crime of rape from that of sexual intercourse with a minor, on the one hand, the criminal investigation should not have as a starting point the existence of consent, even if the victim has expressed it. On the other hand, we express the opinion that the courts must interpret the victim's behavior from the perspective of his young age, must take into account the psychiatric expertise of the minor, which can highlight whether the victim's reactions are not the psychological consequence of abuse, must also consider the age difference between the perpetrator and the victim, the difference in physical strength between them, and whether the juvenile's allegations of rape are really based on the perpetrator's actions, and not on other grounds.

In order for justice to be done in the best interests of the child, we believe it is necessary to effectively enforce the rights recognized to them, taking into account the best interests of minors, and specialists that working with children in order to evaluate them should use a common framework common at least at national, if not European, level.

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[2] The Convention entered into force on the 1st of July 2010 and Romania ratified it on the 28th of June 2013.
[3] Adopted by the Council of Europe on the 5th of May 2011, the Convention entered into force on the 1st of August 2014, and Romania signed it on the 27th of June 2014.
[4] See Article 49 of the Convention on the Prevention and Combating of Violence against Women and Domestic Violence.
[5] See Article 54 of the Convention on the Prevention and Combating of Violence against Women and Domestic Violence.
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Democratic government impossible without the decentralization

Nedelcu I.[1], Nedelcu P.-I.[2]

[1] University Professor, PhD habil, member of the Institute of Administrative Science "Paul Negulescu", Lawyer – Dolj Bar, NARB (ROMANIA)
[2] Doctor of Laws, Lawyer – Dolj Bar, NARB (ROMANIA)
E-mail: avocatnedelcu@yahoo.com, paul_iulyan@yahoo.com

Abstract

The political, economic and social transformations in Romania after December 1989 have naturally led to substantial changes in the organization and functioning of the public administration.

With the adoption of the Constitution, the extensive reform process after 1991 imposed the use of the concept of decentralization in the institutional sense, imposing the need to rethink the old centralized system in order to have an efficient public administration that would be closer to the citizens and would comply with the European principles and rules.

The public administration reform must be understood as an essential condition of the Romanian democratization process, the creation of the rule of law, the modernization and development of the economy in order to achieve a market economy; thus, the restructuring of the administration materialized in the conception and adoption of an adequate legal framework, a premise that removed the elements of the old administrative regime (centralism, bureaucracy, hierarchical levels of subordination and control)

The principles of the local public administration were determined by the Constitution of 1991, substantiating from a legal point of view, the administrative organization of the territorial and administrative divisions.

Consequently, the state became aware of the fact that there are local authorities administered by their local elected officials and with their own forces, but under the control of the state authorities.

Keywords: democracy, decentralization, local public administration.

1 Preliminaries

Romania has evolved when it comes to the constitutional regulation of the decentralization principle. We believe that after revision, Article 119 and Article 120 of the Romanian Constitution represent the basis for the functioning and organization of the public administration – local autonomy and decentralization, text that was amended by Law no. 429/2003 on the reform of the Constitution, supplementing the principles of decentralization and deconcentration of public services and introducing a new paragraph as an independent principle – the right of national minorities to use their mother tongue in their relations with the decentralized public services and local public administration.

The analysis of the public administration in our country in terms of decentralization imposes the description in detail of this phenomenon taking into account the current reform process of the Romanian public administration, the transition from a highly centralized structure of public administration to a decentralized one.

Decentralization of the public administration represents a system of administrative organization that gives the authorities the possibility to administer themselves under the control of the state, grants them legal personality, allows them to establish own authorities and equips them with the required means.

With the decentralization the public administration is more efficient and operative, the issues that interest the population are no longer filed in ministerial offices, but solved at local levels, in conditions of rapid operability.

The modern form of expression of the decentralization principle is represented by the local autonomy, a principle set out by the Constitution and the Law on the local public administration[1], according to which the local authorities have the right and ability to solve and manage an important part of the public affairs, under the law and at their own risk, in the interest of the population[2].

The concept of local autonomy is manifested within the limits of the material and territorial jurisdiction set out by the law, but by the freedom of initiative of the local administration authorities to solve the issues as civil legal entities, owners of the private domain and public legal entities, owners of the public domain of local interest.

Regarding the legislative evolution of the regulation of decentralization, the first law adopted after 1989 on the local public administration, Law no. 69/1991[3] with subsequent amendments and completions, established the principle that governs the organization of the local public administration, respectively local autonomy, decentralization, legality, consultation of the population by referendum.

Secondly, in 2004, was adopted Law no. 339/2004[4], a framework on the decentralization. But, the regulation was considered unsatisfactory due to the mutations in the

[1] Law no. 215/2001 on the local public administration, updated and published in the Official Gazette no. 123 of 20.02.2007., repealed by GEO no. 57/2019.
[2] Art. 3 of the European Charter of Local Self-Government, signed 1985 at Strasbourg and drawn up at the initiative of the Congress of Local and Regional Authorities in Europe.
[3] Law no. 69 of November 26th, 1991 was published in the Official Gazette of Romania, Part I, no. 238 of November 28th, 1991.
[4] Published in the Official Gazette of Romania, Part I, no. 668 of July 26th, 2004.

evolution of the Romanian State, considering that Romania completed the entire European integration path, which was completed on January 1, 2007.

Besides, in the year preceding the time of accession, out of the need for a legal framework defining the institution of decentralization the framework law no. 195/2006 on decentralization was adopted, setting out the realization of preparatory measures for the decentralization process, impact studies, cost standards and monitoring indicator systems.

Another time[5] we analyzed the Decision no. 1/2014[6] of the Romanian Constitutional Court on the objection of unconstitutionality of the Law on the establishment of decentralized measures of some powers exercised by various ministries and specialized bodies of the central public administration and of reform measures on the public administration.

Consequently, we welcome the adoption by the Romanian Government of the Emergency Ordinance no. 57 of July 3, 2019 on the Administrative Code, published in the Official Gazette number 555 of July 5, 2019.

2 The concept of local autonomy

The local autonomy[7] is the modern form for expressing the decentralization principle. Indeed, the administrative decentralization is a principle claimed by the doctrine and a trend in the evolution of the public administration for the realization of the local autonomy. The basis of each decentralization is the idea of a certain local autonomy[8].

The principle of local autonomy is the fundamental principle that governs the local public administration and consists of "*the right of the territorial and administrative division to meet their own interests without the involvement of central authorities, a principle that calls for the administrative decentralization where the autonomy is a right and the decentralization is a system that implies autonomy*"[9]

The concept of "autonomy" can only by correctly understood if we consider the fact that a modern society has a hierarchy of legal norms according to their greater or lesser legal force. Starting with this diversification of the legal norms, the autonomy degree of the body issuing them varies also, in accordance with its power to issue laws or normative acts subordinated to laws.

Thus, "*a legislative autonomy"* will exist when a human community is granted the right to exercise the legislative function itself or by representatives elected. It is the case of the member states of federal states, where the legislative bodies have the power to

[5] P.-I. Nedelcu (2015) *Descentralizarea – studiu comparativ*, Universul Juridic Publishing House, Bucharest, p. 339-342.
[6] Published in the Official Gazette of Romania no. 123/18.02.2014.
[7] The expression "autonomy" comes from the old Greek where "auto" means alone, by itself, independently and "nomos" – law. In the etymological sense, the concept of "autonomy" reflects the freedom (right) to govern oneself by one's own law.
[8] An. de Laubadere, J.C. de Venezia, Y. de Gaudemet (1983), *Tratat de drept administrativ*, vol. I, L.G.D.J., Paris, p. 104.
[9] A. Teodorescu (1935), *Tratat de drept administrativ*, vol. II, Bucharest, Institutul de Arte Grafice, E. Marvan Publishing House, p. 286.

adopt laws in all domains, except those established by the Constitution in the jurisdiction of the federal legislative body.

If a human community has the right, directly or by representatives, to adopt legal norms with legal force subordinated to laws, we are talking about "*an administrative autonomy"*. The jurisdiction of the local authorities will be established by the Constitution or by law and the initiative within such jurisdiction will not be limited.

Analyzed exclusively from an administrative point of view, the local autonomy appears as a last step in the development of the administrative decentralization, a form of expression of this principle. According to the opinion of an author[10], the local autonomy consists in the distribution of decision-making powers between the government, on the one hand and the local agents, on the other hand (mayors, local councils), who are to some extent independent of the central power, having the right to take certain measures, without seeking government approval or being censored.

The exact content of the concept of local autonomy is manifested within the limits of the material and territorial jurisdiction established by the law, but especially, by the freedom to solve the problems of the community, in their capacity of public legal entities, owners of the public domain of the local interest.

The local autonomy is manifested on several levels[11], legal, institutional and decision-making. Thus, regarding the legal capacity, the local territorial authorities are distinct legal entities with own public interests; institutionally, they have their own administrative authorities, external to the central administrative system and in terms of decision-making autonomy, these authorities have their own powers and make decisions in the interest of the communities they represent.

Local public administration authorities are autonomous, but not sovereign.

On the one hand, the autonomy is manifested only at administrative level, as a non-political autonomy, as in the case of federalism.

On the other hand, the local public administration authorities are subject to a specific administrative control, the administrative guardianship control, by the central public administration; such control aims to protect the public interests of the state, the compliance with the laws and it is a control of legality and not one of opportunity. The administrative guardianship control is a special control exercised only if the law establishes it expressly and only in the forms, procedures and effects expressly established by the law.

An important aspect of the local autonomy concerns the right of the local authorities to associate with other local authorities in order to carry out tasks of common interest under the law.

Also, they can cooperate with the authorities of other states.

The legal protection of the local autonomy is achieved by the right of the local authorities to resort to the judicial bodies to ensure the free exercise of their powers and to observe the rights conferred by the Constitution and the law.

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[10] C. Ionescu (1997), *Drept constituţional şi instituţii politice. Teoria generală a instituţiilor politice*, vol. I, Lumina Lex, p. 70 and the following.

[11] P. Negulescu (1925), *Tratat de drept administrativ roman*, ed. a III-a, vol. I, Book I, Tipografiile Unite, Bucharest, pp. 563-564.

3 Amendments of the legal framework on the administrative decentralization

With the adoption of the Constitution, the extensive reform process after 1991 imposed the use of the concept of decentralization in the institutional sense, imposing the need to rethink the old centralized system in order to have an efficient public administration that would be closer to the citizens and would comply with the European principles and rules, from the perspective of an EU member state.

In the process of democratization of Romania, the public administration reform represented an essential condition for the creation of the rule of law, modernization and development of the economy in order to achieve a market economy, so that it materialized in the design and adoption of an appropriate legal framework, a premise that removed the elements of the old administrative regime.

4 Decentralization is the indispensable attribute of democracy and implies the idea of autonomy

As a characteristic phenomenon of an administrative organization system, the decentralization allows human communities to administer themselves under the state control, which gives them legal personality, allows them to establish their own authorities and provides them with the necessary means.

Thus, the public administration is more efficient and operative, the issues that interest the population are no longer filed in ministerial offices, but solved at local levels, in conditions of rapid operability.

In the transition period after 1991, which tended towards a legislative stabilization at the level of all branches of law, the problem of systematizing legal norms in relation to the new social and constitutional realities was questioned.

The need to systematize the legal norms in the field of public administration and administrative law[12] was a major issue.

The legal administrative norms have a much greater legislative dispersion unlike other branches of law and first of all, compared to the civil law where the norms have always had a greater stability due to the diversity of the domains where the public administration acts using the administrative regime and to the fact that the administrative activity changes and supplements in a fast rhythm because of the instability or the transition of social relations that they reflect.

The administrative code, according to the literature, must ensure in a unitary conception: the rational organization of the entire system of public administration in order to increase its efficiency; precise establishment of the rights and obligations of the public administration public servants, their liability, awareness of the citizens regarding their rights and obligations as subjects of the legal relationship with the public administration. This desideratum has been wanted since 2000, being evoked over the years in the governing programs and the legislative programs of the Government and, as

[12] A. Negoiță (1993), *Drept administrativ și Știința administrației*, Editura Atlas-Lex, Bucharest, p. 33-34.

it results from the substantiation note of the law on the Administrative Code of Romania[13], its necessity resulted from the multitude of "issued normative acts and frequent changes of regulations in the process of their application, which generated parallels, overlaps and, implicitly, difficulties in the practical application."[14].

At the same time, we can see the problems appeared during the analysis of the substantiation process of the draft Administrative Code, which concerned legislative technique dysfunctions and substantive dysfunctions of regulations: *the lack of some unitary definitions of the main concepts of public administration; more redundant and parallel legal provisions in the field of public administration; the existence of contradictory legal rules; the legislative blankness – in particular the legal framework regime of public services and the difficulties in applying the legal provisions in force generated by unclear and uncorrelated legal rules, while the substantive dysfunctions of the regulations in force were presented for each of the domain that make up the entire regulation of the Administrative Code*.

In the substantiation note to GEO no. 57/2019 on the Administrative Code, in accordance with the constitutive Treaties of the European Union and with other binding community regulations, it was specified that the normative act is limited to the priorities and objectives established by the Government of Romania through the Strategy for the consolidation of the public administration 2014-2020, approved by Government Decision no. 909/2014.

The Administrative Code is the first comprehensive normative intervention in the implementation process of the National Strategies that set out the legal framework for addressing the general objectives assumed also by the Partnership Agreement 2014-2020, "*on adapting the structure and mandates of the central and local public administration to the citizens' needs, providing the optimal framework for the distribution of powers between the central and the local public administration, adapting the human resources system to the requirements of a modern administration, debureaucratizing and simplifying the public administration, strengthening the capacity of the public administration to ensure the quality and access to public services*"[15].

The Administrative Code aimed to ensure that the function of public service provision is mainly the attribute of the local public administration, thus relieving the activity of the central public administration, in accordance with the principle of subsidiarity established in Art. 5 paragraph (3) of the Treaty on the European Union (EU Treaty) and Protocol No. 2 on the application of the principles of subsidiarity and proportionality.

Art. 3 section 1 of the European Charter of Local Self-Government, ratified by Law no. 199 of 17 November 1997 ratifying the European Charter of Local Self-Government, adopted in Strasbourg on 15 October 1985, defines the concept of local autonomy as the right and capacity of the local public administration authorities to settle and manage an important part of the public affairs on their own behalf and in the interest of the local population, in accordance with the law,

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[13] http://www.cdep.ro/proiecte/2018/300/60/9/em369.pdf
[14] http://www.cdep.ro/proiecte/2018/300/60/9/em369.pdf
[15] https://www.gov.ro/ro/guvernul/procesul-legislativ/note-de-fundamentare/nota-de-fundamentare-oug-nr-57-03-07-2019&page=1

In this context, Article 5, section 25x) of the Administrative Code, defines decentralization as "*the transfer of administrative and financial powers from the central public administration to the public administration of the territorial and administrative divisions, together with the necessary financial resources for their exercise*".

The principle of decentralization was previously mentioned by Art. 2 paragraph (1) of the Law on Local Public Administration no. 215/2001: "*The public administration in the territorial and administrative divisions shall be organized and shall function on the grounds of the principles of decentralization, the local autonomy, deconcentration of public services, eligibility of the local public administration authorities, legality and consultation of the citizens in the solving of the local matters of a particular interest*"[16].

The framework law of decentralization no. 195/2006 defined the decentralization as "*the transfer of administrative and financial power from the central public administration to the local public administration or the private sector".*

The current definition no longer addresses the transfer of administrative and financial powers, but underlines the transfer of financial resources required for the exercise of duties by the local public administration.

According to Art. 5 j) of the Administrative Code, the local autonomy "*the right and actual capacity of the local public administration authorities to settle and manage public affairs, on their own behalf or in the interest of the local communities that chose them, in accordance with the law."*

We can see that Chapter II of the Administrative Code regulates the decentralization process, replacing the provision of the framework law of decentralization which was repealed with the entry into force of the Code.

Like the Framework Law on decentralization, the Administrative Code lists the principles of decentralization at Art. 76, namely:

"the principle of subsidiarity consisting in the exercise of powers by the local public administration authority located at the closest administrative level to the citizen and which has the necessary administrative capacity; the principle of ensuring the resources corresponding to the transferred powers;

the principle of responsibility of the local public administration authorities in relation to their powers, imposing an obligation to comply with the application of quality standards and cost standards in the provision of public and public utility services;

the principle of providing a stable decentralization process based on objective criteria and rules that would not constrain the activity of local public administration authorities or limit the local financial autonomy;

the principle of equity, which involves ensuring the access of all citizens to public and public utility services."[17]

We notice that the principle of budgetary constraint is no longer listed among the principles of decentralization. This principle remains the basis for the exercise of the

[16] Repealed by GEO no. 57/2019 of 3 July 2019 on the Administrative Code, published in the Official Gazette no. 555 of 5 July 2019

[17] https://idrept.ro/DocumentView.aspx?DocumentId=00202574-2020-04-08&DisplayDate=2020-05-12.

local public administration activities and it is regulated by Art. 75 of the Code, among the specific principles applicable to the local public administration[18].

The provisions of Chapter II, Section 1 of Law 195/2006 were replaced by the provisions of Art. 77 of the Code and they establish a series of rules of the decentralization process.

According to these regulations, *"The government, ministries and other specialized bodies of the central public administration transfer powers to the local public administration authorities at the level of communes, cities, municipalities or counties, as appropriate, in accordance with the principle of subsidiarity and the criterion of geographical area of beneficiaries, according to which the transfer of power for the provision of a public service is made to the local public administration that best corresponds to the geographical area of the beneficiaries"*[19].

Thus, according to the Administrative Code, *the transfer of power is made by law and it is based on impact analyzes and monitoring indicator systems established by ministries and other specialized bodies of the central public administration, in collaboration with the coordinating ministry of the decentralization process and with the associative structures of the local public administration authorities*.

Moreover, the provisions of Art. 77 par. 2), 3) and 4) regulate the regime of databases in the context of the entry into force of the General Data Protection Regulation[20] and it is one of the novelties brought by the Code, it has no correspondent in the previous legislation.

5 Conclusions

The analysis of the constitutional provisions regarding the local public administration[21], the law on local public administration[22] and those regarding the local election[23], the Administrative Code and the opinions expressed in the Romanian doctrine highlights the main characteristics of the local public administration, as follows: *the organization and functioning of the local public administration is based on the principle of local autonomy and that of the decentralization of public services, representing the expression of the regime of administrative decentralization applied at the level of the Romanian public administration; it includes the autonomous*

[18] https://idrept.ro/DocumentView.aspx?DocumentId=00202574-2020-04-08&DisplayDate=2020-05-12.

[19] https://idrept.ro/DocumentView.aspx?DocumentId=00202574-2020-04-08&DisplayDate=2020-05-12

[20] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC

[21] Second section of chapter V of Title III of the Constitution of Romania, Art. 120-122.

[22] Law no. 69/1991, published in the Official Gazette of Romania, part I, no. 238/28.11.1991, republished under Art. III of Law no. 24/13.04.1996, published in the Official Gazette of Romania, part I, no. 76/13.04.1996.

[23] Law no. 70/1991, published in the Official Gazette of Romania, part I, no. 239/28.11.1991, republished in 1996 in the Official Gazette of Romania, part I, no. 77/13.04.1996, amended by GEO no. 28/2000, published in the Official Gazette of Romania, no. 153/13.04.2000 and GEO no. 63/2000, published in the Official Gazette of Romania, no. 240/31.05.2000.

administrative authorities; communal, city and county – local councils and mayors, county council and public services organized under the authority of these local public authorities; the relations between the public administration organized at the level of communes and cities and the one at the county level are based on the principles of autonomy, legality and collaboration in solving common problems; there are no relations of subordination between them; they solve local public affairs and perform public services of county interest, by elected administrative authorities and by local referendum, in accordance with the law.

We can say that the role of the public administration is to solve the public affairs and endure the interests of the local communities, in accordance with their need closely related to the specific of their administrative and territorial division.

The decentralization means the recognition of local interests, its purpose is to give the local communities their own life as they are the only ones able to appreciate their interests and satisfy them naturally. This regime has certain advantages, thus, through decentralization, legality acquires its fullness and the administration becomes more legal. Only through decentralization the state can fulfill its two great duties: the preservation and the progress of the nation.

More than that, the decentralization provides the proper climate for the natural development of the local interests, in accordance with the locals' customs and their actual requirements. No one other than the local authority itself can know the needs of the locality more closely and in more detail and no one else can know the most appropriate means to satisfy them. In this way, the local interests can be resolved in much better conditions, as local public services can be run more efficiently by local authorities, in a regime in which they are not obliged to comply with the orders and instructions of the center.

Subjectively, the decentralization appears as a special means for the political education of the citizens. "*They will know that they need to rely on their own powers", "developing their feelings of freedom and solidarity, as well as their spirit of initiative"*[24].

By its nature, the decentralization can ensure the judicious administration of localities, using only the strictly necessary number of public servants to meet the local interests, while in the centralized regime the number of public servants is much higher and their working time is consumed with the preparation of materials required by the central authority and with the implementation of the orders received. In the regime of administrative decentralization, the public servants remove greatly the bureaucratic and routine phenomena in the local activity.

On the other hand, under the decentralization regime, the tax are regarded as "*contributions"* and are given back to the locals under the benefit of various public services[25]. The local communities control their own budget under the guidance of the state representative and at their own risk.

Also, under the decentralization regime, the local authority can solve and meet the local requirements unlike the centralized regime where the central authority acts remotely, delaying the solution of problems, asking for explanations through administrative correspondence.

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[24] I. Vida (1994), *Puterea executivă şi administraţia publică, Bucharest*, p. 21.
[25] A. de Laubadere, J.C. de Venezia, Y.s de Gaudemet (1983), *op. cit.,* p. 90.

The decentralization generates the feeling of local freedom, the interest for the good of the locality, a fact that determines a special development of the human communities in the administrative and territorial divisions.

With all these advantages mentioned, it should be noted that the decentralization has certain limitations and even disadvantages. Regardless of the form it takes, the decentralization is an exclusively administrative issue, as opposed to federalism, which is a political issue, assuming the existence of a constitution and the separation of powers.

No matter how wide the power of the elected local authorities is in solving local problems, they carry out their activity in a unitary state and not outside it[26]. There are two distinct aspects, namely, the nature of authorities autonomous to the state, through which the administrative decentralization is achieved and the state limit of the activity[27]. If such limit, which is given by the Constitution, the law and the acts of the specialized central authorities, had not exist, the autonomous local authorities would turn into political authorities, as in the case of the federation, evolving into true independent state structures, with harmful consequences nationally and internationally[28].

Regarding the disadvantages of the decentralization, politically it diminishes the force of the central power, being a principle of autonomy.

Administratively, it gives priority to these interests, over the interests of the country, being a defense system of the local interests. In a pronounced decentralized regime, the action of the central power is much more difficult because it is not fully connected to the actions of the local authorities in all cases. According to the opinion of an author, the election of the decentralized authorities introduces the party policy in the local administration, which monopolizes and vitiates everything.

Regarding the management of assets and finances, the decentralization increases the number of authorities with own assets and budget, which makes it difficult to achieve an efficient control over the use of public money and to form a more real vision on the country's finances.

Regardless of the concrete forms under which it is practiced in various countries, the decentralization of the public administration is a quality of the present and future society, with important implications economically and socially. Applied judiciously, it can contribute to a significant improvement in the efficiency of resource allocation and the quality of the administrative function of the state.

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Legal problems in the matter of the competition of crimes between bribery or influence peddling and tax evasion provided by art. 9 para. (1) lett. c) of Law no. 241/2005 for preventing and combating tax evasion

University Lecturer PhD Teodorescu M.G.

"Titu Maiorescu" University (ROMANIA)
E-mails: tmgeorgiana@gmail.com

Abstract

Considering the large number of corruption offenses discovered in the recent years, in judicial practice were identified many ways in which bribery is offered or remitted. One of these ways is to justify the amounts paid as a bribe or to buy influence, by concluding fictitious contracts, in an attempt to create the appearance of a legal transaction. This way of committing acts of corruption has posed and will continue to raise serious problems for the criminal prosecution bodies in terms of proving the fictitious nature of the operations, but in addition to this issue, a legal issue has been reported which generates a non-unitary practice, including inside the same court. This article aims to present and analyze the legal frameworks set in the hypothesis of committing corruption offenses in this way.

Keywords: Tax evasion, Bribery, Influence peddling, Competition of crimes, Investigation of corruption offenses, Right to a fair trial, Right to defense, Legal issues, Non-uniform practice, Criminal Code, Code of Criminal Procedure.

1. Introduction. Crime analysis

A well-known mode of operation which creates major difficulties from the point of view of evidence in the investigation of corruption offenses is the "disguise" of the

amount offered as a bribe or used for the influence peddling by a legal person by paying the value of services or goods, based on a fictitious contract. The consequence of this action is the registration of the operation in the accounting of the paying company, and most of the times, in order to keep the appearance of the real character of the transaction, the expense will be declared as deductible according to the fiscal norms.

The legal problem appeared in the files in which the commission of corruption offenses was ascertained through this method is the legal classification of the facts, also reported to the provisions of art. 9 para. (1) lett. c) of Law no. 241/2005 for preventing and combating tax evasion.

For a better understanding of the legal issue subject to analysis through this article, we will briefly analyze in the light of the relevant elements of the study the bribery offenses, the influence peddling and the tax evasion offense provided and punished by art. 9 para. (1) lett. c) of Law no. 241/2005 for preventing and combating tax evasion (hereinafter referred to as Law no. 241/2005).

The offenses of bribery and influence peddling are provided in the Criminal Code (hereinafter referred to as CP) at art. 290 and art. 292, being classified as corruption offenses.

I chose to approach the study only from the perspective of the two crimes of corruption, as the persons who commit them are "responsible" for the remittance of the sums of money that represent bribes, respectively for carrying out the operations through which it is carried out.

Thus, the crime of bribery provided by art. 290 of the Criminal Code is defined by reference to the crime of bribery and consists in *the promise, offering or giving of money or other undue benefits to a civil servant, for himself or for another, in connection with the fulfillment, non-fulfillment, urgency or delay of performing an act that enters into his duties or in connection with the performance of an act contrary to these duties.* Considering that there are not many contrary opinions regarding the content of these crimes, their analysis being well consolidated in the doctrine, I will proceed to the analysis of the elements that are of interest to the present study.

The special legal object of this crime is represented by the social relations regarding the good development of the service activity, which is affected by the acts of corruption on civil servants, other persons exercising tasks in the service of an assimilated civil servant or on persons exercising their service within a legal entity.[1]

There are no special problems regarding the active subject, it can be any person who can be criminally liable, and the passive subject is represented by the authority, public institution or other public or private legal person or person exercising a service of public interest of which the bribed person is part.

Next, we will analyze only the action of "giving", as a way of committing the material element of the objective side of the crime of bribery, given that committing the crime in the manner of concluding a fictitious contract and recording its payment in accounting as a fictitious expense, it also involves making a payment.

Thus, *giving"* means delivery, remittance, handing over, regardless of whether it is done physically or virtually through a bank transaction or through an application that

[1] D. Vasile, collective, *New Criminal Code commented*. Third edition revised and added, Commentary on art. 290 CP, Universul Juridic, 2016.

ensures the transfer of money, regardless of the actual method of transfer, as long as it was ensure that the bribe is made available to the bribed person directly or indirectly.

The immediate consequence of the crime of bribery consists in the state of danger created towards the social relations regarding the good development of the service activities in which the persons provided in art. 175 and 308 of the Criminal Code, which may cause incorrect performance, non-fulfillment, urgency, or delay in the performance of duties.

Regarding the subjective side of the crime, respectively the form of guilt with which it can be committed there are two opinions:

1) the crime of bribery can be committed only with direct intent[2];

2) the crime of bribery can be committed both with direct intent and with indirect intent.

In motivating the opinion according to which the crime of bribery can be committed only with direct intention, it was considered that the perpetrator promises, offers or gives sums of money or benefits that are not due to the civil servant or a person provided in art. 308 of the Criminal Code, in order to determine or accept that it fulfills, does not fulfill, speeds up or delays the fulfillment of an act that enters into its duties or performs an act contrary to these duties, having implicit representation that social relations on good development of the passive subject is affected.

In other words, by the manner of committing the material element (consisting in the remittance of a sum of money in connection with the breach of duties) no immediate consequence can be considered other than the creation of a state of danger for affecting the proper conduct of business relations service, this result being a certain one, inevitable. Thus, if the act of execution cannot avoid the immediate pursuit of the crime, the idea that the perpetrator did not pursue the production of this result cannot be sustained.[3]

Besides, the idea is reinforced by the fact that the crime of bribery is an offense of abstract danger, so the state of danger is presumed to be created by the act of execution performed.

On the other hand, there are two distinct arguments for which the offense can also be committed with indirect intent.

According to the first opinion, in the case of the crime of bribery, as a rule, the perpetrator does not seek to provoke a state of danger for service relations, but nevertheless accepts this possibility. Therefore, the violation of the duties of the service within the meaning of the article 289 of the Criminal Code does not necessarily mean for the perpetrator also the endangerment of the service relations protected by the rule of incrimination.[4]

In a second opinion, the crime of bribery can also be committed with indirect intent, given that it has been incriminated in relation to the crime of bribery[5], a crime that can be committed with indirect intent. This opinion is motivated by the fact that

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[2] M. Udroiu, *Criminal law. The special part*. 5th edition, p. 485.

[3] Decision no. 1150/2005 of the HCCJ, cited after Mihail Udroiu, *Criminal law. The special part*, 5th edition, p. 485.

[4] C. Rotaru, A.R. Trandafir, V. Cioclei, *Criminal law. Special Part II.* Thematic course. Edition 4, 2018, p. 243.

[5] The promise, offering or giving of money or other benefits, under the conditions shown in art. 289, is punishable by imprisonment from 2 to 7 years.

compared to the previous regulation, the phrase "for" fulfillment, non-fulfillment, etc. has been replaced with "in connection with".[6] In another opinion, the replacement of the phrase has the effect only of "*extending the area of incrimination, in the sense that, according to the new regulation, it may constitute the crime of bribery and the promise, offering or giving of money or other benefits to a civil servant after he performed the act in which his performance is concretized, as a thanks, gratitude for the activity carried out."*[7]

The punishment provided by law for committing the crime of bribery in the standard version is imprisonment from 2 to 7 years, and in the attenuated version provided in art. 308 CP the punishment limits provided for the standard variant are reduced by one third.

Regarding the special confiscation, according to art. 290, para. (5) CP the money, values or any other offered or given goods are subject to confiscation, and when they are no longer found, the confiscation by equivalent is ordered.

It should be noted that the provisions governing the crime of bribery provide special causes of imputability and impunity as well as special provisions regarding the measure of special confiscation when they are incidents, but we will not analyze them because they are not relevant to the topic of the article.

The crime of influence peddling is similar to the crime of bribery, which is why we will only point out the elements of differentiation between the two crimes relevant to the study.

Influence peddling*, consists in the promise, offering or giving of money or other benefits, for oneself or for another, directly or indirectly, to a person who has influence or lets himself be believed to have influence over a civil servant, to determine him to perform, fail to perform, expedite or delay the performance of an act that falls within his duties or to perform an act contrary to these duties.*[8]

The special legal object of the crime consists in the social relations related to the good performance of the service activities, within the public or private units and which exclude any attempt to create suspicion regarding the correctness of the civil servant or the person exercising permanently or temporarily, with or without remuneration, an assignment of any nature or the service of a natural person from those provided for in Article 175 paragraph (2) or within any legal person."[9]

The modalities of the material element are identical to those of the crime of bribery, which is why we will not repeat them.

The immediate consequence consists in the state of danger created for the social relations regarding the good development of the service activities in which the persons provided in art. 175 and 308 of the Criminal Code, materialized in the creation of the possibility of incorrect fulfillment or non-fulfillment of service duties, being able to determine the endangerment of the activity of the institution or of the state body.

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[6] D. Vasile, collective, *New Criminal Code commented*, 3rd edition revised and added, Commentary on art. 290 CP, Universul Juridic, 2016.

[7] T. Toader, M.-I. Mărculescu-Michinici, A. Crilu-Ciochința, M. Dunea, R. Răducanu, S. Răduleţu, *The New Criminal Code – comments on articles,* Bucharest, 2014, p. 471.

[8] Art. 292 CP.

[9] A. Boroi, *Criminal law. The special part,* 2nd Edition, C.H Beck Publishing House, Bucharest 2014, p. 455.

From the subjective point of view, unlike the crime of bribery, the vast majority of doctrine holds that the crime of buying influence is committed only with qualified direct intent in order to determine through a person a civil servant or a designated person provided in art. 308 of the Criminal Code, to fulfill, not to fulfill, to expedite or to delay the fulfillment of an act that enters into his service duties or to fulfill an act contrary to these duties.

The punishment provided by law for committing the crime of buying influence in the standard version is imprisonment from 2 to 7 years, and in the attenuated version provided in art. 308 CP the punishment limits provided for the standard variant are reduced by one third.

Also, money, valuables or any other goods given or offered are subject to confiscation, and if they are no longer found, the confiscation by equivalent is ordered.

Unlike the crime of bribery, in the case of the crime of buying influence there is no special cause of imputability, but there are provisions on the special cause of impunity and special provisions regarding the measure of special confiscation when it occurs.

The crime of tax evasion that we will take into account is provided by art. 9, para. (1) lett. c) of Law no. 241/2005 for preventing and combating tax evasion and consists in *the act of highlighting, in accounting documents or other legal documents, expenses that are not based on real operations or highlighting other fictitious operations in order to evade the fulfillment of obligations.*

The special legal object of the crime of tax evasion is represented by the social relations regarding the good development of financial activities by ensuring the correct establishment of the fiscal fact, collection of taxes, duties and contributions and fulfillment of fiscal obligations by actions of highlighting in the legal documents some unreal expenses or other fictitious operations.[10]

The material element of the crime consists in highlighting, in the accounting documents or in other legal documents, the expenses that are not based on real operations or other fictitious operations.

The way of performing the material element relevant for the example we want to analyze is the highlighting in accounting documents or other legal documents of fictitious operations (concealing reality by creating the appearance of the existence of an operation that does not actually exist[11]), which aim to reduce income net and, implicitly, of the fiscal obligation to the state.

The immediate consequence is represented by the state of danger regarding the full collection from taxpayers of the amounts representing fiscal obligations to the state. Therefore, this crime is a dangerous crime, because the law requires to exist only the purpose of evading the payment of tax obligations to the state, not the achievement of this purpose.

The form of guilt with which the crime of tax evasion can be committed is the direct intention qualified by the purpose of evading the fulfillment of tax obligations.

The crime of tax evasion provided by art. 9 para. (1) of Law no. 241/2005 is punished in the standard form with imprisonment for 2 years to 8 years, and in the

[10] A. Boroi (coordinator), M. Gorunescu, I.A. Barbu, B. Virjan, *Business criminal law,* 6th Edition revised and added, C.H. Beck Publishing House, Bucharest, 2016, p. 177.
[11] Art. (2) let. f) of Law no. 241/2005 for preventing and combating tax evasion.

aggravated variants from par. (2) and (3) the punishment limits shall be increased by 5 and 7 years, respectively.

Finally, we show that the provisions of art. 10 para. (1) of Law no. 241/2005 regulates a special case of reduction of the punishment consisting in the reduction of the punishment limits by half if during the criminal investigation or the trial, until the first trial term, the defendant fully covers the claims of the civil party.

Therefore, the three crimes analyzed are similar in the fact that they are crimes of abstract danger, in the sense that the legislator presumes that the commission of the material element automatically creates the state of danger for the protected social relations, without the need to prove it. Also, given the fact that there are different opinions regarding the crime of bribery regarding the form of guilt with which it can be committed, we would have two hypotheses: (1) all the crimes analyzed can be committed only with direct intention; (2) only offenses of influence peddling may be committed with direct intent qualified by purpose.

2 Aspects of non-unitary practice

As mentioned above, a factual situation often encountered in the investigation of crimes of corruption and/or tax evasion and which creates difficulties in terms of evidence and in terms of legal framework is the act of a person to provide a sum of money as a bribe (or through which he buys the influence of a person), through a company he owns or controls, the amount being "disguised" as the payment of the value of some services/goods that the bribed person/trafficker of influence or their intermediaries only fictitiously provide or offer them under a contract.

As a consequence, the payment of the fictitious transaction will be recorded as a deductible expense, in accordance with the tax rules.

Specifically, company X, through the administrator, remits a bribe (or buys influence) to a third party, concluding a service contract/purchase of goods with another company (usually belonging to an intermediary of the civil servant who receives the bribe). Based on this contract the payment will be made, but the services/goods will in fact never be provided/delivered by the provider company. In order to maintain the appearance of legality, in the accounting of company X the payment will be registered as deductible depending on the nature of the operation and the fiscal norms.

Regarding this factual situation, different solutions have been offered in judicial practice regarding the legal classification of the deed. Through the different solutions ordered even within the same prosecutor's office, respectively the National Anticorruption Directorate, solutions confirmed by dozens of court solutions, a new legal problem was born: what is the legal framework in the hypothesis of giving a bribe/buying influence disguised through a contract fictitious, later recorded as a deductible expense?

On the one hand, it was ruled in the sense that the correct classification is the retention of the crime of tax evasion provided by art. 9 para. (1) lett. c) of Law no. 241/2005 in competition with the crime of bribery/influence peddling, and on the other hand, it was considered correct to retain only the crime of bribery/influence

peddling[12], motivated by the fact that i missing the form of guilt provided by law in order to retain the crime of tax evasion, respectively the direct intention, qualified for the purpose of evading the fulfillment of tax obligations.

2.1 *Analysis of the notions relevant to the study*

The reason behind the non-unitary practice is the discussion on the existence or non-existence of the form of guilt provided by law in the case of tax evasion, which is why we will analyze this issue taking into account the other incidental institutions.

According to the provisions of art. 16 para. (3) lett. a) of the Criminal Code, there is a direct intention when by committing his deed the perpetrator foresees the result of the deed and pursues its production. Therefore, the perpetrator has the exact representation of the result he wants, and the consequence must be certain, inevitable or present a very high probability of occurring, and it must represent the consequence of the perpetrator's action or inaction.

On the other hand, there is indirect intention when the perpetrator foresees the result of his deed and although he does not pursue it, he accepts the possibility of its occurrence[13]. In the case of indirect intent, I think that unlike direct intent, the perpetrator has only the representation of a simple possibility, medium-level probabilities, in terms of the outcome of the crime[14], which he does not pursue, but accepts the possibility of its occurrence.

Thus, if the act of execution is likely to create certainty or certainly tends to cause immediate consequence, we are in a situation of direct intention.

On the contrary, if the enforcement act creates only a possibility or an average probability to produce the immediate consequence, and may have a different consequence from it, and for the perpetrator it does not matter the consequence it will cause, we are in a situation of indirect intention.[15]

The purpose of the crime, although it does not appear very often in the legal content of a crime, in the case of the crime of tax evasion is an essential requirement. It consists in the "goal" pursued by the perpetrator by committing the deed provided by the criminal law. Also, characteristic of the purpose qualified by purpose, is the exact knowledge of the result of the illicit conduct of the perpetrator.

The immediate consequence as a mandatory element of the objective side of the constitutive content of the crime represents the consequence of committing the material element. Thus, depending on the nature of the result, the offenses are classified as result or danger offenses. Given that all three offenses analyzed in this article are dangerous offenses, we will only detail this notion.

Dangerous offenses are characterized by the fact that their consequence does not produce a material consequence of the social relations protected by the incrimination

[12] Filing solution ordered by the Indictment from file no. 476/P/2014 of 25.04.2019, remained final by rejecting the complaint against the classification solution ordered by the Bucharest Court by the Decision of 28.11.2019 pronounced in the file no. 2118/1/2019.
[13] Art. 16 para. (3) let. b) CP.
[14] M.-I. Mărculescu-Michinici, M. Dunea, *Criminal law. The general part. Theoretical course in the field of licensing (I),* Hamangiu Publishing House, 2017, p. 579.
[15] *Idem*, pp. 580.

norm. If the state of danger created for social relations is presumed by the legislator, the crime is of abstract danger.

On the contrary, there are offenses known as actual danger offenses, in which case the legislator did not presume that the act of enforcement automatically has as an immediate consequence the state of danger for the protected social relations, proceeding to expressly mention it normally as an incrimination. For example, the crime of non-compliance with the legal measures of safety and health at work provided by art. 350 para. (1) CP. *Failure by any person to comply with the obligations and measures established with regard to safety and health at work, if this creates an imminent danger of an accident at work or an occupational disease, shall be punishable by imprisonment from 6 months to 3 years or with a fine."*. As can be seen, in the case of this crime, the legislator has expressly provided for the immediate consequence whose existence must be proven in order to be able to detain the commission of the crime, respectively the creation of a state of imminent danger of an accident at work or professional illness.

2.2 *Applying the notions analyzed in order to establish the legal classification of the facts of bribery or influence peddling by highlighting fictitious transactions in accounting documents or other legal documents in the manner presented*

As we have previously shown, the crime of tax evasion provided by art. 9 para. (1) lit. c) of Law no. 241/2005, can be committed only with qualified direct intent for the purpose of the perpetrator to evade the fulfillment of tax obligations.

Therefore, the issues considered in establishing the form of guilt in the case of tax evasion are, on the one hand, the determination of whether the perpetrator had a clear representation of the immediate consequence, respectively the state of danger created for social relations protected by criminal law, therefore which he pursued, and on the other hand the fulfillment of the requirement regarding the purpose of committing the crime, respectively the diminution of the fiscal obligations due to the state.

We consider that the reasoning for which the analyzed tax evasion offense is retained in competition with the crime of bribery or influence peddling in the hypothesis presented is the motivation according to which in the case of fictitious transactions in company accounting and the qualification of payments made as deductible expenses (according to the Fiscal Code), it cannot be admitted that the perpetrator did not have a clear representation of the fact that the social relations protected by the incrimination norm were endangered. Basically, it is considered that the perpetrator could choose not to declare the expense as a deductible, precisely in order not to harm the state budget.

It is thus considered that at the time the crime was committed, the immediate consequence was unavoidable, obvious, given the fact that the crime of tax evasion is a crime of abstract danger. We also find this reasoning in the opinion that the crime of bribery can be committed only with direct intent.

I do not think that any highlighting of fictitious operations in accounting is done with direct intent, the perpetrator not having the representation of creating a certain state of danger, obvious, for protected social relations, but rather a possibility, probability in

its creation. The probability we are talking about must also be taken into account by analyzing the dynamics of the company's economic situation during the respective fiscal year, there is even the possibility that the company does not register any profit, regardless of the expense in question.

Of course, if the condition regarding the existence of the purpose of diminishing the fiscal obligations is fulfilled, I think that the perpetrator cannot have another representation, than the endangerment of the social relations protected by the norm of incrimination of the deed provided by art. 9 para. (1) lett. c of Law no. 241/2005.

Although the crime of tax evasion is considered an offense of abstract danger, so the state of danger to social relations is presumed by committing the act of execution incriminated, to detain the commission of the crime, there must be the purpose of committing the crime, respectively, the reduction of fiscal obligations due to the state. In our case, by recording fictitious expenses as deductible. I specify that in our example we refer to the situation in which the nature of the fictitious operation related to the fiscal norms, "obliges" the taxpayer to register the payment made as a deductible expense.

Therefore, the purpose of the administrator pursued by the enforcement act is first of all, to dispose of the company's money in order to offer it as a bribe or payment for the influence peddling and at the same time to mask, hide, deed or create the appearance of a legal transaction, so that it is not discovered.

At first sight, it can be stated that it is a simple situation to prove, but often in practice there is no concrete proof of elements such as: purpose, causal link, etc.

From a theoretical point of view, in order for the crime of buying influence or bribery (in the opinion that it can be committed only with direct intent) to be retained in competition with the crime of tax evasion, it is necessary to prove that at the time making the payment and recording it in the accounts as a deductible expense, the perpetrator had a clear, obvious and unavoidable representation of the fact that by his enforcement acts he endangered the social relations regarding the proper conduct of service activities and on those regarding the full collection from taxpayers of the amounts representing fiscal obligations to the state. It is therefore necessary to prove that by the enforcement acts performed these consequences were inevitable, representing the natural consequence of enforcement.

After proving this circumstance, it is necessary to prove the purpose of committing both crimes. On the one hand, the corruption of the civil servant/the purchase of the influence that a person has over a civil servant, in order to violate the duties of the service, in the sense of the incrimination norms and on the other hand, the diminution of fiscal obligations to the state.

If the operation performed is likely to require the registration of the payment as deductible and result in a reduction of tax obligations owed to the state, I find it difficult to prove the purpose required by the criminal law. In fact, precisely in order to hide the crime of corruption committed and to create the appearance of a legal operation, the perpetrator will be obliged to proceed with the registration of the operation according to the fiscal norms, in our case as a deductible expense.

An important circumstance for establishing the real intention and purpose is the moment when the crimes are committed. Therefore, if at the time of recording the fictitious transaction in the accounts, it had no influence on the taxes due, but during the

fiscal year the situation of the company changed, in the sense that the payment resulted in a decrease in tax obligations, I consider that it is not possible to consider the crime of tax evasion.

As regards the reasoning that the offense of bribery may also be committed with indirect intent, since the rule in this matter is that the perpetrator does not seek to provoke a state of danger to employment, but nevertheless accepts this possibility, may be retained as argument for which tax evasion cannot be retained in competition with corruption offenses in the example provided, except in exceptional cases.

This opinion is shared by part of the doctrine, being generalized at the level of abstract danger crimes, considering the fact that the rule consists in the fact that the perpetrators do not seek to endanger the protected social relations, only accept this possibility.

Thus, although the state of danger is presumed by simply performing the act of execution, in fact, the perpetrators have the representation of only a medium-level possibility, a probability of producing the result, not pursuing it.

Applying this reasoning, we consider that the rule in case of committing the crime of tax evasion is to perform the act of execution with indirect intent, the perpetrator not clearly having the representation of the occurrence of the immediate consequence.

In this condition, I am of the opinion that only in exceptional situations can one of the analyzed corruption offenses be retained, in competition with the tax evasion offense provided by art. 9 para. (1) lett. c) of Law 241/2005 committed in the manner presented, considering that in addition to proving the direct intention, its purpose must also be proved.

In practice, however, these aspects are no longer concretely proven, being tacitly presumed by the judicial bodies.

2.3 *Determination of the damage*

A particularly relevant aspect for the analysis of this article is the determination of the damage. Specifically, if we refer to the crime of tax evasion, the state damage will consist in the difference between the amount of tax obligations paid and the one that would have been due if the fictitious operation/expense had not been recorded in the accounts.

However, if we consider a legal classification that consists in the contest of crimes between evasion and bribery, the amount of bribes offered or remitted will be confiscated based on art. 290 para. (5)[16] CP.

Therefore, the value of the fictitious contract (bribe) will be confiscated and then the company will be obliged, by reference to tax evasion, to pay a percentage of this amount, related to the tax obligations that have not been paid to the state.

Also, one aspect that should not be neglected is the fact that the company that collected the bribe most likely paid the tax obligations related to that collection.

With regard to a similar situation regarding the special confiscation, the High Court of Cassation and Justice ruled by Decision no. 23 of September 19, 2017 on

[16] Money, valuables or any other offered or given goods are subject to confiscation, and when they are no longer found, the confiscation by equivalent is ordered.

resolving legal issues regarding the interpretation of the provisions of art. 33 of Law no. 656/2002 for the prevention and sanctioning of money laundering and art. 9 of Law no. 241/2005 for the prevention and combating of tax evasion by which it established *"In interpreting the provisions of art. 33 of Law no. 656/2002 for the prevention and sanctioning of money laundering and art. 9 of Law no. 241/2005 for the prevention and combating of tax evasion in the case of the competition of offenses between the crime of tax evasion and the crime of money laundering, it is not necessary to take the security measure of the special confiscation of the sums of money that were the object of money laundering deriving from committing the crime of tax evasion at the same time as obliging the defendants to pay the sums representing tax obligations due to the state as a result of committing the crime of tax evasion."*

Applying the aforementioned Decision, for the situation in which the correct classification would be the retention of the two offenses in competition, the value of the amount remitted as a bribe will be confiscated, but the obligation to pay the value of tax obligations in case of tax evasion will no longer be operable, since we are in the presence of a single damage, and the simultaneous application of the two measures would result in a double sanctioning of the person convicted of committing both offenses.

Another important issue is the nature of the amount offered as a bribe and whether it can have an influence on tax obligations.

In this respect, if the transaction were real, the paying company would normally benefit from the reduction of tax liabilities due by recording the payment in the accounts as deductible, and on the other hand, the company receiving the "price" will record an increase in liabilities due to the state. Of course, we can also imagine situations in which the state can only benefit from carrying out such an operation, but we will not dwell on them, as this is not the topic of the article.

Therefore, the "price" in this case has effects on the tax obligations owed by the companies involved in the transaction, so that the amount of money has a double quality: on the one hand it is a deductible expense for the paying company, and on the other hand it represents a collection for the provider company, which will normally result in an increase in the amount of tax obligations due until then to the state.

In the case of committing the crime of bribery or influence peddling, the question arises whether the amounts paid as a bribe or for the purpose of buying influence, can still be considered relevant from a fiscal point of view, since receiving a sum of money with bribery title does not give rise to tax obligations on a person.

Therefore, if the content of the legal classification also includes the crime of tax evasion in competition with the crime of corruption, the damage would result from the taxation of an illegal amount, contrary to legal provisions. Or, if the act of hiding a good or of the chargeable or taxable source, if the latter come from the commission of certain crimes, does not constitute the crime provided by art. 9 para. 1 lett. a) of Law no. 241/2005 for the prevention and combating of tax evasion[17][18], I consider that even the amount proven to be a bribe cannot have effects in the fiscal plan.

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[17] *Economic Crimes,* 2016, Rosetti Publishing House, Commentary on Article 9 of Law no. 241/2005.
[18] C. Balaban, *Tax evasion. Controversial aspects of judicial theory and practice,* Rosetti Publishing House, Bucharest, 2003, p. 96.

3 Conclusions

I consider that it is necessary to ensure a uniform practice in relation to the example analyzed in this article, given the major difference in the sanctioning treatment that entails the retention of the two offenses in competition, compared to the hypothesis of retaining only the crime of corruption.

Following the study, I consider that not every person who commits the crime of evasion analyzed is presumed to have a clear representation of the immediate consequence required by the criminal law and even less the purpose of evading the fulfillment of tax obligations. I do not agree with the opinion that, as a rule, any perpetrator at at the moment when he chose to commit in this way the deed provided by art. 9 para. (1) lett. c) of Law 241/2005 realized that he would create a state of danger for the social values protected by the norm of incrimination and more than that he pursued this result. In addition to the arguments set out above, the fact that the legislature expressly provided in the criminal law the purpose of evading tax obligations represents an argument that it is the exception and not the rule.

Also, for a correct identification of the form of guilt with which the perpetrator committed a crime of tax evasion and the purpose of committing it is necessary to analyze all the elements of fact resulting from the manner of committing the act may or may not outline a qualified direct intention.

On the other hand, an important aspect to be clarified remains the determination of the damage in case of retention of the offenses of bribery/influence peddling in competition with the tax evasion committed in the manner analyzed in this article.

Finally, considering the non-unitary judicial practice, I consider that it is necessary to notify the High Court of Cassation and Justice in order to establish the circumstance: if in the hypothesis that a bribe or an amount intended to buy the influence of a person within the meaning of art. 292 CP, is disguised by highlighting in accounting some fictitious operations, the deed constitutes the crime of tax evasion provided by art. 9 para. (1) lett. c) of Law no. 241/2005 for the prevention and combating of tax evasion in competition with the crime of bribery/influence peddling or a single crime of bribery/influence peddling.

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Considerations regarding the regulation of body search and physical examination in the code of criminal procedure, including the relationship between the two evidentiary proceedings in connection with the possibilities of investigating the person's body

Manea T.

"Titu Maiorescu" University, Faculty of Law, Bucharest (ROMANIA)
E-mail: teodor.manea@prof.utm.ro

Abstract

According with the legal provisions a body search is the external body examination of a person, oral cavity, nose, ears, hair, clothing, objects that were in the possession or use of the person at the moment the search was performed. Furthermore, the physical examination represents the internal and external examination of one's body, as well as the collection of biological samples.

Upon a straightforward reading of the two sections of texts we notice the fact that the legislator uses the phrase "external examination" in both contexts, a phrase that in the case of the body search implies the inspection of one's oral cavity and nose.

In this frame of reference, we can infer ab initio that: the examination of one's clothes, as well as one's personal items, not excluding pets that accompany the person, represents part of a body search; the collection of biological samples represents solely a component of the physical examination; for example, the internal examination of one's body via the use of invisible radiation can only be achieved through physical examination.

Concerning the external examination of one's body we find that there are no activities that fall within the scope of an external examination of the body, while being impossible to be performed pending a body search, but subsequently being within the limits set for a physical examination.

Thus, we conclude that the body search represents a stand-alone probative technique, but which accompanies, whenever it is necessary, the physical examination in order to carry out upon one's body an external examination.

Keywords: body search, physical examination, external body examination.

1 Introduction

At the time of the adoption of the code of criminal procedure, the legislator also turned his attention to the institution of body search. As it is shown in the explanatory memorandum of the normative act "the project establishes the possibility of carrying out the body search in order to discover traces of the crime, material evidence or other objects that are important for finding out the truth in the case. The body search involves the external examination of a person's body, which may include the examination of the mouth, nose, ears, hair, clothing, objects that a person has on him or under his control, at the time of the search." It is further stated that "The project thus distinguishes between the institution of the body search and the physical examination, the latter involving external and internal examination of the person's body, as well as biological sampling, being a much more invasive evidentiary procedure and requiring an augmented control upon the manner of execution [1]."

Previously, this matter was regulated by art. 106 of the Code of Criminal Procedure. It provisioned for the body search to be carried out by the judicial body that ordered it, in compliance with the general provisions in the matter, or by the person designated by it, as well as provisioning for the mandatory performance of the evidentiary procedure by a person of the same sex as the person under search.

The changes are significant from this starting point. Currently, the criminal procedure law regulates two procedures, not one, each one being described in detail. Thus, two texts are dedicated to the body search, art. 165 which has the marginal name "Cases and conditions in which the body search is carried out" and art. 166 entitled 'Carrying out a body search'.

On the other hand, art. 190 of the Code of Criminal Procedure has been created for the physical examination. This article is in fact a rule that has no less than 11 paragraphs containing provisions regarding the disposition of the evidentiary procedure, the manner of performing it, as well as provisions regarding recording the findings and the legal possibilities of using the results of the examination.

2 The body search

Regarding the body search, according to art. 165 para. (2) of the Code of Criminal Procedure, it is put into motion by the authorities with attributions in ensuring public order and security [2], or by the judicial bodies, whenever there is a reasonable suspicion that by carrying out the evidentiary procedure, material evidence, other objects that are important for the fair settlement of the case, or traces of the crime will be discovered.

The first conclusion we can draw from the analysis of these provisions is that the body search can be ordered both within the criminal process and outside it. In this context, we appreciate that it is not even necessary to issue an ordinance whenever a body search is carried out by the agents of the authorities with attributions in ensuring public order and security. The judicial bodies, however, have the obligation to motivate the need to carry out the evidentiary procedure [3].

The disposition of the evidentiary procedure is conditioned by the existence of reasonable suspicions that the person bears on him traces or objects related to a deed of a criminal nature. In practice, this can be materialized, for example, in the body search carried out on the occasion of a flagrant crime, when the alleged perpetrator is searched for stolen goods, or used objects such as knives, blades, scissors, firearms. The entire evidentiary procedure is carried out if there are data that the person could carry goods whose possession is prohibited by law, such as drugs or weapons.

Also, the home search can be accompanied by a body search of the people found in the space to be investigated. The purpose of carrying out the evidentiary procedure is obvious in such cases: the discovery of objects related to the crime under investigation, or, in most cases, the removal of the possibility of a violent retaliation of the person, or attempts at self-harm.

According to art. 165 para. (1) of the Code of Criminal Procedure, the body search consists of "the external examination of a person, mouth, nose, ears, hair, clothing, objects that a person has on him or under his control, at the time of the search."

Prior to the search, the person is asked to hand over the objects in question. If it does so, the search shall no longer take place unless it is considered that it is still useful to identify other traces or objects.

The body search is carried out by a person of the same sex as the searched person and always with respect for human dignity.

From a forensic point of view, performing the evidentiary procedure involves two stages. A preliminary investigation is carried out, which consists in searching for it for the discovery of knives, firearms or blunt objects and which aims to remove the person's possibility of retaliating violently.

Subsequently, the person's body and clothes are inspected. It is preferable for the clothing to be removed from the body so that it can be examined more easily. Its removal is also desirable in order to be able to discover any objects that have been attached to the body or hung on it.

Body search also involves researching objects that the person has on them, such as bags, umbrellas, suitcases, etc. Pets are also being investigated, if it is estimated that they could have been used to hide various goods [4].

From the perspective of the manner of conducting the body search, in foreign practice it has been shown that such evidentiary proceedings do not interfere with the right to privacy as long as its performance is justified and is maintained within reasonable limits of proportionality [5]. Thus, the search of a person in the street does not constitute a degrading treatment, in the context in which the law does not provide that such an activity be carried out in conditions of privacy [6].

The results of the body search are recorded in a report that will contain the mentions provided by art. 166 para. (4) of the Code of Criminal Procedure [7]. It is signed on each page and a copy is left to the person searched.

3 The physical examination

As shown in art. 190 para. (1) of the Code of Criminal Procedure "the physical examination of a person involves the external and internal examination of his body, as well as the taking of biological samples."

The performance of the evidentiary procedure presupposes the existence of a written agreement of the person to be examined. To the extent that the person refuses to submit to the examination, the prosecutor requests the order of the judge of rights and freedoms, who decides on the request in the council chamber, by final decision. It admits the request in so far as the measure is justified for "establishing facts or circumstances to ensure the proper conduct of the criminal investigation or to determine whether a particular trace or consequence of the crime can be found on or within the body" as shown in art. 190 para. (2) the final sentence of the Code of Criminal Procedure.

When there is no consent from the part of the person meant to undergo the physical examination and it is necessary that the evidentiary procedure needs to be carried out urgently, while being the danger that the criminal investigation will be substantially delayed, or that the evidence will be altered or lost, the law provided for a similar procedure in art. 141 of the Code of Criminal Procedure. Thus, the examination will be ordered by the prosecutor by ordinance, an act which is subsequently subject to confirmation by the judge of rights and freedoms. If the judge does not confirm the measure, obviously, the evidence obtained will be excluded.

As it can be seen from the economics of the legal provisions, physical examination is ordered in criminal proceedings, exclusively by the judiciary [8]. The regulatory difference with the body search is a reflection of the greater degree of intrusion into the person's right to privacy and the dignity that the procedure entails.

Regarding the effective accomplishment of the evidentiary procedure, the law provides, at art. 190 para. (7) of the Code of Criminal Procedure, that "the internal physical examination of a person's body or the collection of biological samples must be performed by a doctor, nurse or a person with specialized medical training".

In order to ensure the operability of the investigation in the last sentence of the text, it is provided that when the collection of biological samples is done by non-invasive methods, the sampling can be performed by police specialists.

As it is normal, the results obtained by examining the samples obtained can be used in other cases, and samples that were collected and not consumed after analysis are kept and preserved for a significant period of at least ten years from the time of the final judgment.

The establishment of the evidentiary procedure is done, as it is normal, by means of a report, which, under the conditions of par. (9) of art. 190 of the Code of Criminal Procedure will contain "the name and surname of the criminal investigation body that concludes it, the ordinance or conclusion by which the measure was ordered, the place where it was concluded, the date, the time when it started and the time when the activity ended, the name and surname of the person examined, the nature of the physical examination, the description of the activities carried out, the list of samples collected following the physical examination." Attached to it are any legal photos taken.

4 The relationship between the two institution

a. As it can be seen from the above, the legislator's assessment of the explanatory memorandum regarding the fact that the physical examination is a much more intrusive procedure finds its resonance in the way of regulating the disposition procedure, but also the performance of the evidentiary procedure. In other words, at this level, because the difference between the two institutions is obvious, we will not insist on this aspect.

However, what remains to be established is the difference between the body search and the physical examination in terms of their actual performance, more precisely what are the limits of each piece of evidence, which can be investigated through each.

b. The difficulty comes, in our opinion, from the way of regulating the object of each evidentiary procedure. Thus, if the body search, as we have shown before, involves "the external body examination of a person, the oral cavity, the nose, the ears, the hair, the clothing, the objects that a person has on him or under its control, at the time of the search", in turn the physical examination involves the external and internal examination of the body as well as the taking of biological samples."

From simply reading we can conclude that the legislator uses the phrase external examination in both situations, external examination which, in the case of body search, also involves the investigation of a person's mouth and nose.

In this context, compared to the description made by the legal norm, we can easily draw the following conclusions:

- The examination of a person's clothes, as well as objects, including the accompanying pets, is the exclusive object of the body search.
- Biological sampling is the sole subject of physical examination.
- The examination of the inside of a person's body can be done only through physical examination.

The question that arises is in nexus to the external examination of the person's body, more specifically it is related to the question if the two texts of law refer to the same aspect, but, in this context, the body search becomes a kind of preamble of the physical examination, when the latter is considered necessary, or if, on the contrary, the scope of the notions is different in the case of the two evidentiary proceedings [9].

In the professional literature, regarding the issue in question, it was shown that "this external examination, similar both in the case of body search and body examination, does not involve any instrument of interference in the body of the suspect or investigated person. However, medical forceps may be used to remove certain objects from the suspect's cavities if these objects have been observed on external examination and cannot be removed otherwise. Medical forceps may be used provided they remain outside the body of the suspect, any intrusion of this medical instrument into the person's body exceeds the limits of the body search and must be authorized by the judge of rights and freedoms [10]".

c. Considering that the most intrusive evidentiary procedure is that of the physical examination, we consider that what must be established is whether the analysis of the outside of the body involves limitations in the case of body search, or the possibilities of investigation are identical in both cases.

Analyzing the two legal texts, the one regarding the object of the body search being clearer, we can conclude that the external research of the body aims at two fundamental aspects: the discovery of some objects and the discovery of some traces.

As for the former, it seems obvious that they can be the object of a search if they are attached to the body, by gluing for example, or by creating special holes in this regard, such as earrings.

However, when they are introduced into the natural cavities of the body, it seems that the search must be limited to the investigation of the oral cavity, nose and ears, as shown in art. 165 of the Code of Criminal Procedure.

However, the enumeration made by the legislator is exemplary, and it cannot be imputed to him that he did not make a complete list of the natural cavities of a person's body. In this context, in agreement with the aforementioned authors, we also appreciate that, insofar as the presence of objects can be identified by researching the body from the outside, without analyzing its interior by specific means, including medical, they can be raised with on the occasion of a body search.

In all other cases this requires an internal investigation, which can only be done through physical examination.

Regarding the "traces" that can be identified during the body search it is not very clear what the legislator had in mind, especially since the notion has acquired very varied definitions in the professional literature [11].

Considering the purpose of the evidentiary procedure we believe that any traces left by other objects, persons or substances on a person's body have been taken into account. Thus, in the case of a body search, one could look for secondary traces of shooting, hairs and tissue retained by the subungual deposit, traces of the chemicals used to perform a in flagrante delicto, even possible traces of the hands of another person on the searched body.

It becomes more problematic when, for example, it would be necessary to search for traces left by blunt objects on the body. Compared to the comprehensive wording of the legal text, we do not think it is at all exaggerated to consider that the search for a mark left in the person's skull, or the trace of a cutting object made on the arm can be included in the scope of the body search. As can be seen, they can be identified without internal intervention on the body, and can be analyzed from a strictly pathological perspective, and not forensic.

In this context, it is not possible to identify activities that fall within the scope of the notion of "external examination of the body" and that are impossible to perform in the context of a body search, but which can be carried out during a physical examination.

Consequently, the body search is an independent probative procedure, but which accompanies, when deemed necessary, the physical examination, as regards the external examination of the person's body.

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[2] Among these we can note, for example, the gendarmerie bodies which, according to art. 19 of Law no. 550/2004 on the organization and functioning of the Romanian Gendarmerie, with subsequent amendments and completions, have among other responsibilities: "executes, at the request of the General Inspectorate of Border Police, checkpoints for crossing the state border; (...) performs, in cooperation with the competent state institutions, public order missions during official visits or other activities in which high Romanian or foreign dignitaries participate on the Romanian territory, in the area of objectives and places of development activities "etc.

[3] In its jurisprudence, the European Court of Human Rights held that "in the absence of an ordinance adapted to the applicant's case, which clearly indicated the purpose and extent of the body search, the interference with the applicant's right to privacy was not in accordance with the law "within the meaning of art. 8 of the Convention European Court of Human Rights" – Cauza Cacuci și S.C.Virra & Cont Pad S.R.L. c. România, par. 79.

[4] E. Stancu, *Tratat de criminalistică,* ediția a VI-a, revăzută, Editura Universul Juridic, București, 2015, p. 516.

[5] L. M. Uriarte Valiente, T. Farto Piay, *El proceso penal español: jurisprudencia sistematizada,* La Ley, Madrid, 2007, p. 205

[6] *Ibidem*.

[7] Art. 166 alin. (4) provisions that: "The search report must include: a) the name and surname of the searched person; b) the name, surname and capacity of the person who carried out the search; c) listing the objects found during the search; d) the place where it is concluded; e) the date and time at which the search began and the time at which the search was completed, mentioning any interruption that occurred; f) the detailed description of the place and conditions in which the documents, objects or traces of the crime were discovered and collected, their enumeration and detailed description, in order to be recognized; indications as to the place and conditions in which the suspect or defendant was found. "

[8] Precisely for this reason, art. 190 of the Code of Criminal Procedure states that, if there are suspicions against a person that he drove a vehicle on public roads under the influence of alcohol, biological sampling is done only with his consent, not requiring mandatory physical examination of the judge of rights and freedoms. Refusal to submit to the sampling constitutes an offense under the conditions of art. 337 of the Criminal Code.

[9] The conceptual difference between the two institutions is also made in comparative law. In the Spanish-language legal literature, for example, a distinction is made between 'personal register' and 'body inspection'. In

Spain, given that the legislation does not describe any of these concepts, the doctrine could differentiate between body checks carried out for the purpose of finding out the truth in criminal proceedings, and those carried out for other purposes, for example to ensure public safety. them in different categories with distinct degrees of individual protection. For more details see, for example, J.J. Duart Albiol, Inspecciones, registros e intervenciones corporals en el ámbito del proceso penal, Librería Bosch, S.L., Barcelona, 2014, p. 31-42.

[10] C.M. Chiriță, A.S. Uzlău, în N. Volonciu, A.S. Uzlău, D. Atasiei, C.M. Chiriță, T.-V. Gheorghe, C. Ghigheci, T. Manea, R. Moroşanu, G. Tudor, V. Văduva, C. Voicu, *Codul de procedură penală comentat,* ediția a 3-a revizuită și adăugită, Editura Hamangiu, București, 2017, p. 449-450.

[11] For more details see E. Stancu, *op. cit.,* p. 113-117.

Issues on the Insolvency Procedure from a Human Rights Perspective[1]

Berna M.B.

"Titu Maiorescu" University (ROMANIA)
E-mail:berna.beatrice@yahoo.com

Abstract

Insolvency procedure is classically limited to commercial law. Designating the debtor's condition, characterized by the insufficiency of the funds necessary to cover the debts, the insolvency evokes a technical procedure that claims as a means of manifestation, the business relations. In this paper, we aim to study the legal implications generated on employees following the initiation of the employer's insolvency proceedings. We will therefore apply a study paradigm that reconfigures the insolvency procedure by translating from the specifics of business relations to the specifics of labor relations. In our demarche we aim to promote a human rights based approach through which we will emphasize the humanistic aspects of the insolvency procedure, thus focusing on ensuring greater social protection in favor of employees. Consequently, the analyzed international and European standards will be evaluated from the perspective of the rights and social freedoms of the individual.

Keywords: human rights, insolvency proceedings, wage claims, employee, employer.

1 Social and legal coordinates of the insolvency procedure

Work designates the notion that, in recent times, has been subjected to a process of conceptual metamorphosis, its meanings being translated from *utility* or *social need* to *valorization* and *protection*. Modernity has placed the work process and the individual-worker on new social coordinates in the context of which the performance of activities by the worker exceeds the significance of an act of social rhetoric; consequently, the remuneration for work ceases to bring together, in its conceptual content, exclusively the significance of an intrinsic labor provided to the worker. Work becomes one of the

[1] The article was written within the Internal Research Project of Titu Maiorescu University of Bucharest, Edition I (2018-2020), code PR04 INSOL-PERS.

fundamental social values - able to bring together, in its scope, both economic and humanistic aspects and the remuneration for the work performed acquires the value of a real social claim through which it is possible to assess the degree of involvement of the individual in the working process and in social affairs. Whether we relate to the socialist doctrine or we consider the theory of capitalism, work is conceptualized in terms of the supreme social value, which ennobles the human being and determines social progress. Thus, starting from the implications brought by labor on society, both socialism and capitalism build, each in its own particular way, articulated by its own doctrinal creed, *a labor society*.

The regulating framework corresponding to the labor society has as object the protection of the labor and of the worker and the reasoning of the regulations adopted in this field results from multiple aspects: (1) the worker's involvement in work is explicable by appeal to public considerations (work represents the worker's contribution to the welfare of society), respectively to private aspects (the needs of the worker and his family are met through work); (2) work meets the material requirements (we refer to the pecuniary benefits obtained as a result of performing work) as well as the spiritual needs of the individual (in this case, we consider the construction, at the level of society of an *imago hominis* focused on cultivating creativity and performance).[1]

In doctrinal studies, the way of valuing work is reflected from multiple perspectives; through the lenses of utilitarianism, work is an economic value through which individual and collective needs are met while the sociological dimension of work is extensive and covers the moral, spiritual and transformative implications of the human being. [2]

It is clear that between the two dimensions of labor valorization (utilitarian and sociological) there is a cleavage that raises doubts about the regulatory process: are the issues arising from the labor process likely to be subjected to regulations that involve a high degree of technicality or, even more, is it fair for them to be regulated by rules whose humanitarian vocation competes with technical aspects?

With the aim of clarifying the normative framework adopted in this field, the International Labor Organization has advanced, through the Philadelphia Declaration [3], the principle according to which *labor is not a commodity* under which the activity performed by the worker represents more than its economic value. By performing labor, the worker engages his creativity and innovative spirit, thus surpassing the repetitive movements and determining added value. The result of the work includes the final object produced, without being reduced to it. The humanist perspective advanced by the International Labor Organization on how to understand work as an activity combats the reification of work and, implicitly, the reification of the worker: if work is not a commodity it means that the worker will not be valued in terms of a valuable object, thus its creative and interpretive power is recognized.

International and European labor standards have approached the same humanistic perspective, establishing a substantial protection in favor of the worker, by reference to circumstances that may arise in the work process. The protection of workers in the event of the insolvency of the employer is a topic that has been the focus of international labor standards. In addition to the obvious purpose of the regulations – to ensure the worker in a situation where the employer is in a vulnerable position, – international regulations

seek *to change the existing power relations between employee and employer in order to establish an additional degree of independence and protection in favor of the worker.*

However, in approaching the subject of *insolvency*, the prospects are technical rather than humanistic; nevertheless, without contradicting the essence of this procedure, the study of the employer's insolvency proves humanistic valences by means of the possibilities of action specific to the protection of the employee. In its classic version, labor law regulates the relations between employer and employee in conditions of legal inequality, the employer benefiting from ascendancy over the employee both by coordinating his duties at work and by the material reward received. Instead, the employee has additional guarantees in his favor which become active to the extent that the employer is deprived of the appropriate legal means to exercise the ascendant specific to him. In case of insolvency, the employer does not have sufficient funds to pay the certain, liquid and due claims of the employees. Losing the advantage of cash flow, the employer replaces the employee and his position of inferiority, becoming responsible towards the employee. National insolvency law [4] distinguishes between two ways in which a state of insolvency can be manifested (1) by relative presumption if the debtor has not paid his debt to the creditor after 60 days from maturity; (2) imminently if it is proved that the debtor will not be able to pay the debts due, by using the funds available at the due date. By correlating the aforementioned national provisions with the provisions of labor law [5] under which *wages are paid before any other pecuniary obligations of employers*, in case of insolvency proceedings, employees will be protected mainly by ensuring the collection of wage claims. The social protection guaranteed to employees in the event of the employer's insolvency converts the former into privileged creditors who can invoke, the order of preference and the intervention of the guarantee institutions in order to satisfy the claims.

2 Convergences and divergences between international and European standards for the social protection of employees in the event of the insolvency of their employer

The supranational legal framework (international and European) adopts different normative perspectives on the protection of wage claims in case of insolvency of the employer: International Labor Organization Convention no. 173/1992 [6] pays particular attention to the protection of workers' wage claims in the event of the insolvency of the employer by means of regulating *a privilege*, and establishing in the background the *guarantee institutions*, while Directive 2008/94/EC of the European Parliament and of the Council [7] emphasizes the importance of *guarantee institutions* in the process of ensuring the payment of unpaid wage claims of workers.

The differences in approaching the issue of protection of workers' wage claims identified by comparing the rules of the European Union with those of the International Labor Organization are well-founded if we take into account the normative specifics of each legal system. The ILO's regulatory system is based on conventions and recommendations – the former being binding and particular: the binding character necessarily results from the observance of commitments under the Convention by States which have

acceded to it by ratification, while the particular nature is evident from the possibility of progressive implementation of the provisions of ratified conventions, in accordance with the degree of economic and social development of the State Party. [8] ILO Convention no. 173/1992 advances a legal model with a more generous scope than that established by Directive 2008/94/EC because it proposes two instruments of protection in the event of insolvency: *privileges* and *guarantee institutions*. In order to maintain the terminological rigor, we note that the situation-premise of the regulation – the insolvency of the employer- knows a detailed conceptualization in the ILO Convention no. 173/1992. According to Article 1 of the Convention, *the term insolvency refers to situations in which, in accordance with national law and practice, a procedure has been opened in respect of the assets of an employer in order to collectively pay his creditors. Any Member State may extend the time limit to other situations where workers' claims cannot be paid due to the employer's financial condition, for example, if the employer's sum of assets is recognized as insufficient to justify the opening of insolvency proceedings*.

Thus, according to the Convention, the insolvency of the employer is closely related to the insufficiency of assets ("a proceeding concerning the assets of a person", "the amount of assets is recognized as insufficient to justify the opening of insolvency proceedings"), without the need to meet other technical requirements. Insolvency is appreciated especially in its substantial dimension, not in its procedural parameters. The perspective is reversed in the text of Directive 2008/94/ EC which sets out, in Article 2, a definition emphasizing the procedural dimension of insolvency: *(...) an employer is considered to be insolvent if a claim has been made for the opening of a class action based on the insolvency of the employer, provided for by the laws, regulations or administrative provisions of a Member State, involving the total or partial deprivation of the employer of his assets, the appointment of a syndic judge or a person exercising a similar function and the authority which is competent under those provisions: (a) has decided to establish a procedure; (b) has found that the employer's business or establishment has been definitively closed and that the available assets are insufficient to justify the establishment of the procedure.*

The text of ILO Convention no. 173/2002 develops through its regulations, in particular, *the privilege* granted to workers while the rules on *guarantee institutions* establish a flexible system of protection – which, according to article 3 of the Convention, can be limited by the State Party only to certain categories of workers and certain economic sectors provided that they are mentioned in the declaration of acceptance. The mechanism for enforcing the *privilege* established in favor of workers in the event of the insolvency of the employer shall be determined, in particular, under articles 5 and 6 of the Convention; thus, under the privilege they enjoy, workers, in their capacity as employees, are entitled to the payment of their claims from the assets of the employer who is insolvent *before the payment of the share of non-privileged creditors*. The amount of the privilege shall be extended to cover the claims of the corresponding workers either for a specified period which shall not be less than 3 months preceding the insolvency or termination of employment or for a period corresponding to paid leave due as a result of work performed during the year there was insolvency or termination of employment as in the previous year. Also, the amount of the privilege may be extended to cover the amounts due for other paid leave, related to a certain period which

must not be less than 3 months preceding the insolvency or termination of employment or to cover the indemnities due to workers in case of termination of employment. In any case, is applicable the rule according to which the national law will place workers 'claims at a higher privilege than other claims and, in particular, workers' claims will occupy a higher position than the position allocated to State claims.

The rules of the Convention are restricted as to the way in which guarantee institutions are regulated, given that they do not lay down the organization, operation and management of such institutions, article 11 of the Convention, which is the subject of its rules, is essentially a reference to national legislation. We consider relevant the provisions of article 12 which details the categories of claims that are protected by a guarantee institution: a) claims for wages for a certain period which must not be less than 8 weeks preceding the insolvency or termination of employment; b) receivables for paid leave due as a result of work performed during a certain period, which must not be less than 6 months preceding the insolvency or termination of employment; c) receivables for amounts due for other paid leave, related to a determined period which must not be less than 8 weeks preceding the insolvency or termination of the employment relationship; d) the claims for the indemnities that are due to the workers in case of termination of the employment relationship.

If the text of Directive 2008/94/ EC is incomplete in terms of the privileges of workers facing insolvency of the employer, this is compensated by reference to the regulatory framework that regulates the *guarantee institutions* (Chapter II of the Directive). Guarantee institutions are under the coordination of the Member States which will take the necessary measures to ensure the payment of unpaid workers' wage claims in the event of the insolvency of the employer, including in situations where national law governs severance pay. Salary claims assigned to guarantee institutions are identified by Member States on the basis of a time criterion: *Receivables taken over by the guarantee institution are unpaid salary entitlements for a period preceding and/or, as the case may be, succeeding a set date by the Member States.* The obligation of guarantee institutions to take over the payment of workers' wage claims in the event of the employer's insolvency is not rigid, as Member States have the possibility to amend the content and scope of this obligation in accordance with the social purpose of the Directive. Under the coordination of the Member States, guarantee institutions shall be organized, financed and operated in accordance with the principles set out in Article 5 of the Directive: (a) the assets of the institutions must be independent of the working capital of employers and must be constituted in such a way that it cannot be seized in the course of insolvency proceedings; (b) employers must contribute to the financing, insofar as it is not fully covered by public authorities; (c) the payment obligation of the institutions exists independently of the fulfillment of the obligations to contribute to the financing.

Supranational law establishes *minimum standards* which, transposed at national level, provide a model of action and

a starting point in the development of more comprehensive and generous regulations. In that regard, Directive 2008/94 states in the recitals that the provisions for the protection of employees in the event of the insolvency of their employer constitute the minimum level of protection for securing unpaid wages. Member States will coordinate the guarantee institutions provided for in the content of the Directive and, in accordance

with the principles of subsidiarity and proportionality, will intervene in order to ensure that they balance their social and economic development. The Directive also requires States to be involved in defining the *state of insolvency*; among the regulations of the Directive there are no benchmarks for conceptualizing insolvency other than those specified in the legislation of the Member States. According to the provisions of the Directive, *in order to establish the obligation to pay the guarantee institution, Member States should be able to provide that, in cases where an insolvency situation leads to several insolvency proceedings, the situation should be addressed as such as a single insolvency proceeding*.

The programmatic nature of the Directive extends to *cross-border issues*, taking into account the legal security of employees in the event of the insolvency of companies operating in several Member States. In this context, it is imposed the application in conjunction of the principles of proportionality and subsidiarity so that provisions can be laid down at national level to enable the institution responsible for the payment of unpaid wages to be accurately identified.

3 Substantial and case law analysis on the provisions of Directive 2008/94/EC

Having as a precursor Directive 80/987/EC [9] whose objective was the establishment of a Guarantee Fund for the payment of wage claims by employers so as to materialize at the legal level the obligation of employers to insure their own employees against the risk of non-payment of sums due to them in performance of the employment contract or as a result of termination of employment, Directive 2008/94/EC codifies these provisions as well as those contained in the amending directives and includes interpretations by the Court of Justice of the European Union in this matter. Directive 2008/94/EC reconfigures the protection of employees in the event of the insolvency of the employer by redefining insolvency in accordance with the law of the Member States and by including in the scope of this concept other insolvency proceedings, with the exception of liquidation. [10]

In order to combat the risk to which employees are subjected in the event of the insolvency of their employer, the Directive provides for extended protection, also referring to part-time workers within the meaning of Directive 97/81/EC, to fixed-term workers within the meaning of Directive 1999/70/EC as well as to workers employed under an interim employment relationship in accordance with article 1 (2) of Directive 91/383/EEC. In other words, although it sets minimum standards for the protection of employees in the event of the insolvency of the employer, Directive 2008/94/EC *does not condition the granting of protection by guarantee institutions by a certain duration of the employment contract or of the employment relationship*. At the same time, Directive 2008/94/EC allows Member States *to extend the protection afforded to employees to other insolvency situations such as the permanent de facto cessation of payments established by specific procedures provided for by national law*.

An important aspect, highlighted in the previous section of the paper, is that the obligation to pay wage claims also exists in cases where *compensations* are regulated under domestic law. The interpretation of compensations granted in accordance with the

provisions of national law has been advanced by the Court of Justice of the European Union in resolving the reference for a preliminary ruling having as object the configuration of the concept of 'severance pay'. [11] In this case, the Court noted: *The first paragraph of Article 3 of Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer must be interpreted as meaning that, in accordance with certain national damages due to the termination of the employment contract by the will of the worker, as well as those due in case of dismissal for objective reasons, such as those considered by the referring Court, relate to the notion of "termination compensation"; for the purposes of this provision, legal compensation due for the termination of the employment contract by the will of the worker due to the transfer of the job by the employer, which obliges the worker to change his place of residence, must also be included in the same notion.*

The way in which the guarantee institution operates is equivalent to a form of subrogation of it to the employer in respect of the employee's unpaid salary entitlements for a period preceding and/or succeeding a certain date set by the Member States. The concept of *wage rights* will have a different meaning depending on the national law of the State to which we refer. In order to overcome this inconvenience, the Court of Justice of the European Union has established, by means of case law, that the principles of equality and non-discrimination must be observed in respect of benefits due by guarantee institutions. [12] In the European Commission's analysis and synthesis document [13] regarding the provisions of Directive 2008/94/EC, a distinction is made between States which have set a reference period to which claims may relate and States which have not set a specified reference but only a reference before or after which the claims must be reported. The countries that have opted to regulate, at the level of national law, a reference period of 6 months before the opening of the insolvency proceedings to which the claims relate are: Bulgaria, the Czech Republic, Denmark, Greece, Malta, Portugal and Austria; Poland uses a reference period of 9 months, Italy and Latvia set a reference period of 12 months and Belgium applies a period starting from 12 months before the closure of the company and up to 13 months after that. In the category of Member States that have not set a reference period we include Romania as well as Estonia, France, Luxembourg, Hungary, France, Spain, Finland or Sweden. The issue of the reference period has been examined in the case law of the Court of Justice of the European Union, emphasizing that the content of Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer must be interpreted as not precluding national rules that guarantee the salary claims of workers whose *employment relationship has ceased more than three months before the decision on the opening of the judicial reorganization procedure concerning their employer is transcribed in the trade register.* [14]

The time criterion for assessing when the protection of workers in the event of the insolvency of the employer becomes active is established by the Court by its interpretation in the settlement of the reference for a preliminary ruling concerning the possibility of granting workers protection at *all stages of the insolvency procedure*. [15] Accordingly, the Court interpreted the provisions of Directive 2008/94/EC as stating that they do not oblige Member States to provide guarantees for employees' claims *at every stage of their employer's insolvency proceedings*. In particular, that Directive does

not preclude the possibility for Member States to provide a guarantee only for the claims of workers born before the decision to initiate legal proceedings in the Trade Register, even if that decision does not provide for the termination of the employer's activities.

The possibility of limiting the payment obligation imposed on guarantee institutions is specified in Article 4 of the Directive, as developed in the Commission Report on the implementation of the provisions of Directive 2008/94/EC. There are two means of limiting this obligation: (a) by specifying the length of the period entitling to the payment of unpaid claims, provided that this period covers at least the remuneration of the last 3 months of employment or 8 weeks if the reference period is at least 18 months [article 4 (2)] (in the case of Romania) or (b) by setting a ceiling for payments made by the guarantee institution, provided that this ceiling is not lower than a threshold which is compatible with the social aim of the Directive [Article 4 (3)]. [16]

Although the main scope of Directive 2008/94/EC applies to workers who are employed under an employment contract or employment relationship, article 8 contextualizes the protection measures proposed by the text of the Directive and extends them to persons who have left already the undertaking or unit of the employer on the date on which his insolvency occurred in respect of acquired or about to be acquired rights, in respect to the old-age pension, including survivor's pensions, under supplementary social security schemes at enterprise or group of existing enterprises outside the national compulsory social security systems. The content of article 8 of Directive 2008/94/EC was reiterated by the Court, which noted two points in that regard: (1) article 8 must be interpreted as meaning that, in order to determine whether a Member State has complied with the obligation laid down in that article, pension benefits from the compulsory social security system cannot be taken into account; (2) article 8 of Directive 2008/94 must be interpreted as meaning that, in order for it to apply, it is sufficient that the supplementary social security scheme at the undertaking level does not receive sufficient funding at the time when the employer is in insolvency and that, due to insolvency, the employer does not have the necessary resources to pay sufficient contributions to this system to allow full payment of benefits due to beneficiaries. It is not necessary for the latter to prove the existence of other factors which lead to the loss of their old-age pension rights. [17]

Given that they extend the standards offered by the Directive, the guarantees covered by article 8 have been quantified by the Court by the case law interpretation which state: article 8 must be interpreted as meaning that each employee must receive an old-age pension of at least 50% of the amount of his rights acquired under an additional social security scheme at enterprise level in the event of the insolvency of his employer. [18] For the purposes of the scope of extensive protection provided for in article 8 of the Directive, the Court concluded that the provisions of article 8 do not require that, in the event of the insolvency of the employer, salary deductions converted into pension contributions of a former employee in the employer's burden of payment, to be excluded from the mass of insolvency. [19]

The protection of workers in the event of the insolvency of their employer applies to transnational situations, governed by articles 9 and 10 of the Directive, on the premise that if an undertaking operating in the territories of at least two Member States is in a situation insolvency, the competent institution for the payment of unpaid claims

of employees is the institution of the Member State in whose territory they usually work or operate.

Transnational situations will be assessed by applying the principle of cooperation between public authorities and institutions of the States in whose territory the insolvent enterprise operates and also by applying the principle of mutual information, the Commission adopting the relevant measures for disseminating information on transnational insolvency situations to the general public.

Article 12 of the Directive represents the rule governing the application of the employer's insolvency protection by the performance of specific activities by Member States, such as: (1) the adoption of measures that are necessary to prevent abuses; (2) the refusal or reduction of the obligation to pay or the obligation to guarantee if the execution of the obligation is not justified due to the existence of special links between the employee and the employer and of common interests embodied in a secret agreement between them; (3) the refusal or reduction of the obligation of payment or of the obligation to guarantee in cases where the employee, alone or together with close relatives, owned a substantial part of the employer's undertaking or firm and exercised considerable influence over its activities.

It follows from the correlation of these specific activities with the final purpose of the Directive (ensuring the protection of employees in the event of the insolvency of the employer) that the application of the rules of the Directive cannot be incompatible with measures taken by Member States to prevent abuse or refusal or reduction if the employee is in special circumstances by reference to the employer. As we have shown in the previous sections of the paper, the rationale for regulating the protection of the employee in the event of the employer's insolvency lies in the protection of the subordinate part of the employment relationship. Or, in the cases referred to in Article 12, the employee shall change his position in the employment relationship by adopting a position of legal equality with the employer. The reconversion of the quality of the employee leads to the modification of his legal status and the blurring of the objective pursued by the rules of the Directive. Thus, if agreements between the employee and the employer have been established by common interests or by the interests of the employee (that he has alone or together with family members) as the employee has an essential part of the employer's business and exercises considerable influence in the conduct of its activities, the employee is subrogated to the employer, benefiting of the same legal status.

4 Conclusions

In order to have a comprehensive understanding of the insolvency procedure, it is necessary to make the study perspective more flexible. The shift from a purely commercial perspective to a social and human rights-based approach is all the more necessary as the study of insolvency in the context of labor relations and the guarantee of increased social protection in favor of the employee necessarily involves an analysis of social principles and not a simple assessment of the economic and financial situation of the employer.

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Compatibility of State Aid with the Internal Market of the European Union in times of Public Health Crisis caused by COVID-19

Panc D.

Assistant Lecturer, PhD., "Titu Maiorescu" University, Faculty of Law (ROMANIA)
E-mail: danielapanc@yahoo.com

Abstract

The European Union (EU) internal market operates on the basis of common rules on competition, taxation and legislative harmonization. Crisis situations, such as the current public health crisis caused by the coronavirus pandemic (COVID-19), call for the need to change general rules for the functioning of society, the usual rules being replaced by the application of exceptions to these rules.

This scientific approach highlights such an exception to the rule prohibiting state aid, in the context of the unprecedented economic and social challenges for the EU posed by the COVID-19 pandemic, and examines the extent to which the adoption of state aid is compatible with the specific internal market principle of fair competition.

This paper examines the legal regime of state aid, highlighting the relevant case law of the Union courts and the decision-making practice of the European Commission, and identifies the special regulatory framework adopted at EU level, based on the exercise of its exclusive competence in establishing of competition rules necessary for the functioning of the internal market. Thus, it highlights the main elements of the European Commission's communications on the possibilities for a coordinated EU economic response and on the temporary framework for State aid measures to support the economy in the context of the current COVID-19 pandemic. The paper addresses the specific situation of the Romanian State Aid Scheme approved in accordance with the exception stated in Article 107 (3) (b) of the Treaty on the Functioning of the European Union (TFEU) on the compatibility with the internal market of State aid intended to remedy a serious disturbance in the economy of a Member State.

Keywords: *state aid, internal market of the European Union, COVID-19 pandemic, Romania*

1 The context of the public health crisis generated by the COVID-19 pandemic

The uniqueness of the European Union's internal market makes the interconnected national economies of the Member States to function in a coordinated manner, based on common rules.

Protocol no. 27 of the EU Treaties on the internal market and competition stipulates that the internal market as set out in Article 3 of the Treaty on European Union (TEU) includes a system ensuring that competition is not distorted. The EU Internal Market means freedom, operationalized by the four freedoms of movement of goods, persons, services and capital. [1]

Through the restrictive measures implemented at national level to protect the health of the population, the COVID-19 pandemic crisis has generated restrictions on fundamental rights and freedoms following national border closure, school closure, traffic restrictions, travel restrictions, banning events.

In the context of the public health crisis caused by the COVID-19 pandemic, the negative effects on companies and employees are leading to an economic crisis with an impact on the Union economy as a whole, with consequences for businesses, jobs and households.

The negative economic effects, especially the lack of liquidity for undertakings, determined by the current public health crisis are found in all sectors of activity, the most affected being transportation, tourism and culture. This calls for the intervention of decision-makers throughout the economy, in order to support all actors in the economy, especially small and medium-sized enterprises (SMEs), both during and after the crisis, for the recovery of the economic sector.

In addition to health measures, such as the purchase of protective equipment, medicines and medical devices, the European Union legislative and financial support also aims to mitigate the socio-economic consequences of the pandemic.

2 The coordinated EU economic response to the COVID-19 pandemic

The economic security of enterprises, especially SMEs, with economic difficulties due to the COVID-19 pandemic is achieved mainly at Member State level, through national budgets, as governments can implement measures quickly, knowing the realities of the business environment, channeling all financial efforts in the form of State aid to undertakings in difficulty.

In its Communication of 13 March 2020 on the EU's coordinated economic response to the COVID-19 epidemic, the European Commission outlined the alternatives that Member States have in their response to mitigate the socio-economic impact of the COVID-19 pandemic. [2] Member States may take measures to directly and effectively alleviate financial pressure on undertakings in accordance with existing State aid rules:

"First, Member States can decide to take measures applicable to all companies, for example wage subsidies and suspension of payments of corporate and value added taxes or social contributions. These measures alleviate financial strains on companies in a

direct and efficient manner. They fall outside the scope of State aid control and can be put in place by Member States immediately, without involvement of the Commission.

Second, Member States can grant financial support directly to consumers, e.g. for cancelled services or tickets that are not reimbursed by the operators concerned. These measures also fall outside the scope of State aid control and can be put in place by Member States immediately, without involvement of the Commission.

Third, State aid rules based on Article 107 (3) (c) TFEU enable Member States, subject to Commission approval, to meet acute liquidity needs and support companies facing bankruptcy due to the COVID-19 outbreak.

Fourth, Article 107 (2) (b) TFEU enables Member States, subject to Commission approval, to compensate companies for the damage suffered in exceptional circumstances, such as those caused by the COVID-19 outbreak. This includes measures to compensate companies in sectors that have been particularly hard hit (e.g. transport, tourism and hospitality) and measures to compensate organisers of cancelled events for damages suffered due to the outbreak.

Fifth, this can be complemented by a variety of additional measures, such as under the *de minimis* Regulation and the General Block Exemption Regulation, which can also be put in place by Member States immediately, without involvement of the Commission."

The Commission also identifies the possibility of adopting additional national support measures to remedy a serious disturbance in the economy of a Member State, in accordance with Article 107 (3) (b) TFEU.

Therefore, the Commission presents not only a series of measures which do not fall within the scope of State aid control and can be instituted immediately by the Member States, without the involvement of the Commission, but also measures granted to undertakings falling within the scope of State aid legislation, as regulated by Article 107 TFEU.

In the current context, the Commission presents three possibilities for granting State aid subject to approval by the Commission:

- aid to compensate undertakings for damage suffered as a result of the COVID-19 epidemic, pursuant to Article 107 (2) (b) TFEU, *"aid to make good the damage caused by natural disasters or exceptional occurrences"*;
- additional national aid to remedy a serious disturbance in the economy of a Member State, as set out in Article 107 (3) (b) TFEU, *"aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State"*;
- aid to undertakings facing acute liquidity and/or bankruptcy due to the COVID-19 outbreak, in accordance with the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty [3] and pursuant to Article 107 (3) (c)) of the TFEU, *aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.*

Pursuant to Article 107 (3) (c) TFEU and in accordance with the Guidelines on State aid for rescuing and restructuring, Member States may notify the Commission the

aid schemes designed to meet acute liquidity needs and to support undertakings which faces financial difficulties caused or aggravated by the COVID-19 epidemic.

Pursuant to Article 107 (2) (b) TFEU, Member States may also grant compensation to undertakings in sectors which have been particularly affected by the epidemic (eg. transport, tourism, culture, hospitality and retail trade) and/or the organizers of the canceled events for the damage suffered as a result of the epidemic and caused directly by the epidemic.

The Commission states that the cumulation of the compensation received by the undertakings under the Guidelines on State aid for rescuing and restructuring and Article 107 (3) (c) TFEU is not incompatible with the aid that the Commission declares compatible under Article 107 (2) (b) TFEU, "since the latter type of aid is not *rescue aid, restructuring aid or temporary restructuring support* within the meaning of point 71 of the Rescue and Restructuring Guidelines."

3 Legal regime of state aid

The legal regime of state aid is regulated by Articles 107-109 of the TFEU, part three of the Treaty *Union policies and internal actions,* under Title VII *Common rules on competition, taxation and approximation of laws* laying down rules on competition in the internal market in Articles 101 to 109.

Article 107 provides that State aid granted to certain undertakings or for the production of certain goods, which lead to distortions of competition and to affect trade at EU level is prohibited, as a rule, but exceptions to the rule may be accepted in certain situations authorized by the European Commission. The exceptional provisions applicable to the economic crisis generated by COVID-19 concern Article 107 (2) (b), Article 107 (3) (b) and Article 107 (3) (c) of the TFEU and are of strict interpretation.

3.1 *The notion of state aid*

The concept of State aid is an objective and legal concept defined in the primary law of the European Union in Article 107 (1) TFEU as *"any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States".*

In the wider context of State aid modernization [4], the operationalization of the concept of "State aid" has been achieved by summarizing the case law of the Union courts and the Commission's decision-making practice in the *Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union*. [5]

Following the analysis of the definition, we can highlight the cumulative criteria that correspond to the concept of State aid, namely:

1. the aid is granted directly or indirectly by the state or through state resources (at central, regional or local level) and is imputable to the state. For this purpose, the aid may be granted directly by a public authority or the public authority may designate a private or public body for the administration of a measure conferring an advantage. [6]

2. the aid favors one or more undertakings or the production of a particular good, that is to say, to selectively confer an advantage on certain undertakings or categories of undertakings or on certain economic sectors.

The settled case-law of the Court of Justice has held that the concept of an undertaking covers entities carrying on an economic activity, regardless of their legal status and the way in which they are financed. For example, non-profit legal entities that offer goods or services in a particular market and are in competition with other non-profit associations or for-profit associations are considered to be undertakings [7].

General economic policy measures, such as lowering the corporate tax rate, are not selective measures that fall within the scope of the concept of State aid. In order to meet the selectivity criterion, the measures must provide a benefit to some undertakings to the detriment of others in a comparable situation.

3. the aid distorts or has the potential to distort competition, which enables the undertaking to obtain a higher competitive position than it would have had if the support had not been granted. The judicial practice of the Union courts [8] considers that this criterion is considered to be met, despite the fact that the amount of aid is low or that the recipient undertaking is small.

4. the aid affects trade between EU countries, by strengthening the position of the recipient state aid in relation to its competitors at Union level. In Eventech v. The Parking Adjudicator [9], the Court stated that *"[...] it should be borne in mind that, in accordance with the Court's settled case-law, for the purpose of categorising a national measure as State aid, it is necessary, not to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition."*

4 The temporary framework for State aid

In the context of the severe economic turmoil caused by the COVID-19 pandemic and taking into account the need for a coordinated economic response in all Member States, the Commission adopted a special legal framework on 19 March 2020 [10], in order to facilitate the procedure for granting state aid.

Similarly, in 2008, the Commission adopted a Temporary Framework to respond adequately to the global financial and economic crisis [11], which justified Member States to adopt certain categories of State aid, for a limited period, to remedy the economic difficulties, declared compatible with the common market on the basis of Article 87(3)(b) from the Treaty establishing the European Community – the current Article 107 (3) (b) TFUE. Therefore, with regard to both the global economic crisis in 2008 and the current economic crisis due to the coronavirus, the Commission declared compatible with the internal market the aid offered "to remedy a serious disturbance in the economy of a Member State". The EU case law stricly interpreted this provision and ruled that the disturbance must affect the whole of the economy of the Member State concerned, and not merely that of one of its regions or parts of its territory. [12]

Published in the Official Journal of the EU on 20th of March 2020, the Commission Communication on the Temporary Framework for State Aid Measures in the current COVID-19 outbreak applies until 31 December 2020 (hereinafter referred to as the Temporary Framework).

The purpose of the Temporary Framework is to establish additional temporary State aid measures for undertakings facing economic difficulties, which the Commission considers compatible with the EU internal market under Article 107 (3) (b) TFEU, by a rapid approval procedure, following notification by a Member State.

In order to be approved, the Commission establishes that the State aid measures notified under the Temporary Framework must be *necessary, appropriate and proportionate* to remedy a serious disturbance in the economy of the requesting Member State. The Commission's control is intended to maintain the integrity of the internal market and to ensure compliance with the principles of fair competition. "EU state aid control also avoids harmful competition for subsidies, which means that Member States with more financial resources can afford to spend more than neighboring states, to the detriment of Union cohesion."

The Temporary Framework provides for five types of state aid:

Section 3.1. Aid in the form of direct grants, repayable advances or tax advantages, enabling undertakings to be granted up to EUR 800 000 per undertaking to meet its urgent liquidity needs;

Section 3.2. Aid in the form of guarantees for loans taken out by undertakings from banks;

Section 3.3. Aid in the form of subsidies interest rates for loans, through which Member States may grant loans at favorable interest rates to undertakings, in order to meet immediate working capital and investment needs;

Section 3.4. Aid in the form of guarantees and loans channeled through credit institutions or other financial institutions;

Section 3.5. Short-term export credits insurance.

Following the evolution of the COVID-19 pandemic, the Temporary Framework for State aid measures to support the economy was amended on 3 April 2020 [13], "in order to support relevant research and development activities on COVID-19, support the construction and modernization of product testing units relevant to COVID-19, as well as support for the creation of additional capacity for the manufacture of products needed to respond to the epidemic, including relevant medicinal products (including vaccines) and treatments, their intermediates, active pharmaceutical ingredients and raw materials; medical devices, hospital and medical equipment (including ventilators, protective clothing and equipment as well as diagnostic tools) and necessary raw materials; disinfectants and their intermediary products and raw chemical materials necessary for their production; data collection/processing tools." (paragraph 38)

This first amendment to the Temporary Framework introduces additional types of State aid that may be granted to relevant actors:

Section 3.6. Aid for COVID-19 relevant research and development;

Section 3.7. Investment aid for testing and upscaling infrastructures;

Section 3.8. Investment aid for the production of COVID-19 relevant products;

Section 3.9. Aid in form of deferrals of tax and/or of social security contributions;

Section 3.10. Aid in form of wage subsidies for employees to avoid lay-offs during the COVID-19 outbreak.

According to official statements, in April 2020, the European Commission approved 127 State aid measures to support businesses and protect the standard of living during the COVID-19 pandemic.

4.1 *Romania's State Aid Scheme*

Romania, in order to ensure that SMEs receive the necessary support and financial liquidity, in accordance with the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, on April 5 notified the Commission regarding the scheme for granting state aid, thus respecting the procedural notification obligations provided by Article 108 (3) TFEU.

The legal basis for the State aids Scheme comprising direct grants and loan guarantees, in accordance with Sections 3.1. and 3.2. set out in the Temporary Framework, is the Government Emergency Ordinance no. 42 of April 2, 2020. [14]

The State aid scheme to support the activity of SMEs in the context of the economic crisis caused by the COVID-19 pandemic in the amount of EUR 3.3 billion was approved by the European Commission [15] on 10 April 2020, being compatible with the internal market, in line with the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak.

By adopting this aid scheme, Romania wants to alleviate liquidity problems and stimulate private bank lending to undertakings during the COVID-19 outbreak, with reasonably estimated effects on the entire Romanian economy.

Romania's notification to the Commission argues on the legality of the measures, on meeting the criteria of State aid, as well as on the compatibility of the proposed measures with the internal market of the Union. The state aid scheme has its legal basis in Article 107 (3) (b) TFEU, aimed at remedying a serious disturbance in the Romanian economy.

Romania argues in the notification sent to the Commission the fulfillment of the four constitutive elements of the concept of state aid. Regarding the condition of state participation in granting aid, the granting authority of the State aid scheme is the Ministry of Public Finance, and the mandated administrator of the state aid scheme is the State owned National Credit Guarantee Fund for SMEs (Fondul Național de Garantare a Creditelor pentru Întreprinderile Mici și Mijlocii, "FNGCIMM"). Therefore, the scheme is financed from state resources, from public funds.

The condition of the selective advantage is fulfilled by the fact that the aid granted in the form of direct subsidies and public loan guarantees exempts the beneficiaries from costs, which they should bear under normal market conditions.

The advantage granted by the measure is selective, because it is granted only to certain undertakings, to SMEs registered in Romania which are active in all sectors, except banks, other financial institutions and undertakings expressly mentioned in the Scheme.

The measure is likely to distort competition, as it strengthens the competitive position of its beneficiaries. It also affects trade between Member States, as these beneficiaries are active in sectors where there is intra-EU trade.

Based on the arguments presented by the Romanian state, the Commission approved the State aid scheme considering that it complies with the conditions of compatibility with the EU internal market pursuant to Article 107 (3) (b), the measures being necessary, adequate and proportionate in order to remedy the serious economic disturbance caused by the COVID-19 pandemic.

5 Final considerations

Taking intro account the arguments of the present paper, the case of the State aid granted to undertakings which face financial difficulties caused or aggravated by the COVID-19 pandemic, reinforces the "exceptional times call for exceptional measures" paradigm.

Pursuant to exceptional policy responses, the European Union manages to strike a balance between relaxing competition rules by applying exceptions to the usual rules and granting short-term aid to the economies of the Member States and to the Union as a whole.

The specificity of the EU internal market calls for the adoption of a coordinated Union-wide response to the disruptive impact on the economy of the COVID-19 pandemic crisis, in order to ensure the integrity of the internal market.

The regulation of a common framework for the granting of State aid to undertakings in economic difficulty actually allows the European Union to exercise control on the possibility of granting State aid in the exceptional situations provided for in Article 107 TFEU, justified by a serious disturbance in the economy of a Member State.

Considering the fact that the provisions are to be strictly interpreted and that the proposed State aid measures are temporary, the European Commission seeks to avoid distortions of fair competition, thus declaring aid granted in exceptional situations like the coronavirus crisis compatible with the internal market.

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Human dignity in criminal proceedings. Relevant decisions in the case-law of the European Court of Human Rights and the Inter-American Court of Human Rights

Ph.D Predescu N.R.

"Titu Maiorescu" University (ROMANIA)
E-mail: ramona.predescu@prof.utm.ro

Abstract

This article is intended to analyse and identify the relation between human dignity and the violation of some human rights which might occur in the course of criminal proceedings, during the criminal prosecution phase, in the trial phase, as well as in the phase of enforcement of custodial sentences. For this purpose, the article highlights several key decisions of the European Court of Human Rights and the Inter-American Court of Human Right that found a violation of human dignity during the criminal proceedings phases and lays down the role which should be played by human dignity in any legal system.

A particular importance in this study is attached to the requirements arising from the provisions of Article 2 of the European Convention of Human Rights and Article 4 of the American Convention of Human Rights concerning the right to life and those of Article 3 of the European Convention of Human Rights concerning the prohibition of torture and of inhuman or degrading treatment or punishment, which have been highlighted in the presentation of the case-law.

Keywords: human dignity, criminal proceedings, prohibition of torture and of inhuman and degrading treatment, international protection of human rights, ECtHR and ACHR case-law

1 Introductory considerations on human dignity. Human dignity and the right to life

1.1. No legal system can function legitimately unless the rights that are inherent to the human being are guaranteed and respected and everyone is treated with respect and due dignity.

The concept of human dignity, such as we know it and use it today (as an intrinsic value of the human being), marked by Kant's philosophy[1] and strongly influenced by the historical events which took place during the two World Wars, and especially by the atrocities committed during the war against the Jewish people, came into societal collective mind quite recently, after World War II, with the adoption of the Charter of the United Nations[2] in 1945 and of the Universal Declaration of Human Rights (UDHR)[3] in 1948.

With the adoption of UDHR it became statutory that everyone is endowed with dignity and, by virtue of such dignity, everyone must be offered respect both by the state, through its bodies, and by other people. Article 1 of the Declaration provides that "*all human beings are born free and equal in dignity and rights.*" The relevant literature[4] held that human dignity is the keystone for the other human rights principles (universality, inalienability, indivisibility, interdependence etc). Following this line of reasoning, we can say that human dignity is the keystone for the entire palette of human rights.

Considering that since the adoption of the Charter of the United Nations and the Universal Declaration of Human Rights, and implicitly the recognition of the dignity inherent to the human being as the keystone of freedom, justice and peace in the world and that human beings are born free in dignity and in rights, dignity has enjoyed large recognition and has gained new valences, and it ceased being just a simple social value and even became a veritable principle underlying the entire construction of human rights.

1.2. The European Convention on Human Rights (ECHR) contains no reference to the concept of *dignity* or *respect for dignity*, however, the priceless value of the Convention is undisputable with regard to the guarantee and protection of the rights which are inherent to the human being.

The concept of dignity was mentioned for the first time at regional level in the regulatory texts adopted in the area of human rights by the Council of Europe (CoE) in 2002, when Protocol No. 13 concerning the abolition of the death penalty in all circumstances[5] was adopted. This concept is used so as to strengthen and support the decision reached by the member States of CoE, which is that the death penalty must be abolished. The Preamble of Protocol No. 13 states that the abolition of the death penalty is essential for the protection of the right to life and for "*the full recognition of the inherent dignity of all human beings*". We should say that, with the adoption of Protocol No. 13, the exception from the right to life of any person established in Article 2 of the European Convention has no longer an object. The exception refers to the fact that it is possible to inflict the death of a person only when a death penalty has been sentenced by a competent court of law. With the adoption of Protocol No. 13 on the abolition of the death penalty, this exception, obviously, fell into desuetude. Of course, at international

level, some states still apply the death penalty, but at European level, the signatory states understood that in order to comply with the right to life of every person and implicitly with the inherent dignity of the human being, the death penalty must be abolished, otherwise it would contradict the fundamental values recognised for all people in a democratic society.

1.3. One of the values underlying the establishment of the European Union is the principle of respect for human dignity, and this is the purpose of the provisions of Article 2 of the Treaty on European Union (TEU).[6] Furthermore, Article 21 of TEU states that, internationally, the external action of the EU is based on the principles which led to its creation, development and enlargement and which are promoted by the EU, everywhere and among these principles there is the respect for human dignity.[7]

The European Union assigns a well-deserved importance to the concept of human dignity in relation to the protection of human rights with the introduction of this concept in the Charter of Fundamental Rights of the European Union. Article 1 of the EU Charter states that "*human dignity is inviolable"* and that "*it must be respected and protected"*. Human dignity is an absolute principle, which does not allow for derogations, and this implies that the human being cannot be treated as an instrument.[8] We find, based on the official interpretations[9] of this article, that human dignity, besides being a fundamental right by itself, is the very foundation underlying the fundamental rights. We can say that, at EU level, human dignity appears represented both as a fundamental right and an authentic principle of all fundamental rights.

1.4. Human dignity is mentioned in the provisions of the American Convention on Human Rights (ACHR)[10] and applies to all its signatory states. Article 5 of ACHR referring to the right to humane treatment states that all persons deprived of their liberty should be treated with respect for the inherent dignity of the human being. Furthermore, Article 11 point 1 referring to the right to privacy holds that every person has the right to have their honour respected and their dignity recognised. The interpretation of this article by the Inter-American Court of Human Rights is favourable to the recognition of a right to dignity assigned to the human being.[11]

In this context, this article underlines the decision pronounced by the Inter-American Court of Human Rights in the *Case "Street Children" (Villagran-Morales et al.) v. Guatemala*[12], concerning the death of several street children caused by police agents, where the Court held that "*the right to life is a fundamental human right, and the exercise of this right is essential for the exercise of all other human rights. If it is not respected, all rights lack meaning. Owing to the fundamental nature of the right to life, restrictive approaches to it are inadmissible. In essence, the fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence"*. The Court's reasoning set out above without any reasonable doubt is an expression of the evolution of the right to life in the context of the international law of human rights, generally, and in the context of the American Convention on Human Rights, with reference to Article 4, particularly. We can see that the right to life involves both the negative obligation not to deprive a person of their life arbitrarily and the positive obligation to take all necessary measures to

ensure that this fundamental right is not violated. Of course, we refer here to the positive obligation incumbent on every state to take the necessary measures through its bodies in order to ensure that the right to life is respected.

In the concurring opinion formulated in the *Case "Street Children"*, judges Antônio Augusto Cançadu Trindade and Alirio Abreu-Burelli hold that the right to life should no longer be conceived, like it used to, as referring strictly to the physical deprivation of life and that there are now distinct ways to deprive a person arbitrarily of their life, and it is the duty of the State to take positive measures designed to confer protection to people's life, especially for those who are in a risk situation, a vulnerable situation, such as the case of children in the streets. Thus, the two judges affirm that the arbitrary deprivation of life is not limited to the illicit act of homicide, and it extends as well to the deprivation of the right to live with dignity. Moreover, the two judges affirm that the interpretation of the right to life should be such as not to compromise the minimum conditions of life with dignity and that the "project of life" is consubstantial of the right to existence and requires conditions which are specific to life with dignity and to the security and integrity of the human person.

This evolutive approach used by the Costa Rican Court is not found in respect of the ECtHR. The Strasbourg Court takes human dignity into account in its decisions, but it does not share this opinion according to which the right to life of the human being also means a right to live with dignity.[13]

2 The principle of human dignity vs. the principle of liberty in the criminal judicial system

2.1. The relevant literature has yet to come with an answer to the question: Why the respect for human dignity is important in any legal system and especially in the area of criminal justice? In an attempt to offer an answer to this question, this study intends to weigh dignity against another principle which is specific to the law of criminal proceedings, namely the principle of the guarantee of the liberty of the person.

The right to liberty and security is enshrined in Article 6 of the Charter of Fundamental Rights of the European Union and in Article 5 of the European Convention on Human Rights (ECHR)[14] according to which no one can be deprived of his liberty with the following exceptions: a) if a person is lawfully detained based on a conviction by a competent court; b) if a person was lawfully arrested or detained for non-compliance with an order given by a court, under the law, or in order to secure the fulfilment of an obligation provided by law; c) if a person was arrested or detained for the purpose of bringing them before a competent judicial authority, when there is reasonable suspicion of that person having committed an offence or when there are sound reasons to consider it necessary to prevent the person from committing an offence or fleeing after having done so; d) if there is a lawful detention of a minor, for the purpose of their education under supervision, or there is a lawful detention for bringing the minor before a competent authority; e) if there is a lawful detention of a person susceptible of spreading an infectious disease, of a person of unsound mind, an alcoholic, a drug addict or a vagrant; f) if there is a lawful arrest or detention of a person to prevent their illegal entry

into a territory or against whom a deportation or extradition procedure is being conducted.[15]

In Romanian law, liberty is one of the fundamental values protected by the Constitution of Romania. Article 23 paragraph 1 of the Constitution stipulates that "personal liberty and security are inviolable." In the Code of Criminal Proceedings, the principle of the guarantee of personal liberty and security throughout the criminal proceedings is enshrined in Article 9 paragraph 1.[16] Paragraph 2 of the same article establishes the exception that "any measure involving a deprivation or restriction of liberty is ordered exceptionally and only in those cases and conditions provided by law".[17]

In a situation where a person does not comply with the legal rules established in every society, the state, through its jurisdictional bodies, may restrict a person's liberty in various ways, including by ordering measures involving a deprivation or restriction of liberty, such as the preventive measures provided for by Article 202 paragraph 4 of the Code of Criminal Proceedings, among which there are the detention for 24 hours, the house arrest or the provisional detention[18], or by a punishment involving a deprivation of liberty applied by a court of law.

2.2. Dignity, on the other hand, cannot be restricted. The state, through its jurisdictional bodies, cannot deprive a person of their dignity. Even in a situation where a person has some of his or her rights restricted, such as their right to liberty as a consequence of committing an offence or of a reasonable indication that the concerned person would have committed an offence or in a situation where there are no criminal rules involved and the state restricts some citizen rights taking into account some current social aspects, such as the existence of a pandemic or a state of war, the dignity of all human beings still cannot be restricted in any form. Moreover, in the case-law of the Supreme Court of the United States[19] an idea has taken shape that "inmates may be deprived of rights which are fundamental in respect of their liberty, but they cannot be deprived of the essence of human dignity that is inherent to all people".[20]

In the current Romanian Code of Criminal Proceedings, human dignity is represented as a guiding principle for the application of the law of criminal proceedings and is governed by Article 11 under the marginal name of "Respect for human dignity and private life". According to the regulation of criminal proceedings, "any person that is subject to criminal prosecution or to a criminal trial shall be treated with respect for their human dignity."[21]

Any other human right may be restricted, but not the right to dignity, because dignity is more than a right; it is a principle underlying the entire human rights construction and at the same time a supreme value, an intrinsic value of the human being, such as revealed by the case-law of the Constitutional Court of Romania (CCR).[22] In *Decision no. 1576 of 7 December 2011*[23], CCR stated that "*human dignity is an inalienable attribute of the human person."*[24] The violation of any human right, be it the right to liberty, the right to life or the right to private and family life, is, inevitably, also a violation of the right to human dignity.

Moreover, the Court of Justice of the European Union in its Judgment of 9 October 2001 in *Case C-377/98*[25] stated that the fundamental right to human dignity is part of Union law. In the same case, in the Conclusions of the Advocate General Jacobs presented on 14 June 2001, the Advocate General affirms that the right to human

dignity is recognised by the Court as a fundamental right.[26] Therefore, none of the rights laid down in the EU Charter may be used to attempt on the dignity of other persons. The dignity of the human person is part of the essence of the rights enshrined in the EU Charter and it cannot be prejudiced including through the limitation of a right.[27]

Taking into consideration the aforesaid, I think human dignity should play a central part in the area of criminal justice, in Romania and in any other state, being the only right which a person cannot be deprived of, even when other rights of that person have been restricted.

3 Prohibition of torture and of inhuman and degrading treatment

3.1. Even if *human dignity has not found a place in the contents of the European Convention of Human Rights*, *its role is,* nevertheless, *determinative in the practice of the European Court of Human Rights.* Human dignity was the basis of the ECtHR decisions, especially when the Court found a violation of Article 3 of the ECHR referring to the prohibition of torture.[28]

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)[29] sets forth, in Article 1, a detailed definition of torture:

"The term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."[30]

We can see in the CAT text a distinction between torture and other forms of inhuman treatment.[31] The duty to determine if a situation in a concrete case falls either in the category of torture or in that of inhuman treatment rests with the Strasbourg Court[32] when cases are referred to its judgment.

3.2. The first reference of the Strasbourg Court to human dignity was in the *Case of Tyrer v. The United Kingdom*[33] referring to the application of a corporal punishment to a student as part of a legal sentence. The Court held that the application of such a punishment "*constituted an assault on [...] the main purposes of Article 3 to protect, namely a person's dignity and physical integrity"*.[34]

In another case[35] on trial before the Strasbourg Court, the applicant claimed that she was beaten by the policemen when she was taken at the police section because she refused a search of her flat.[36] The Court specified that "in respect of persons deprived of their liberty, recourse to physical force which has not been made strictly necessary by their own conduct diminishes human dignity and is in principle an infringement of the

right set forth in Article 3" of ECHR.[37] Therefore, any conduct of the police officers with regard to a person whose human dignity is diminished by that conduct constitutes a violation of Article 3 of the Convention.

3.3. In the *Case of Bouyid v. Belgium*[38], the Court found that the dignity of the applicants was undermined and the provisions of Article 3 of the Convention were violated by the slapping by the police agents and every slap applied was an impulsive act in response to an attitude perceived as disrespectful.[39] Moreover, the Court emphasised that the infliction of a slap by a police agent on a person who is entirely under his control is a serious attack on that person's dignity.[40]

4 Detention conditions and ill-treatment

4.1. The practice of the European Court of Human Rights has shaped a various and vast collection of decisions on precarious detention conditions and ill-treatment of inmates and in respect of which a violation of Article 3 of ECHR was found, and implicitly a violation of human dignity. Some of these are: the hygiene conditions in cells, ill-treatment by cell mates, ill-treatment by the police officers of the penitentiary, overcrowded prisons and the lack of personal space in cells with several inmates, repeated transfers, failure to ensure the inmates' safety during transfer, far too strict isolation conditions, inmates' body search, video surveillance in cells and disregard of the right to private life.[41] Of course, these solutions are concerned with the enforcement of court decisions involving a deprivation of liberty, but they can also relate to the criminal prosecution phase when a preventive measure involving a deprivation of liberty has been taken against those concerned. Romania has been "*convicted"* many times by the ECtHR for its precarious detention conditions in prisons, such as the overcrowded penitentiaries, lack of hygiene, lack of hot water or of a window to let air or natural light in etc.[42]

One of these situations is the *Case of Florea v. Romania*[43], where the Strasbourg Court found a violation of Article 3 of ECHR because of the detention conditions of the applicant. The Court noted, in particular, that besides the deprivation of a convicted person of their rights, some improved protection of vulnerable individuals is necessary in some cases. Such a situation was that of the applicant, who was suffering of chronic hepatitis and high blood pressure and for a 9 month period had to share a cell provided with only 35 beds with 110-120 other inmates. Furthermore, the Court held that the inmate was put in cells with other inmates who were smokers and had not an appropriate diet given his medical conditions. Moreover, the Court said that the State must ensure that all inmates are imprisoned in conditions where their human dignity is respected, that they will not be subject to suffering or difficulties of such an intensity as to exceed the inevitable level of suffering inherent to a detention situation and that their health is not compromised.

Therefore, we can see the importance assigned by the ECtHR to human dignity, calling on and reminding the states (the Romanian state in this case) of the need to protect it, especially when vulnerable people are in detention conditions in a penitentiary.

4.2. The Court in Strasbourg found on many occasions a violation of Article 3 of the Convention resulting from not allowing inmates' access to medical care. In the *Case of Aleksanyan v. Russia*[44], the ECtHR considered that national authorities did not care sufficiently for the applicant's health when they refused the applicant's transfer to an institution specialised in the treatment of AIDS, in a context where that transfer was necessary due to the applicant's medical condition which required such a treatment and the hospital of the penitentiary was not an institution specialised for this purpose.[45] The Court determined that the conduct of the national authorities undermined the applicant's dignity and led to acute difficulties, causing much more suffering than the one inevitably associated with an imprisonment conviction and the applicant's medical conditions, and all these constituted inhuman and degrading treatment.[46]

5 Conclusions

Human dignity occupies an important position in the context of international law, being considered a fundamental principle which must be respected, especially because human dignity is inherent to all human beings and is, at the same time, a principle underlying all human rights. Human dignity is the keystone on which human rights have been established.

My opinion is that the concept of dignity should occupy a central position also in the area of criminal justice, in Romania and in other countries, because dignity is both an intrinsic value of the human being and a right of which no person may or should be deprived, even when some other rights are restricted, such as the right to liberty as a consequence of an offence or the existence of a reasonable indication that the person concerned committed an offence.

Human dignity means more than a simple notion; the concept itself constitutes a complex of rights and freedoms underlying the social existence. Although human dignity was not expressly established in the international conventions for the protection of human rights, its essence is present in any right protected at national and international levels.

With regard to criminal aspects, as highlighted in this study with the presentation of the case-law of the supranational courts for the protection of human rights (the European Court of Human Rights and the Inter-American Court of Human Rights), human dignity has been violated at the same time with the violation of the right not to be subject to torture, inhuman or degrading punishment or treatment during the phases of criminal proceedings and throughout the period of a conviction involving a deprivation of liberty. Moreover, it appears from the decisions which have been presented that the courts held the violation of human dignity in order to emphasise that it is necessary for the states to ensure that all inmates are detained in conditions where their human dignity is respected, that they are not subject to suffering or difficulties of an intensity so high as to exceed the inevitable level of suffering inherent to a detention situation.

We still have to answer the question whether the current national or international regulations succeed in ensuring the necessary protection for the respect of the human

dignity of every individual seen as a social being, destined to evolve in an organised society where man himself is a social value.

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[1] Immanuel Kant (born on 22 April 1724 – died on 12 February 1804), a philosopher of German origin, is considered one of the greatest philosophers of the Age of Enlightenment and one of the greatest interpreters of the notion of "human dignity". In the philosopher's view, people should be treated as an aim and not as pure means, and human dignity is an absolute value, inherent to the human being: "every man should be respected as an aim by himself, and it is a crime against his dignity, which belongs to him as a human being, to be used as a means to attain any goals external to him" (Groundwork of the Metaphysics of Morals, 1785).

[2] The United Nations, the Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

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[4] M. Butrymowics, *Human dignity in law – a case study of the Polish legal system, The person and the Challenges,* Vol. 6, no. 2, 2016, p. 90.

[5] Council of Europe, Protocol No. 13 to the European Convention on Human Rights concerning the Abolition of the Death Penalty in All Circumstances, 3 May 2002, ETS 187.

[6] "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." – Treaty on European Union, Article 2.

[7] "The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law." – Treaty on European Union, Article 21.

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[9] The European Union, *Explanations relating to the Charter of Fundamental Rights,* OJ C 303, 14 December 2007, pp. 17-35; see also http://fra.europa.eu/en/charterpedia/article/1-human-dignity, last accessed on 12 September 2019.

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[11] See the Case of *I.V. versus Bolivia,* 30 November 2016, C no. 329, §148-150.

[12] CIADO, the Case *"Street Children" (Villagran-Morales et al.) versus Guatemala,* 19 November 1999 (Merits), Series C no. 63.

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[14] Article 5 paragraph 1 of ECHR: "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty [...]".

[15] Article 5 paragraph 1 of ECHR.

[16] Article 9 of the Code of Criminal Proceedings referring to the right to liberty and security provides as follows:
(1) In the course of criminal proceedings, the right of every person to liberty and security is guaranteed.
(2) Any measure involving a deprivation or a restriction of liberty is ordered exceptionally and only in the cases and the conditions provided by law.
(3) Any person that is arrested has the right to be informed as soon as possible and in a language he understands of the reasons for his arrest and has the right to lodge an appeal against the arrest measure.
(4) When a measure involving a deprivation or a restriction of liberty is found to have been unlawfully ordered, the competent judicial bodies have the obligation to order that the measure be recalled and, as appropriate, to let the person detained or arrested free.
(5) Any person against whom, in the course of criminal proceedings, a measure involving a deprivation of liberty has been unlawfully ordered is entitled to a compensation for the damage suffered, under the law.

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[30] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, Article 1.
[31] See Article 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Luban D., *Treatment of prisoners and torture* in Marcus Düwell, Jens Braarvig, Roger Brownsword, Dietmar Mieth (edit.), *The Cambridge Handbook of Human Dignity*, Cambridge University Press, London, 2014, pp. 451-453.
[32] See more on this: Rainey B., Wicks E., Ovey C., (2017), *Jacobs, White, and Ovey; The European Convention on Human Rights,* 7th edition, Oxford University Press, pp. 187-191.
[33] *Case of Tyrer v. The United Kingdom*, 25 April 1978, Series A no. 26.
[34] *Idem,* §33; see also Case of *Ribitsch v. Austria* (ECtHR)*,* 4 December 1995, Series A no. 336, §38; ECtHR, *Case of Bouyid v. Belgium* [MC]*,* 28 September 2015, no. 23380/09.
[35] *Case of Menesheva v. Russia*, no. 59261/00, 9 March 2006.
[36] *Idem*, §48.
[37] *Idem*, §59.
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[40] *Idem*, §103.
[41] For concrete cases relating to such detention conditions and ill-treatment of inmates, see: https://www.echr.coe.int/Documents/FS_Detention_conditions_ENG.pdf.

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Digital identity

Capisizu L.A.

PhD Candidate, "Titu Maiorescu" University, Bucharest (ROMANIA)

Abstract

Identifying a person in a society is an essential aspect of any functioning economy. The lack of effective ways to identify natural persons would make it impossible to establish relationships. The advent of the Internet has led to the need of adopting appropriate means of identification in the digital realm. Thus was born the idea of digital identity, a concept that has evolved over time from simple digital representations of real-world means of identification (eg, ID card scanning) to advanced methods of identification based on cryptography (eg, electronic signature). Recent technological advances consisting in the improvement of smartphones, the evolution of cryptography and the emergence of the blockchain have allowed the creation of a new framework for expressing digital identity, in the center of which is the user. This framework aims to change the current paradigm of "centralized" identity to a model of "decentralized" identity. Thus, new notions are outlined such as "decentralized" digital identity and even of a species of it, respectively the self-sovereign identity (SSI). This article explains these notions, as well as how they might work in the current European legislative context.

Keywords: blockchain technology, decentralized digital identity, self-sovereign identity (SSI), eIDAS.

1 The notion of digital identity

Before we realized the usefulness and importance of the Internet in our daily lives, the Internet was built without a user identification mechanism. In the absence of a standardized way to identify people, each website began to create its own digital identity solution with its own local accounts and passwords. As a result, people collect a multitude of digital identities in their digital interactions, from various e-mail accounts and social media profiles to e-banking accounts. [1, p. 5]

Digital identity is a combination of all the identification attributes that exist about a person in the digital realm. These identifying attributes are not limited to the "official" ones such as those written on identity cards, driving licenses, passports and other official documents, but sum up all our digital "fingerprints", thereby understanding all those pieces of information that shapes our online profiles. [2, p. 5]

Unlike the real-world identification attributes that are expressly and limited provided by Article 59 of the Romanian Civil Code, namely name, domicile, residence

and marital status [3], the identification attributes in the digital realm are unlimited, being represented by any information that may be associated with a person's identity.

The relationship between the identification attributes in the real world and those in the digital world is from part to whole, meaning that the attributes in the second category also include those in the first category. In addition to these attributes, identification in the digital environment can be done with the help of "biometric" attributes, ie those attributes related to the intrinsic qualities of a person, such as facial image [4], fingerprints, voice stamp or even the style of typing on the keyboard [5].

There are also many other "digital footprints" [6, p. 6] that contribute to shaping the digital identity, such as a person's transaction history or the history of places they visit, as well as other social identifiers, such as family relationships, circle of friends or hobbies.

Digital identity therefore is atomic in nature, constantly enriching itself with new information at each connection to the internet. All these "fragments" of information make up a person's profile in the digital realm, ie his digital identity

Currently, digital identity is fragmented, which has many disadvantages [6, p. 5]. For users, having a large number of accounts and passwords is time consuming because they have to repeatedly record their credentials with each new digital interaction and often lose access to their accounts because they forget their passwords. From a data security perspective, the current fragmented landscape of digital identity is characterized by a discouraging number of heterogeneous and unregulated levels of security. Because of this, many users neglect security issues and use the same simple password to access several different services.

The disadvantages of digital identity fragmentation also affect online businesses, which have to develop and maintain their own expensive identification processes in order to provide their services. In addition, each company must periodically update customer data to reflect any changes [7].

In contrast, a unique digital identity has the potential to significantly improve the user experience, making digital services easily accessible without the need for repeated registration of identification data. In addition, users will be able to regain control of their digital identity, having the ability to choose which attributes they want to share and with whom. A universally usable digital identity is also an opportunity for companies to reduce risk and achieve significant cost savings by outsourcing customer identification. [1, p. 5].

2 The digital identity ecosystem

The provision and use of digital identity involves a number of interdependent actors, which together form an ecosystem of digital identity [1, p. 6]. In order to function, any successful ecosystem requires a collaborative effort between different organizations and industries to cope with an increasing volume of transactions and meet customer expectations.

At all stages of the digital identity life cycle, each actor involved assumes a certain role. Depending on the number of roles and their specific tasks, digital identity systems may have different configurations.

Therefore, we will present the archetypal roles in a digital identity ecosystem. They are divided into basic and ecosystem-dependent roles. Basic roles are the bare minimum for creating any digital identity ecosystem. These roles are held by the following 3 actors: the user ("identity owner"), the identity provider and the relying party. Basic roles are absolutely necessary, but they are not enough for the optimal functioning of a digital identity ecosystem. In addition, the following roles can be integrated: broker, attribute provider and service provider [1, p. 7].

The user is the natural person who owns and controls the data about his digital identity. The identity provider is responsible for providing a digital identity. Its tasks are to verify the real identity of persons and to issue the appropriate credentials that certify the digital identity. This role is performed either by a government agency (eg, a passport office) or by a government-recognized organization (eg, a bank). The relying party relies on the digital identity of users certified by identity providers in order to register new customers and/or authenticate existing ones. The relying party can therefore be businesses (eg online stores) and government agencies (eg tax offices). [1, p. 7].

The broker ensures interoperability in the ecosystem and improves data confidentiality by preventing the tracking of actions between different roles. Due to the fact that its task is to mediate the flow of data between the identity provider and the beneficiary, this role can only be accomplished by a neutral organization. The attribute provider provides additional identity attributes to users that are not collected by the identity provider at the time of registration, attributes that allow beneficiaries to speed up their digital processes and provide users (customers) with personalized services [1, p. 7]. This role can be fulfilled by a government agency (for example, Directorate for Personal Records and Database Administration – DEPABD), by a national company (for example, Romanian Post) or even by a private company (for example, telecom). The service provider is responsible for providing reliable electronic services, such as electronic signatures.

From a practical point of view, the key question when designing a digital identity ecosystem is to adopt either a broker-centered or a provider-centered identity model. In an identity provider-centric model, data is transferred directly from the identity provider to the relying party and vice versa. Therefore, user actions can be tracked throughout the ecosystem. In a broker-centered model, an identity broker mediates the data flow between the identity provider and the relying party. Therefore, the user's actions cannot be tracked [1, p. 7].

However, channeling the entire data stream through the broker as a central authority introduces a single point of failure with a vast amount of valuable data. A possible solution to this problem could be to implement a broker based on a private blockchain, such as the Canadian digital identity solution developed by SecureKey [8].

3 Decentralized digital identity

In the current paradigm, digital identity is considered "centralized" because user information is on the servers of issuing entities. Thus, the "centralized" nature of digital identity does not refer to the existence of a single central source of digital identities, but to their provision almost exclusively by third parties (most often by private companies) for their own specific purpose. For example, certification authorities provide digital

identities by the nature of their object of activity, banks or social platforms provide digital identity in order to use an online service, etc. [2, pp. 12-13].

Technological advances in hardware, including the evolution of smartphones, as well as the developments in cryptography that led to the emergence of the blockchain, have made possible the idea of a decentralized identity and a subtype of decentralized identity called self-sovereign identity (SSI) [2, pp. 12-13].

Decentralized identity is a digital identity created by a person and which remains under his control. By attaching reliable information from a trusted authority (responsible for identifying people in the real world), the person can prove his identity in relationships with other people, while maintaining control over his data. [2, pp. 12-13]

Information that prove the identity in the digital realm is called credential, which represents the attestation of the authentication elements used in information systems for access to information or other resources. In general, the term refers to pairs of username and password, but other type of data can also be used as credentials such as biometric data [9] (fingerprints, voice recognition, retinal scanning), digital certificates, etc. Attestations from a public authority are considered reliable information and are called verifiable credentials.

Therefore, in the paradigm of "decentralized" identity, a person could create a digital identity equivalent to the identity recognized in the physical world, by associating information about his identity recognized by public authorities, respectively verifiable credentials. The objective is to place the person (user) in the centre of the frame, thus eliminating the need for third parties to issue and manage identity

The process by which a person could create his own digital identity could be as follows: first, the person creates a unique identifier or a set of unique identifiers to which he attaches information. The person will then be able to collect credentials from trusted authorities that can certify, for example, citizenship, personal code number, address etc. When submitting a request, such as remote voting, the person will simply be able to present the corresponding credentials. These credentials accompanied by cryptographic evidence, such as digital signatures, play a key role in decentralized identity as they represent digital versions of real-world identity cards, passports or driver's licenses, benefiting in addition from the properties given by their digital nature. The digital signature of the credentials by the trust authorities is a strong proof that the attestations are authentic, in the sense that they come from the issuing authorities, that they have not been subsequently modified and that the person presenting them is indeed the person to whom these attestations refer to. [2, p. 12].

The use of decentralized identities has many advantages. The most important one is that it offers a greater control over the identity data, and at the same time it is easier to prove the identity in the digital realm [10]. Thus, once the credentials are issued by trusted authorities, they can be easily used on multiple websites, without the need to enter the same information repeatedly. If credentials change, for example if the person changes their address, this change will only need to be registered once. Decentralized identities are also considered more secure than centralized ones, as it is the person who keeps the information associated with his or her identity. Of course, this fact also has the disadvantage of passing on to the person the full responsibility for keeping his/her identity data.

4 Self-sovereign identity (SSI)

In the decentralized identity model described above, the user is placed at the centre of the identity framework, but most of his identity data is dependent on third parties. For example, the digital driving license should be issued by a central authority, just like its physical counterpart.

The possibility for a person to exercise control not only over his identity, but also over all the data associated with it led to the idea of self-sovereign identity (SSI). This means that the person has both the means to generate and control unique identifiers and also the facilities for store the identity data. The person is thus free to share only the data he wants to transmit, whether it is data recognized by public authorities, data from a social network, the history of transactions on an e-commerce site etc. [11].

The ability to collect data from different sources helps to create several different digital identities of a single person, which they can control and share depending on the context. This innovative perspective on the concept of digital identity paves the way for new business opportunities, while allowing people to monetize their personal data if they wish.

Implementing the self-governing identity model is a technical challenge. The necessary elements for such implementation include mechanisms that allow people to create their own identities, called Decentralized Identifiers (DIDs), as well as means of storing personal data, for example in personal data lockers or in identity hubs. Digital "wallets" or other similar programs are also needed to enable people to manage and use their identities in different contexts [10, p. 16]

An effective technical solution for implementing decentralized identity could be blockchain technology. This technology includes by default a number of features designed to facilitate the creation and registration of Decentralized Identifiers (DIDs), while providing a decentralized infrastructure to control different access to data, as well as the use of smart contracts that are linked to the person's identification data and that are scheduled to trigger automatic payments when certain predefined conditions are met [12].

5 European regulatory framework

The most important regulation in the European Union on identity is Regulation no. 910/2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC [13] (eIDAS Regulation [14]).

The eIDAS Regulation, adopted on 23 July 2014 and entered into force on 1 July 2016, amends and improves on previous legislation represented by the Electronic Signature Directive from 1999 [15]. The new regulation is binding and directly applicable in all Member States, which will prevent the shortcomings of the old Directive [16], transposed differently by each Member State, which has led to a lack of interoperability and the adoption of non-uniform standards at European level.

Unlike the directive, which only regulated electronic signatures, the new regulation provides for a much wider range of reliable services [17], such as electronic sealing, time stamping and website authentication. The main objective of the Regulation is to create a common standard for trusted services in the electronic environment and to

allow for the mutual recognition and acceptance of electronic identification systems in all EU Member States.

The eIDAS Regulation sets out a number of basic principles binding on all Member States, such as the principle of mutual recognition of electronic identification and authentication and the principle of cooperation and interoperability between notified national electronic identification schemes, according to which citizens of a Member State may use their electronic identity in any other Member State to access online public services.

Member States are free to choose the means of electronic identification they deem appropriate, but must also notify the other States. Once electronic identification schemes have been notified, they must be accepted by all other Member States.

To ensure interoperability, each Member State operates a node in the eIDAS node network, which allows the reliable transfer of identification information. In Romania, the implementation of the national node eIDAS is carried out through the project "Technological interoperability system with EU Member States – SITUE" [18]. This project will be used for national and cross-border authentication of persons in relation to e-government service providers and will make possible the communication between the national electronic identification infrastructure and the national electronic identification infrastructures of other states [18].

6 Conclusion

At the current stage of development, data associated with a person's digital identity is most often under the control of external entities and not the person concerned. The paradigm shift towards the decentralized identity consists in transferring this control to the person, thus limiting the need of third parties.

The emergence of the blockchain allowed the creation of a new framework for expressing digital identity, in the center of which is the user. Thus, new notions emerged such as decentralized identity and self- sovereign identity.

The implementation of the decentralized identity model is feasible in the near future, given the present technical capabilities and the compatible European legal framework. The purpose of implementing this new model is for identity to speak for us, not about us [19].

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Territorial administrative deconcentration in Romania

Morărescu (Codeia) A.-L.

(ROMANIA)
E-mail: lorena.morarescu@yahoo.com

Abstract

The problem is the restructuring of Roumania`s territorial regionalization futher restoration involves administrative structures for each newly created region.

So this work is to treat territorial-administrative reorganization in all its aspects, but especially for a legal, we insist to discussing on legal support that it assume.

Naturally, the new administrative-territorial redistribution of the situation we will need a different legal structure, such as changing the Constituion and legal acts that regulate aspects of this problem. Working hard enough to achieve it in practice because the new structure will affect primarily the citizen relationship with local authorities responsible for the problem.

Therefore, this studie aims to present by comparing old and the new organizational structure of Roumania, but also to express an objective opinion on the completion of the link between local government authorities and citizens (including the effects of the referendum).

Keywords: territorial-administrative reorganization, legal support, the citizen relation with local authorities responsible, referendum, changing the structure.

1 Introduction

The paper will address the issue of regionalization in Romania, in accordance with the country's legislative provisions and the current possibilities of administrative-territorial reorganization.

The importance of the study is highlighted in the European context, where Romania still has a difficult legislative adaptation, given that we fail to implement the entire legislation and thus to comply with the practical premises of the new conditions. Thus, in accordance with EU development policies, the funds allocated by the EU will be granted only for administrative units with larger areas than a county, which means that at present our country does not meet these conditions. ([17] *European Regional Development Fund, https://ec.europa.eu/regional_policy/index.cfm/en/funding/erdf/*).

Moreover, in our case, internally, the change will affect us in terms of the citizen's relationship with local public administration authorities, because the individual will find it really difficult to adapt to the new formula of the administrative apparatus, the new structure of documents and the identification of the new responsibilities assigned to each decision-making body, being only two of the aspects that will raise problems in adapting society to the new system.

As for the objectives of this study, they materialize in initiating and familiarizing the individual with the new concept and its implications, by defining and presenting the notion of regionalization, but also by explaining at a theoretical level the mechanisms involved in territorial reorganization.

Regarding the opinions expressed in the specialized doctrine and the literature ([7] *Iordan NICOLA, Some considerations on the regionalization process in Romania, Acta Universitatis Lucian Blaga, 2013*), it did not deepen the issue of territorial reorganization, only to present the general implications of the regionalization process, because in Romania the institutions and the responsible bodies have relatively recently taken this administrative perspective into account ([16] *MEMORANDUM on Adopting the necessary measures to start the regionalization-decentralization process in Romania, material available online at https://www.mlpda.ro/pages/prezentare-generala-6062-1117*), although the need to close development gaps between regions has existed since 2006. Therefore, the references are few and the existing ones focus mainly on the structure of public administration and public services, and analyze less the subject from a legislative point of view, this due to -is, as we can see from the content of this study, the fact that there are currently at least two possibilities in this regard and no concrete project in the process of debate. In this context, we also mention the opinion expressed by the Constitutional Court of Romania in Decision no. 1/2014 ([18] *Published in M. Of. no. 123 of 19 February 2014*) on the objection of unconstitutionality of the Law on the establishment of decentralization measures of certain powers exercised by some ministries and specialized bodies of the central public administration, as well as reform measures on public administration, which unanimously admits the criticism of intrinsic unconstitutionality and notes the unconstitutionality of the draft law, which is one of the main sources that should underpin a future legislative proposal.

2 Content

From a conceptual point of view, by regionalization we mean the division of the national territory into zones (regions), defined on the basis of somewhat homogeneous administrative-territorial conditions, encompassing one or more important cities in terms of economic development.

The principle of regionalization began to be applied in Europe after World War II, and the first fully regionalized state was Germany, which accepted the federal system imposed by the Allies in 1949 for the decentralization of power as a guarantee of democracy. The division into Länder did not take into account either historical or economic or cultural traditions, but was rather influenced by the areas of jurisdiction of the occupying powers. The federalization of Germany strengthened the country's unity and encouraged relatively uniform economic development.

In Italy, the system introduced by the 1948 Constitution delimited historical regions, but the effect was to widen the economic gap between north and south, against the background of different mentalities and diverse traditions of the peninsula, encouraging development where its premises existed and, leaving in poverty areas unable to mobilize. Instead, the regional reform in Belgium between 1970 and 1988 transformed a hyper-centralized state into a federal state with secessionist tendencies.

The French model based on centralization of authority, uniformity and symmetry ([5]*Gerard MARCOU, The French experience in regionalization: regional decentralization in the unitary state, material available online at http://altera.adatbank.transindex.ro/pdf/9/002.pdf)* which Romanian officials seem to claim, started from the same fears that Romanians have, namely the danger of dismemberment, so the system applied in the 1980s largely preserves centralism, the French regions having a wide material competence, but being lacking normative competences, thus becoming autonomous political actors, subject to governmental arbitrariness.

As a result, the regionalization model works in most European Union countries ([6] *Gerard MARCOU, La regionalisation en Europe, Parlament Europeanen, L-2929, pp. 17-34*), and Romania is obliged, in order to be able to benefit from Community funds in the future, to implement a reform in this field. sense. Among the models that work more on paper, such as Italy that produces side effects, Romania can find a good solution, only if it abandons the model of centralism and accepts an intense therapy against historical fears, relying on the coherence of historical regions, without fear of federalism. Autonomies of any kind, including those that develop as a result of regionalization, endanger the country's sovereignty, which is why Romanians prefer the traditional centralism that protects their poverty, or limited decentralization.

In order to function effectively, the new regions should receive both economic and political powers, and in this regard, the country should be divided into areas with distinct identities, possibly historical, which should receive administrative and political prerogatives, in accordance with the general principles of the fundamental law, enshrined in Title I of the Constitution, so that it can be self-governing ([19] *In this regard, with reference to the general constitutional principles, see Decision of the Romanian Constitutional Court No. 80/2014 on the legislative proposal on the revision of the Romanian Constitution,* ***published in M. Of. no. 246 of April 7, 2014***). The management of material resources and local opportunities must be carried out independently, without waiting for the decisions issued by the central authorities, and the dependence on them to decrease in such a way that people benefit from adequate services, even if in some provinces they will live. better than others.

The current legal basis existing at the base of the administrative-territorial organization of Romania is represented by the provisions of art. 3, para. 3 of the Constitution ([9] *The Constitution of Romania, published in M. Of. no. 233 of November 21, 1991, with subsequent amendments and completions introduced by Law no. 429/2003 for the revision of the Constitution, published in M. Of. no. 758 of October 29, 2003*), which enshrines the territorial division "into communes, cities, counties, in accordance with the law some cities being declared municipalities". At the same time, the basic principles of administrative law, but also of local public administration are enshrined in art. 120-123 of the Romanian Constitution and in Law no. 554/2004 on administrative

litigation ([15] *Published in M. Of. no. 1154 of December 7, 2004, as subsequently amended and supplemented*).

Thus, the public administration of administrative-territorial units is based on the principle of decentralization and deconcentration of public services (art. 120 Romanian Constitution), and at the level of communes and cities, the representative authorities of public administration are local councils and town halls, elected under the law (art. 121 The Romanian Constitution). According to art. 122, para. (1) Constitution, the public services of county interest are placed under the subordination of the county council, which manages the activity of the communal and city councils. Also, in the territory, the prefect is the representative of the Government and the body that exercises the role of administrative guardianship, dealing with the control of the legality of the decisions, respectively the dispositions issued by the local authorities ([14] *The principles of organization and functioning of the prefect's institution are enshrined in Article 123 of the Constitution and in Law No. 340/2004 on the prefect and the institution of the prefect (published in M. Of. no. 658 of July 21, 2004 and subsequently amended by Law no. 262/2007 for modification and completion Law on administrative litigation no. 554/2004, published in M. Of. no. 510 of July 30, 2007), as well as in Law no. 554/2004 regarding the administrative contentious*). We specify that both the general regime of local autonomy and the provisions regarding each decision-making and executive body within the local public administration are the object of Law no. 215/2001 ([12] *Published in M. Of. no. 204 of April 23, 2001, as subsequently amended and supplemented*), and the provisions regarding the organization of local elections are established in Law no. 67/2004 ([13] *Published in M. Of. no. 271 of March 29, 2004, as subsequently amended and supplemented*).

Therefore, corroborated and hierarchized, the normative acts mentioned above establish the structure of the administrative apparatus at central and local level, as follows:

- Romania being a parliamentary parliamentarized semi-presidential republic, we can speak at a central level especially about the Parliament, enshrined in Title III, Chap. I of the Constitution. The institution is regulated as the only legislative authority of the country, with a bicameral structure – the Chamber of Deputies and the Senate, with a term of 4 years, which can be extended by law only under the law (art. 63 of the Romanian Constitution). It follows that, in the event of territorial redistribution, the regions created must still respect the principle of separation of powers, at national level a Parliament elected by the citizens is needed to represent the legislative power, and at the local level a Governor is needed to represent the power. executive, and a Court of Appeal representing the judiciary, thus having two sets of powers, such as those that will be retained at the center and those that will be transferred to regions ([2] *BŰKFEYES-RÁKOSSY Zsombor, Realities and perspectives of Romania's regionalization, Transylvanian Journal of Administrative Sciences 2 (37)/2015, pp. 28-37*). Thus, although from the perspective of separation of powers in the state and prevention of parliamentary tyranny we support the idea of maintaining a bicameral Parliament, we appreciate that members of the legislature will disagree with the functional reorganization of this institution, as almost all local elected officials will not want to accept that the

transformation of the counties into territorial regions leads to a reduction of their powers or number, in the context of a different decision-making or legislative way, depending on the attributions and competences of each chamber ([20] *For details, see the Report of the Presidential Commission for the Analysis of the Romanian Political and Constitutional Regime, for the consolidation of the rule of law, material available online at http://old.presidency.ro/static/rapoarte/Raport_CPARPCR.pdf).*

- Two other authorities mentioned in the constitutional section dedicated to public authorities are those with an executive role, namely the institution of the President and the Government (Title III, Chapters II and III of the Constitution and Law No. 90/2001 on the organization and functioning of the Romanian Government and of ministries) ([11]*Published in M. Of. no. 164 of April 2, 2001*). The acts derived from them are the decrees – belonging to the President and decisions, respectively ordinances of the Government. To a certain extent, the two bodies of the executive can also be talked about in the public administration.
- Chapter IV is dedicated to the Prime Minister, an authority with an administrative role regarding the commitment of the Government's responsibility for normative acts and for the countersigned acts of the President of Romania.
- And in the contents of Chap. V of Title III of the Constitution, are regulated both the specialized public administration bodies and the local public administration, competent bodies to organize and implement the principles of public administration punctually, on levels of activity.

At the local level, the authorities vested with prerogatives of public power are the county council and the president of the county council, the local council, the mayor and the prefect. With the exception of the prefect, a body appointed in office, being the representative of the Government of the country in the territory, all other authorities are elected by the citizens, by direct, secret, universal and freely expressed vote. As each authority acts at different decision-making levels, their tasks provide for the functioning and organization of the local apparatus and even, establishing an effective balance between citizens and the state, the administrative procedure carried out by each institution is materialized by issuing decisions (councils), dispositions (of the mayor) and of some orders (of the prefect). Having a pre-established term of office and acting on behalf of the law, the bodies with administrative powers, issue normative acts whose validity is closely linked to their competence. We note that, in practice, depending on their purpose and purpose, we distinguish between several types of skills, such as: a) generally determined ([1] *D. BREZOIANU, Romanian Administrative Law, Ed. All Beck, Bucharest, 2004, p. 290-291*), which represents the realization of the administration as a form of exercising public power, which consists in the rights and obligations of the bodies of the administrative apparatus of to execute the legal acts from their sphere of activity; b) specifically determined, including all the specific attributions of each public administration body (grouped by activity sectors or individually), materialized in material competences (specialized bodies and bodies with general material competence) and territorial competences (with action on the whole territory of the country (central bodies) and only within the scope of an ATU, but with special provision and local

action, at the level of an ATU – these being bodies of local public administration); c) temporal, the authorities authorities, generally having an unlimited competence in time (indefinite competence), exceptionally being situations in which public administration bodies are set up for a predetermined period of time.

In these conditions, taking into account the current organization and functioning of the public administration, the transition to the regional organization of the country would involve changing normative regulations and dealing with problems that will arise in the relationship between the citizen and public authority. The new project would involve the grouping of counties under the name of region which would lead to the elimination of the concept of county council and its transformation into a regional council, retaining its prerogatives, but with extended powers and powers, like the prefect institution, which will exercise power over the whole region. We are of the opinion that in the event of the extension of the sphere of competence and power of the public administration bodies in the territory, a restriction of the administrative apparatus would be achieved on the one hand, but on the other hand, it would increase the possibility of legal errors, because it will be really difficult to take into account all the problems that have arisen on the surface of the region at the level of a single institution. with reduced operating capacity to the size of a county. We appreciate that an efficient way to achieve the territorial reorganization is the grouping of several counties keeping the terminology, and maintaining the institution of the county council, but extending its attributions and also those of the prefect, in whose competence will enter exclusively the solution of legality problems. regarding the provisions issued on the entire territory of the new county. Also, for the proper functioning and for the control of the local territorial bodies, in both cases their subordination must be made in relation to the central authorities. We consider that the main justification for such an approach is that, at present, the division of the national territory involves the division into small units, which does not favor development due to the difficulty of exercising decision-making powers at the local level. Thus, the contrary interests of the various administrative units necessitate the adoption of decisions at central level, precisely in order to ensure their convergence towards the satisfaction of the general interest. Or these shortcomings would be eliminated in the case of larger administrative units, which would allow the effective and efficient distribution, at the local level, of decision-making powers. The draft revision sent to the legislative circuit now lacks any reference to the transition to regions,

We emphasize that, although the need for territorial reorganization is an administrative reality, the draft revisions of the Constitution did not include the amendment regarding the division of Romania into regions. Thus, another way to promote the idea of regionalization is a "legislative engineering" to adopt a special regulation in this area. However, the physical operation of "achieving" the larger territorial units is similar to the transition to regions, ie the merging of three or four counties, except that in this case it is no longer necessary to amend the Constitution, but only a law adopted by Parliament. Assuming that the administrative structure of the arable regions takes place by amending the Constitution, the new administrative map will have to be drawn up by a separate law, voted in Parliament. as it appears from the provisions of art. 13 para. (3) of Law no. 3/2000 on the organization and conduct of the referendum ([10] *Published in M. Of. no. 84 of 24 February 2000, as subsequently amended and supplemented*), for

the debate of such a delegation in the parliamentary procedure it is necessary the acceptance of the local communities expressed through 41 local referendums, one in each county ("*Bills or legislative proposals on amending the territorial boundaries of communes, cities and counties shall be submitted to Parliament for adoption only after prior consultation of the citizens of the respective administrative-territorial units, by referendum. In this case the referendum is mandatory*"). In the case of this type of referendum, the constitutional provisions apply, respectively "national sovereignty belongs to the Romanian people, which exercises it through its representative bodies, constituted by free, regular and fair elections, as well as by referendum" ([9] *Title I, art. 2, paragraph (1), Romanian Constitution and 2 common laws, Ed. Hamangiu, 2010*), text of law which undoubtedly results in an approach in the sense of amending the referendum law would be completely wrong, the removal of the referendum from this procedure is only possible if the name of the regions is adopted in a draft revision of the Constitution. Therefore, 41 local referendums involve a series of relatively high costs, but it is not the financial problem that is paramount, but the existence of the risk that in some counties the result of the referendum will be negative. (We consider that, at least theoretically, the inhabitants of Arad County will never say "yes" to a merger with Timisoara County, being valid and reciprocal, and the community of Covasna will never vote for a merger to miss Harghita and Mures. In these situations the law of "large counties" may no longer exist).

Whatever legal operations the legislature would use to implement the regionalization project, it must be borne in mind that the new structure of decentralization of local self-government and deconcentration of public services will primarily affect the citizen, whose interests will suffer. The support is based on a poor knowledge of the levers for applying the principle of subsidiarity, even in the current relatively simple structure of local self-government. But until we imagine what the new system will look like, let us not forget that above all in a democracy where political interests prevail, even minorities are given special importance, this taking place out of the desire of some rulers to do not lose power. So far, the government has not decided how to make the regional cuts, so as to thank the Hungarian leaders, who want to put together the counties of Harghita, Covasna and Mures, known as the Szekler Land ([21] *S.FATI (2011), Regionalizare sau federalizare?, https://romanialibera.ro/* cuts, *https://romanialibera.ro/*). An idea that has not been approved so far, puts the Szeklerland and the counties of Brașov, Sibiu, Alba in the same region, the Romanian authorities wanting to avoid tracing regional structures according to historical regions, more because of prejudices than because of imminent dangers. Compared to this behavior, we believe that in order to truly pursue economic and administrative coherence, Romania can opt for territorial redistribution according to the traditional regions Banat, Transylvania, Crișana and Maramureș, Muntenia, Oltenia, Dobrogea, Moldova, thus renewing a natural path interrupted by centralism established after 1918 ([4] *For details see Carolina MACOVEȚCHI (2014), Theoretical approaches to regionalism and regionalization, Law and Life Magazine, p. 26 ff.; Ioan ALEXANDRU, Regionalization and interregional cooperation in the process of European integration. http: //fr.scribd. com/ doc/41479644/Ioan-AlexandruRegionalizzazione-Si-Cooper-Area-InterRegional-A-in-Procesul-de-IntegrareEuropeana*).

The major importance of regionalization also lies in the fact that since 2014 there has been the possibility that Romania can no longer access and benefit from European funds, because the community institutions want them to be granted only for administrative units with larger areas than the counties, which at national level will impact us in a rather harsh way, because even today Romania does not benefit too high from the funds allocated by The EU, which is seen in the development of all projects launched within the country. In addition to a very difficult development, this will also affect our image in the European community, because we are perhaps the only underdeveloped state in the Union, which, although in these conditions, still does not make efforts to make a significant evolution.

The negative aspects are not limited to just that, the immediate shortcomings will be manifested in the collaboration between citizens and local public administration authorities, thus affecting the structure of decision-making bodies in the territory. The practical transposition of the principle of subsidiarity even means the competence of the local bodies to solve the problems of the citizen with a permanent residence within the respective administrative-territorial unit, for which the authorities were responsible.

The specialized literature from the interwar period substantiated the notion of public service starting from the social needs that the state satisfied, the public service being "the means by which the administration exercises its activity" ([3] *Antonie IORGOVAN, Treatise on Administrative Law, vol. II, Nemira Publishing House, Bucharest 1996, p. 61*), further supporting the idea of public service as a foundation of public actions. So, referring to the citizen's ability to know their rights in relation to local self-government, we notice that even in the current structures, people do not use correctly the legal means available to them, and imagining the implementation of the new formula of administration In this context, it is easy to understand that adapting to this change will be difficult. The citizen's acquaintance with the new responsibilities assigned to each administrative body, as well as the new aspect of the documents issued by the competent authorities will pose real problems in establishing the proper functioning of the public system.

We mention that regionalization is not a form of homogeneous territorial and administrative reorganization, since for a maximum efficiency a state can know on its territory several forms of regionalization. ([8] The forms of territorial administrative reorganization can be: a) administrative regionalization; b) regionalization through local communities; c) regional decentralization; d) regional autonomy (institutional regionalism); e) regionalization through federal authorities. (*For details, see Mihaela PACESILA, Regionalization in the states of the European Union, material available online at http://www.ramp.ase.ro/_data/files/articole/3_15.pdf*), depending on existing needs and problems. In practice, although several types of regionalization differ depending on the position of the central government and state administrations, they coexist and cooperate permanently, even if they are limited in states where regional autonomy is stronger.

3 Conclusions

The main directions of regionalization are concretely outlined, being represented by the administrative-territorial reorganization and the legislative change that it implies,

which will be possible only insofar as the citizens will respond affirmatively to the referendum call. For this, as an immediate action, and as a coordinate for studies that aim to address this issue in depth, the exposure of models outside Romania, which have already adopted the new form of organization is a strategy to clarify the problem at the level of each individual. from society, because a comparison made between a strongly developed state and a less developed one, will help man to evaluate the chances of acquiring the notion in an optimal time and implicitly will be able to outline an image on the evolution of the state.

Moreover, in the context of a member state of the European Union, Romania also needs an integration in the community spirit and realities, in order to develop a coherent and active regional policy, by preparing the territory to correspond to the requirements formulated by the Union. By reference to the regions, as a form of administrative-territorial organization, the Union intends to correct or prevent potential imbalances, giving legitimacy to the regions and institutions representing their interests, by extending local policies to cohesion policies and reforming them as a way to moderate and balance the effects of the completion of the internal market.

At present, at national level, European funds dedicated to regional development aimed to increase cohesion and reduce development disparities between counties and regions, data from the annual analysis and forecast reports show that inter- and intrare-gional disparities have increased. Thus, in view of the application and implementation of the project of administrative-territorial regionalization of Romania, we appreciate that we must consider the functional models of European states, in terms of our interest in developing both nationally and community.

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From Liberty to Encroachment via National Security

Pădurariu D.-A.

Lawyer, Iaşi Bar Association (ROMANIA)
E-mail: padurariudavid@yahoo.com

Abstract

Respecting and protecting fundamental rights and civil liberties of citizens is a token of maturity that a state could give on an international level, pervading in a noticeable way the theories regarding national security. The obligation to counter the dangers and threats jeopardizing national security falls upon the state, although more often than not the state itself threatens the fundamental rights of its own citizens. Curtailing the interference of the state in the exercise of rights and civil liberties of its citizens could be achieved by way of an effective separation of the powers of the police and those of the intelligence services, as stipulated by Law no. 51/1991, regarding national security. This separation is of paramount importance, especially in the light of the fact that none of the intelligence services entrusted with national security issues has ever had judicial police powers.

Keyword: rule of law, fundamental right and liberties, national security, intelligence services, police, technical surveillance warrant, European Convention on Human Rights.

1 Introduction

In the aftermath of the fall of Communism, in Romania there were laws passed in order to bring our legislation in line with the standards of genuine western democracies, as well as to smoothen the passage from the Communist political system to the new one. The street rallies that affected Romania in 1990 triggered a growing need for a new legislation on national security. In May 1991, Law no. 51/1991 is published in the Official Journal, a law that was setting a new standard, in the context of those years that would lead to the fall of the Berlin Wall.

National security was given a definition that was perpetuated long after the publication of the aforementioned law, up to 2014. Art. 1 from Law no. 51/1991 defines national security as a form of legality, balance and social, political and economic stability instrumental in the development of the Romanian national state into a sovereign,

unitary, independent and indivisible state. This was also essential to the preservation of legal order, as well as ensuring a proper climate for the unfettered exercise of fundamental rights, liberties and basic obligations of citizens, according to the democratic principles cemented by the Constitution.

Article 119 of the Fundamental Law regulates the legal framework which the Supreme Council of National Defense considers when "coherently organizing and coordinating activities regarding the countries defenses and national security, actively taking part in maintaining international security and in collective defense via the military alliances, as well as action of maintaining and restoring peace."

Given the aforementioned article from the Constitution, it is mandatory that we defined National Defense. Law no. 45/1994 defines defense as the ensemble of measures and activities adopted and carried out by the Romanian state aiming at guaranteeing national sovereignty, independence and unity of the state, its territorial integrity and constitutional democracy.

2 Security vs Liberty – Encroachment, Restriction or Protection

Kenneth N. Waltz, deemed as the father of the neorealism in the theory of international relations, stated that "just like individuals, states deal with an insecurity proportional to their freedom. If we are to desire freedom, we should accept insecurity. The organizations that see to relations of authority and control can enhance security at the expense of liberty".

The issue of clearly delineating the two concepts – security and liberty – has taken the shape of a conundrum regarding the need to defend the social collective values and the desire to protect fundamental right and liberties. This dilemma has seeped out of mere political and philosophical debate, becoming a topic of debate in the normative environment.

The European Convention on Human Rights defines national security as a incremental measure for a democratic society, which, in legal contexts, can come down to the restriction of certain fundamental right and liberties. The national security concept is purposefully mentioned in Art. 6 (the right to fair trial), Art. 8(the right to privacy and family life), Art. 10 (freedom of speech), Art. 11 (freedom of peaceful assembly and association) and Art. 2 of Protocol 4 (freedom of movement). Moreover, the aforementioned articles the concept of national security is mentioned along other judicial categories: public safety, maintenance of public order and prevention of crime, territorial integrity.

It must be noted that any restrictive clause of the Convention should not leave much room for interpretation, so as not to offer states the chance to commit abuses in the name of analogies and far-fetched interpretations. C.E.D.O. is the body that fixes these rules, maintaining that "a strict interpretation entails that a restriction, no matter its nature, cannot be warranted by any criteria other than the Escape Clause and that the official criteria are to be interpreted in such a way that their content in in line with their customary sense." (Sunday Times Great Britain, April 26, 1979 judgment of the Court).

Professional literature identifies three conditions that must be met in order to speak about a restriction of the exercise of fundamental right and liberties stated by articles 8, 10 and 15 from the Convention: the encroachment must be defined by the law; the encroachment must entail a legitimate purpose; the encroachment be necessary in a democratic society to achieve this legitimate purpose.

As far as the first condition is concerned, the Court has illustrated that the notion of law must be considered in a material, and not a formal sense, with the additional condition that the law be accessible to all individuals. The purpose of such a clause is that "no individual that is subjected to a measure grounded in national security issues should be deprived of guarantees against the arbitrary. There must be an embedded possibility to have the measure contested before an independent and impartial body, in which case the individual should benefit from a special procedure that would allow one to state his point of view and to refute the arguments of the authorities. (*Lupsa c. Romaniei,* June 8, 2006 judgment of the Court).

As far as the second condition is concerned, the one revolving around the legitimate purpose put forward by the state to vindicate the fundamental rights and liberties encroachment, the case law of the Court relies on both general and private interests. Professional literature underlines that the right of a state to infringe upon the exercise of rights guaranteed by the Convention must not be discretionary, if we refer to the need to preserve national security.

In the *Rotaru v. Romania* case, C.E.D.O. established that "the secret surveillance of individuals is only accepted by the Convention as a measure necessary to the defense of democratic institutions". This last condition must be interpreted in concreto, given that democratic necessity is a complex concept that features three sub criteria: "the necessity of the adopted measure, the clear link and the proportionality between the adopted measure and the legitimate purpose invoked, and lastly, the compatibility between the measure and the democratic spirit".

In the *Olsson v. Sweden* case, by way of the March 24 1988 judgment of the Court, the Court states that the concept of "democratic necessity" implies that "the encroachment must correspond to an urgent social need, and above all else, it must beproportionate with the legitimate purpose pursued"; in order to establish whether or not an encroachment is necessary to a democratic society the court shall take into account that the Contracting States are allowed a margin of appreciation". This appreciation margin refers to the choice of internal means of action when "weighing in balance the interest of the state national security-wise when resorting to secret surveillance measure and the gravity of the encroachment on an individual's right to privacy" (*Roman Zakharov v. Russia*, December 4, 2015 judgment of the Court).

Regarding the national Constitution, one notices that the encroachment on fundamental rights and liberties is featured as an exception. Art. 53 from the Constitution stipulates that a restriction of these rights can only be called upon as an exception, only as established by law and only if it is necessary in a democratic society. The restriction is adopted only if vindicated by the following circumstances: for the defense of national security, order, health or public morals, rights and liberties of citizens; criminal instruction; averting the consequences of natural calamities, hazards or a very serious disaster.

Given that our national legislation has been aligned with international regulations regarding fundamental rights, as consolidated by art. 20 from the Constitution, art. 53

paragraph 2 from the Fundamental Law establishes the aforementioned threefold requirement in accordance with the CEDO standards, thereby the measure must be proportionate with the situation that triggered it, it must be carried out in a non-discriminatory manner without prejudice to the existence of rights and liberties.

3 Threats to National Security

Law 51/1991 exemplifies the cases that pose a threat to national security. Article 3 presents 13 cases:

a) Plans and actions aiming at undermining or impinging on the sovereignty, unity, independence or indivisibility of the Romanian state;
b) Actions with the direct or indirect purpose of waging war against the country or sparking a civil war, the facilitation of foreign military occupation, subservience to a foreign power or enabling a foreign power or organization to carry out such actions;
c) Treason by helping the enemy;
d) Military actions or any other violent actions aiming at undermining state power;
e) Espionage, revealing state secrets to foreign powers and organizations or to their agents, procurement or illegal ownership of state secrets (data, documents) with the purpose of disclosing them to foreign powers and organizations or to their agents, as well as disclosing state secrets by mishandling them;
f) Undermining, sabotage, or any other actions that seek to overthrow by force the democratic institutions of the state or any actions that gravely prejudice the fundamental right and liberties of Romanian citizens or that undermine the defense capacity or other such interests, as well as the destroying, damaging or rendering inoperative the structures essential to national defense or to those structure that enable a decent socio-economic life;
g) actions that threaten the life, physical integrity or health of individuals performing important functions in the state or of representatives of other states or international organizations, whose protection must be ensured during their stay in Romania, according to law, and signed treaties and conventions, as well as international practice;
h) initiating, organizing, committing or supporting in any way totalitarian or extremist actions of communist, fascist, legionary or any other nature, racist, anti-Semitic, revisionist, separatist that may jeopardize in any way the territorial unity and integrity of Romania, as well as incitement to deeds that may endanger the rule of law
i) terrorist acts, as well as the initiation or support in any way of any activities whose purpose is to commit such acts;
j) attempts against a community, committed by any means;
k) the theft of weapons, ammunition, explosive or radioactive materials, toxic or biological from the units authorized to possess them, smuggling, producing, possessing, alienating, transporting or using them in conditions other than

those provided by law, as well as carrying arms or ammunition, without right, if they endanger national security;

l) Initiating or setting up organizations or groups or joining or supporting them in any form, for the purpose of carrying out any of the activities listed in letters a) -k), as well as the secret conduct of such activities by organizations or groups established by law.

m) Any actions or inactions that harm Romania's strategic economic interests, those that have the effect of endangering, illegally managing, degrading or destroying natural resources, forestry, hunting and fishing funds, water and other such resources, as well as monopolizing or blocking access to them, with consequences at national or regional level.

The law stipulates that these cases cannot be interpreted or used to deprive an individual of the right to defend a legitimate cause, to manifest one's ideological, political, religious disagreement (or of any other nature) by protesting, which are guaranteed by the Constitution. Furthermore, no individual can be surveyed for having openly expressed his political views, and one's private life, family, home, properties, mail and communications cannot be subjected to surveillance unless one has committed one of the crimes listed by the present law, which jeopardize national security.

4 Public services with attributions in national security

The intelligence services with attributions in national security were founded as public services, according to administrative law. Thus, whether we talk about S.R.I, D.G.P.I, S.I.E, S.P.P or D.G.I.A, we could mantain that these services carry out a socially useful activity, being under the legal supervision of the administrative authority that founded and organized them, providing goods or services in an impersonal manner and have a legal regime regulated by principles of public law, as in they act in order to meet the general interests for which they have been founded.

On March 26 1990, the National Union Provisional Council adopts Decree no.181, founding the S.R.I., an autonomous administrative authority, specialized in gathering information concerning national security "with substantive competence within the country borders regarding obtaining, validating and capitalizing on information related to internal and external threats to national security". S.R.I. is a state body specialized in the field of national security information regulated by Law 14/1992. S.R.I. is part of the national defense system, and its activity is organized and coordinated by CSAT (National Defense Supreme Council), but subject to Parliament validation.

Direcția Generală de Protecție Internă goes back to the days of the Communist Regime, given that the counterintelligence internal protection of each Police County Deparment was afforded by a military counterintelligence officer of the State Security Department (Directia a 4-a). The December 1989 revolution led to the dissolution of these structures, Militia being turned into the Police (Politia). The Ministry of Internal Affairs still needed internal protection, which prompted Consiliul Frontului Salvarii Nationale to found Direcția Specială de Informații by adopting Decree 100/07.02.1990. This state body, which bore the military code U.M. 0215 (two and a quarter – rough translation of the Romanian pun), was directly subordinated to the Minister of Internal Affairs. This structure was subjected to the largest number of changes of its legislative

framework, the most recent being adopted by way of the Emergency Decree no. 76/02.11.2016, legislative act that saw to the establishment of what we now know as D.G.P.I.

Serviciul de Informații Externe dates back to July 12 1918, when Sectia IV, part of Marele Stat Major, was founded. After undergoing several changes, Divizia "A" de informații is reorganized in 1978 and renamed Centrul de Informații Externe (CIE), answering to the State Security Department. On January 6 1998, Law nr. 1/1998 was adopted, regulating the organization, functioning and activity of SIE, legislative act in effect to this day.

Direcția a V-a (the 5th Directorate) was a structure specialized in the protection of the PMR/PCR leadership and of the persons who enjoyed diplomatic immunity, including the high foreign officials who were temporarily on the Romanian territory. It functioned as part of the Securitate institution of the communist regime in Romania. On May 7 1990, Consiliul Provizoriu de Unitate Națională (the Provisional Council of National Unity) established, by Decree no. 204, Unitatea Specială de Pază și Protocol – the Special Guard and Protocol Unit (USPP), subordinated to the M.Ap.N (Ministry of National Defense), with the mission to ensure the protection and guarding of Romanian dignitaries, as well as of foreigners visiting Romania.

The enactment of Law no. 51 of July 26, 1991 on the national security of Romania saw USPP being renamed as Serviciul de Protecție și Pază (SPP) – the Protection and Guard Service -, becoming a state body "with attributions in the field of national security". The activity was carried out based on the provisions of a Regulation approved by the Supreme Council of National Defense, on 15.11 1991, which lasted until 1998 when Law no. 191/1998 on the organization and functioning of the Protection and Guard Service was passed.

Direcția Generală de Informații a Armatei (The General Intelligence Directorate of the Army) is a specialized internal structure within the Ministry of National Defense, which was established in 1990 in the form of a Military Intelligence Directorate, whose main objective was to discover threats to Romania and to uncover their military potential, and of a subsequent Directorate of Military Protection and Security, which was tasked with the counter-intelligence defense of the military activities and personnel.

5 Separation of police power from the power of national security services

By Decree no. 33 of December 30 1989, Consiliul Frontului Salvării Naționale (The Council of the National Salvation Front) decided to abolish the Department of State Security. This structure, commonly known as the "Securitate", is subordinated to the Ministry of Internal Affairs. The Romanian post-communist legislation in the field of national security tried to separate the attributions of the old institution of the "Militia", which was first turned into "Police" and later on into intelligence services established after the regime change, but they all derived from the former State Security Department.

The separation of police institutions from national security services must be seen both from an organizational and competence perspective. If from the organizational

standpoint, each service with attributions in the sphere of national security, as well as the police, has its own regulation norm, the problem arises when we analyze the attributions of these public services.

The normative acts that established and regulate the activity of the services with attributions in the sphere of national security are enacted in the first years after the fall of the communist regime. As these acts were poorly adapted to the evolution of the society, for a long time intelligence services interfered with the police activity. The intervention of the Constitutional Court was needed to delimit some of the intelligence service responsibilities that overlapped with those of the police.

According to Law no. 51 of 1991 on national security, the Romanian Intelligence Service is the state body specialized in gathering information within country's borders, and in the case of activities specific to gathering information that involve restricting the exercise of fundamental rights or liberties, intelligence services with responsibilities in the field of national security are required to request the authorization of such specific activities. The proposal is submitted to the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice and is examined in terms of legality and validity, within 24 hours of registration or immediately in cases of urgency. If it is considered that the proposal is justified and the conditions required by law are met, the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice or his legal substitute requests in writing to the President of the High Court of Cassation and Justice authorization of the proposed activities. The application shall be examined as a matter of urgency in the Council Chamber by one of the judges appointed by the President of the High Court of Cassation and Justice. If the judge finds that the request is justified and the activities are warranted given the lack of any other ways or by the limited number ways of learning, preventing or counteracting risks or threats to national security, and that these activities are necessary and proportionate under the circumstances, he orders the authorization, by motivated interlocutory judgment.

Up until February 2018, there had been encroachments of the intelligence services on the activity of the judicial police, usually resorting to "exploiting" the national security mandates, which more often than not begged the question of whether S.R.I. should carry out criminal prosecution acts or if the intelligence personnel within the Ministry of Internal Affairs border the status of judicial police officers. The answer was clear as daylight as Law no. 364 of September 15, 2004 on the organization and functioning of the judicial police explicitly stipulates which persons can act as judicial police investigation bodies.

The laws regulating intelligence services and national security have not been updated although having been designed during the first years of Romanian democracy as an attempt to abolish the State Security Department and replace it with certain institutions capable of respecting fundamental rights of citizens and while also to ensure the security of the state. Thus it was imperative to draw a line of separation between the tasks of intelligence services and those of the judicial police, a clarification that did not come from the legislature, but from a decision of the Constitutional Court, pronounced on the occasion of a notification with an exception of unconstitutionality of the provisions of several articles of Law no. 51/1991.

By Decision no. 91 of February 28, 2018, the exception of unconstitutionality regarding art. 3 lit. f) of Law no. 51/1991 on national security was admitted, finding that the phrase "seriously infringe on the fundamental rights and freedoms of Romanian citizens" contained in that article is unconstitutional.

In the above-mentioned decision, the Court points out that "the purpose for which the activities undertaken in the field of national security are used is different from that of criminal proceedings. The first focuses on the knowledge, prevention and elimination of internal or external threats in order to achieve national security, and the others aim at prosecuting those who have committed crimes."

Interpreting systematically and teleologically, we come to the conclusion that Law no. 51/1991 and the Code of Criminal Procedure have different purposes. I agree with the Court's considerations that not every situation which constitutes a threat to national security requires preparation against an intention of committing crimes against national security, and the means of preventing threats to national security cannot be reduced to combating crime.

The European Contentious Court, in the Decision of Iordachi et al. V. Moldova (judgment of 10 February 2009), resuming those established in the Decision of Leander v. Sweden (judgment of 26 August 1987) emphasized that "predictability in the special context of secret surveillance measures, such as the interception of communications, cannot mean that a person should be able to learn beforehand when the authorities will intercept his or her communications, so so that he can adapt his behavior accordingly. However, especially where a power conferred on the executive is exercised in secret, the risks of arbitrariness are obvious". If we were to give discretionary power to the executive or a judge as to the scope of the technical surveillance measures for communications, without it being possible to exercise effective control over them by the persons concerned, we would be witnessing a flagrant breach of the rule of law".

The Constitutional Court distinguishes between acts which constitute crimes and those which constitute threats to national security. It emphasizes that if actions/deeds are directed against an individual subject, "the threatened person must meet the quality required by law (for example, a person performing an important function in the state), a quality which in itself determines the qualification of these actions as threats to national security". If actions or deeds are directed against a collective subject, they must be individualized by common elements, such as race, ethnicity, nationality, religion, sexual orientation, etc. in order to be able to call into question the existence of a threat to national security.

The distinction between the attributions of the judicial police in the application of surveillance mandates according to the norms of the Code of Criminal Procedure and those of the intelligence services according to Law no. 51/1991 was dealt with extensively by the RCC. With regard to the first category, that of interceptions and recordings made in the course of criminal proceedings on the basis of a technical supervision warrant, the Court notes that they constitute evidence in criminal proceedings. Regarding the second category, that of the records obtained via the execution of a national security mandate ordered according to Law no. 51/1991, they cannot be considered as evidence, but only simple data and information of interest for national security. These are retained in writing and transmitted to law enforcement agencies. criminal investigation, accompanied by the warrant issued for them, to which is added the proposal to

declassify, as the case may be, total or in extract, according to the law, of the warrant only insofar as they point to the preparation or commission of an act stipulated by criminal law. Intercepted conversations and/or communications, reproduced in writing, and/or recorded images shall be transmitted to the criminal investigation bodies in their entirety, accompanied by their original digital content.

Moreover, the RCC notes that the regulatory object of Law no. 51/1991 is that of knowing, preventing and removing internal or external threats that may harm national security, and not the regulation of elements that may constitute evidence or means of evidence in criminal proceedings.

Until the spring of 2020, the only criminal procedural provision that could have conferred evidence quality to the records resulting from activities specific to the collection of information, authorized according to Law no. 51/1991, was article 139 par. (3) of the Code of Criminal Procedure. The article qualifies as evidence the recordings made by the parties or other persons, when they concern their own conversations or communications with third parties, as well as any other recordings, if not prohibited by law. In February 2020, the Constitutional Court admitted, by a majority of votes, the exception of unconstitutionality and found that the provisions of Article 139 paragraph (3) final sentence of the Code of Criminal Procedure are constitutional insofar as they do not concern registrations resulting from carrying out activities specific to the collection of information that involve restricting the exercise of fundamental human rights or freedoms carried out in compliance with legal provisions, authorized according to Law no. 51 of 1991.

Public data reveals that in 2015 alone in Romania, 16 times more interception warrants were put into effect on national security than in America. This situation was possible based on protocols signed between the services with responsibilities in the field of national security and the General Prosecutor's Office attached to the High Court of Cassation and Justice. By Decision no. 26/2019, the National Court of Constitutional Contentious finds that "the Public Ministry had an institutional conduct, which led to the signature of two successive" collaboration protocols", in violation of its constitutional attributions. It is appreciated, thus, that such conduct violated, on the one hand, the constitutional attributions of the Parliament, and, on the other hand, it generated a judicial practice contrary to art. 124 of the Constitution." These considerations lead us to the conclusion that as long as technical surveillance measures do not have a clear and predictable legislative framework, which takes into account the requirements imposed by European law and the binding decisions of the ECHR and the RRC, criminal prosecution bodies or court may either randomly or abusively violate the fundamental rights and freedoms of an individual.

6 Conclusion

The danger of arbitrary behavior can be avoided if any encroachment is strictly controlled. According to art. 18 of the European Convention on Human Rights, restrictions which, under the terms of this Convention, are imposed on those rights and freedoms, may be applied only for the purpose for which they were provided, thus prohibiting deviations from the proper conduct of citizens' daily lives. These provisions are not autonomous and must always be corroborated with another article of the

Convention which authorizes the restriction of rights, in order to be able to exploit to the maximum and to ensure effective protection of fundamental rights and freedoms.

The delimitation of the attributions of the intelligence services from those of the police bodies entrusted with carrying out criminal prosecution acts is vital for respecting fundamental rights, given that, in criminal cases, our legislation allows certain rights and freedoms to be limited in accordance with the Code of Criminal Procedure. This separation should not be seen as an impediment in the activity of intelligence services to achieve national security, but there should be a harmony between their activity and the protection of the exercise of the fundamental rights and liberties of citizens.

La liberté religieuse au niveau constitutionnel – analyse de contenu

Zidaru R.

Université de Strasbourg (FRANCE)
E-mail: zidaruradu@yahoo.com

Résumé

Les mesures récentes prises pour restreindre la liberté religieuse/ de religion m'ont déterminé à présenter / à décrire aux lecteurs chrétiens le contenu de la liberté religieuse au niveau constitutionnel/ de la Constitution roumaine, puisqu'il est dit que tout commence et se termine par la loi fondamentale. L'analyse de la liberté religieuse est faite en expliquant les alinéas 1 et 3 – 6 de l'article 29 de la Constitution, et pour chacun d'entre eux est mis en exergue un ou deux principes. La dernière partie de l'analyse vise la modalité de réglementer dans le domaine, et, au passage, la modalité de restreindre l'exercice de la liberté. Bien que certaines informations soient déjà connues, j'espère toutefois que cette modalité de les présenter contribuera à une meilleure compréhension de la liberté en elle-même.

La liberté religieuse, en tant que *dimension*[1] ou *partie*[2] de *la liberté de conscience*, est consacrée par la Constitution de la Roumanie[3] à travers plusieurs alinéas de l'article 29, comme suit.

1 *La règle* de la non-limitation de la liberté religieuse

«La liberté des croyances religieuses ne peut être restreinte sous aucune forme» [art. 29, alinéa (1)]. *Les croyances religieuses* peuvent être définies comme *ces sentiments et actes qu'une personne rapporte au monde environnant et à l'existence*. La liberté religieuse implique *à la fois un côté intérieur et un autre extérieur de manifestation*. Dans la *perspective du côté intérieur*, la liberté religieuse a un *caractère absolu*, donc l'état ne peut pas la restreindre[4]. Sa manifestation se concrétise par le droit de la personne d'avoir ou d'adopter, *dans son for intérieur*, *une croyance*. Dans la *perspective du côté extérieur*, qui présuppose le droit de la personne d'extérioriser sa croyance, par la participation aux saints offices, processions, pèlerinages etc.[5], *la liberté a un caractère relatif* et l'état peut la restreindre[6], mais uniquement *par voie d'exception*, car *la règle* est constituée par *l'impossibilité de restreindre les croyances religieuses*. Le fait que dans la jurisprudence de la Cour Constitutionnelle de la Roumanie (CCR) est affirmée l'existence à la fois du côté intérieur et extérieur de la

liberté religieuse, représente une «assimilation» de l'enseignement chrétien selon lequel «la croyance [la foi] comporte une partie intérieure et une extérieure»[7]. Toutefois, par la jurisprudence élaborée, la CCR a fait preuve de comprendre qu'il faut prendre en compte certains aspects spécifiques aux croyances [à la foi], tel ceux selon lesquels *«la croyance [le sentiment religieux – nous soulignons] et les bonnes actions [les actes extérieurs – nous soulignons] contribuent à l'accomplissement du fidèle»*[8]; *«Le premier but du culte de l'église orthodoxe est la manifestation à l'extérieur de la religion intérieure, c'est-à-dire l'adoration interne de Dieu de la part des communautés»*[9], ou encore: *«Le culte représente une médiation continuelle du salut des hommes»*[10]. Enfin, si on prend en compte la jurisprudence et la doctrine pertinente pour la matière des droits de l'homme[11], nous pouvons encore affirmer que, à son tour, l'article 29 alinéa (1) de la Constitution consacre également, *implicitement, l'autonomie personnelle dans le domaine de la liberté religieuse*, c'est-à-dire que la personne peut adopter, peut avoir ou peut changer librement sa croyance.

2 La liberté des culte et leur organisation statutaire

«Les cultes religieux sont libres et s'organisent selon leurs statuts propres, dans les conditions de la loi» [art. 29 alinéa (3)]. Deux principes fondamentaux et connexes sont consacrés à cet alinéa: *la liberté des cultes religieux* et *leur organisation statutaire, dans les conditions de la loi*. Par *culte* on comprend: *«dans un acception organique – une association/ organisation relieuse et, dans une acception fonctionnelle – le rituel pratiqué»*[12]. Le culte [l'association/ l'organisation] a la liberté, entre autres, d'exercer son propre rituel religieux [l'office ou la procession]. Il jouit de cette liberté, qui est *de rang constitutionnel*. *Le statut* représente *l'acte juridique d'organisation* et, en même temps, il *relie le culte religieux et l'état*. Il faut remarquer que, bien que dans la Constitution soit utilisé seulement le terme *statut*, dans la Loi n° 489/2006 on utilise, avec celui-ci, le syntagme *codes canoniques* [art. 8 alinéa (3)] [13]. Il revient donc à la charge de la Cour Constitutionnelle de se prononcer, à l'avenir, dans un sens *restrictif* ou *extensif*, sur la constitutionnalité du syntagme[14]. Enfin, il faut observer également le *caractère de guide [directeur] de la loi.* Elle trace les conditions selon lesquelles les cultes religieux peuvent s'organiser, et les dispositions statutaires ne peuvent pas contrevenir à la loi, car *le respect de la loi représente une obligation de rang constitutionnel* [art. 1 alinéa (5)]. Par conséquent, on parle d'une limitation des cultes religieux dans leur organisation interne, limitation qui est prévue par la Constitution, *in abstracto*, et qui devient *in concreto lorsque la loi le prévoit expressément*[15].

3 Interdiction dans la relation entre les cultes

«Dans les relations entre les cultes sont interdits toutes formes, moyens, actes ou actions d'hostilité religieuse» [art. 29 alinéa (4)]. Ce texte réglemente *Les Rapports entre les Cultes* ou *Les Rapports Inter-religieux*[16] et, en même temps, consacre *implicitement l'égalité des cultes religieux devant la loi et la Constitution.*

4 L'autonomie des cultes vis-à-vis de l'état, mais le soutien que ce dernier leur accorde

«Les cultes religieux sont autonomes vis-à-vis de l'état et jouissent de son soutien, y compris par la facilitation de l'assistance religieuse dans l'armée, les hôpitaux, les prisons, les asiles et les orphelinats» [art. 29 alinéa (5)]. Le texte consacre deux principes fondamentaux pour l'exercice de la liberté religieuse, c'est-à-dire: celui de l'*autonomie des cultes religieux par rapport à l'état*[17], ou de *la séparation de l'état*, et celui du *soutien que l'état accorde aux cultes*. Dans la littérature de spécialité, l'autonomie des cultes religieux a été ainsi définie: *«la capacité des cultes de légiférer et de se conduire selon les statuts propres»*[18]; *«le droit de l'Église d'établir unilatéralement les nomes doctrinaires, cléricales et juridiques spécifiques à sa nature, et de s'auto-gouverner par celles-ci, de manière indépendantes par rapport à l'état»*[19] ou: *«la liberté de chaque culte d'organiser sa forme de rituel, l'enseignement, les relations avec les adeptes du culte, les relations avec l'état»*[20]. Dans sa jurisprudence, la Cour a montré que *«le principe de l'autonomie du culte ne serait plus respecté si les instances de droit commun exerçaient le contrôle sur les décisions prises par les instances disciplinaires et les tribunaux ecclésiaux dans des questions doctrinaires, morales, canoniques et disciplinaires»*[21]. On parle alors d'une *consistance constitutionnelle de ce principe*, dans le sens où les dispositions de la loi, si elles interfèrent avec certaines dispositions des statuts d'organisation et de fonctionnement des cultes religieux, ne doivent pas violer le principe de l'autonomie lequel, à son tour, est de rang constitutionnel [art. 29 alinéa (4)]. On observe donc la *nécessité de l'existence d'un équilibre entre le principe du respect de la loi* [art. 1 alinéa (5)] et *celui de l'autonomie des cultes religieux* [art. 29 alinéa (4)], équilibre qui est à maintenir toujours par la Cour par l'intermédiaire de la jurisprudence. En ce qui concerne le *principe de la séparation des cultes et de l'Etat*[22], celui-ci n'est autre chose qu'un *synonyme* du principe de l'autonomie. Bien qu'il existe un régime de la séparation de l'état et des cultes, l'état a toutefois l'*obligation positive de «soutenir les cultes reconnus par la loi»*[23], *«y compris par des moyens financiers»*[24]. Par rapport à cet aspect, il ne faut pas oublier que l'obligation de l'état de soutenir les cultes représente *une mesure compensatoire quant à la sécularisation des biens monastiques*[25]. En outre, il faut mettre en évidence l'aide matérielle accordée par l'Église orthodoxe roumaine dans le contexte de l'épidémie COVID-19, dont la valeur est à présent de 14.876.474 lei[26]. Par conséquent, l'obligation constitutionnelle dont nous avons fait mention est *justifiée du point de vue du contexte historique tant passé, qu'actuel.* Enfin, vu dans son ensemble, l'alinéa (5) de l'art. 29 peut être intitulé *Le Rapport des cultes religieux avec l'état*[27].

5 «Le droit constitutionnel parental»

«Les parents ou les tuteurs ont le droit d'assurer, selon leurs propres convictions, l'éducation des enfants mineurs dont ils ont la responsabilité» [art. 29 alinéa (6)]. Dans cet alinéa on affirme l'une des plus importante formes de la liberté religieuse, celle du *droit des parents d'assurer l'éducation religieuse*, droit qui peut être exercé lorsque les

deux conditions sont remplies: *la qualité de parent/ tuteur* [condition personnelle] et *l'existence de la situation de minorité* [condition objective].

6 Modalité de réglementation dans le domaine de la liberté religieuse – *la règle* et *l'exception*

La loi fondamentale stipule, *comme règle*, que *«le régime général des cultes est réglementé par loi organique»* [art. 73 alinéa (3) lettre s.]. Mais, si on prend en considération les dispositions constitutionnelles qui prévoient, *comme exception*, la possibilité de réglementer dans le domaine de la loi organique aussi par l'intermédiaire de l'ordonnance d'urgence [cf. art. 15 alinéa (4)-(6)][28], il est évident que *le domaine de la liberté religieuse peut, lui-aussi, être réglementé par OUG*, car elle est acceptée comme *acte juridique normatif de force minimale*. À travers une ordonnance simple, *décret*, décision du Gouvernement, *ordonnance militaire* etc., on ne peut pas introduire des réglementations dans le domaine et, également, on ne peut pas disposer *la restriction de l'exercice de la liberté religieuse*, car ce type de pratiques sont contraires, avant tout, aux prescriptions de la Constitution [art. 53 alinéa (1)] [29], et aussi à la loi [art. 2 alinéa (2) de la Loi n° 489/2006 et art. 4 de l'OUG n° 1/1999].

7 Restriction de la liberté religieuse dans un esprit constitutionnel

Une telle restriction peut être réalisée *strictement* dans les conditions évoquées par l'art. 53 de la Constitution et, puisque je considère que les actes administratifs qui ont prévu la restriction ne remplissent pas la condition de la légalité, je n'analyserai plus les autres conditions qui concernent la mesure de restriction. Ainsi, la Constitution précise que l'exercice de certains droits et libertés peut être restreint *«seulement par la loi»* [art. 53 alinéa (1)], celle-ci étant la première *condition objective* que l'acte juridique de la disposition des mesures de restriction devra remplir pour qu'il soit considéré comme *constitutionnel*. Il sera complètement dépourvu d'objet si on discute de la constitutionnalité de la mesure restrictive si, *ab initio*, l'acte lui-même ne remplit pas l'exigence demandée. Le terme *loi* désigne, en sens matériel, à la fois *la loi organique* ou *ordinaire*, adoptée par le Parlement [art. 73 alinéa (1)], que *l'acte juridique de force égale à la loi*, par lequel peut se réaliser la restriction dans le domaine d'un droit ou d'une liberté prévue par la Constitution. Cet aspect présuppose que, dans certaines conditions, la restriction *«peut être faite aussi par ordonnance du Gouvernement»*[30]. Toutefois, si on prend en compte le fait que, *en règle générale*, *«Le régime général des cultes est réglementé […] par loi organique»* [art. 73 alinéa (3) lettre s)], et aussi le fait que *«Le Parlement peut adopter une loi spéciale pour habiliter le Gouvernement pour émettre des ordonnances dans des domaines qui ne font pas l'objet des lois organiques»*[31] [art. 115 alinéa (1)], il résulte que, *par une ordonnance donnée sur la base d'une loi d'habilitation [ordonnance simple], le Gouvernement ne peut pas restreindre l'exercice de la liberté religieuse. Un tel acte pourrait être déclaré inconstitutionnel,* car il ne remplit pas, du point de vue matériel, la condition stipulée

par l'art. 53 alinéa (1) de la Constitution. Dans sa jurisprudence, la Cour a souligné l'*interdiction pour le Parlement d'habiliter le Gouvernement à émettre des ordonnances dans le domaine des lois organiques*[32], ainsi que *l'interdiction de réglementer dans le domaine des lois organiques par l'intermédiaire des ordonnances émises sur la base d'une loi d'habilitation*. Par ailleurs, si l'interdiction exclut l'ordonnance simple, qui possède toutefois une certaine force juridique, alors *il est d'autant plus impossible de restreindre l'exercice de la liberté religieuse par un décret présidentiel* ou *ordonnance militaire*, qui sont des *actes juridiques d'une force inférieure à la loi*. Si la restriction de la liberté religieuse se faisait par ordonnance simple, *alors l'acte juridique normatif pourrait faire l'objet d'un contrôle d'inconstitutionnalité*, sous l'aspect de son échec à réaliser la condition objective stipulée par l'art. 53 alinéa (1). Donc, la Cour ne vérifiera par si la mesure respecte les conditions objectives évoquées par l'art. 53 alinéas (1) et (2). Si la restriction de la liberté religieuse se faisait par ordonnance d'urgence, alors *la mesure pourrait faire l'objet d'un contrôle d'inconstitutionnalité* par rapport à l'échec de réaliser l'une des conditions stipulées par l'art. 53 alinéas (1) et (2), *sans vérifier la condition qui vise l'acte juridique normatif*.

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[2] Alți specialiști renumiți ai dreptului constituțional, și nu numai, afirmă că: *«libertatea religioasă este parte a libertății de conștiință»*. M. CONSTANTINESCU, A. IORGOVAN, I. MURARU și E.S. TĂNĂSESCU, *Constituția României revizuită. Comentarii și explicații*, Ed. All Beck, București, 2004, p. 57.

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[3] Modificată și completată prin Legea de revizuire a Constituției României nr. 429/2003, publicată în Monitorul Oficial al României, Partea I, nr. 758 din 29 octombrie 2003, republicată de Consiliul Legislativ, în temeiul art. 152 din Constituție, cu reactualizarea denumirilor și dându-se textelor o nouă numerotare [art. 152 a devenit, în forma republicată, art. 156]. Legea de revizuire a Constituției României nr. 429/2003 a fost aprobată prin referendumul național din 18-19 octombrie 2003 și a intrat în vigoare la data de 29 octombrie 2003, data publicării în Monitorul Oficial al României, Partea I, nr. 758 din 29 octombrie 2003 a Hotărârii Curții Constituționale a României nr. 3 din 22 octombrie 2003 pentru confirmarea rezultatului referendumului național din 18-19 octombrie 2003 privind Legea de revizuire a Constituției României.

[4] Libertatea credințelor religioase *«sub aspectul laturii interioare*, *are caracter absolut»*. Vezi în acest sens: Decizia CCR nr. 47 din 31 ianuarie 2017 referitoare la excepția de neconstituționalitate a dispozițiilor art. 40

alin. (1) şi ale art. 41 alin. (2) lit. d) din Legea nr. 489/2006 privind libertatea religioasă şi regimul general al cultelor, publicată în Monitorul Oficial al României, Partea a II-a, nr. 409 din 31 mai 2017; tot referitor la acest aspect, în literatura de specialitate s-a precizat că: *«o dimensiune importantă a conținutului juridic propriu libertății de conștiință este "dreptul de a avea o convingere". Acesta este un drept cu caracter general, protejează forul interior, adică domeniul convingerii personale şi al credințelor religioase. Este important de a remarca că, din punct de vedere juridic, dreptul de a avea o convingere nu poate fi supus unor restricții, limitări, condiționări sau derogări»*. M. ANDREESCU, *op. cit.*, p. 309.

[5] Pentru o opinie similară, a se vedea: M. CONSTANTINESCU, A. IORGOVAN, I. MURARU și E.S. TĂNĂSESCU, *op. cit.*, p. 57.

[6] *Supra. cit*.

[7] † Silvestru de CANEV, *Teologia Dogmatică*, trad. de arhim. Gheorghe Miron, tom. IV, Ed. Tipografia Cărților Bisericești, București, 1903, p. 201.

[8] Pr. acad. D. POPESCU, *Iisus Hristos Panocrator*, Editura Institutului Biblic și de Misiune al Bisericii Ortodoxe Române, București, 2005, p. 295.

[9] Pr. V. MITROFANOVICI, *Liturgica Bisericei Ortodoxe*, reeditată și completată de † Nectarie Cotlarciuc, Editura Consiliului Eparhial Ortodox Român din Bucovina, Cernăuți, 1929, p. 16.

[10] M. ANDREESCU, *Libertatea conștiinței. Implicații juridice și religioase*, în rev. «Management Intercultural», vol. XVII, nr. 2 [34] din 2015, p. 308.

[11] A se vedea, în mod deosebit, Hotărârea CEDO nr. 2346/02 în cauza *Pretty c. Regatului Unit*, în care s-a arătat, indirect, că *autonomia personală în materie religioasă* presupune: *«manifestarea unei religii sau credințe prin venerare, învățare, practicare [a cultului – s.n.]»*. Unii specialiști în domeniu, au precizat că: *«Curtea [CEDO – s.n.] nu a dat o definiție a ceea ce înseamnă autonomia, deși a folosit destul de frecvent noțiunea, în două accepțiuni: autonomie personală, care decurge în principal din art. 8 din Convenție, dar care are implicații și în ceea ce privește viața religioasă, și mai ales, autonomia comunităților religioase, aflată în inima libertății de religie, garantată de art. 9 din Convenție»*. Pr. I.-G. CORDUNEANU, *Neutralitatea religioasă în jurisprudența Curții Europene a Drepturilor Omului*, Ed. Universul Juridic, București, 2018, p. 206.

[12] I. MURARU și E.S. TĂNĂSESCU, *Drept constituțional și instituții politice*, vol. I, ediția a XIII-a, Ed. C.H. Beck, București, 2008, p. 181; M. SAFTA, *Drept constituțional și instituții politice. Teoria generală a dreptului constituțional. Drepturi și libertăți*, vol. I, Ed. Hamangiu, București, 2008, p. 231.

[13] Din punct de vedere istoric, expresia "cod canonic" ia naștere abia la începutul sec. al XIX-lea, când Biserica Catolică promulga primul său *Codex Iuris Canonici [cf. Codex Iuris Canonici Pio X Pontificis Maximi iussu digestu Benedicti Papae XV auctoritate promulgatus (Praefatione, fontium annotatione et indice analytico-alphabetico ab Emo Petro Card. Gasparri auctus)]*, Romae, 1917. Arhid. G. GRIGORIȚĂ, *Legea nr. 489/2006*

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[13] Din punct de vedere istoric, expresia "cod canonic" ia naștere abia la începutul sec. al XIX-lea, când Biserica Catolică promulga primul său *Codex Iuris Canonici* [cf. Codex Iuris Canonici Pio X Pontificis Maximi iussu digestu Benedicti Papae XV auctoritate promulgatus (*Praefatione, fontium annotatione et indice analytico-alphabetico ab Emo Petro Card. Gasparri auctus*)], Romae, 1917. Arhid. G. GRIGORIȚĂ, *Legea nr. 489/2006 și Biserica Ortodoxă Română*, în rev. «Studii Teologice», seria a III-a, anul III, nr. 2 din 2007, București, p. 198.

[14] Referitor la *utilizarea sintagmei coduri canonice* în legea cultelor, dar dintr-o altă perspectivă, un reputat specialist în Drept canonic este de părere că: *«ea creează două unități de măsură*, *respectiv "statutele de organizare" sau "codicele". Astfel*, *legea [cultelor-s.n.] intră în conflict cu ea însăși*, *căci nu se mai poate vorbi despre "culte egale în fața legii și a autorităților publice" [art. 9 alin. (2)]*, *ci de "culte cu statut de organizare" și de "culte cu coduri canonice". Deci*, *menținerea în textul de lege a acestui tip de formulare nu poate conduce decât la crearea unui regim legislativ discriminant. [...] Actuala legislație canonică a Bisericii Catolice cuprinde două Coduri canonice: "Codex Iuris Canonici" [pentru Biserica Catolică Latină] și "Codex Canonum Ecclesiarum Orientalum" [pentru Bisericile Orientale Catolice]. Însă*, *cei doi codici nu reprezintă legislația unei singure Biserici locale*, *ci au un caracter universal. Deci*, *nu poate fi vorba în nicun caz de codici ai unor Biserici catolice din România*, *care ar putea fi recunoscuți de Statul român. Aceasta deoarece*, *pentru recunoașterea acestor documente canonice*, *Sfântul Scaun încheie acorduri politice cu Statul interesat*, *acorduri numite "concordate". Cum singurul concordat încheiat între România și Sfântul Scaun a fost denunțat unilateral de autoritățile române prin Decretul nr. 151/18 iulie 1948*, *ne întrebăm ce caută expresia conduri canonice în Legea nr. 489/2006»*. Arhid. G. GRIGORIȚĂ, *op. cit.* pp. 197-199; pentru unii autori citați, statutul reprezintă și *«modalitatea de concretizare a organizării cultului religios»*. M. CONSTANTINESCU, A. IORGOVAN, I. MURARU și E.S. TĂNĂSESCU, *op. cit.*, p. 58.

[15] Unii specialiști, pun un *semn de egalitate între ipoteza de limitare și cea de restrângere*, arătând, totodată, că: *«în temeiul art. 53 alin. (1) din Constituție*, *orice restrângere a exercițiului oricărui drept și sub orice aspect nu poate fi presupusă*, *ci trebuie prevăzută expres de lege»*. T. BODOAȘCĂ, *Utilizarea operei de către terțe persoane fără consimțământul titularului dreptului de autor*, în rev. «Universul Juridic» nr. 6 din 10 iunie 2019, București, p. 24; pentru opinie întru-câtva asemănătoare, a se vedea: I. MURARU și E.S. TĂNĂSESCU, *op. cit.*, p. 181.

[16] Unii autori au optat pentru denumirea: *«raporturile dintre religii»*. I. MURARU și E.S. TĂNĂSESCU, *op. cit.*, p. 182.

[17] În literatură, autonomia cultelor mai este denumită și: *«libertate instituțională»*. B. G. SCHARFFS, *The Autonomy of Church and State*, în «BYU Law Review», no. 4/2004, *sine loco*, p. 1226.

[18] M. SAFTA, *op. cit.*, p. 232.

[19] Pr. I.-G. CORDUNEANU, *Biserica și Statul: două studii*, Ed. Evloghia, Târgușorul Vechi, 2006, pp. 52-82.

[20] M. ANDREESCU, *op. cit.*, p. 309.

[21] Decizia CCR nr. 448/2011 referitoare la excepția de neconstituționalitate a disp. art. 26 din Legea nr. 489/2006 privind libertatea religioasă și regimul general al cultelor, publicată în Monitorul Oficial al României, Partea I, nr. 424 din 17 iunie 2011.

[22] *«Constituția României consacră separarea statului față de autoritate»*. M. ANDREESCU, *op. cit.*, p. 309; *«Constituția României consacră separarea statului față de biserică»*. I. MURARU și E.S. TĂNĂSESCU, *op. cit.*, p. 181; M. SAFTA, *op. cit.*, p. 232.

[23] I. MURARU și E. S. TĂNĂSESCU, *op. cit.*, p. 182.

[24] M. ANDREESCU, *op. cit.*, p. 309.

[25] În literatura istorică s-a arătat că: *«Secularizarea averilor mănăstirești a fost, alături de reforma agrară, una dintre reformele fundamentale adoptate de Alexandru Ioan Cuza pentru modernizarea României, prin care proprietățile bisericilor și mănăstirilor închinate din țară au fost trecute în proprietatea statului»*. M. MIHALACHE, *Cuza Vodă*, Editura Tineretului, București, 1967, p. 164; *«Măsura adoptată în 1863, la 4 ani de la Unirea Principatelor, era fundamentală pentru formarea noului stat român, întrucât 1/4 din suprafața arabilă a țării aparținea mănăstirilor românești aflate sub influență preponderent greacă. Aceste proprietăți generau anual venituri de circa 7 milioane de franci, bani care luau calea străinătății și pe care călugării greci instalați în mănăstiri îi cheltuiau fără să dea socoteală autorităților și fără să aducă un folos real»*. L. PREDESCU, *Enciclopedia României. Cugetarea*, Editura Saeculum, București, 1999, p. 772; totuși, trebuie avut în vedere că: *«Chiar dacă prin Legea de secularizare s-a realizat soluționarea problemei averilor mănăstirilor închinate, s-a creat o altă problemă, anume Biserica Ortodoxă Română a rămas lipsită de mijloacele proprii de întreținere, cu atât mai mult cu cât preluarea proprietăților bisericești neînchinate s-a făcut fără nicio despăgubire»*. Din Cuvântul Preafericitului Părinte † DANIEL, Patriarhul Bisericii Ortodoxe Române, la deschiderea lucrărilor Sesiunii de comunicări științifice: *«Secularizarea averilor bisericești [1863]. Motivații și consecințe»*, organizată de Patriarhia Română și Academia Română, marți, 12 noiembrie 2013. Disponibil la: www.patriarhia.ro. Pagină accesată la 1 mai 2020, ora 16:40 [ora Franței].

[26] Informație preluată de la adresa: www.trinitas.tv. Pagină accesată la 1 mai 2020, ora 16:25 [ora Franței].

[27] Ați autori optează pentru denumirea: *«Raporturile dintre stat şi culte»*. M. CONSTANTINESCU, A. IORGOVAN, I. MURARU și E.S. TĂNĂSESCU, *op. cit.*, p. 58.

[28] În acord și cu deciziile CCR cu nr. 34 din 17 februarie 1998; nr. 95 din 4 martie 2004 și nr. 245 din 10 mai 2005.

[29] Într-o opinie mult mai restrictivă, în sensul că este interzisă limitarea drepturilor fundamentale chiar și prin OUG, ipoteza fiind aplicabilă și în domeniul libertății religioase, unii specialiști au afirmat că: *«O problemă specială se pune atunci când gestiunea stării de urgență impune restricționarea exercițiului drepturilor fundamentale. Constituția României cuprinde în această privință o normă specială de protecție. Astfel, ea dispune că exercițiul unor drepturi sau unor libertăți poate fi restrâns numai prin lege [art. 53 alin. (1) teza întâi]. În fața formei explicite a unui asemenea text nu rămâne de discutat decât dacă legea poate fi adoptată într-o primă fază și de legiuitorul delegat – Guvernul. Constituția vorbește de lege, iar nu de ordonanță [de urgență], cea din urmă fiind denumirea sub care sunt adoptate actele normative cu putere de lege de către executiv. A admite restrângerea exercițiului drepturilor fundamentale prin ordonanță ar fi numai un inadmisibil adaos la Constituție, ci și o încălcare a logicii constituționale care cere ca, atunci când se pune problema limitării unor asemenea drepturi, interpretarea motivelor, dar și a normelor procedurale aplicabile să fie cât mai restrictivă. Acesta este unul dintre motivele pentru care Constituția dispune ca pe perioada stării de urgență Parlamentul să se găsească în sesiune și, totodată interzice dizolvarea sa. Fiind la post, parlamentarii pot adopta în regimul de urgență, compatibil cu starea generală a națiunii, toate restricțiile legale ce se impun. De aceea, solicitarea unora ca astfel de restricții să se stabilească măcar prin O.U.G., este un compromis inacceptabil, atât sub aspectul procedurii stabilite prin Constituție, cât și sub cel al fondului, circumscris de importanța capitală a valorilor de apărat»*. A. SEVERIN, *Amenzile aplicate în starea de urgență sunt nule. Haosul constituțional generează abuz administrativ*, în «DCNEWS», disponibil pe www.dcnews.ro. Accesat la 30 aprilie 2020, ora 20:23 [ora Franței].

[30] Pentru opinie concurentă a se vedea: M. SAFTA, *op. cit.*, p. 181.

[31] Decizia CCR nr. 34 din 17 februarie 1998 cu privire la constituționalitatea Legii pentru aprobarea Ordonanței de urgență a Guvernului nr. 88/1997 privind privatizarea societăților comerciale, publicată în Monitorul Oficial al României, Partea a II-a, nr. 88 din 25 februarie 1998.

[32] Decizia CCR nr. 95 din 4 martie 2004 referitoare la excepția de neconstituționalitate a dispozițiilor art. 155 din Codul de procedură penală, cu modificările ulterioare, publicată în Monitorul Oficial al României, Partea a II-a, nr. 234 din 17 martie 2004. A se consulta și Decizia CCR nr. 245 din 10 mai 2005 referitoare la excepția de neconstituționalitate a prevederilor art. 79 alin. (1) teza întâi din Ordonanța de urgență a Guvernului nr. 195/2002 privind circulația pe drumurile publice, precum și a ordonanței în integralitatea sa, publicată în Monitorul Oficial al României, Partea a II-a, nr. 612 din 14 iulie 2005.

The Impact of the Activity of the United Nations General Assembly in Maintaining Peace among the States of the World

Manciu L.A.

"Dimitrie Cantemir" State University of Chișinău/Kishinev
(Republic of MOLDOVA)
E-mail: liana.manciu@yahoo.ro

Abstract

The United Nations Organization is based on the sovereign equality of all its members, on each state, large or small, all states being equal. The General Assembly is the sole body in which all members states of the United Nations have an equal chance to discuss their common issues of global concern. The United Nations General Assembly represents the sole authority appointed as the open conscience of the world. Since all the members of the General Assembly have a right to vote, the resolutions on issues of global concern are adopted by a majority vote. Some resolutions of the General Assembly are fundamental and they may undoubtedly create general law principles. Thus, the General Assembly may contribute, indirectly if not directly, to the progresses recorded in the process of law modernization. The UNO Charter attributes to the Assembly the task of making recommendations that may progressively contribute to the development and codification of the international law.

Keywords: United Nations Organization, General Assembly, general principles, states, right to vote.

The General Assembly is the main deliberative and representative body of the United Nations Organization, consisting of the representatives of 193 member states, who represent a forum for multilateral discussions over international issues, including maintaining international peace and security. The UNO Charter imposes the main responsibility for maintaining international peace and security to the Security Council, and the tasks of the General Assembly are subsidiary in this respect. Theoretically, the powers vested in other bodies than the Security Council with regard to maintaining international peace and security are interpreted in a restrictive sense, therefore they have no competencies in imposing obligations on states.

According to the UNO Charter, the General Assembly has the following functions and competencies in the field of maintaining international peace and security:

• to take into consideration the general principles of cooperation in maintaining international peace and security, including in the matter of disarmament, and to make adequate recommendations;

• to discuss any questions with regard to maintaining international peace and security and to make recommendations related to such questions, except for the case where the relevant difference or situation is discussed by the Security Council;

• to debate any issues related to the application of the Charter or those affecting the powers and the functions of any UN body and, with the same exceptions, to make adequate recommendations;

• to initiate studies and make recommendations in order to promote and facilitate international cooperation in the political, economic, social, humanitarian, cultural, education, and health fields; to develop and codify the international law and the branches thereof; to promote the fundamental rights and liberties on a large scale;

• to recommend measures for the peaceful regulation of any situations that might affect the friendly relationships among nations.

Nevertheless, despite the fact that the main tasks related to maintaining international peace and security are appointed to the Security Council, in practice the General Assembly plays a sufficiently important role, especially when the Security Council is not able to reach a unanimous and acceptable decision for all members, situations that appear to be frequent.

In that sense, in the advisory opinion of the International Court of Justice issued in the case file *Certain Expenses of the United Nations (Article 17 paragraph (2) of the Charter) [1]*, it was underlined that the role of the Security Council in maintaining international peace and security is primary, but not exclusive, a significant place being left for the General Assembly as well.

Moreover, at a practical level, despite the limited competencies vested in the General Assembly by the UNO Charter, an extension of its powers, as we shall see in what follows, is provided in the Resolution adopted in the early period of the Cold War called "Unification for Peace". More than that, in case of inaction or, *especially*, in the case of a selective action of the Security Council, the General Assembly remains the central body which expresses the international opinion.

Universality of the General Assembly: Art. 2 of the UNO Charter, which regulates the organization principles, clearly indicates in its paragraph (1) that the United Nations Organization is based on the sovereign equality of all its members. This means that each state, large or small, occupies an equal place to all the others. The General Assembly is the sole body in which all members states of the United Nations have an equal chance to discuss their common issues of global concern, as well as any questions related to the field of application of the Charter. Thus, the UN General Assembly represents the sole authority where the opinions of the international community are voiced and fully heard, as this organization is in fact appointed as the open conscience of the world. Since all the members of the General Assembly have a right to vote, the resolutions on issues of global concern are adopted by a majority vote. Some resolutions of the General Assembly are fundamental and they may undoubtedly create the general law principles provided under art. 38 paragraph (1) letter c) of the Statutes of the International Court of

Justice [2]. Thus, the General Assembly may contribute, indirectly if not directly, to the progresses recorded in the process of law modernization. The UNO Charter attributes to the Assembly the task of making recommendations that may progressively contribute to the development and codification of the international law.

The competencies of the General Assembly in the field of maintaining international peace and security were an issue of dispute among smaller states and the great powers. In the proposals formulated at the Dumbarton Oaks Conference for the establishment of the UNO (August 21, 1944 – October 7, 1944), the great powers did not concede a real importance to the General Assembly. At the San Francisco Conference, as a result of which the UNO was founded (April 25, 1945 – June 26, 1946), the smaller states insisted that the whole power should not be concentrated in the hands of the Security Council [3]. Nevertheless, the competencies of the General Assembly in maintaining international peace and security are just to make recommendations and they are not compulsory. It can make recommendations for the members of the United Nations Organizations or for the Security Council or both" [4], "to discuss on any issue regarding the international peace and security" [5], "to draw the attention of the Security Council to situations that might endanger the international peace and security" [6], and "to recommend measures of peaceful settlement of any situation" [7]. The competencies of the General Assembly to discuss and to make recommendations with regard to the international peace and security specifically include the right to investigate. This right may be derived from the Charter: in order to discuss about any issue, the General Assembly must be able to make the investigations required; for such investigations, it may appoint a commission or a committee of inquiry. For example, in the year 1946 a special committee was appointed to investigate the circumstances in Palestine – the UN Special Committee for Palestine; in 1956, a commission was appointed to investigate the course of events in Hungary; in 1958, the General Assembly decided to send a mission of observers in Lebanon – UNOGIL. All these efforts of the General Assembly helped reducing the escalation of dangers or threat towards peace.

The relationship between the Security Council and the General Assembly is not a competitive one; the aim of each of these bodies is to facilitate the other's decision-making activity. The function of the General Assembly is to make recommendations based on its own interpretation of a situation that might endanger the international peace and security. As we mentioned above, the power of making compulsory decisions is vested in the Security Council, either by using the force of by imposing other forms of sanctions on the grounds of Chapter VII of the UN United Nations Charter. Nevertheless, the Security Council may also request that the UN General Assembly offer a recommendation in accordance with art. 12 paragraph (1) of the Charter.

In the case of art. 2 paragraph (7) – "*No disposition of this Charter will authorize the United Nations to intervene in issues that are essentially pertaining to the internal competence of a state, not will obligate its members to submit such issues for solving based on the provisions of this Charter; this principle will nevertheless not affect in any way the application of the measures of constraint provided for in Chapter VII*" – which has always been interpreted in a strict sense by the states, the General Assembly is concerned about the internal situations of the member states to the extent in which they may be subject to the international law.

In that sense, we underline the fact that the notion of human rights is reflected in the public international law and thus it is no longer an issue that falls exclusively under the internal jurisdiction of a state. This position prevailed in many of the resolutions adopted by the General Assembly on the topic on guaranteeing and promoting the fundamental rights and liberties recognized for the human being, therefore articles 1, 2, and 55 of the Charter underline the importance of promoting and protecting the human rights at the largest scale. The Security Council also accepted to a large extent this visualization confirmed by the General Assembly, and in many resolutions of the Security Council, serious violations of the human rights were found to be a "threat against international peace and security" in the sense of art. 39 of the Charter – "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with article 41 and 42, to maintain or restore international peace and security".

For example, in 1956 took place the uprising of the Hungarians in Budapest, which was violently repressed by the military forces of the USSR. In the "Hungarian matter", the General Assembly rejected the applicability of art. 2 paragraph (7), considering that the actions of the Soviet Union were contrary to the provisions of art. 2 paragraph (4) of the Charter – "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations". In its Resolution no. 1133 (XI) of September 14, 1957 [8], General Assembly stated that the USSR, by violating the provisions of the UNO Charter and of the Geneva Convention of 1949, deprived Hungary from its liberty and political independence and the Hungarian people from the exercise of its fundamental rights, by imposing a new political regime by armed intervention.

In a similar manner, the General Assembly adopted a clear position with regard to the decolonization, racial discrimination, apartheid, considering such matters outside the internal jurisdiction of a state, and art. 2 paragraph (7) of the Charter is not applicable to these matters.

The racial discrimination and the policy of apartheid promoted in Africa concerned the General Assembly since the beginning of the 1950's. The majority of the UNO member states agreed the policy of apartheid was not just an internal topic of concern. Basically, the policy of apartheid in South Africa was repeatedly discussed and condemned in the session of the General Assembly, which requested that the Security Council pay special attention to this matter. In the end, in 1977 the Security Council adopted some resolutions attesting that the policy of apartheid in South Africa constituted a danger for the international peace and security in accordance with art. 39 of the Charter. Prior to the year 1977, the embargo imposed to South Africa by certain states was just voluntary, but along with the invocation of Chapter VII in 1977, it became compulsory for all states. Thus, in the opinion of the General Assembly, the serious breached of the human rights in the form of racial discrimination or any other form, perturbed the world peace. [9]

The Resolution "Unification for Peace": The "Unification for Peace" was a product of the division from the beginning of the Cold War between East and West. The frequent incapacity of the Security Council to carry out the functions attributed to it by

the Charter due to the veto right often used by the Soviet Union, brought about a change in the correlative power of the Council and of the Assembly. The Assembly won the trust to take over the role of the Security Council, when the latter proved to be unable to engage the primary responsibility for maintaining international peace and security. The Resolution "Unification for Peace" enjoyed a wider support within the international community, with the intention that the United Nations play an active role in restoring the international peace and security. It was a great achievement for the General Assembly in the exercise of its functions to accomplish the highest fundamental goal of the Charter – to maintain peace.

In June 1950, North Korea invaded South Korea. The Security Council took prompt action to deploy the UNO troops on site, under the command of the US Army General Douglas McArthur, to push back the North Korean forces. During that period, the USSR was boycotting the sessions of the UNO institutions, therefore it was not able to exercise its veto right as a permanent member of the Security Council against engaging the UNO troops in the Korean conflict. Nevertheless, when the boycott was over, the Soviet Union used its veto in the voting process, all the way constantly questioning the validity of the resolutions adopted by the Security Council in its absence. Such situation determined the Security Council to call in n emergency session of the General Assembly, which, in the beginning of November 1950, adopted the Resolution "Unification for Peace" (Resolution 377 (A-E).[10] According to such resolution, in the event that, due to the lack of unanimity of opinions of the permanent members, the Security Council were not able to engage its primary responsibility for maintaining international peace and security in case of existence of threats against peace or of acts of aggression, the General Assembly would immediately look into the matter and make adequate recommendations for the member states to adopt collective measures, including the use of armed forces if necessary, in order to maintain or restore the international peace and security. If the Council is not in session at that specific moment, the Assembly may convene in a special emergency session within 24 hours from the request of the member states.

In fact, that Resolution represented a proposal made by the USA in order to render UNO more efficient with regard to the *future* threats against peace. Nevertheless, the General Assembly adopted a series of resolutions specifically related to the Korean issue after the procedure "Unification for Peace" was finalized. Thus, in the Resolution no. 498 (V) of February 1, 1951 [11], the UN member states were requested to increase the support granted to the UNO forces, which indicates an action according to the Resolution "Unification for Peace", and in the Resolution no. 500 (V) [12] adopted on May 18, 1951, the states of the world were requested to impose an embargo against China and North Korea with regard to weapons, ammunition, atomic power, oil, transportation of materials of strategic importance, due to the hostilities taking place and the intervention of the Chinese government in the relevant territory.

Ten special emergency session took place with regard to the situations in which the activity of the Security Council was blocked. They focused on the situation in the Middle East (1958 and 1967), the "Hungarian matter" (1956), the situation regarding the Suez Canal (1956), Congo (1960), Afghanistan (1980), Palestine (1980 and 1982), Namibia (1981), the situation of the occupied Arab territories (1982), and the illegal

Israeli actions in occupying the territory of East Jerusalem and in the rest of the occupied Palestinian territories (1997 – 2004).

As we can see, putting in place of the procedure "Unification for Peace" allowed the General Assembly of the United Nations Organization to react more or less promptly to the threats against peace in the world, in situations where, due to the divergent political interests, the decisional capacity of the Security Council was blocked. But it is worth mentioning that the procedure "Unification for Peace" is extraordinary and regretfully not as effective as it could be desired, because most of the issues that it was supposed to tackle have remained unsolved so far.

Among the latest attempts to apply the "Unification for Peace" was the "Iraqi matter", which was nevertheless not solved in that way. As a matter of fact, in the year 2003, when it was almost certain that the USA and its allies were preparing a preventive attack against Iraq, governments and groups from all over the world requested that an alternative to war should be found. Many states, including Russia and France, opposed the war. There was a clear deadlock, the issue of using the force against Iraq separated in the Security Council, the USA and the United Kingdom on the one hand, and France and Russia on the other hand. Several sessions of the General Assembly were convened on the matter. The Center for Constitutional Rights, based in New York, proposed a resolution draft based on the "Unification for Peace", due to the deadlock experienced in the Security Council with regard to the Iraqi matter, with the intention that, subsequently, certain member states would present the resolution draft within the General Assembly. Nevertheless, the draft as such was not debated within the General Assembly, and on March 20, 2003, the coalition forces of the USA and of the United Kingdom initiated the military intervention in the Iraq led by Saddam Hussein.

The United Nations Peacekeeping Forces: Another important achievement of the General Assembly was the creation of the United Nations forces for maintaining and restoration of peace. The peacekeeping forces were deployed for the first time in 1956, when Israel and later the United Kingdom and France invaded Egypt following the nationalization by the latter of the Suez Canal. The General Assembly authorized the deployment of a military contingent in order to restore the peace in the region. Moreover, the Assembly adopted such decision in the situation where the veto of the United Kingdom and of France paralyzed the decision-making capacity of the Security Council. [13]

These events triggered a hot debate over the question whether the General Assembly may authorize the application of coercive measures or whether the authorization of a peacekeeping mission must be seen as an application of force, considering the fact that art. 14 of the UNO Charter authorized the General Assembly to recommend measures for peaceful settlement of any situation, but it does not indicate whether such measures may have a coercive nature.

It is worth mentioning theat the fact that in the case file *Certain Expenses of the United Nations [Article 17 paragraph (2) of the Charter]* quoted above, the International Court of Justice, although it had analyzed the role of the General Assembly with regard to peacekeeping, it did not mention whether the latter could recommend adopting coercive measures, thereby leaving a place for interpretation in this field. Such confusion is also aggravated by the conclusion drawn by the ICJ that the role of the Security Council in peacekeeping is primary, but not exclusive.

Prevention and Removal of Disputes: On December 5, 1988, the UNO General Assembly by its Resolution no. 43/51 [14] adopted the *Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten the International Peace and Security and on the Role of the United Nations in this Field*. By this act, the General Assembly was concerned for the first time with an aspect of maintaining the peace and the international security, which is not clearly identified and developed in the Charter and which is not less important for the achievement of the goals of the UNO – preventing the occurrence of international disputes [15]. The said Declaration examined the role of the states, of the Security Council, of the General Assembly, and of the Secretary General in this field. With regard to the General Assembly, text of the Declaration enumerates the possibilities similar to those of the Security Council – to request an advisory opinion from the International Court of Justice and to support the efforts made to prevent the disputes at the level of regional organizations. The sole specific paragraph stipulates that "the General Assembly should make use of the dispositions of the Charter in order to discuss disputes or situations, whenever necessary, and in accordance with art. 11 and under the reserve of art. 12 of the Charter, to make recommendations in relation thereto". This paragraph reflects, on the one hand, the generally recognized competence of the General Assembly by art. 10 of the Charter and, on the other hand, emphasizes the fact that it is difficult to achieve effective actions from it in the field of prevention of international disputes.

The Millennium Declaration: The 55th session adopted the Resolution no. 55/2, known as the *Millennium Declaration* [16], which provides for the main directions of activity for the main international forum – the United Nations General Assembly. By this resolution, the stats affirmed their will to establish a just and durable peace in the whole world, in accordance with the purposes and principles of the Charter: to support all the efforts to upkeep the sovereign equality of all states, the respect for their territorial integrity and political independence; to solve disputes by peaceful means in accordance with the principle of justice and international law; to promote the non-interference in the internal affairs of the states; to ensure the respect of human rights and of the fundamental liberties to an equal extent for all, irrespective of their race, sex, language, or religion, and to promote international cooperation in solving international issues of economic, social, cultural, or humanitarian nature.

Also, the above mentioned Resolution consecrates fundamental values that are essential for the international relations, such as freedom, equality, solidarity, tolerance, respect for the environment, and division of responsibility.

With regard to the international peace and security, the Millennium Declaration separately consecrates the following tasks put in charge of humanity, the responsibility for surveillance of their execution pertaining primarily to the General Assembly, since it is the main representative, deliberative, and political in the world:

• consolidation of the respect for the rule of law at the international level and in the internal affairs, including in order to ensure the compliance of the member states with the decisions of the International Court of Justice, in accordance with the United Nations Charter, in the cases where they are parties;

• rendering the United Nations effective in maintain peace and security by making available the resources and the instruments required to prevent disputes, peaceful solving such disputes, maintaining or, as the case may be, edification of peace;

• reinforcing the cooperation between the United Nations and the regional organizations, in accordance with the dispositions provided by Chapter VIII of the Charter;

• minimizing the adverse effects of the area economic sanctions placed by the United Nations on the population, the regular revision of such sanctions and removing the negative effects of the sanctions on third parties;

• ensuring the implementation by the member states of the treaties related to the arm control and disarmament, the international humanitarian law, and the international law of human rights;

• all states should consider signing and ratifying the Rome Statute of the International Criminal Court;

• adopting efficient collective measures against international terrorism;

• intensifying the efforts in the fight against transnational crime in all its dimensions, including human trafficking and money laundering;

• making efforts to eliminate all weapons of mass destruction, especially the nuclear weapons, and to keep all options open in order to achieve this goal, including the possibility of convening an international conference in order to identify some ways to eliminate the nuclear dangers;

• taking steps towards stopping the illicit traffic of small calibre arms and light weapons, through the surveillance of weapon transfers and support of regional disarmament measures;

• persuading the states to take into consideration adhering to the Convention on the prohibition of use, stockpiling, storage, production, and transfer of anti-personnel mines and the destruction thereof.

With regard to the stability and development, the General Assembly set forth the following concrete targets:

• to halve, by the year 2015, the world population whose daily income is lower than 1 US$ and of the population suffering from hunger and lack of drinkable water;

• to ensure access to education all over the world, equally for boys and girls;

• to diminish the maternal deaths by 3/4 and deaths of children under the age of 5 years – by 2/3;

• to stop the spreading of HIV/AIDS, of malaria and other serious diseases which affect humankind;

• to promote special assistance to children whose parents died of HIV/AIDS;

• to considerably improve, during the next years, the living conditions for at least 100 million persons living in poor neighbourhoods;

• to ensure a sustainable development;

• environment protection and preservation;

• to adopt and to promote an ethical preservation of the environment and of the biological resources of the Earth;

• to intensify the collective efforts in the management, preservation, and sustainable development of the natural resources;

• to promote the implementation of the Convention on the biological diversity and elimination of desertification.

As we can see from the above, the Millennium Declaration consecrated a series of targets of prominent importance for humankind in the next millennium, those related to

maintain peace, security and stability having a separate role in this context. Actually, the United Nations General Assembly sketched a frame plan for the long-term coordination of the international relations, attributing to itself the role of promotor and supervisor of the accomplishment thereof. It is noteworthy the fact that, having read the reports published on a regular basis by the Secretariat of the United Nations, the majority of the targets proposed for execution by the Millennium Declaration toward the year 2015 were accomplished accordingly, which is a fact proven by statistical evidence. [17]

World Summit Outcome: to continue the topics of the long-term frame programs, for the period September 14-16, 2005, at the headquarters of the United Nations in New-York there took place the international summit whose sessions were attended by the representatives of all UNO member states (191 at that moment). The summit was characterized "the largest reunion of the heads of state in the history of humankind" and "the unique opportunity to adopt bold decisions in the fields of development, security, human rights, and reformation of the United Nations". [18]

Within the summit, on September 16, 2005, the UN General Assembly adopted the Resolution no. 60/1 which reflected the major concerned of the humankind with regard to the international peace and security, the states of the world reaffirming their commitment to work toward obtaining a security consensus based on the acknowledgement of the fact that several threats are interconnected, therefore the development, the peace, the security, and the human rights are interdependent, no state may protect itself efficiently by acting entirely alone and ll states need an effective collective security system in accordance with the purposes and the principles of the Charter. [19]

Especially, the said Resolution focused on:

• Peaceful solving of disputes: it was underlined the obligations of the states to solve international disputes by peaceful means in accordance with Chapter VI of the UN Charter, including by submitting the disputes to the International Court of Justice, if need be; it was underlined the importance of preventing armed conflicts in accordance with the purposes and the principles of the Charter; it focused on the importance of a coherent and integrated approach in order to prevent armed conflicts and to solve disputes, and the Security Council, the General Assembly, the Economic and Social Council, and the Secretary General should coordinate their common activities with a view to carry out these tasks.

• The use of force in accordance with the UN Charter: it was reiterated the obligation of all member states to abstain from threatening or using force in the international relations in any way that is incompatible with the Charter; it was decides to adopt efficient collective measures in order to prevent and eliminate the threats of peace and to suppress acts of aggression or other breaches of peace, and to solving of ensure international disputes by peaceful means.

• International terrorism: the antiterrorism strategy proposed by the Secretary General of the United Nations was saluted, the General Assembly having the obligation to develop the said strategy without delay with a view to adopt and implement some measures for promoting complete, coordinated, and coherent responses against terrorism at the national, regional, and international level.

• Peacekeeping: it was underlined the need of creating and deploying police forces that should assist the UNO pacification missions with consulting and expertise; the observance and ratification of the treaties on armament were requested.

• Peace edification: it was revealed the necessity of a coordinated, coherent, and integrated approach to the post-conflict peace building and reconciliation, by acknowledging the need for an institutional mechanism dedicated to the special needs of the emerging countries, in that sense it was decided to establish the Peace-Building Commission as an intergovernmental body, whose main purpose is to conciliate and propose integrated strategies for building the post-conflict peace. The Commission should focus on the reconstruction of the institutions necessary for the post-conflict recovery and to lay the basis for sustainable development. Moreover, the Commission is going to provide recommendations and information in order to improve the coordination of all relevant actors, to help ensure financing for the activities of post-conflict recovery. The activity of the Commission is based on the consensus of all its members.

• The responsibility of the states to protect the population against genocide, war crimes, ethnic cleansing, and crimes against humanity: it was stipulated that every state is responsible for protecting its citizens against such crimes, the responsibility of the states residing in preventing them, including by preventing the incitation to such crimes. At the same time, the international community also has the obligation, through the United Nations, to use diplomatic, humanitarian, and any other kind of means in accordance with Chapters VI and VIII of the Charter, in order to protect civilians against the crimes mentioned above, by adopting collective measures with good and prompt results.

It is worth mentioning that the Security Council Resolution no. 1674 (2006) of April 28, 2006 [20], reaffirmed the stipulations of the General Assembly Resolution no. 60/1 with regard to the responsibility of the states to protect the population against genocide, war crimes, ethnic cleansing, and crimes against humanity, the Security Council being entrusted with the mission to take concrete actions in order to protect the civilians in case of armed conflicts.

As a mater of fact, by the documents adopted on September 8, 2000, and later, on September 16, 2005, the international community having consolidating their common efforts through the UN General Assembly, established the direction lines for the continuous development of humankind, also underlining the main major problems that need solving. In this context, we point out that although we cannot talk about absolutely radical positive changes in the field of the problems and targets mentioned, multiple successes, especially with regard to the social fields, such as eradication of poverty in the underdeveloped countries, promotion of high quality health care, fight against malnutrition, providing drinkable water and schooling for children, are certain. Still stringent remain the issues related to the international terrorism, the world economic crisis (including the fluctuations of gold and oil prices) and armed conflicts, because such problems have always had obvious political connotations And focused divergent visions of the great powers of the world on the route of the development of humankind and their role in this context.

Although neither the UN General Assembly, in its capacity of main forum of humankind, nor the Security Council, in its capacity of major decision-making body in the world, as we are going to see in what follows, have not been able and, probably, will not be able to finally solve the sensitive international issues approached in various manners, the General Assembly – on the basis of the UN Charter and on the practices established for more than seven decades – has the mission to pinpoint the main issues

that conform humankind, to search and propose common mechanisms for solving such issues, especially with regard to maintaining international peace, security and stability.

And in order to carry out its tasks in such vast fields, the ***General Assembly has at its disposal several subsidiary bodies***, the so-called committees and commissions that are subordinated to it.

The Committee for peacekeeping operations was established by the Resolution no. 2006 (XIX) on February 18, 1965 [21]. The main purpose it was created for was to adequately regulate the entire activity of the peacekeeping operations under every aspect, as well as to inform and submit recommendations to the General Assembly with regard to such operations. The tasks entrusted with the Committee also include creating methods which might increase the capacity of the United Nations in carrying out the operations of peace keeping and restoration, the Committee being obligated to present an annual report on its activity before the Forth Committee within the Assembly (the Committee for special policies and decolonization), to which it is subordinated. Based on these reports, the Office of the UN Secretary General draws up his own annual report, which details the progresses achieved in the implementation of the recommendations regarding the development of pacification operations and reviews the essential proposals of the Committee in this field, and points out the progresses related to the improvement of arrangements related to the planning, management, and supervision/monitoring of missions.

The issues tackled by the Committee during the past decade include, apart from the main one, peace keeping and restoration, other aspects, such as safety and security of UN personnel, cooperation with regional administrative and security institutions. The most recent report from the year 2015 is based on the issues mentioned above, but extends at a general level on sections regarding the cooperation with donor countries, consolidation of the peacekeeping capacities in Africa and the Middle East, the reformation and restructuring of peacekeeping, conduct and discipline of the UN personnel. [22]

On its turn, the ***Committee for special policies and decolonization*** is responsible for investigating the issues that are not tackled by other committees of the General Assembly: various political issues, decolonization, issues related to Palestinian refugees. Within this Committee, there can be initiated resolution drafts, which require a specific action from the international community. At the same time, among the tasks of this Committee is the conciliation of other bodies and organizations in relation to the peace missions recommended. Moreover, the Committee often makes recommendations to the Security Council in this respect.

The Committee for disarmament and international security (First) [23] is concerned about the issues of disarmament, the global challenges and threats against peace that affect the international community, and searches for solutions for maintaining and consolidating of the international security regime maintaining. Dedicated to "establishing and maintain the international peace and security", is focuses on topics related to the weapon control, peaceful solving of disputes, and global security. The Committee makes recommendations for the Security Council in all aspects related to the issues that put the international peace at risk. Since the Committee incorporates the voice of every UN member state, its resolutions are always observed and taken into account by the Security Council.

As far as the *financing of peacekeeping operations* is concerned, by its Resolution no. 55/235 of December 23, 2000 [24], the UN General Assembly reaffirmed a set of general principle that financing is based on, namely:

• Financing of peacekeeping operations is the collective responsibility of all UN member states and, consequently, the costs of peacekeeping are included in the expenses borne by the states according to art. 17 paragraph (2) of the UN Charter;

• In order to cover the expenses of such operations, it is required to use a different procedure than the one applied to cover the expenses of the United Nations Regular Budget;

• Since the more developed countries are in the position of making greater contributions for peacekeeping, the countries with a less developed economy have a relatively limited capacity to contribute to peacekeeping operations that require significant expenses;

• In the event that the circumstances justify this, the General Assembly must pay a special attention to the situation of member states that are victims or are otherwise involved in events or actions that determined the initiation of a peacekeeping operation.

• It is worth mentioning that, in time, the General Assembly acquired a specific, even if complementary role, but which is in fact indispensable in the peacekeeping field, other times it has the role of counterweight in relation to the Security Council, the General Assembly has been and still is the place there the representatives of the international community, in their diversity, may express their views and even protest. Sometimes, the General Assembly act instead of the main decision-making body – the Security Council, when the activity thereof id blocked due to the divergent opinions of the permanent members, then the Assembly may use the whole range of maneuvers indicated by the Charter and previously used in its practice.

The identity and the role of the General Assembly have changed and will continue to change, according to the conflictual preferences in the governmental structures, the ideological debates on the social values and the concern of the international community with human rights and democracy. These ideological modifications are greatly due to the social, political, and security evolution of societies in the UN member states, the latter having radically changed their policies for a decade and a half. After the terrorist attacks of September 11, 2001, the priorities of several states entities oriented themselves toward discovering and preventing terrorism, such fact being reflected in the resolutions adopted by the General Assembly in order to engage in the activity of preventing and punishing those who choose the way of international terrorism. After the tragic events of September 11, 2001, the Security Council became much more concerned with the fight against terrorism in all its forms, and the General Assembly, on its turn, made multiple efforts to ensure a good monitoring of these policies. Nevertheless, by freezing the assets and restricting the circulation of certain persons suspected for terrorism activities or relations with terrorist organizations, the UN Security Council regretfully adopted a tactic of limitation of the fundamental human rights, in other cases being blamed for abuses, and the General Assembly, although it tried to temperate and monitor the schemes of the Security Council in this field, but other UN bodies as well, found themselves powerless in trying to effectively monitor and prevent the eventual abuses.

Anyway, from the establishment of the United Nations Organization and until the present day, the General Assembly has had successful attempts to make heard its own opinion on the issues related to peacekeeping and ensuring stability, thereby influencing de facto the restoration of peace in certain area affected by armed conflicts and war. This represents a change of the role that was initially designed for the General Assembly, as a universal forum for debates, and not decision-making body, the General Assembly being also active in an area that is mainly dominated by the Security Council. By the Declaration on the principles of the international law concerning the relations of friendship and cooperation among states in accordance with the UN Charter (Resolution no. 2625 (XXV) of October 24, 1970) [24], the Definition of Aggression (Resolution no. 3314 (XXIX) of December 14, 1974) [25], and later on the Kampala Conference held in 2010 [26] during which the Rome Statute of the International Criminal Court was amended with regard to the jurisdiction of the Court on war crimes committed in non-international conflicts and the definition of the crime of aggression, the General Assembly has showed that it is determined to solve the problems related to the use of force irrespective of the position of the Security Council.

It is also worth mentioning the firm position of the General Assembly against racism and discrimination, which was an eloquent example for the rest of the world. The despise of the majority community for racism and discrimination has created a useful impulse within the Organization also with regard to the UN engagement in monitoring, preventing, and punishing genocide and ethnic cleansing, including with regard to the dreadful events that took place two decades ago in ex-Yugoslavia and Rwanda. We hope that the humanitarian crises in Ukraine and Syria, which threaten the international peace and security, will nevertheless find a final solution in proximal terms with the involvement of the UN General Assembly, considering the fact that a common position in that sense has not yet been established within the Security Council for several years.

In conclusion: the UN Charter imposes the main responsibility for maintaining international peace and security on the Security Council. The Security Council was created as a body concerned with guaranteeing international peace and security after the horror and devastation caused by the World War 2. No one could reasonably anticipate at the moment when the UN Charter was drafted that the subsequent practice of the Council would evolve towards including a general activity of drafting normative acts, in order to confront with threats against the international legal order, whose nature has radically changed since mid-40's. Since its establishment in 1946, the Security Council was confronted with considerable criticism and, from that moment on, several appeals were made for its reformation. A great deal of criticism was due to its structure, because many consider it undemocratic, above all because it offers considerable powers and privileges to certain countries of the world. The main example is the veto right of the five permanent members. The first veto right was used from the very beginning of the institutional activity, by the USSR in February 1946, and, since then, the permanent members used the opower of the veto right for almost 300 times. Most often during the years, the veto right was used by Russia and by the USA, each of them rather defending its own interests than being concerned with the international peace and security. At present, instead of using their veto right and attract criticism, the countries prefer threatening to use their veto right. They use this menace implicitly or explicitly, either during private reunions of the five permanent members, or during plenary meetings. In

relation to several matters, they succeeded in reaching the result they wished and they could exclude some issues from the agenda of the Council, or to "soften" the language used in the resolutions. In spite of the speculations that the Security Council might be confronted with a "severe crisis " and it would not be able to ensure according to the UN Charter the collective security in the era of globalization, it still remains a unique international instrument, which actually carries out the functions of dispute prevention and solving. Proof of this is the fact that, to a great extent, namely due to the intervention of the United nations Organization and of the Security Council, slipping into a global conflict in the post-war period was avoided.

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European Union Foreign Policy and Diplomacy. News and Perspectives

PhD. Candidate Sultan T.

"Titu Maiorescu" University, Bucharest (ROMANIA)
E-mail: titisultan2006@yahoo.com

Abstract

The foreign policy of the European Union and its corresponding instrument of materialization – diplomacy, stands out, after more than half a century of existence and remarkable achievements, of special importance, as a notable segment in the field – unique and original, imposing- as results and as prestigious as possible – as an outfit, from the history so far of international relations between states. These relationships are already based on the evolution of complex and delicate situations, as well as rich accumulations of valuable experience, prestige and lessons learned during the millennium of existence and action by the most developed state formations that have ruled the world and have elaborated human history. Foreign policy and European Union diplomacy are a creation in the field of thought and wise action adorned by the realise, needs and prospects reached at the end of the second World War, but also drawn by the developments identified in post-war, the urgent need for society to economic, social development and welfare creation, and for the resolution of the issues dictated by the imperative of adapting and adapting to the interests that have been established in the modern, complex globalization society. The European Union's foreign policy is currently being conducted in full compliance with the need to ensure a climate of peace, security, development, and working together in solving the global problems we face, while taking advantage of the experience and prestige of the past, but also of what the European Union represents today in the world (a political and legal structure and a leading player covering the whole social sphere in its action, having a particular impact in international relations between States, and to which, for congruency reasons, it is only a suitable foreign policy and diplomacy, a remarkable one and one held as perceived and already recognized in the world). Foreign policy and European Union diplomacy are among the most constructive, effective and prestigious forms of participation in international life worldwide, and remain one of the most attractive pages in the history of international relations – not only as an experiment, but also as a result of the international relations. representing the action of a group of states that integrate into the European environment, but also as an achievement and model that is recommended and necessary in the current international context.

1 The common foreign, security and defense policy in the Treaty of Lisbon [1]

The common foreign and security policy is one of the areas of great relevance and perspective, an area of great concern to the European Union; from its origins and the assurance of international security was one of the reasons that determined the reason (substrate) for the establishment of the European Communities (C.E.C.O. – to keep under control, an activity that would have reopened the post-war revenge). The concept of the Common Foreign and Security Policy (PESC) as such is therefore not at all new, and the European Union's responsibilities in this regard are an important segment of its activities, especially in the international context of the European Union moment.

Compared to the Constitutional Treaty (2004), the Treaty of Lisbon – which makes structural changes by drawing up Title V of the Treaty on European Union (TEU) – the Union's external action, from specific provisions concerning the common foreign and security policy (P.E.S.C.) and the other provisions relating to the common security and defense policy (P.E.S.A.) of Part V of the T.F.U.E., it is, in essence, very similar to the previous one. Through this external action, there has been a significant improvement in the provisions in force, highlighting the international stature of the European Union and increasing its capacity to act effectively and responsibly in international affairs, there are also some important innovations. namely external representation by the President of the European Council, the High Representative for the Common Foreign and Security Policy, the European External Action Service, etc.

The provisions of the T.U.E. leaves, however, ample room for pertinent, sometimes contradictory, interpretations, media coverage and discussions between the main actors – states and institutions, with diverse interests and visions on the action of common diplomacy; even at the Conference, the perspective of separating the common foreign and security policy from the common defense policies was circulated – Declaration no. 13 and 14, constituting a reflection of this vision.

However, the Treaty of Lisbon established an essential element in the field, namely that the European Union has legal personality (art. 47) – a circumstance with great impact in this case and that it replaces the European Community – as a result of the transformation of the T.C.E. in the T.F.U.E. – "organizes the functioning of the Union" and that it succeeds it [art. 1 par. (C)]. [2]

As a result, the European Union, becoming the sole holder of all existing and added tasks, the common foreign and security policy segment has taken on a much more visible dimension; its attributions in this field were enriched, extended and diversified, and the legal nature of the competencies it held, was qualitatively transformed, evolving in the direction of the accumulation of communitization elements.

Consequently, under Title V of the Treaty on European Union, regulations on external action were introduced (Articles 21-46 of the T.U.E.) – taking over and adapting the provisions in force or reformulating them, and in Art. 205 – 215 of the T.F.U.E., are stipulated in addition to the general provisions on the external action of the European Union in the T.U.E., and the common commercial policy, cooperation with third countries and humanitarian aid, development cooperation, etc.; there is and is, therefore, a set of attributions that broaden the scope and substantiate, the external

activity propelling the European Union as a notable, of first rank, actor of the international life.

The common foreign and security policy, which has already been included in the Treaty on European Union (Maastricht) – as one of the objectives of the European Union – is now gaining remarkable content and weight through the amendment following the adoption of the Treaty of Lisbon – in terms of expanding and diversifying the field, as well as improving the institutional mechanism at its disposal, as well as the way in which it is regulated; we can say with certainty that we are in a stage of community growth and expansion, which consequently marks a qualitative transformation of the structure of the European Union. According to the provisions of art. 24 of the TEU – "the competence of the European Union in matters of the common foreign and security policy shall include all areas of foreign policy and all matters relating to the security of the Union, including the gradual definition of a common defense policy which may lead to a common defense"; the common foreign and security policy is subject to the application of special rules and procedures, as defined and implemented by the European Council and the Commission.

In our opinion, the scope and strategy of the common foreign, security and defense policy segment is clearly reflected in the process of deepening European integration and also involves the continued transfer of Member States' sovereign attributes to the European Union; this segment is underlined by the fact that specific and individualized regulation is attributed to the field, in contradiction with the general set of foreign policies pursued by the European Union.

It is therefore transposed into the new regulation by clarifying and consolidating the overall position of the European Union in the international community, then formulating the rule that the European Union's action on the international stage is based on the principles which led to its establishment and which it intends to promote worldwide: democracy, the rule of law, the universality and indivisibility of fundamental human rights and freedoms, respect for the principles of the UN Charter. and international law. The European Union maintains and develops key relations and at the same time establishes effective partnerships with third countries and international organizations, promoting multilateral solutions to common problems, in particular within the United Nations. At the same time, the European Union defines, strengthens and acts to establish a high level of cooperation and communication in all areas of international relations, to promote and defend common values, fundamental interests, security, its independence and integrity, peacekeeping, conflict prevention and the establishment of international security in accordance with the aims and principles of the UN Charter, the Helsinki Final Act and the objectives of the Paris Charter, including those on the external borders; to promote sustainable development, encourage the integration of all states into the world economy, participate in the development of measures to preserve and improve the quality of the environment, etc. (art. 21 of the T.U.E.).

The consolidation of this picture of the set of common objectives and values pursued is completely detached, and is dominated by such a magnitude and permanence that it is meant to reflect and ultimately establish the ideals and hopes of mankind, these rules and principles being valid. for the whole of the European Union's foreign policy.

The Protocols to the Treaty of Lisbon on the role of national parliaments in the European Union and on the application of the principles of subsidiarity and proportionality govern, for the first time, how subsidiarity can be exercised. [3]

Promoting an institutional line anchored to the same logical perseverance, in art. 25 of the Treaty on European Union, reflects how the definition and establishment of general guidelines takes place, and in art. 22, 24 and 26 of the Treaty on European Union, the institutions of the European Union which will be transposed into mechanisms for the choice of the above purposes are mentioned – The European Council (which identifies strategic objectives, takes decisions that may govern relations with a country or a region), the role of the Commission and the High Representative of the Union as well as the European External Action Service. It also stipulates that interests and objectives concern "other areas of the Union's external action". There is, therefore, a broad and concrete picture of all the problems facing the international community, to the solution of which the European Union can also make a significant contribution.

Under the Treaty of Lisbon, national parliaments acquire the following rights and responsibilities: receiving information, draft legislative and non-legislative acts directly from the institutions of the European Union; verifies compliance with the principle of subsidiarity; participates in the procedures for revising the treaties (art. 48 of the T.U.E.); are informed about applications for membership of the Union (art. 49 of the T.U.E.); participates in interparliamentary cooperation between national parliaments and the European Parliament (Protocol on the role of national parliaments in the European Union). National parliaments also receive, inter alia: Commission consultation documents (green papers, white papers, communications); The annual legislative program of the European Commission; draft legislation and amended drafts; Agenda and results of Council meetings; initiatives of the European Council to activate footbridge clauses, etc. [4]

The overall foreign policy and the diplomatic activity of the European Union do not exclude the foreign policies of the Member States (which maintain their essential functions as a sovereign and independent state), but it coexists with them, completes and enhances them (making them more effective), while continuing to be subjects of international law. They also maintain and develop relations (concluding international treaties) with the other Member States of the European Union or with third countries, but these relations do not remain outside the sphere of influence that the foreign policy of the European Union has and to which the Member States are bound (there must be a compatibility between the commitments they enter into and their obligations under the status of Member States of the European Union, which may conclude treaties, but there is a hierarchy in which Community treaties take precedence over those concluded between Member States and those subsequently concluded between Member States and third countries).

2 European Union foreign policy

The activity related to the common foreign and security policy of the European Union is substantially highlighted and enriched, by the new regulations brought or by the reformulation and improvement of the existing provisions. Thus, according to the provisions of art. Article 24 of the Treaty on European Union, the competence of the

Union in matters of the common foreign and security policy includes as a whole, all areas of foreign policy, as well as all other issues and objectives relating to the security of the European Union, including the gradual definition of a common security and defense policy; with regard to the arrangements for implementing the common foreign and security policy, special rules and procedures shall be laid down for the purpose of defining and implementing them by the European Council and by the Council, acting unanimously – which is unambiguously clear that this area is still related to intergovernmental cooperation and does not fall within the supranational sphere. This policy shall be implemented by the High Representative of the Union for Foreign Affairs and Security Policy and by the Member States in accordance with the Treaties. As regards the enforceability of the European Union's foreign policy actions, the Member States must respect the action of the European Union, actively and unreservedly support this policy, in the spirit of loyalty and mutual solidarity; they cooperate and refrain from any action contrary to the interests of the Union or which could harm efficiency as a cohesive force in international relations (art. 24 of the T.U.E.).

The European Union carries out its common foreign and security policy work, by defining the general guidelines and adopting those decisions, by the actions taken, the positions to be taken, and by strengthening systematic cooperation between Member States on the direction of their policy (Article 21 T.U.E). This article stands out as a new text, it contains additional ideas on the degree of policy cohesion envisaged and is reformulated to take into account the new approaches (when the element of "adoption" is no longer as emphasized as in the old text, it stands out even more that this policy belongs to the European Union, as its holder).

The European Council identifies the strategic interests of the European Union, sets the objectives and defines the general guidelines of the common foreign and security policy (art. 22 T.U.E.). Where international developments so require, the President shall convene an extraordinary meeting of the Council, for the obvious purpose of defining the strategic lines of European Union policy in relation to that development (Article 26 of the T.U.E.); from this article (reformulated), the provision from par. (2), referring to strategies applicable in areas where Member States had important common interests – procedure which can no longer be associated with the new approach to the role and importance of the European Union in this area of current relevance.

At the same time, at the institutional level of the European Union, it was imperative to include a regulation, in which to establish the functions of the High Representative of the Union, namely: implement the common foreign and security policy (art. 27 of the T.U.E.); chairs the Foreign Affairs Council; contributes, through its proposals, to the development of the common foreign and security policy and ensures the implementation of the decisions adopted by the European Council and the Council; represents the European Union in the areas of the common foreign and security policy; carries out, on behalf of the European Union, political dialogue with third parties and expresses its position in international organizations and international conferences. In the exercise of his mandate, the High Representative of the European Union is supported by a European External Action Service (which operates in collaboration with the diplomatic services of the Member States – Article 27 of the T.U.E.).

In the context in which the international situation calls for justified operational action by the European Union, the Council shall take the necessary decisions; if a

change occurs with an unforeseen consequence on a situation, the Council shall review the principles and objectives of that action; decisions engage Member States in taking their positions and in carrying out their actions [art. 28 para. (2) of the T.U.E.]; any national position or action pursuant to such a decision shall be the subject of a notification by the State within a reasonable time to allow a prior agreement to be reached in the Council. Where necessary, in the light of developments in the situation and in the absence of a review of the Council Decision, Member States may, as a matter of urgency, take the necessary measures, taking into account the general objectives of that decision, and in the event of major difficulties in implementing decisions, the Member State shall refer the matter to the Council, which shall deliberate and seek appropriate solutions (Article 28 of the T.U.E.).

In order to make the Council's decision-making process more efficient, the High Representative of the European Union shall, in close consultation with the State concerned, seek to find an acceptable solution for it. In the absence of a result, the Council, acting by a qualified majority, may request the European Council to rule on the matter, with a view to adopting a unanimous decision [Art. 31 para. (1) of the T.U.E.]; In certain situations, the Council decides by qualified majority [art. 31 para. 2 of the T.U.E.].

The Member States of the European Union agree, in any matter of general interest in the field of foreign policy activity, for the purpose of defining common approaches [art. 32 para. (1) of the EU]. Before pursuing an activity on the international stage or making a commitment which could harm the interests of the European Union, they must consult the other States in the European Council or in the Council; Member States coordinate their actions in international organizations and at international conferences [art. 34 para. (1) and art. 35 of the T.U.E.]; Member States ensure, through their convergence, that the Union can promote its interests and values on the international stage and that they are in solidarity with each other (Article 32 of the T.U.E.).

Following the establishment and definition of a common approach to the European Union, the High Representative and the Ministers of Foreign Affairs of the Member States shall coordinate their activities in the Council and their diplomatic missions in third countries and in international organizations shall cooperate with each other. in application of the common approach [art. 32 para. (3) of the T.U.E.].

Despite the opposition of those who dispute the theory of – parliamentarisation, they are clearly playing an increasingly active role in European decision-making and exercising greater control over European affairs than governments, by reforming their own rules of procedure and shaping deadlines. their interaction with other institutions. [5]

If the European Union adopts a position on an item on the agenda of the UN Security Council, its Member States shall request that the High Representative be invited to present the position of the European Union [Art. 34 para. (2) of the T.U.E.]. The High Representative, as well as the establishment of the External Action Service, "shall not affect the responsibilities of the Member States – as they currently exist, with regard to the formulation and conduct of their foreign policy or their national representation in third countries and international organizations"; Declaration no. 14 specifically mentions the UN Security Council. and states that the provisions of the Treaty relating to P.E.S.C. "does not give the Commission new powers to initiate decisions or increase

the role of the European Parliament." In conclusion, P.E.S.C. has been restricted by this provision of the Treaty – which is absolutely natural, since the decisions of the European Union cannot change an international rule which the European Union is obliged to respect (an institution of the European Union cannot acquire powers for this what is established within other organizations).

The High Representative for Foreign Affairs and Security Policy plays a leading role in the European Union's foreign policy activity, as he leads the P.E.S.C. and he is vice-president of the European Commission, and if we also highlight his position as president of the Foreign Affairs Council, he ends up having, as noted, three very important prerogatives – a position which represents a major innovation, becoming a prominent figure in the external economic relations and the common foreign and security policy of the Member States of the European Union.

3 Common Security and Defense Policy (P.S.A.C.)

In strict accordance with the provisions of art. 42 paragraph (1) of the Treaty on European Union – "Common security and defense policy is an integral part of the common foreign and security policy"; ensuring operational capability, based on civilian and military means, and the Union may use it in missions outside the Union to maintain peace, prevent conflicts and strengthen international security, in accordance with the principles of the UN Charter. The performance of these tasks shall be based on the capacities made available by the Member States (paragraph 1); therefore, the European Union's action in this field of defense is limited to the cases mentioned, and not in general – it concerns situations of intervention other than those within the European Union (the missions expressly mentioned).

The common security and defense policy includes the gradual definition of a common defense policy of the European Union, which will lead to a common defense, after the European Council decides (unanimously) and recommends that the Member States take a decision in accordance with their rules constitutional requirements [para. (2)]. It is worth noting that decisions on common defense are taken unanimously, but it remains for the Council's recommendation to be taken into account by states in accordance with their constitutional rules.

For the purpose of implementing the common security and defense policy, Member States shall make civilian and military capabilities available to the Union, as well as their multinational forces, and shall undertake to gradually improve their military capabilities. The European Defense Agency identifies operational needs, promotes useful measures to strengthen the industrial and technological base in the field of defense (paragraph 3).

Decisions on the common security and defense policy (including those concerning the launching of a mission) shall be taken by the Council, acting unanimously on a proposal from the High Representative of the European Union or at the initiative of a Member State. The Council may entrust the performance of a mission to a group of States, in order to defend the values of the European Union [para. (4)].

Then, a set of clarifying provisions is highlighted: where the solidarity between the states that integrate in the European Union extends to the correlation of the relations

between the right to self-defense enshrined in the Treaty and the one provided in the UN Charter; the relationship between the European Union and the N.A.T.O. to. [6].

Therefore, in art. 42 para. (7) of the Treaty on European Union provides that 'If a Member State is the subject of armed aggression in its territory, the other Member States shall be obliged to provide assistance and assistance by all means available to them, in accordance with Article 51 of the UN Charter " (the right to individual or collective self-defense in the event of aggression- n.n). This "does not affect the specific nature of the security and defense policy of certain Member States". Taking the O.N.U. Charter as a point of reference. (Article 51) As regards the limits and nature of the assistance, the latter shall specify the specific nature of the security and defense policy of certain Member States; is provided that "commitments and cooperation in this field are in line with the commitments made within the North Atlantic Treaty Organization, which remain for the member states of this organization the basis of their collective defense and the framework for its implementation" [para. (7)].

The mutual assistance clause included in the Lisbon Treaty (art. 42 TEU) is worded in the same language as the collective defense of the Western European Union and NATO Treaties, but, nevertheless, the obligation to assist will not prejudice the specific character and policy defense of some Member States, that is, the non-aligned states. Moreover, the commitments must be in line with the commitments made to the N.A.T.O. – a stipulation considered important, but more pro-Atlantic (because membership of the European Union also determines a conjunctural attitude towards the N.A.T.O.).

Apart from the fact that it reflects the binomial European Union – N.A.T.O. – achieved in what are known as the 'Euro-Atlantic structures', the provision includes the extremely important element to be proclaimed for the Member States of the European Union, namely the 'mutual assistance' clause (which is typical of military treaties); this is done in the sense enshrined in the UN Charter. (art. 51); even if there is no perfect symmetry between the two structures (while some states like the USA, Canada, Turkey, etc. are NATO member states, but not of the European Union, and others like Austria, Cyprus, Malta, etc. are members of NATO), which gives solidarity to this partnership. Consequently – We consider that the necessary clarifications were felt above: the European Union's policy does not affect the specific nature of the security and defense policy of certain Member States, it complies with the obligations arising from the North Atlantic Treaty, whose defense is made within it [art. 42 para. (2) of the T.U.E.].

The following articles (arts. 43-46 of the T.U.E.) list the cases in which the European Union may have recourse to civilian and military means, of which we list: peacekeeping, conflict prevention and security-building missions, civilian and military disarmament, humanitarian and evacuation missions, military advisory and assistance missions, conflict prevention, crisis management missions, including restoring peace and stabilization operations after the end of conflicts and the case of missions of a group of states.

3.1 *Deficiencies of the common security and defense policy*

Analyzing the legal provisions in force, we appreciate that the common security and defense policy occupies a much more prominent place in the Treaty of Lisbon, with an even more emphasis on the element of capability, including civilian and military (art. 42 of the T.U.E.).

The much-vaunted Petersburg tasks defined at the Western European Union rally in 1992 and included in the Treaties of the European Union by the Treaty of Amsterdam are extended to incorporate joint post-conflict stabilization disarmament activities and operations, as well as "the fight against terrorism, including by supporting third countries in combating terrorism on their territory", both civilian and military means can be used (art. 43 of the T.U.E.).

The emphasis on operational capacity led to the establishment of the European Defense Agency (which had been established since 2004) – art. 42 of the T.U.E.

The Treaty of Lisbon introduced greater flexibility in the provisions of the P.E.S.C., as well as in common security and defense policy. First of all, we point out that the Treaty has allowed "enhanced cooperation" in all spheres, including the P.E.S.C. and S.C.P.A. (requiring a minimum of 9 participating Member States, compared to 8 previous states); further, enhanced cooperation requires unanimity in the Council (art. 329 of the T.F.U.E.).

At the same time, the Lisbon Treaty introduces the new concept of "permanent structured cooperation"; contrary to the situation of "enhanced cooperation", and unanimity is no longer required. The paradox is that Member States will act together, with more goodwill and defense capability, in a closer and more permanent kind of cooperation, and that such cooperation will generate and drive the growth of a Member State's military capabilities. and in this way, of the European Union.

In order to extend the tasks of Petersburg, the Treaty of Lisbon regulates the method of entrusting "the execution of a mission to a group of Member States which wish and have the necessary capacity for that mission" (Article 44 TEU) – "Coalition" coalition of the able and willing".

Although unanimity is the basic rule in the adoption of decisions by the P.E.S.C., there is nevertheless the possibility of the adoption of decisions by the Q.M.V. Of the four modalities for Q.M.V mentioned in the Treaties, three of them have worked in the past; as an element of novelty, there is the hypothesis in which the High Representative for European Affairs proposes a decision following a "specific request" from the European Council (art. 31 of the T.U.E.). The treaty also includes the "constructive abstention" that comes from the Amsterdam Treaty – only those who vote in favor by committing, while those who abstain and explain in a statement why they do not commit, accept that this decision commits the European Union [art. 31 para. (1) of the T.U.E.]. The context in which the Council may order the application of decisions by the Q.M.V. is not a new one, but the Member States have so far been reluctant to consider this possibility. In art. 31 of the T.U.E., this possibility is undoubtedly related to the so-called "emergency broke", and the state has no vital reason to oppose a decision, but may request that the decision be moved from the Council to the European Council to a decision which is taken unanimously – there is practically a narrowing of the prero-

gatives, as it should according to the Union Treaty Nice, there are two important reasons for this justification.

Consequently, the foreign policy of the Member States of the European Union consists mainly in their participation in the elaboration of the common foreign and security policy – where the European Union is the holder, and they, the executors, after the elaboration of this state being obliged to apply it (including treaties concluded by the European Union). We also mention the fact that, apart from this common policy, they can only have those relations that are not contrary to their quality as member states of the European Union.

If the Maastricht Treaty regulates what sanctions are against "smart sanctions", the Lisbon Treaty instead contains a new article allowing restrictive measures "against natural or legal persons and groups or state entities"; C.J.E. it has jurisdiction to verify the legality of such restrictive measures against natural and legal persons.

Even though the structure of the pillars has been formally abolished, there is still a noticeable difference between the external economic relations (which were in pillar 1) and the P.E.S.C. (which was the second pillar), because the Member States are not prepared to extend the "Community method" to the latter (art. 24 of the T.U.E.) – it is about those expenses that occur through operations that have military and defense implications and the cases in which the Council unanimously decides otherwise – art. 24 of the T.U.E. There is a suspicion that, as the European Union has not been able to form a pool consortium and delegate sovereignty to the P.E.S.C., a P.E.S.C. efficient; leadership is an important "input" in a process of European integration.

The fundamental issue regarding P.E.S.C. is to identify and manage the problems facing the European Union. During the term of office of Ms. Frederica Mogherini, who held the position of High Representative of the Union for Foreign Affairs and Security Policy from 1 November 2014 to 30 November 2019, the situation of conflicts of interest within the P.E.S.C. in the sense that partners in an alliance are tempted to evade and contribute less to common defense. At the same time, there were problems related to the coordination and harmonization of common interests or the lack of institutions available and able to establish directions for reconsideration of relations between European states in the field of common foreign, security and defense policy.

4 Perspectives in the field of common foreign, security and defense policy

As perspectives in the field of foreign, security and common defense policy, the new guidelines formulated recently also should be mentioned, and an x-ray of the situation and political, economic and social issues of the society at European level is not of interest, even after the entry into force of the Reform Treaty – itself being considered a lifeline after the rejection of the Constitutional Treaty. The Treaty of Lisbon maintained most of the amendments that had been included in the Constitutional Treaty, amending the T.U.E. and T.E.C. – this being called T.F.U.E.; all references that symbolized constitutionalism (including the flag, anthem, etc.) were excluded. Although legislation and the legal framework have not been removed, they have remained under the old name of regulations and directives; the post of Minister of Foreign Affairs in the

Constitutional Treaty was replaced by that of High Representative of the Union for Foreign Affairs and Security Policy. At the same time, it is not explicitly regulated that European Union law has priority, even if such a consequence of priority is highlighted based on the jurisprudence of the European Court of Justice. The Treaty of Lisbon only maintains that the election of the President of the European Council shall be by "qualified majority" for a term of two and a half years, renewed once; The European Council officially becomes an institution and will set out the "interests and strategic objectives of the Union". The Treaty of Lisbon formally abolishes the structure of the pillars and, consequently, the P.E.S. – the former second pillar, although to a large extent, it remains intergovernmental; the structure of the former pillar has created problems of coherence between Community relations (first pillar) and C.S.E. (second pillar), and only the Community had personality. As legal personality has now been assigned to the Union as a whole (Article 47 TEU), it will in future be able to conclude international agreements in the field of PESC, and the High Representative will be dealind with both the Union's external economic relations European Parliament – in his capacity as Vice-President of the Commission, as well as PESC issues – in his capacity as High Representative and Chairman of the Foreign Affairs Council (art. 27 para. 1 of the T.U.E.); In this way, there has been an effort to increase coherence in the external action of states in general.

The integration process is a way to check the capacity of internal organization, to react promptly and to focus on external events. The external power of the European Union manifests itself in terms of internal cohesion, and with the US approaching the Pacific, the need for a Europe of defense becomes even more acute. Although the European Union remains a significant geoeconomic actor, it can hardly be said that it is also a geopolitical actor capable of anticipating the most appropriate measures on new political trials and their impact on its security and prosperity. In the future, it is necessary to capitalize on the economic success of the European Union, as trade policy is not yet perceived as a field of external action coordinated by the European Union, and Member States continue to pursue competing policies to the detriment of long-term competitiveness.

Although the United Kingdom (UK) ceased to be a member of the European Union on 31 January 2020 at 24 hours (Central European Time), its membership of the European Union for 47 years and its status as a permanent member of the Council of UN security, as well as NATO membership, the United Kingdom will continue to be an important partner for the European Union in terms of the common foreign policy, defense and security, and it is in the interest of both parties to establish a partnership that ensures continued cooperation. Although excluded from the decision-making structures of the European Union, the United Kingdom will become an important partner, given the urgent need to present a common response to the challenges of foreign policy, security and defense in the immediate vicinity of the European Union and in the international arena.

In our view, the European Union is moving in a new direction of foreign policy that transcends traditional boundaries, because the European Union, unlike historical empires, has emerged in a political context as a result of the conflagration and directions that have forced to a reconsideration of relations between European states.

5 Conclusions

The foreign policy is determined, it is shaped according to the objectives and requirements of the external actions of the European Union – so we have a common policy – which is normal; but obligatorily, taking into account the interests of all Member States; in this case, the representatives of Romania should take into account, in assuming, only those obligations in which they were taken into account – its interests are reflected; it is understood that the voice of a country with lower potential is less heard, while the basic note is the acceptance from the point of view of developed countries; but there is nothing new in this respect, as it is precisely the purpose of intelligent, skillful and patriotic diplomacy. [7]

It is not a novelty that without an active foreign policy, bold and anchored to national interests – carried out intelligently and ardently, a state has no chance of promoting its interests, of survival even, indulging in the state of inferiority in which it is put on times that it chooses for itself, out of fear or convenience, it remains at the discretion of others, and then security and national defense become vulnerable.

Regarding this state of affairs, researchers and specialists in the field submit to the discussion a series of recommendations; and the purpose of these contributions, through the debate on the issue, is to sound the alarm and at the same time suggest how European Union policies should be conducted in order to effectively manage the new fundamental problems that arise in international society, ie to restore an update of them based on existing regulations, or by amending and supplementing them. [8]

In conclusion, the new challenges in the field of common foreign, security and defense policy should take into account the following goals: a more united and realistic Europe to deal with the growing crises on the periphery of the European Union, the development of a common foreign policy, the revision the European Security Strategy, the preparation of a White Paper on the security and defense of the European Union, clarifying the constraints and means of the P.E.S.C., the need for a common energy policy, a responsible and supportive Europe on human resources, strengthening intra-European solidarity and cooperation with countries of origin and transit, pursuing a responsible migration policy, an ever – increasing European Union active in commercial matters.

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Considerations concerning the offences against the financial interests of European Union

Popescu A.M.A.

"Titu Maiorescu" University, Faculty of Law (ROMANIA)
E-mails: adinam.popescu@yahoo.com

Abstract

The European Union has as its operating principle the protection of financial interests and therefore updates and strengthens the fight against fraud and any criminal activity. The main objective is to ensure the protection of financial interests through criminal law, as well as their assimilation, cooperation and harmonization in all Member States through the anti-fraud strategy.

The regulation of criminal acts is an attribute of the internal policy of each European state, but in all cases it is necessary to respect the general values imposed by the Community Statute.

The term fraud is used generically for various illegal acts of a pronounced criminal nature and is therefore in some cases synonymous with a crime.

At the same time, the detection and prevention of fraud is an objective that leads to any appropriate measures being taken to eliminate the occurrence of damage.

In this framework of cooperation, Romania has adopted criminal law norms that sanction fraudulent actions related to the management of European funds and are part of the issue of modernizing the legislation to protect the financial interests of the European Union. The new European Directives require a new examination of the existing internal legal framework (Law No 78/2000) and its adaptation to the current strategy to combat any infringements of the rules of Community law.

Keywords: fraud; European funds; offenses; harmonization; cooperation.

1 Introduction

European funds are non-reimbursable financing instruments granted by the European Union in order to reduce the economic development gaps between member countries. They are jointly managed and supervised by the European Commission and

each Member State on the basis of strict provisions and instructions aimed at ensuring that the funds are used as intended, in a transparent and accountable manner.

Failure to comply with these rules, depending on the severity, mode of operation and consequences, entails criminal liability which must have the same assessment in all EU countries.

Internally, the Managing Authority (specific to each Operational Program and the institutions designated in the coordination, management and control of structural instruments) is the structure which, in addition to the strictly financial tasks, ensures the prevention, detection and sanctioning of irregularities.

In general terms, the irregularity refers to any non-compliance or misapplication of the rules of European Union or national law which would only make it possible to register damage.

The European Anti-Fraud Office (OLAF) has the task of detecting, identifying, investigating and stopping any acts of fraud, corruption and acts which constitute criminal activities likely to affect the financial interests of the European Union. In Romania, the contact institution of the European Anti-Fraud Office (OLAF) is the Department for Anti-Fraud – DLAF which ensures the protection of the European Union's financial interests through operational (control) measures to combat fraud in relation to the general framework of art. 83 and art. 325 of the Treaty on the Functioning of the European Union (consolidated version).

The concept of fraud affecting the financial interests of the European Union was initially defined and circumscribed by the Convention on the Protection of the European Communities' Financial Interests (PIF) of 27.11.1995 (Art. 1) by reference to:

– Expenditure (meaning "the use or presentation of false, inaccurate or incomplete declarations or documents which have the effect of unfairly collecting or withholding funds coming from or on behalf of the general budget of the European Community or of budgets managed by the European Communities").

– Revenue (in the sense of "the use or presentation of false, inaccurate or incomplete declarations or documents which have the effect of unlawfully diminishing the resources of the general budget of the European Community or of budgets managed by or on behalf of the European Communities; failure to disclose information in breach of specific obligations, having the same effect; embezzlement of a legally obtained advantage having the same effect").

Considering the principles contained in art. 325 para. (2) (3) (4)/ex-art. 280 TEC/of the Treaty on the Functioning of the European Union (consolidated version) regarding the assimilation, cooperation and harmonization of measures to combat fraud, the regulation of crimes against the financial interests of the European Community was carried out in Romania by introducing art. 18^1, art. 18^2, art. 18^3, art. 18^4 and art. 18^5 in the content of Law no. 78/2000 for the prevention and sanctioning of corruption (by Law no. 161/2003). These provisions were subsequently amended by art. 79 of Law no. 187/2012 for the implementation of Law no. 286/2009 on the Criminal Code (published in the Official Gazette, Part I, No. 757 of November 12th, 2012).

Also, refer to criminal acts that affect the interests of the European Union in relation to corruption offenses are expressly found in the provisions of art. 5 paragraph (3) of Law no. 78/2000, and under the aspect of the crime of money laundering in art. 49 paragraph (5) of Law no. 129/2019.

At the date, the protection of the European Union's financial interests has been reassessed in the light of the current challenges, the tendency and the aimed goal being the development of some complementary rules and removal of inconsistencies at both European and local level.

As a result, Directive (EU) 2017/1371 of the European Parliament and of the Council from July 5th 2017 on combating fraud against the financial interests of the Union by means of criminal law which includes a common definition of fraud and reconsiders activities with a view to criminal nature in terms of public procurement, misappropriation of funds, money laundering in the sense of introducing "an exact definition of the offenses that involve such behaviour".

In such conditions (the implementation deadline being July 6th, 2019) a new investigation of the finality of the crimes against the financial interests of the European Union, provided in Law no. 78/2000 (as subsequently amended and supplemented).

The general purpose of the paper is to highlight the aspects and elements considered in the new vision as fraud and their reporting to the existing regulation and necessary to be updated by Law no. 78/2000. To this end, an attempt is made to examine the provisions of the Directive and to establish a framework in accordance with the provisions of national law in order to make a useful, current, harmonious and effective change in the fight against crime.

2 Protection of the financial interest of the European Union

2.1 *The concept of fraud*

Domestic law, through the provisions contained in the O.U.G. no. 66/2011 on the prevention, detection and sanctioning of irregularities in the obtaining and use of European funds and/or national public funds related to them clarified exactly the notions of "irregularity" and "fraud". The normative act, through its content, expressly specified in art. 1 (1) that the object of regulation is the activities of prevention, detection of "irregularities", establishment and recovery of budget receivables resulting from "irregularities" in obtaining European funds and/or national public funds related to them, as well as reporting "irregularities" to the European Commission or other international donors.

According to art. 2 paragraph (1) letter a), "irregularity" was considered "any deviation from legality, regularity and compliance in relation to national and/or European provisions" which "has harmed or may harm the budget of the European Union".

The scope is within the meaning of art. 1 paragraph (2) of Regulation (EC, Euratom) no. COUNCIL REGULATION (EC) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests, which states that "any infringement of a provision of Community law as a result of an act or omission the general budget of the Communities or the budgets which it manages, either by diminishing or losing revenue from own resources collected directly on behalf of the Communities or by unjustified expenditure."

As for the notion of fraud, the O.U.G. no. 66/2011, art. 2 paragraph (1) letter b) clearly states that this means "the crime committed in connection with the obtaining or use of European funds and/or national public funds related to them, incriminated by the Criminal Code or other special laws" (the reference being to the provisions of Law no. 78/2000).

In view of the current provisions contained in Directive (EU) 2017/1371 (Title II, Art. 3, paragraphs 1 and 2) of the European Parliament and of the Council of 5 July 2017 (to be implemented), they are considered to be fraud of a Community nature (ie offenses when committed intentionally) acts relating to the making of expenditure which may or may not relate to purchases, as well as those relating to VAT revenue.

These acts consisting of actions or inactions have in their material content, as the case may be, "the use or presentation of false, incorrect or incomplete statements or documents, non-disclosure of information, improper use of funds made available, improper use of a profit obtained legally, the submission of VAT returns in order to fraudulently mask non-payment or the establishment of undue entitlements to the refund of VAT".

It should be noted that with regard to expenditure from Community funds intended or not for procurement, the facts complained of in the form of actions or inactions are identical, but there is a nuance when they refer in some cases to the Union budget or budgets managed by or on behalf of the Union. and in others to the detriment of the financial interests of the Union. Under this aspect in art. Article 2 (1) (a) of the Directive states that "financial interests of the Union" means all revenue, expenditure and assets that are included in, collected, due to the Union budget, the budgets of the Union institutions, bodies, offices and agencies established under the Treaties or the budgets managed or monitored directly or indirectly by them".

We consider that the differentiations consist in the effects of the possibility of causing damage affecting the Union budget, budgets managed by the Union or on its behalf as a more limited scope, while the phrase "prejudicial to the financial interests of the Union" has a special explanation unfavourable consequences for the component institutions of "Economic and Monetary Union" and for the overall integration process of the economies of the Member States of the European Union.

Fraud relating to revenue derived from own VAT resources (Article 3 (2) (d)) constitutes infringements only in so far as they have serious consequences in that they relate to the territory of two or more Member States of the Union; and there is a total damage of at least 10,000,000 Euro.

With regard to the criminalization of such acts, it should be noted that the European Commission's Proposal on the Multiannual Financial Framework 2014-2020 states that VAT is a new own resource at both national and European Union level that will provide "significant and stable" additional revenue.

The same Directive makes distinct reference in Art. 4 to the offenses of money laundering, embezzlement and corruption.

The money laundering offense is defined by reference to art. 1 (3) of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 and consists in the exchange or transfer of goods, concealment or concealment of their true nature, acquisition, possession knowing that they come from a criminal activity.

Active and passive corruption are related to the promise, offering or grant followed by an acceptance of any advantage likely to affect the financial interests of the Union, the offense being committed in active form by any person and in the passive by an official of the Union, or a national official directly or through an intermediary.

Embezzlement means the action of a civil servant (Union or national) who manages funds or assets and who engages, appropriates or uses resources in any way that is prejudicial to the financial interests of the Union.

At the same time, the Directive contains provisions requiring Member States to adopt the criminal law framework for the sanctioning of all forms of commission (instigation, complicity, attempted) of fraud qualified as criminal offenses. Also, there are provisions on the liability of legal entities, as well as individuals, highlighting the nature of penalties depending on the significance or severity of the act in relation to the value of the damage.

2.2 *The boundary between irregularity and fraud*

In accordance with the provisions of art. 325 (1) of the Treaty on the Functioning of the European Union (consolidated version) both the European Commission and the Member States have a duty to combat fraud and any other illegal activities which are likely to affect the financial interests of the Union..

Acts affecting the financial interests of the Union shall be classified as irregularities and fraud.

Irregularities are those that signal any deviation from legality, regularity and compliance with the rules of Community law, and their detection removes the consequence of fraud. In this sense, it can be stated that the irregularity signals a suspicion of fraud, but not any suspicion of fraud means committing a crime. The irregularity determines only the initiation of an administrative or judicial procedure in order to establish affirmatively or negatively the existence of a fraud.

Irregularities are elements which are likely to detect and which, together, may lead to the conclusion that one of the offenses affecting the financial interests of the Union has been committed.

A difference between irregularity and fraud is highlighted by elements that refer to the intention to carry out the action or inaction. In the absence of a proven and causal intention with respect to the prejudicial result of the act, there is no fraud in the sense of meeting the constituent elements of an offense as listed in the European Directive. Also, an irregularity which does not affect any of the areas of reference expressly indicated (income, expenditure, VAT, transfer of goods, management of funds or assets, benefits, etc.) or which does not fall within the criteria expressly shown in terms of potential injury, it cannot be qualified as fraud.

The irregularity has as a consequence a financial correction, and the purpose of the fraud is to establish a criminal liability. A large number of financial corrections can be a sign of suspicion of fraud, but at the same time irregularities can be an element of misunderstanding, misunderstanding of legal provisions or a lack of training which leads to a lack of intent.

We believe that irregularities must be examined and analyzed through a dynamic, complex perspective that makes a correct link between cause and effect, intention or guilt and leads objectively, when necessary, to establishing the elements of fraud.

In most cases, this task belongs to the criminal prosecution or the court, which has the obligation to assess whether, based on and on the basis of the evidence administered, the facts fall within and constitute fraud in the criminal sense imposed by criminal law.

3 Updates regarding the regulation of crimes against the financial interests of the European Union

3.1 *Law no. 78/2000*

Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on combating fraud against the financial interests of the Union by means of criminal law (hereinafter referred to as the Directive) replaces the Convention (with a similar objective) of the Council of the European Union of 26 July 1995 which constituted the reference element, according to the community obligations, for the adoption of the provisions contained in art. 18^1 la art. 18^5 of Law no. 78/2000.

In this respect, and in view of the precise content of the provisions contained in Article 3 (1) and (2) (a), (b), (c) and (d) of the Directive, a their assimilation and harmonization with the criminal law norm contained in art. 18^1, art. 18^2, art. 18^3, art. 18^4 and art. 18^5 of Law no. 78/2000.

The texts of the law shown contain in part an expression similar to those in the Directive, but on the whole they are likely to create confusion and difficulties as to the criminal nature of the frauds considered to be criminal offenses.

Therefore, we appreciate that the texts of art. 18^1 and 18^3 of Law no. 78/2000 should clearly contain references to "non-procurement expenditure", "procurement expenditure", "revenue from own VAT resources" and "submission of correct VAT returns", such as and the fact that they relate to actions or inactions affecting the budget of the Union, the budgets managed by the Union or on its behalf or the financial interests of the Union.

It should be noted that in the wording of Article 3 (1) of the Directive, the commission of one of the offenses is conditioned by the expression "when it is committed intentionally", so that an exclusion of the expression "in bad faith" is required regarding the use or presentation of documents, false, inaccurate or incomplete statements.

The phrase "whether the act results in wrongful obtaining of funds" is to be examined and correlated with what is individualized by the Directive in the expressions "having the effect of misappropriation or withholding of funds or assets", "misuse of funds", "obtaining an illegal profit "or" illegal depletion of resources ". In this respect, it could be argued that "unfair obtaining of funds" is likely to include all the activities shown, but this interpretation leads to uncertain results regarding the existence or non-existence of the material side of a crime.

The provisions of art. 18^2 of Law no. Regulation (EC) No 78/2000, which expressly refers to the offense of misappropriation of European funds, is incomplete because it relates only to European funds without taking into account assets (e.g. invest-

ments, loans, pre-financing, receivables, product stocks, cash and cash equivalents/bonds) shown in the Directive.

The current incrimination from Law no. 78/2000 mentions the exclusive qualification of the facts in relation to the provisions of national law, without taking into account that depending on the value of the damage expressly shown by Art. 2 paragraph (2) and Art. 7 paragraphs (3) and (4) of the Directive, some actions or inactions are not considered offenses.

3.2 *Other legal provisions*

With regard to the provisions contained in Article 5 (1), (2) (a) (b) and (3) of the Directive, we consider that a better systematization of the legal framework regarding the crime of money laundering, corruption offenses and misappropriation of funds.

The crime of money laundering is provided in art. 49 of Law no. 129/2019, and its content is in full compliance with Directive (EU) 2015/849 and Directive (EU) 2016/2258 issued by the Council of the European Union. In connection with the protection of European financial interests by art. 49 paragraph (5) of Law no. 129/2019 states that its provisions apply "regardless of whether the crime from which the property originates was committed on the territory of Romania or in other Member States or third countries".

However, this provision is of a general nature and does not contain a precise reference to the financial interests of the European Union.

Corruption offenses are criminalized by art. 5 paragraph (1) (2) (3) of Law no. 78/2000 with reference to the offenses provided by art. 289-292 of the Criminal Code (bribery, bribery, influence peddling and influence peddling that are consistent with the expression of passive and active corruption in the Directive). The provisions of art. 5 paragraph (3) of Law no. 78/2000 mentions, however, that its provisions are also applicable to "offenses against the financial interests of the European Union provided for in Articles 18^1 – Article 18^5 (of the same normative act) by sanctioning which the protection of European Union funds and resources is ensured".

Compared to this expression in explicit terms, it can be understood that the offenses provided by art. 289-292 of the Criminal Code does not form part of the Community fraud referred to in the Directive.

In connection with the provisions regarding VAT contained in the Directive, it is noted that the provisions of Law no. 241/2005 for the prevention and combating of tax evasion does not contain references to the protection of the financial interests of the European Union.

3.3 *Some theoretical and practical aspects related to the crimes against the financial interests of the European Union*

These crimes, provided by Law no. 78/2000, have as their special legal object the social relations regarding the protection of the Community's financial interests, the

normal development of which implies the access, obtaining and use of the funds according to the destination for which they were granted.

The active subject of the offenses may be any natural person, a Union official, a national official or a legal person. Criminal participation is possible in all its forms, namely co-authorship, instigation, complicity (Art. 5 para. (1) Directive and the corresponding provisions of domestic law).

The taxable person is the state through its specialized institutions as the guarantor of obtaining, using and reimbursing (where appropriate) the European Commission.

Regarding the objective side of the crimes, the material element is achieved through an action or inaction.

Each of the offenses (as presented by the concept of fraud in the Directive) is unique and has a complex character which also contains elements characteristic of other offenses. Consequently, a contest of offenses cannot be retained in relation to the offenses of deception and misappropriation of funds provided by the Criminal Code (in this sense Decision no. 4 of 04.04.2016 pronounced by the High Court of Cassation and Justice, the panel competent to judge the appeal in the interest of the law).

From the point of view of the causal relationship between actions or inactions and the socially dangerous result, there must be a correlation from cause to effect, the offenses being the result.

Offenses may be committed in the form of an attempt [Article 5 (2) of the Directive] or in a consummated manner.

The subjective side of crimes involves the intentional commission of actions or inactions.

The sanctioning regime is established by correlating the rules contained in the Directive with those of national law.

In all cases, seizure, insurance and taking legal measures to recover the damage are mandatory.

The competence to carry out the criminal investigation belongs to the prosecutor, and the competence to judge in the first instance belongs to the tribunal (which judges in specialized panels, as provided by art. 29 of Law no. 78/2000).

The pronounced court decision is subject to the remedies provided by law.

4 Conclusions

Protecting the European Union's financial interests is an important objective for both the Community institutions and the Romanian national authorities. The need to ensure the protection of European funds through criminal law is strictly topical and is achieved through a permanent reaction that has materialized most recently through the adoption of Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 requiring a legislative implementation.

The current internal regulation of crimes affecting the financial interests of the European Union is deficient and requires a complete and specific systematization, even established and adopted by a single normative act.

The difficulties and contradictions of the regulation lead to the adoption of different judicial solutions that can be considered as lacking legal support or objectivity, thus being called into question the reference values of the European Community.

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The evolutive interpretation of the European Convention of Human Rights and the development of the right to a fair trial

Ciobanu R.

PhD student Lucian Blaga University Sibiu – Faculty of Law (ROMANIA)
E-mail ra.ciobanu@yahoo.com

Abstract

This study aims to analyze the doctrine of evolutive interpretation of the European Convention of Human Rights (the doctrine of the "living instrument"), as well as how this doctrine has helped the development of the right to a fair trial, as guaranteed by article 6 of the European Convention of Human Rights.

We aim to identify the sources of this doctrine, its evolution over time and the current qualification of the institution. Also, in the content of the article, we will try to highlight the importance of the evolutive interpretation of the European Convention, as well as the legitimacy of this instrument of interpretation.

The analysis regarding the right to a fair trial focuses mainly on the evolution of the guarantees that compose this right, while providing the basic notions needed to develop this subject.

Keywords: evolutive interpretation, the doctrine of the "living instrument", the right to a fair trial.

1 Introduction

Over time, both academic studies and public debates have questioned the courageous way of interpretation adopted by Strasbourg judges over the rights and freedoms guaranteed by the European Convention of Human Rights ("ECHR").

Although the topic of interpretation of the European Convention of Human Rights has received attention from the legal researchers, in this paper we want to address in detail the character of the Convention as a "living instrument" regarding the protection of human rights and its connection with the development of the guarantees of a fair trial, protected by article 6 of ECHR.

In this paper we aim, using the legal studies and the jurisprudence, to analyze how this interpretation, along with other tools used by the Strasbourg court (theory of positive obligations and autonomous interpretation) determined the occurrence of implicit guarantees that were not expressly granted by the authors of the ECHR.

In the end of the article we want to establish whether the development of the doctrine of the "living instrument" has strengthened the legitimacy of the European Court of Human Rights or, on the contrary, has affected its legitimacy.

This paper is structured in four parts. The first part of the paper is reserved for introductory aspects and, in the second part, we will focus on the theory of the "living instrument" as a way of interpreting the European Convention of Human Rights. The next part of the study presents the way in which the "living instrument" theory has influenced the right to a fair trial and contributed to the development of implicit guarantees for this right. The final part of the paper, the part dedicated to the conclusions, will highlight the benefits of the evolutive interpretation of the European Convention of Human Rights.

2 The doctrine of the "living instrument"

Using the instruments provided by the Vienna Convention on the Law of Treaties (1969), article 31-33, the European Court of Human Rights developed a special practice when interpreting the European Convention of Human Rights. This interpretation, which involves a predominantly evolutive (dynamic), teleological and often comparative interpretation, used "instruments" such as the development of autonomous notions, the implementation of the doctrine of the margin of appreciation and the development of positive obligations to ensure the effectiveness of the rights and guarantees protected by the Convention.

While a part of the legal researchers[1] has held that the rules of interpretation set out in the Vienna Convention play a limited role in the interpretation process of the Strasbourg court, which adopts a "moral lecturing" of the rights guaranteed by the Convention, when determining its original terms and textual interpretation, another part of the legal doctrine considers that the rules established in the Convention on the Law of the Treaties are the starting point in the interpretation of the European Convention of Human Rights[2]. This last authors also considered that its flexibility and general applicability make the Vienna Convention an appropriate framework for the interpretation of the European Convention, the Strasbourg court's approach being "a holistic and uniform way of interpretation".

Other authors are more reserved, considering that the degree of use by Strasbourg judges of the interpretive instruments provided by the Vienna Convention depends on the "zoom position of the objective" used in the analysis: when it is reduced, we see an interpretive uniformity; when the zoom is magnified, the interpretive divergence

[1] G. Letsas, *Strasbourg's Interpretive Ethic: Lessons for the International Lawyer*, in European Journal of International Law, 2010, pp. 511-512.
[2] M. Fitzmaurice, *Interpretation of Human Rights Treaties*, in Dinah Shelton (ed.), The Oxford Handbook of International Human Rights Law, Oxford University Press, 2013, pp. 739-771.

occurs[3]. We support this interpretation, and we appreciate that the Strasbourg court always had in mind the object and purpose of the European Convention when it had the tasked of interpreting its provisions, while respecting the preamble of the Convention which states that one of its aims is to defend and develop human rights and fundamental freedoms. The European Court of Human Rights itself has detailed, in Golder v. The United Kingdom, how it intends to use the instruments provided by the Vienna Convention to interpret the Convention, in a teleologically way and in order to reach its purpose.

The Strasbourg judges have not only the task of interpreting the provisions of the Convention, but also that of interpreting the facts of the cases laid before them. In this regard, it was emphasized that while the Court's judges identify the European Convention as a "living instrument", which should be interpreted in the light of "current conditions" and "commonly accepted developments and standards", they must also determine which are the "current conditions" and "commonly accepted standards"[4].

Inspired by the theory of "living constitutions"[5], the visualization of the European Convention of Human Rights as a "living instrument" implies its possibility to develop over time, or rather, to be developed in an interpretive way, to face new social and moral realities that could have not be foreseen by the authors of the Convention.

The character of "living instrument" of the European Convention of Human Rights arose with the Tyrer judgment against Great Britain, when the Strasbourg court ruled that the Convention is a "living instrument" which, as The Commission rightly pointed out, must be interpreted in the light of current conditions. However, this current interpretation cannot make abstraction of the actual text of the Convention[6].

In its subsequent case law, the Strasbourg court developed this theory by considering the Convention as a "living instrument" that must be interpreted in the light of the living conditions of the present and in line with developments in international law, so as to reflect the growing high standard claimed in the field of human rights protection, thus implying a greater firmness in establishing the violations of the fundamental values of democratic societies[7].

In our opinion, the character of "living instrument" of the European Convention of Human Rights implies giving the terms of the Convention the meaning which they carry when the Strasbourg court rules on a matter, rather than the meaning that those terms would have had at the time of elaboration of the convention or the initial intention of its authors.

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[5] For more details on this topic see W. Rehnquist, *The Notion of a Living Constitution*, in Texas Law Review, 1976, vol. 54, p. 693, http://lc.org/071218TheNotionofaLivingConstitution.doc.pdf, access date 25.04.2020.

[6] *Ferrazzini c. Italy,* parag. 30.

[7] *Demir și Baykara c. Turkey,* parag. 146; *Öcalan c. Turkey,* parag. 163, *Selmouni c. France,* parag. 101.

In this regard, it was appreciated that the interpretation of the European Convention of Human Rights as a "living instrument" implies an interpretation that reflects the social changes and not a static view of the Convention's standards[8].

The legal studies[9] emphasize that the interpretation of the Convention by the European Court of Human Rights as a "living instrument" is based on three essential aspects. First, the Court gives priority to current standards when interpreting the Convention, not to what may be considered acceptable conduct of the State at the time when the Convention was drafted or what its authors intended. Secondly, the current standards must be common or shared by the Contracting States, and thirdly, the Court does not attach decisive importance to the opinion of the respondent State as to what the appropriate standard should be in the particular case.

However, it should be emphasized that not everyone considers that this vivid interpretation of the Convention was desired by its founders because states are often being taken by surprise by the evolution of the Court's interpretations[10].

3 The limits of the evolutive interpretation of the European Convention of Human Rights

Although the evolving interpretation of the European Convention of Human Rights has raised considerable criticism from the legal profession, often being considered that the Strasbourg court has extended the sphere of protection of the Convention beyond the areas covered by its founders, we will show that these criticisms are unfounded, the evolution being one in accordance with the preamble of the European Convention.

In its case-law, the Strasbourg court has shown that the Convention and its protocols must indeed be interpreted in the light of the current conditions[11]. However, the European Court of Human Rights cannot, by an evolutive interpretation, obtain from these instruments a right that was not included in the Convention from the beginning. This is especially the case when the omission has been deliberated.

The European Court of Human Rights has not made excessive use of the doctrine of the living instrument when dealing with cases concerning sensitive issues. For example, in cases A, B and C v. Ireland, although it considered that there was indeed a consensus among a substantial majority of the Contracting States of the Council of Europe to allow abortion on more grounds than those granted by Irish law, the Court did not consider that this consensus decisively restricts the wide margin of appreciation enjoyed by states, rejecting the use of the "living instrument" doctrine.

In conclusion, new rights and freedoms which have been voluntarily omitted by the signatories to the Convention or which are not closely related to the rights and freedoms initially guaranteed by the Convention cannot be recognized through the evolutive

[8] P. Van Dijk; F. Van Hoof, *Theory & Practice of the European Convention on Human Rights*, 3rd edition, Kluwer Law International, Hague, 1998, p. 77.
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[11] Marckx, c. Belgium, parag. 58.

interpretation. However, the rights recognized via evolutive interpretation can, to some extent, be "new", for example the right to a healthy environment.

4 The importance of the current interpretation of the European Convention of Human Rights

The evolutive doctrine adopted by the Strasbourg court, in the detriment of a static or original approach, which would involve the interpretation of the Convention as understood by its authors in 1950, respects the preamble of the Convention which states that its purpose is to " secure the universal and effective recognition and observance of the Rights therein declared" but also " pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms".

A "frozen" interpretation of the Convention would have made it obsolete as society has developed, and the Convention would certainly no longer have the importance it has today in the field of human rights protection.

The evolutive nature of the Convention also allows an evolution of the case law of the European Court. In its case-law, the Strasbourg court has held that, although it is not formally required to follow its previous case-law, it is in the interests of legal certainty, predictability and equality before the law not to depart without good reason, from the precedents retained in the previous cases. However, as the Convention is primarily a system of protection of human rights, the Court must nevertheless take into account the changing conditions in the Contracting States and respond, for example, to any consensus on the standards to be reached[12].

The evolutive interpretation of the European Convention of Human Rights allows its application to institutions that did not exist at the time of the signing of the Convention. The Court stated that the fact that a body, in this case the European Parliament, was not predicted by the authors of the Convention should not prevent it from being included in the area of the Convention. As the contracting States establish common constitutional or parliamentary structures through international treaties, the Court must take into account, in interpreting its Convention and Protocols, the structural changes operated through these reciprocal agreements[13].

5 The evolution of the right to a fair trial

The right to a fair trial, guaranteed by article 6 of the European Convention of Human Rights, is a procedural right that does not refer to other substantial rights or freedoms protected by the European Convention of Human Rights, but provides the procedural framework for the exercise of these rights and freedoms before national courts. This right is one of the pillars of the Convention and is considered to be a procedural standard of reference for any dispute[14].

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[12] *Chapman c. United Kingdom*, parag. 70.
[13] *Matthews c.United Kingdom*, parag. 39.
[14] S. Guinchard, *Le procès équitable: garantie formelle ou droit substantiel?,* iin Mélanges en l'honneur de Gérard Farjat, Éditions Frison-Roche, Paris, 1999, p. 139.

The legal studies define the fair trial as a balanced trial between all parties[15]. In another opinion[16], it was appreciated that the notion of fair trial has two meanings, first designating all the procedural guarantees enunciated by article 6 of the Convention, as well as a guarantee with its own content which joins the other guarantees to form the first meaning of the notion.

As can be seen from the European Court of Human Rights' own case-law analysis in O'Halloran and Francis v. The United Kingdom, there is no general criteria for all cases to determine which of them are "qualified" under Article 6 of the Convention, the European Court applying to each case a sui generis proportionality test (essence of the right test).[17]

The Strasbourg court referred to the doctrine of the "living instrument" even in cases in which it analyzed the applicability of article 6 of the Convention. Thus, the Court has held that whether or not a person has a claim which may give rise to legal action depends not only on the actual content of the relevant civil law, as defined in national law, but also the existence of procedural barriers, which prevent or limit the possibilities of referring to a court with possible complaints[18]. In such a situation, article 6 paragraph (1) of the Convention may apply if the national law recognizes a substantive right of a person, without, however recognizing, for whatever reason, a legal remedy for the recognition or application of that right[19]. Instead, it was appreciated that the bodies of the Convention cannot create, through the evolutive interpretation of article 6 paragraph 1 of the Convention, a substantive civil right that has no legal basis in that state[20].

The legal studies appreciated that the European judge, appealing in particular to the "theory of the elements necessarily inherent to a right" used in the matter of positive obligations, substantially enriched the content of the right to a fair trial[21]. It was appreciated that the right to a fair trial was thus "reconstructed" as a triptych. To the central side of the guarantees stricto sensu, stated implicitly (equality of arms) or explicitly (independence and impartiality of the court, publicity, speed of procedure) in the text of article 6, two "substantive" rights have been added: on the one hand, the right access to a court[22], and on the other, the right to enforce court decisions.

Using the evolutive doctrine, the Strasbourg court enshrined a right to benefit, in certain situations, from legal aid in civil cases[23], eliminated the special character of the

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[15] For a more extensive analysis of the notion see S. Guinchard; C. Chainais; C.S. Delicostopoulos; I.S. Delicostopoulos; M. Douchy-Oudot; F Ferrand; X. Lagarde; V. Magnier; H. Ruiz Fabri; L. Sinopoli; J.-M. Sore, *Droit processuel: droit commun et droit comparé du procès équitable*, 7th edition Dalloz, Paris, 2013, pp. 521-537.

[16] D.C. Bunea; C.G. Căian; D.-A. Călin; R. M. Călin; I. Cambrea; V.H.D. Constantinescu; I. Militaru; M.I. Morariu; G. Munteanu; I.A. Neagu; I.-G. Popa; R.H. Radu; M. Vasiescu, *Human rights dictionary*, Ed. C.H. Beck, Bucharest, 2013, p. 683.

[17] *O'Halloran și Francis c. Great Britan,* parag. 44-63.

[18] *Fayed c. United Kingdom*, parag. 65.

[19] *Al-Adsani c. United Kingdom,* parag. 47; *McElhinney c. Ireland,* parag. 25.

[20] *Roche c. United Kingdom*, parag. 117; *Károly Nagy c. Hungary,* parag. 60-61.

[21] F. Sudre, *European and international human rights law – translation,* Ed. Polirom, Iași, 2006, f. 265.

[22] *Golder c. Great Britain,* parag. 36.

[23] *Airey c. Ireland,* parag 26-28.

French administrative courts[24] and extended the application of the guarantees provided by the article 6 of the Convention to provisional measures, including injunctions[25].

Given the case law of the Strasbourg court cited above, we can conclude that the right to a fair trial has benefited from an evolutive interpretation by the Court's judges, which has been interpreted in a "useful" way but also in line with current realities to ensure, the guarantee by the Convention of concrete and effective rights and not only theoretical and illusory ones[26].

6 Conclusions

The academic studies appreciated that the interpretive ethics of the European Court of Human Rights is a unique asset for Europe and the best example of a successful international system in the field of human rights protection. If the Strasbourg court continues to treat the European Convention as a "living instrument", it will not lose its legitimacy; it will lose its legitimacy if it does not[27].

The living interpretation, along with the autonomous interpretation of the terms of the Convention, made by the European Court of Human Rights, helps us to understand how certain guarantees, which do not expressly result from the terms of the Convention, such as the right of access to court or the right to a reasoned decision have come to be protected by the case law of the European Court.

The judicial activism that the doctrine of the "living instrument" implies must not be considered a flaw, this characteristic being essential for the legal regulations to remain relevant in time. Contrary to what has often been argued in the academic field, that the European Court of Human Rights has extended beyond what the founders of the European Convention had in mind, we appreciate that the founding fathers have foreseen, ever since the signing of the Convention, that it will apply in unforeseen circumstances at that time and that it should therefore be treated as a "living instrument". If we were to appreciate the opposite, we should accept that, at the time of its signing, the founders wanted to develop a temporary system for the protection of human rights, a system that would become obsolete over time.

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Legal nature of the urbanism certificate; a document intended for information or for administrative purposes

PhD Candidate Lawyer Kerth Ș.-D. (Dobrescu)

PhD Supervisor: Prof. Univ. Dr. Dana Tofan

Faculty of Law, University of Bucharest (ROMANIA)
E-mail: stefania.kerth@gmail.com

Summary

Regarding the legal nature of the urbanism certificate, two orientations have been noted in the practice of the Romanian courts: in a first case-law orientation, it was considered that the urbanism certificate by which the prohibition to build was instructed or which contains other limitations, although issued by a public authority, with a public power role, for the concrete implementation of legal provisions, is not an administrative document; its annulment would be only admissible along with the annulment of the building permit or, in the case of denial to issue such a permit, in no way separate from the administrative document in respect of which it was issued, as a preliminary document for information purposes. The second case-law orientation found that it is possible to exercise separate legality check over the urbanism certificate if the building ban has been instructed or contains other limitations.

By Decision (RIL [referral in the interest of law] Panel of Judges) no. 25/2017 pronounced by the High Court of Cassation and Justice in the settlement and admission of an appeal in the interest of law, it was ruled in the sense that, in the interpretation of the provisions of Article 6(1) and Article 7(1) of Law no. 50/1991, reported to Article 2(1)(c) and Article 8 of Law no. 554/2004 concerning administrative disputes, it is possible to exercise the legality check separately over the urbanism certificate by which the interdiction to build was instructed or which contains other limitations.

Keywords: urbanism certificate, administrative document, building permit, legality check.

1 Preliminary considerations

The correct classification of the legal nature of the urbanism certificate is of special importance in the legal reality, in terms of the possibility of carrying out the legality check, either separately or together with the building permit.

Over time, many summons have been lodged with the administrative courts, in which the plaintiffs sought both the annulment of the urbanism certificate and of the building permit. Solutions were different, outlining more case-law orientations, which we will analyse further.

2 Purpose of the urbanism certificate

The general regulation in the matter is represented by Law no. 350/2001 regarding spatial planning and urbanism[1]. Law no. 50/1991 regarding the authorisation of construction works[2], republished, regulates the issuance of this certificate, especially in what concerns the construction works.

The urbanism certificate is an administrative operation prior to issuing the building permit and is defined by law as a mandatory document by which county or local public administration authorities inform the applicant of the legal, economic and technical status of buildings and the conditions necessary for investment, real estate transactions or other real estate operations, in accordance with the provisions of the urban plans, their related regulations or of the spatial plans, as the case may be, endorsed and approved, in order to obtain the building permit.

Due to its main function – as stated in Article 29 of Law no. 350/2001 regarding spatial planning and urbanism[3], to inform the stakeholders, owners, holders of other main real rights, builders or administration, concerning the urban easements applicable to a certain plot of land and likely to limit the right to build, the urbanism certificate is a distinct legal figure, difficult to classify into the classic administrative categories. [1]

Thus, it can be observed from the perspective of urban planning legislation that the role of the urbanism certificate is to ensure, through its issuance, the application of spatial planning and urbanism documentation, as it results from the regulation contained in Chapter III section 4 of Law no. 350/2001, a role concretised, mainly, in the function of informing the public administrations, and as a means of control of the land use by the competent authority, within certain limits and according to certain purposes.

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[1] Published in Official Gazette no. 373 of 10 June 2001, subsequently amended and supplemented by GO no. 69/2004, Law no. 289/2006, GO no. 18/2007, Law no. 168/2007, GO no. 27/2008, GEO no. 10/2009, Law no. 183/2009, Law no. 242/2009, Law no. 345/2009, GEO no. 7/2011, Law no. 162/2011, Law no. 221/2011, GEO no. 81/2011, Law no. 219/2012, GEO no. 85/2012, Law no. 190/2013 and Law no. 229/2013.

[2] Republished for the second time in Official Gazette no. 933 of 13 October 2004, subsequently amended and supplemented, on several occasions (GEO no. 122/2004, Law no. 119/2005, Law no. 52/2006, Law no. 276/2006, Law no. 117/2007, Law no. 101/2008, GEO no. 214/2008, GEO no. 228/2008, Law no. 261/2009, GEO no. 85/2011, Law no. 269/2011, GO no. 6/2010, approved by Law no. 125/2012, Law no. 133/2012, Law no. 154/2012, Law no. 187/2012, Law no. 81/2013, Law no. 127/2013, Law no. 255/2013, GEO no. 22/2014 and Law no. 82/2014).

[3] Article 29(1) of Law no. 350/2001 regarding the authorisation of construction works, corroborated with Article 6(1) of Law no. 50/1991 regarding the authorisation of construction works, republished.

3 Analysis of the legal nature of the urbanism certificate

The urbanism certificate does not provide the right to perform construction works[4], as it has the legal nature of an endorsement of conformity. However, there are opinions [2], according to which the urbanism certificate would be an administrative document, but, because it does not produce any legal effect, as it results from the provisions of Article 6(1) of Law no. 50/1991 and Article 29(1) of Law no. 350/2001, it has only a role of informing those interested about the urban regime of a building.

Regarding these aspects, two orientations have emerged in the practice of the Romanian courts:

In a first case-law orientation, it was considered that the urbanism certificate by which the prohibition to build was instructed or which contains other limitations, although issued by a public authority, with a public power role, in order to concretely implement the provisions of law, is not an administrative document within the meaning of the provisions of Article 2(1)(c) of Law no. 554/2004.[5] In support of this orientation, it was shown that, according to the stated legal regulation, the administrative document is defined as an unilateral document with individual or regulatory character issued by a public authority, with a public power role, in order to organise law enforcement or for the actual law enforcement, which gives rise to, amends or extinguishes legal relationships. Or, according to Article 6 of Law no. 50/1991, the urbanism certificate is a document used for information purposes, through which the public authorities inform the applicant of the legal, economic and technical status of plots of land and buildings, being necessary for issuing the building permit, and does not provide the right to conduct construction works. Its annulment would only be admissible with the annulment of the building permit or in case of denial to issue such permit, in accordance with the provisions of Article 12 of Law no. 50/1991, in no way separated from the administrative document in consideration of which it was issued, as a preliminary document for information purposes.

As far as we are concerned, we believe that if the interpretation of the first case-law orientation were to be accepted, in the sense that the urbanism certificate could only be censored in an action against the building permit, it would result that, if such permit is no longer issued precisely because of the construction ban established by the certificate, this document can no longer be subject to legality check and the applicant is obliged to accept the limitations on the use of its property right, denying its right of access to a court.

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[4] See in this sense Article 6(5) of Law no. 50/1991 on the authorisation of construction works, republished, and Article 29(4) of Law no. 350/2001.

[5] Article 2 – The meaning of some terms (1) For the purposes of this law, the terms and expressions below have the following meaning: (...) c) administrative document – unilateral individual or regulatory document issued by a public authority, with a public power role, in order to organise law enforcement or for the actual law enforcement, which gives rise to, modifies or extinguishes legal relationships; within the meaning of this law, contracts executed by public authorities, governing the capitalisation of public assets, the performance of works of public interest, the provision of public services, public procurement are also deemed administrative documents; other categories of administrative contracts within the jurisdiction of the administrative courts may also be included by special laws (...).

Or, these consequences would be clearly contrary to Article 6(1) of the ECHR. In a Judgment dated 21 February 1975 in Case Golder v. The United Kingdom of Great Britain and Northern Ireland, the European Court of Human Rights held that "the right of access is an inherent element of the right set out in Article 6(1). (…) Article 6(1) guarantees every person the right to apply to a court for the settlement of complaints concerning his or her civil rights and obligations."

At the same time, according to Article 20(1) of the Romanian Constitution "(1) The constitutional provisions concerning the rights and freedoms of citizens shall be interpreted and applied in accordance with the Universal Declaration of Human Rights, the covenants and other treaties to which Romania is a party."

As such, in addition to the express terms of Law no. 50/1991 and of Law no. 554/2004, it is necessary to recognise to the person damaged by issuing an urbanism certificate, which contains the interdiction to build or other limitations, the possibility of notifying the administrative court separately.

Moreover, it would be completely devoid of any reason to require the applicant, who is in such a situation, to continue the procedure for obtaining the building permit, after issuing the urbanism certificate with the said restrictions, in the sense of formally requesting the building permit, and, later, to challenge in court the denial to issue this document, on which occasion, possibly, to question the manner in which the request for the issuance of the urbanism certificate was resolved. Such an approach would not only represent a real waste of time for the applicant, but also significant costs, as he would have to first prepare the authorisation documents, obtain the necessary agreements and endorsements, and then to submit it to the mayor's office, without having a practical purpose, as the issuance of a legal building permit is not possible. However, access to court cannot be conditioned by the submission of an application of which it is known that it could not legally receive a favourable solution, because such a condition cannot be regarded as being based on a legitimate purpose.

The provisions of Article 8 of Law no. 554/2004, which is the object of legal action,[6], offers the applicant dissatisfied with the prohibitions imposed by the urbanism certificate the right to address the administrative court for establishing the grounded nature, or not, of his request.

In another case-law orientation, it was noted that the application requesting the annulment of the urbanism certificate which establishes the restriction to build or other limitations, is governed by the provisions of Article 8(1) second thesis of Law no. 554/2004, considering that, when the administrative court has to analyse the justified or unjustified nature of the refusal to resolve an application, it should not be limited to a formal legality check, but must assess the conduct of the administrative authority in the perspective of the purpose of law, through a rational interpretation

[6] (1) The person damaged regarding a right recognised by law or a legitimate interest through a unilateral administrative document, dissatisfied with the response received to the preliminary complaint or who did not receive a response within the term provided in Article 2(1)(h), may notify the competent administrative court, in order to request the annulment of the document in whole or in part, the reparation of the caused damage and, possibly, reparations for moral damage. The person who considers himself damaged regarding a right or legitimate interest, by failing to resolve it within the time limit or by the unjustified refusal to resolve an application, as well as by refusing to carry out a certain administrative operation, necessary for the enforcement or protection of his right or legitimate interest, may also apply to the administrative court.

thereof, because the principle of proportionality of individual administrative measures, in relation to the protected public interest, requires that administrative documents do not exceed the limits of what is appropriate and necessary to achieve the intended purpose, so the inconveniences caused to the individual should not be excessively burdensome, disproportionate in relation to the aims pursued, according to the case law of the European Court of Human Rights.[7]

The non-unitary practice of the courts, listed above, determined the lodging by the General Prosecutor with the Prosecutor's Office attached to the High Court of Cassation and Justice of an appeal in the interest of law, with reference to the interpretation and application of Article 6(1) and Article 7(1) of Law no. 50/1991 regarding the authorisation of construction works, republished, as subsequently amended and supplemented, reported to the provisions of Article 2(1)(c) and (i) first thesis and the provisions of Article 8(1) of the Law no. 554/2004 concerning administrative disputes, as subsequently amended and supplemented, regarding the possibility of carrying out the legality check, separately, over the urbanism certificate, issued in order to obtain a building permit, which instructed the prohibition to build or which contains other limitations.

By Decision (RIL [referral in the interest of law] Panel of Judges) no. 25/2017 pronounced by the High Court of Cassation and Justice[8] in the settlement and admission of an appeal in the interest of law, it was ruled in the sense that, in the interpretation of the provisions of Article 6(1) and Article 7(1) of Law no. 50/1991, reported to Article 2(1)(c) and Article 8 of Law no. 554/2004 concerning administrative disputes, it is possible to exercise the legality check separately over the urbanism certificate by which the interdiction to build was instructed or which contains other limitations.

It was rightly shown in the recitals of the decision that, by reference to Article 6(5) of Law no. 50/1991[9], the legal nature of the urbanism certificate is that of a preparatory document, its role being to prepare the legal issuance of the building permit.

Not being a document likely to produce legal effects by itself, as required by the provisions of Article 2(1)(c) of Law no. 554/2004[10], it was appreciated that the verification of legality of the urbanism certificate can only be conducted within an action lodged against the building permit, this representing the administrative document itself, causing legal effects.

However, the reasoning is no longer verified if the urbanism certificate contains a building ban or other limitations that make it impossible to obtain a building permit, as it always produces certain legal effects, in the sense that obtaining it gives the beneficiary the right to claim a certain conduct of the competent authority in connection with the procedure for issuing the building permit.

To the extent that the urbanism certificate is followed by the issuance of a building permit, these legal effects cannot be considered independently, being limited to the

[7] The cases of Burghelea v. Romania (Judgement of 27 January 2009), Iatridis v. Greece (Grand Chamber, Judgement of 15 March 1999) and Hentrich v. France (Judgement of 22 September 1994).
[8] Published in Official Gazette no. 194 of 2 March 2018.
[9] The urbanism certificate does not provide the right to perform construction works.
[10] The administrative document is "a unilateral document with individual or regulatory character issued by a public authority, with a public power role, in order to organise law enforcement or for the actual law enforcement, which gives rise to, amends or extinguishes legal relationships."

procedure for issuing the administrative document and being fully absorbed in the effects produced by the final document of the authority.

From this perspective, the solution of denying as inadmissible the action lodged exclusively against an urbanism certificate, when it is likely to be followed by the issuance of a building permit is fully justified.

If, by its actual content, by the construction ban or by the limitations contained therein, the urbanism certificate is no longer likely to be followed by the issuance of a building permit, the legal effects which it produces acquire an independent meaning, conferring to the urbanism certificate the characteristics of a true administrative document, in the sense of the legal definition quoted above. It is no longer a simple stage in the decision-making process, as in the case of preparatory documents, but a document that ends this process, the eventual damage of the rights or legitimate interests of the applicant having its source in the respective urbanism certificate.

Consequently, given the legal nature of an administrative document acquired by the urbanism certificate which, due to the prohibitions or limitations it contains, is no longer likely to be followed by the issuance of a building permit, the action for annulment lodged exclusively against this document is admissible.

The conclusion to be drawn is that all other urbanism certificates, which do not fall into that category, cannot be the subject of such an action. [3]

4 Identification of the prohibitions or limitations included in the urbanism certificate

From the category of prohibitions that the urbanism certificate may contain, we list those related to the construction interdiction, which can be total or partial, depending on the surface of the plot, and from the category of limitations those related to the technical status (i.e., the percentage of land occupancy, land use coefficient, minimum and maximum plot sizes, fitting with utilities, building permitted on the plot, pedestrian and car traffic and access, necessary parking lots, alignment of land and buildings to the streets adjacent to the land, minimum and maximum height allowable for construction), and those for obtaining permits or agreements (e.g., neighbours' agreement).

In this context, it is important to note that an applicant dissatisfied with the restrictions or limitations imposed by the urbanism certificate must challenge it, under the conditions of Article 1 reported to Article 7(1) "Before addressing the competent administrative court, the person who considers himself damaged regarding a right or a legitimate interest through an individual administrative document addressed to him must request the issuing public authority or the hierarchically superior authority, if any, its revocation, in whole or in part, within 30 days from the date of communication of the document. For good reasons, the damaged person, addressee of the document, may lodge a preliminary complaint, in the case of unilateral administrative documents, also beyond the term provided in para. (1), but not later than 6 months from the date of issuance of the document", and para. (4) "The preliminary complaint lodged according to the provisions of para. (1), shall be resolved within the term provided in Article

2(1)(g)*[11] of Law no. 554/2004 concerning administrative disputes, respectively within 30 days from the date of registration of the preliminary complaint."

Exceeding this deadline no longer allows the applicant to lodge an action, without being subject to the risk of dismissing the action as belated, or, as it has been the case in court practice, as inadmissible, if the prerequisite for lodging the prior complaint is not met, even if its wording could be redundant, because the local public administration authority has already expressed an opinion on the applicant's request through the urbanism certificate.

With reference to the above, we would like to refer to a solution pronounced in file no. 22896/300/2018 of the Bucharest District 2 Court, in which the plaintiff was required, through the urbanism certificate, to obtain the neighbours' consent issued for entry into legality, although this was not necessary. However, failure to comply with the above procedure, within the legal deadlines, limited the applicant's procedural possibilities, the only legal instrument left at his disposal being to comply with the requirements imposed by the urbanism certificate, respectively to obtain the neighbours' consent, especially that the public administration authority initiated a process of demolition of the building erected without a building permit.

By Civil sentence no. 708/11 February 2020 pronounced by the court in the above-mentioned file, the action lodged by the applicant against his neighbours was denied, the court finding that the consent of the neighbouring owners required by the urbanism certificate was not necessary, whereas his building did not fall within the restrictive conditions imposed by Article 27(1)(a) of the Methodological rules for the application of Law no. 50/1991. The recitals of the decision have the power of res judicata regarding the requirement imposed by the urbanism certificate, regarding the neighbours' agreement, which was illegally requested, so that, currently, the local public administration authority must issue the building permit without the neighbours' consent.

The initiation by the applicant of a lawsuit against the local public administration authority, regarding the limitations imposed by the urbanism certificate, would have removed his obligation to pay the court costs owed to his neighbours, subject to their recovery through tort civil liability, by suing the authority issuing the urbanism certificate.

5 Conclusions

We consider RIL Decision no. 25/2017 pronounced by High Court of Cassation and Justice by which the legal nature as administrative document of the urbanism certificate was stated as beneficent, in the situation in which the interdiction to build was instructed or when containing other limitations, being possible for the administrative court to exercise the competence of checking the legality of this document, thus ending illegal case-law orientations, intended to infringe on the applicants' rights, also leading to unjustified delays in the time limits within which building permits could be obtained.

[11]Article 2(1) letter h), according to Article I(3) of Law no. 262/2007, in which letter (h) failure to resolve a request within the legal term – the fact of not responding to the applicant within 30 days from registration of the application, unless otherwise provided by law.

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Considerations regarding the rejection of the request for confirmation of the solution of waiving the criminal investigation and the possibility of violating the right to a fair trial and defense

Rotaru R.

Lawyer, Bucharest Bar, "Titu Maiorescu" University,
Faculty of Law in Bucharest (ROMANIA)
E-mail: av.raresrotaru@gmail.com

Abstract

The institution of waiving the criminal investigation has undergone numerous changes since the entry into force of the New Code of Criminal Procedure, some of them due to the decisions taken by the Constitutional Court of Romania. However, remained issues that require intervention, in practice causing many problems that often lead to violations of the fundamental rights for which there are no legal remedies. The article aims, among other things, to analyze the possibility of violating the right to a fair trial and defense in the event of rejection of the request for confirmation of the solution of waiving the criminal investigation.

Keywords: Right to defense, Right to a fair trial, Law no. 135/2010 on the Code of Criminal Procedure, the rights of the suspect, the rights of the defendant, the rights of the lawyer, the right to witness the execution of criminal proceedings, the non-completion of criminal proceedings, waiver of criminal prosecution, rejection of the solution, the European Court of Human Rights.

1 Introduction

The institution of waiving criminal prosecution was introduced as an innovation of the legislator in the Code of Criminal Procedure (hereinafter referred to as CPP) entered into force on 01.02.2014, meant to replace the solution of removal from criminal prosecution based on the lack of social danger of the deed, provided in the old

regulation, given the fact that in the new regulation the "*social danger*" was abandoned as an essential feature of the crime.

Considering the fact that it represents a completely new institution in the field of Romanian criminal procedural law, as well as the institution of the preliminary chamber, its initial form does not guarantee the requirements that a criminal norm must meet, being radically modified by the Emergency Ordinance no. 18 of May 18, 2016 for the amendment and completion of Law no. 286/2009 regarding the Criminal Code, Law no. 135/2010 on the Code of Criminal Procedure as well as for completing art. 31 para. (1) of Law no. 304/2004 on judicial organization (hereinafter referred to as O.U.G 18/2016).

Analyzing this institution, it can be seen that it is not currently in accordance with the other provisions of the Code of Criminal Procedure, and the current form may create legal anomalies for which the legislator has not provided remedies.

This article will analyze the hypothesis that in a criminal case that has as object the investigation of one or more crimes in the commission of which several persons participated, for which the solution of waiving the criminal investigation by order regarding a suspect/defendant, and separately from this solution it was ordered to sue the other person (s) through the indictment.

This solution is often encountered in judicial practice, but I will present a more special situation encountered. Thus, in the previously presented hypothesis, there is a relationship of interdependence between the deeds of the person for whom the solution of waiving the criminal investigation was ordered and the deed/deeds of the person/persons for whom the referral was ordered. Following the solutions ordered by the prosecutor, the judge of the preliminary chamber invested to solve the request regarding the confirmation of the solution of waiving the criminal investigation rejects it, and in parallel, in the file formed as a result of notifying the court with the indictment decides the begin of the trial.

2 Waiver of prosecution. Methods

According to the Code of Criminal Procedure, the waiver of criminal prosecution (hereinafter referred to as R.U.P.) may be ordered by ordinance or indictment. When the prosecutor considers that the legal provisions guaranteeing the finding of the truth have been observed, that the criminal investigation is complete and there is the necessary and legally administered evidence, based on art. 327 of the CPC, will issue an indictment ordering the prosecution and, if applicable, other measures such as filing or waiving the criminal investigation or will order by an ordinance the dismissal or waiver of the criminal investigation.

Also, according to art. 328 para. (3)[1] AND 327[2] of the CPC, the prosecutor will issue a single indictment regardless of the number of facts or suspects and defendants

[1] Art. 328 alin. (3) CPP: "The prosecutor draws up a single indictment even if the criminal investigation works concern several facts or several suspects and defendants and even if they are given different solutions, according to art. 327".

[2] "When he finds that the legal provisions guaranteeing the truth have been observed, that the criminal investigation is complete and that there is the necessary and legally administered evidence, the prosecutor:

investigated, even if they are given different solutions provided that the criminal investigation is complete and the conditions of art. 327 CPP are met.

The provisions of art. 318 para. (12) of the CPC provide that in case the solution of waiving the criminal investigation by order has been ordered, it is communicated to the person who filed the complaint, the parties, the suspect, the injured person and other interested persons and is forwarded to the preliminary chamber judge (hereinafter referred to as J.C.P.) from the court which would have, according to the law, the competence to judge the case in the first instance within 10 days from the date of issuance in order to be confirmed.

Of course, the solution of waiving the criminal investigation will be confirmed by a J.C.P. regardless of whether it is ordered by indictment or ordinance, but in order not to deviate from the topic of the article we will refer to the situation where the waiver of criminal prosecution is ordered by ordinance and subsequently an indictment will be issued for other offenses that have been the subject of the criminal proceedings file.

2.1 *Cases of rejection of the confirmation of the waiver of the criminal investigation*

Before the solution of the waiver of the criminal investigation J.C.P. competent, regardless of whether it is ordered by ordinance or indictment, is verified according to art. 318 para. (10) of the CPC in terms of legality and validity by the chief prosecutor of the prosecutor's office or, as the case may be, by the general prosecutor of the prosecutor's office attached to the court of appeal, and when it was drawn up by him or by a prosecutor from the prosecutor's office attached to the HCCJ, the verification is made by the hierarchically superior prosecutor.

If, following the verification of the legality and validity of the solution of waiving the criminal investigation ordered by the prosecutor, J.C.P. considers that the request for confirmation of the solution must be rejected, according to art. 318 para. (15) the CPC may order: *a) the abolition of the solution of waiving the criminal investigation and sending the case to the prosecutor to initiate or complete the criminal investigation or, as the case may be, to initiate the criminal action and complete the criminal investigation; b) the abolition of the solution of waiving the criminal investigation and ordering the classification.*

In connection with the solutions of rejection of the request for confirmation of the R.U.P. problems have been identified in practice, as there are situations in which it is found, for example, lack of verification in terms of legality and soundness by the head of the prosecutor's office or the hierarchically superior prosecutor or unjustified exceeding the 10-day period provided by art. 318 para. (12) of the CPC, in which case the application should be rejected as inadmissible or late.

The High Court of Cassation and Justice (hereinafter referred to as the HCCJ) was notified for the waiver of the law issue regarding the nature of the 10-day period before which the court must be notified, in order to determine whether it is a limitation or

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a) issues an indictment ordering the prosecution, if it results from the criminal investigation material that the deed exists, that it was committed by the defendant and that he is criminally liable;
b) issues an ordinance by which it files or renounces the pursuit, according to the legal provisions."

recommendation period. The Suceava Court was rejected by the Decision no. 11/2018 of 12.09.2018 of the HCCJ (Decision) as inadmissible.

However, the HCCJ, in the recitals of the Decision, ruled both on the nature of the time-limit and on the possibility of rejecting a request for confirmation of the R.U.P. as inadmissible or late.

Thus, with regard to the inadmissibility or lateness of the request for confirmation of the R.U.P decision, the HCCJ considered that *"The opinion expressed by the referring court on the law issue does not have the capacity to produce legal consequences on how to resolve the merits of the case, on the contrary it can attract even leaving unresolved the criminal case by refusing to analyze its object on the grounds that the term provided for it has been exceeded, contrary to the considerations of Decision no. 23 of January 20, 2016 ruled by the Constitutional Court, published in the Official Gazette of Romania, Part I, no. 240 of March 31, 2016, which were the basis for the legislative amendment operated by the Government Emergency Ordinance no. 18/2016 for the amendment and completion of Law no. 286/2009 regarding the Criminal Code, Law no. 135/2010 on the Code of Criminal Procedure, as well as for completing art. 31 para. (1) of Law no. 304/2004 regarding the judicial organization and the purpose for which the confirmation procedure was regulated, respectively the submission of the solution of waiving the criminal investigation to the judicial control."*

Analyzing the considerations of the Decision, we can draw the conclusion that at the time of notifying the HCCJ, it was of the opinion that this term is a term of recommendation and not forfeiture, on the grounds that exceeding the deadline would mean failure to resolve the court review, contrary to Decision no. 23 of 20.01.2016 of the Constitutional Court of Romania (CCR), which was the basis for the amendments to the institution of the R.U.P. by O.U.G.(Government Emergency Ordinance) 18/2016.

Also, regarding the possibility of rejecting a request for confirmation of the R.U.P. as inadmissible or belated, the HCCJ retained *"Moreover, the provisions of art. 318 para. (15) of the Code of Criminal Procedure are explicit regarding the solutions that may be pronounced by the judge of the preliminary chamber, the rejection of the notification as late or inadmissible not being provided by the legal provisions, similar to the solutions regulated by art. 341 para. (6) of the Code of Criminal Procedure in case of a complaint against the solutions of non-prosecution or failure to sue, their interpretation being unequivocal."*

Referring to this view, in practice J.C.P. invested to rule on a request for confirmation of the R.U.P solution that meets the conditions provided by art. 318 para. (1)-(5) of the CPC, but which does not meet the other conditions of legality/admissibility and should order the admission of the application, which would be a serious violation of the principle of legality.

Analyzing the solutions provided by the provisions of art. 318 para. (15) lit. a) of the CPC related to the opinion of the HCCJ, I consider that J.C.P. may reject the application only on grounds of validity, given that the court will decide whether to initiate, complete the criminal investigation or initiate criminal proceedings, solutions that are related to the validity of the solution rather than its legality.

In this situation, what will be the court's solution if the R.U.P. is not verified according to art. 318 para. (10) CPP? Applying the considerations of the Decision, I consider that it cannot be ordered to grant a term of 5 days in order to remedy the

irregularities by the prosecutor as provided in the case of the preliminary chamber procedure at art. 345 para. (3)[3] CPP, because this solution is not expressly provided in art. 318 para. (15) of the CPC governing the solutions that can be pronounced by J.C.P. in this procedure.

Considering that J.C.P. invested with the confirmation of a solution by R.U.P. must verify with priority the legality of the solution and then its validity, it is incomprehensible why it would not have at hand the possibility of pronouncing a solution of rejection of the application on grounds of illegality, as expressly provided in the case of solutions that can be pronounced of JCP in the case of the guilty plea agreement procedure[4], to which reference is made in the recitals of the JRC Decision, given that the rejection solutions made available to J.C.P. they depend on the substance of the solution and not on its legality.

I consider that the reasoning according to which the rejection of the request for confirmation of the R.U.P. without being analyzed on the merits, it would be contrary to Decision no. 23 of 20.01.2016 of C.C.R. (CCR Decision), in the sense that it is not subject to the control of the court in this way (within the meaning of the CCR Decision), is unfortunate.

The rejection of the R.U.P. solutions, including on these grounds, is a clear proof of the control of the court. The view that the rejection of an application as belated or inadmissible equates to the lack of control of the court cannot be upheld. In these cases, the court proceeds to verify the legality of the measure ordered and all the conditions provided by law, and following this "control" resolves the application, issuing a decision of admission or rejection.

In the recitals of the JRC Decision, the Court considered that *"For all these reasons, the Court finds that the waiver of criminal prosecution by the prosecutor, without it being subject to the control and approval of the court, is equivalent to the exercise by him of certain powers, competences of the courts, regulated in art. 126 para. (1) of the Constitution, according to which justice is administered by the High Court of Cassation and Justice and by the other courts established by law. For this reason, the Court finds that the prosecutor's waiver of the criminal investigation, under the conditions regulated in art. 318 para. (1) of the Code of Criminal Procedure, contravenes the constitutional norm previously enunciated."*

Practically, the Court criticized the fact that in the absence of a court control, the prosecutor exercises attributions incumbent on the courts, or the rejection of a request for confirmation of the R.U.P. solution, will not determine the exercise of court powers by the prosecutor, but from on the contrary, with the exception of the dismissal solution,

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[3] In case the judge of the preliminary chamber finds irregularities of the act of notification or in case he sanctions according to art. 280-282 criminal prosecution documents performed in violation of the law or if it excludes one or more evidence administered, within 5 days from the communication of the conclusion, the prosecutor remedies the irregularities of the notification and communicates to the judge of the preliminary chamber if he maintains the order to sue or requests the restitution of the case.

[4] Art. 485 para. (1) lett. b) of CPC: rejects the plea agreement and sends the file to the prosecutor in order to continue the criminal investigation, if the conditions provided in art. 480-482 regarding all the facts retained in the charge of the defendant, which were the subject of the agreement, or if he considers that the solution on which an agreement was reached between the prosecutor and the defendant is illegal or unjustifiably mild in relation to the gravity of the crime or danger of the defendant.

it will lead to another control of the court, given the fact that the case prosecutor will have at his disposal either the sentencing solution ordered by the indictment or the notification of the JCP with the conclusion of a plea agreement.

Among the reasons invoked in support of the opinion according to which the term of 10 days provided by art. 318 para. (12) of the CPC was also found that exceeding this deadline and classifying it as a forfeiture would lead to a situation *"inadmissible that the person who originally benefited from a waiver solution be excluded from this benefit and sent to court for a reason outside his conduct, namely the non-transmission of the order for confirmation by the prosecutor within 10 days from the date on which it was issued"*[5]

I consider that the suspect/defendant has only one vocation to grant the benefit of an R.U.P solution not being his right, and the exclusion of the person from this benefit caused by a passive conduct of the prosecutor can only result in disciplinary sanction. Thus, as it is not a question of the violation of a right provided by the criminal procedural legislation, we cannot consider that this solution would be "*inadmissible*", all the more so as we will show in the following that the non-observance of such term can cause a serious violation. of the fundamental rights of the other defendants in the case.

The reasons for which such notifications may be rejected are of major importance given that in the event of rejection of the request for confirmation of the R.U.P. solution, another waiver of criminal prosecution will not be available, *regardless of the reason invoked* according to art. 318 para. (16) of the CPP. The legislator chose to explicitly specify the phrase "*regardless of the reason invoked*", which from my point of view, includes the hypothesis of rejecting the request to waive the criminal investigation as inadmissible/late, this wording being found only in the case of extraordinary appeal of the cassation appeal.[6]

3 Rejection of the confirmation of the waiver of the criminal investigation ordered by ordinance subsequent to the sending to court through the indictment

The premise from which to identify the violation of the right to a fair trial and the right to defense, is that between the offense/offenses or actions/inactions of suspects or defendants in the case in which different solutions have been ordered (solution of waiving the prosecution and prosecution), there should be an interdependence. For example, in the same criminal case it is ordered to waive the criminal investigation regarding the perpetrator of the theft offense, but it is ordered to send the instigator to

[5] Conclusions formulated by the Prosecutor's Office attached to the High Court of Cassation and Justice in case no. 1198/1/2018 of the High Court of Cassation and Justice, having as object the resolution in principle of the following legal issue: "Legal nature of the term 10 days provided by art. 318 par. 12 of the Code of Criminal Procedure, if it is a term of revocation or recommendation http://mpublic.ro/sites/default/files/PDF/CHP/conc_07_06_2018.pdf accessed on 20.04.2020, time 14:30.

[6] Art. 438 alin. (3) CPP: If the appeal in cassation has been rejected, the party or prosecutor who declared the appeal in cassation may no longer file a new appeal against the same decision, regardless of the reason invoked.

court or it is ordered to waive the criminal investigation of the crime of bribery and prosecution for the offense of taking of bribes.

A concrete example that I have identified in practice is the following: the case prosecutor ordered the waiver of the criminal investigation against 2 suspects accused of committing the crime of bribery consisting in that they offered a bribe to a civil servant for the fulfillment of a act that falls within its attributions, and prior to the settlement of the request for confirmation against the defendant accused of committing the crime of bribery, it was ordered to be sent to court, being issued an indictment in this regard.

Due to the fact that the case prosecutor did not send to the competent court the request for confirmation of the solution of waiving the criminal investigation within 10 days provided by art. 318 para. (12) CPC, well beyond this deadline (approximately 6 months), the preliminary chamber procedure regarding the case in which the person accused of committing the crime of bribery was completed being ordered to start the trial, prior to the settlement of the case aimed at confirmation of the R.U.P. solution ruled against suspects accused of committing the crime of bribery.

The circumstance that raised the issue addressed in this article was that J.C.P. rejected the prosecutor's request, abolishing the solution of waiving the criminal investigation and consequently the file was returned to the case prosecutor. In this example you can see the importance of meeting the 10-day deadline and the effects of exceeding it.

By this solution the case prosecutor was obliged to resume the criminal investigation for committing the crime of bribery, but at the same time, the same criminal investigation was considered complete with the issuance of the indictment and subsequently confirmed by the trial of J.C.P. I mention the fact that in the criminal case the disjunction was not ordered, and this succession of events cannot be interpreted as a real disjunction, not being provided by the provisions of art. 46 and 63 of the CPC. This circumstance was also invoked in the preliminary chamber proceedings, but J.C.P. considered that the commencement of the trial could be ordered.

In this situation, in the file "formed" as a result of the rejection of the request for confirmation of the OR solution in which the crime of bribery will be investigated, a new solution of this kind can no longer be disposed of as shown above, and the criminal investigation body will have only three solutions at its disposal: a) classification; b) issuing an indictment and sending it to court; c) concluding a plea agreement.

With regard to the classification of the case, I consider that only in exceptional cases could it be ordered, given that at the time of disposing of the solution of waiving the criminal prosecution the case prosecutor considered that all the conditions for detaining persons concerned for the crime of bribery are met, but the public interest in pursuing the deed did not exist.

In order to order the other solutions, criminal prosecution acts will be carried out, the execution of which would have entitled to assist the defendant in the case sent to court, such as: initiation of criminal proceedings, hearing of the defendant during the initiation of criminal proceedings, hearings, expertise, etc. or in the "newly formed" case, the defendant in the case sent to court for committing the crime of bribery will have no capacity, therefore no right. It can be admitted that it could acquire the quality of an interested person, but the rights of the interested person are quite restricted and mainly refer to the exercise of remedies.

With the resumption of the criminal investigation regarding the suspects/defendants for whom the waiver of the criminal investigation was initially ordered, new evidence may be administered that could determine the classification of the case regarding them and the acquittal or termination of the criminal trial regarding the defendant sent to trial, given the connection between the crimes, but the defendant sent to trial will not be able to exercise his rights provided by art. 83 CPC, such as the right to consult the file, the right to propose the administration of evidence under the conditions provided by law, to raise exceptions and to draw conclusions, the right to formulate any other requests related to the settlement of the criminal side and civil law of the case, the right of the defendant's lawyer to attend the performance of any act of criminal investigation according to art. 92 of the CPC, which they could have exercised if the original case had not been split in two by this unregulated sequence of events.

Also, the suspect/defendant against whom the R.U.P. has been ordered, will be deprived of rights during the entire period in which the criminal process will take place against the defendant sent to court, who will also lose his quality in the respective case.

The impossibility of exercising the rights by the suspect/defendant is inadmissible in a criminal trial conducted in a democratic society, given the consequences that a criminal trial may have on the fundamental rights enjoyed by an individual.

The main problem is the legal remedy that a defendant in such a situation has at hand. Thus, the question arises as to the extent to which the case sent to court can continue its course considering the resumption of criminal proceedings in the same case as a result of such a succession of events or whether J.C.P. may order the commencement of the trial in the event that the measure of waiving the criminal investigation has not been definitively confirmed.

Under normal circumstances, if during the preliminary chamber procedure it is found that the case prosecutor has not completed the criminal investigation, continuing to carry out criminal proceedings in question after issuing the indictment the case is returned to the prosecutor's office, but what happens when the criminal investigation resumes takes place after the start of the trial, when the preliminary chamber decision is final?

Thus, in the example analyzed above, one can reach the situation where the person sent to trial is definitively convicted for committing the crime of bribery consisting in having received undue sums of money from the two persons in connection with the performance of an act which falls within his duties, and to the persons for whom the R.U.P. was initially ordered, to subsequently order the dismissal or acquittal if it is found that: the deed does not exist, is not provided by criminal law or there is no evidence that those persons were committed the crime of bribery, which would be absurd. The conviction of a person for the offense of bribery cannot be ordered as long as the act/offense of bribery did not exist or the person who allegedly committed the act/offense was not known.

As previously stated, this example can be applied to several practical situations and can lead to absurd solutions, such as: acquittal or classification against the perpetrator based on art. 16 para. (1) lett. a) of the CPC and the conviction of the instigator for determining the perpetrator to commit an act provided by the criminal law which was found not to have existed.

Of course, for such situations there would be an extraordinary remedy of review, but until then the existing legal framework allows serious legal errors to be committed, which can be avoided.

4 Conclusions

The institution of waiving the criminal investigation is welcome in the criminal legislation of Romania considering the elimination of the solution of removal from the criminal investigation provided in the old regulation. In this way, persons who have committed low-risk offenses without causing serious consequences by committing them and who have had good conduct prior to the commission of the offense, a cooperative attitude after the commission of the offense, have endeavored to eliminate or mitigate the consequences of the offense, benefit from this solution, with the possibility of imposing obligations for a certain period of time. However, the provisions governing the waiver of criminal prosecution may be improved so that they are correlated with all other provisions of the Code of Criminal Procedure and in accordance with the Decisions of the Constitutional Court, so as not to create a framework in which may be committed serious violations of the criminal procedural rights and consequently, judicial errors.

Any criminal law must be clear, predictable, precise, not confusing or violating the fundamental rights of the person. The purpose of this article is to present a practical situation that demonstrates that there are still rules in the Code of Criminal Procedure that are not correlated and whose arbitrary application may lead to judicial errors.

I believe that the legislature should expressly provide for the possibility that J.C.P. to be able to reject the request as inadmissible or late in the procedure of confirming the solution of waiving the criminal investigation, and the term of 10 days provided by art. 318 para. (12) of the CPC to be considered one of forfeiture and possibly increased, so that the prosecutor who will have to verify the solution in terms of legality and soundness is not in an administrative impossibility to carry it out.

Also, a provision that would help to avoid such situations would be to include the obligation that prior to the issuance of the indictment, the solutions ordered separately from it be final.

In support of the person who could have benefited from a favorable solution such as waiving the criminal prosecution, but who can no longer benefit from it due to an error by the prosecutor of the case which resulted in the rejection of the solution, I consider that raising the maximum penalty of the criminal law for which the waiver of the sentence of 3 to 7 years can be ordered, would be a measure that would partially solve this problem, given that the solutions are relatively similar in terms of the effects they produce.

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Applicability of Article 9 of the Regulation (EU) 2016/679 on the Protection of personal sensitive data during COVID-19 pandemic

Iunker A.-E.

Ph.D. Student, "Titu Maiorescu" University (ROMANIA)
E-mail: Iunker.ana@gmail.com

Abstract

European Regulation 679/2016 imposes both rules and strict deadlines on both controllers and processors of personal data. The data subjects acquire new rights in the light of the normative act (eg the right to be forgotten, within legal limits, of course) and have a much greater control over data processing, especially when it is classified as "sensitive" (data related to health, for example). The balance of the relationship between the data subject and the controller should be fair and transparent, considering the huge flow of information that circulates in each field of our daily activities. But what happens when this balance is disturbed by emergencies that directly affect our health, either on a regional scale – epidemics, or globally – pandemics? To what extent does the Regulation achieve its purpose of protecting the rights of data subjects?

Keywords: data protection, public interest, public health, safety employment, legitimate activities, sensitive data, global crisis pandemic, covid-19, temperature-check, geo-localisation, lockdown, state of emergency.

1 Introduction

Regulation 679/2016 on the Protection of Personal Data entered into force on 25 May 2018, replacing Directive 95/46/EC of 1995. The objective of the regulation is to ensure the uniform application of EU law in all EU countries. By establishing a global data protection standard, this regulation strengthens the rights of citizens of the European Union and the European Economic Area through its direct applicability in all Member States.

Legal nature: The Regulation is a legal act that has general applicability, binding in all its elements and is directly applicable in all European Union countries, to the

Directive, which leaves to the Member States the manner of legislative application, so as to achieve its intended effect. According to art. 288 from the Treaty on the functioning of the EU, the regulations apply directly in each Member State, so that it become part of the national law of the Member States, without the need for transposition, and can be invoked by individuals before national courts. The regulation does not need an internal rule to take it into the legal order of the Member States. It follows that individuals may invoke the provisions of a regulation directly before a national court. In other words, it creates rights and obligations for or against individuals.

As there have been major discrepancies in the sanctioning regime at Member State level in the light of the former legislation represented by the Directive, the biggest advantage of the Regulation is that the Member States will directly apply the sanctions from the Regulation. In this way, the practice of forum shopping will be avoided in the future, where economic controllers with subsidiaries in several states chose the law applicable in the "most profitable" state.

"One of the most important relationships is that of the Regulation with Directive 95/46/EC. This relationship determines, among others, legal consequences regarding the acts, respectively, the decisions issued by the National Data Protection Authorities prior to the entry into force of the Regulation. It also determines legal effects regarding the interpretations, opinions, guidelines and other acts of the Working Group art. 29. The analysis of the transition from the Directive to the Regulation was performed and aspects were studied regarding the degree of harmonization achieved by the Regulation, related aspects scope, the importance of the Directive-Regulation distinction and the practical consequences in the field of data protection, the direct (horizontal) effect in the system of the new Regulation and the protected fundamental rights as well as the bureaucratic effect of the personal data field in the EU. "[1]

The rule of law is one of the fundamental values on which the European Union is based. This principle guarantees fundamental rights and values, enables EU law to be enforced and supports an investment-friendly business environment.

The protection of personal data is an important and necessary component derived from the Charter of Fundamental Rights of the European Union. Also, the European Convention on Human Rights refers only to the rights of individuals. Likewise, art. 8 of the Charter, which provides: "Everyone has the right to the protection of personal data concerning him or her. Such data must be processed correctly, for the purposes specified and on the basis of the consent of the person concerned or on the basis of another legitimate reason provided by law. Everyone has the right of access to data collected concerning him or her and the right to obtain rectification thereof. Compliance with these rules shall be subject to control by an independent authority. " [2]

"It is remarkable that the Charter of Fundamental Rights enshrines the right to the protection of personal data as a distinct right from the right to privacy. In this way, the importance of the field is emphasized and, at the same time, it is confirmed that the data protection rules have a certain autonomy. " [3]

The European Court of Human Rights has opted for a dual approach to state obligations, dividing them into two categories: negative obligations and positive obligations. The Court requires the statute either to refrain from certain actions that would result in the very violation of the essence of protected rights, or to take certain positive actions to ensure their protection. The right to data protection derives from the

right to respect for privacy, as stated in Article 8 of the Convention: "Everyone has the right to respect for his or her private and family life, home and correspondence. 2. The interference of a public authority in the exercise of this right shall not be permitted except in so far as it is provided by law and the Constitution, in a democratic society, a measure necessary for national security, public security, the economic well-being of the country, defense of order and prevention of criminal acts, protection of the health, morals, rights and freedoms of others". [4] Resuming the fundamental concept of human rights in the Universal Declaration of Human Rights, the Convention examines these rights in much more detail, setting out the premises under which certain derogations may be permitted.

The concept of privacy is associated with human beings. Therefore, individuals are the main beneficiaries of data protection. In addition, according to the opinion of the Article 29 Working Party, only human beings are protected by European data protection legislation. ECHR case law on Article 8 of the European Convention on Human Rights shows that the complete separation of aspects of private and professional life can be difficult.

Following the adoption of the Charter of Fundamental Rights of the European Union, binding legal value has been given to human rights in the European Union as well. Thus, at national level, in the Romanian Constitution we find the principle of respect for privacy in Article 26 "Intimate, family and private life: (1) Public authorities respect and protect intimate, family and private life. (2) The natural person has the right to disposes of itself, if it does not violate the rights and freedoms of others, public order or morals. "[5]

So far, the principles established in the practice of the ECHR are also applied in the context of the current pandemic, even in the context of Romania's derogation from the obligations provided by the Convention, notification sent to the Council of Europe on March 17, 2020 by establishing a state of emergency. [6]

The main objective of personal data protection legislation is to protect individuals (and, by extension, society) against harm resulting from the misuse of such data. To this end, over time, the laws governing the field of personal data have established a number of procedural safeguards to protect individuals, in particular their right to confidentiality. We can distinguish three sets of objectives underlying the provisions of data protection legislation, namely: protecting privacy and associated social values, improving the responsibility of controllers by data subjects and improving the integrity and efficiency of decision-making processes. [7]

On March 11, 2020, the World Health Organization characterized the crown virus as a pandemic. [8] In order to frame the current situation in the context, it is necessary to clarify the state of emergency we are in. Pandemic is a disease that affects almost the entire population of a region, a country and spreads over a very large territory, in one country, in several countries or continents. [Gr. pan – everything, demos – people]. [9]

Data protection rules (such as the GDPR) do not preclude measures taken in the fight against the pandemic corona virus. The fight against communicable diseases is a valuable goal shared by all nations and should therefore be constantly supported. It is in the interest of humanity to reduce the spread of disease and to use modern techniques in the fight against the virus that affects all mankind. In this context, the European Data Protection Board emphasizes: "even in these exceptional times, the data controller and

the proxy must ensure the protection of the personal data of data subjects. Therefore, a number of measures must be considered to guarantee the lawful processing of personal data and, in all cases, it must be remembered that any measure taken in this context must comply with the general principles of law, a condition which may legitimize restrictions on provided that they are proportionate and limited to the period of the state of emergency. "[10]

1.1 *Application*

Article 9, paragraph 1 of Regulation 679/2016 GDPR sets out the general rule for the processing of special categories of data: and the processing of genetic data, biometric data for the unique identification of an individual, health data or data on the sexual life or sexual orientation of an individual. "[11]

The scope of the term personal data is open; it depends on the specific nature of each controller and the data subject and evolves with technological progress. However, the term also covers a subset of "special categories of personal data" – sensitive data. This category of data has been separated and covered with increased protection compared to other regular data, due to their special importance for the protection of the right to confidentiality and the risk to fundamental rights and freedoms. "Sensitive data belongs to a sphere that is not only private but also intimate. Disclosing it can expose data subjects to significant and irreparable harm by violating their dignity, stigmatizing it." [12]

For reasons that are easy to understand, through special categories of data, the legislator presented a list in which it describes this category in a limited way. Therefore, special data will always be those data that: belong to a person's racial or ethnic origin, are related to a person's political opinions or religious/philosophical denomination, reveal union membership, belong to his genetic characteristics or biometric data on identification of the person, can be data related to the life or sexual orientation of a person and the last, but perhaps the most important descriptive element – we are talking about data that reveals information about the health of a natural person, because only this can be targeted the field of personal data protection.

In paragraph 51 of the judgment of 6 November 2003 in Case C-101/01, the CJEU stated that 'a reference to the fact that a person has injured his leg and is half disabled for medical reasons constitutes personal health data in the sense that Article 8 (1) of Directive 95/46. "[13] The same reason applies with regard to Regulation 679/2016 art. 9 (2). The special categories of data, listed in Article 9 of the GDPR, are subject to much stricter principles. Due to their special importance for the right confidentiality, the processing of sensitive data is generally prohibited – unless one of the conditions listed in Article 9 (2) of the GDPR is met, namely:

"Paragraph 1 shall not apply if one of the following applies:

(a) the data subject has given explicit consent to the processing of those personal data for one or more specified purposes, except where Union or Member State law provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject;

(b) processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of

employment and social security and social protection law in so far as it is authorised by Union or Member State law or a collective agreement pursuant to Member State law providing for appropriate safeguards for the fundamental rights and the interests of the data subject;

(c) processing is necessary to protect the vital interests of the data subject or of another natural person where the data subject is physically or legally incapable of giving consent;

(d) processing is carried out in the course of its legitimate activities with appropriate safeguards by a foundation, association or any other not-for-profit body with a political, philosophical, religious or trade union aim and on condition that the processing relates solely to the members or to former members of the body or to persons who have regular contact with it in connection with its purposes and that the personal data are not disclosed outside that body without the consent of the data subjects;

(e) processing relates to personal data which are manifestly made public by the data subject;

(f) processing is necessary for the establishment, exercise or defence of legal claims or whenever courts are acting in their judicial capacity;

(g) processing is necessary for reasons of substantial public interest, on the basis of Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject;

(h) processing is necessary for the purposes of preventive or occupational medicine, for the assessment of the working capacity of the employee, medical diagnosis, the provision of health or social care or treatment or the management of health or social care systems and services on the basis of Union or Member State law or pursuant to contract with a health professional and subject to the conditions and safeguards referred to in paragraph 3;

(i) processing is necessary for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health or ensuring high standards of quality and safety of health care and of medicinal products or medical devices, on the basis of Union or Member State law which provides for suitable and specific measures to safeguard the rights and freedoms of the data subject, in particular professional secrecy;

(j) processing is necessary for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) based on Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject." [11]

The processing of special categories of personal data may be necessary for reasons of public interest in the fields of public health, without the consent of the data subject [11], is specified in recital 54 of Regulation 679/2016. Such processing should be conditional on appropriate and specific measures designed to protect the rights and freedoms of individuals. In this context, the concept of "public health" should be interpreted as defined in Regulation (EC) No. Regulation (EC) No 1338/2008 of the European Parliament and of the Council [10]. This processing of health data for reasons

of public interest should not lead to the processing of such data for other purposes by third parties, such as employers or insurance companies and banks. [11]

2 Processing of sensitive data

The exception that caught our attention and which we want to focus on in this article is the processing of special data out of necessity of public interest. "(I) processing is necessary for reasons of public interest in the field of public health, such as protection against serious cross-border threats to health or ensuring high standards of quality and safety of healthcare and medicinal products or medical devices, in accordance with Union or national law, which provides for appropriate and specific measures to protect the rights and freedoms of the data subject, in particular professional secrecy." [11]

As we have a state of emergency in place – Pandemic declared by the World Health Organization which involves a massive and cross-border spread of COVID-19 virus which poses a serious threat to human health and the provision of national and international healthcare, data processing rules "sensitive" data subjects will automatically fall under the exceptional basis of Article 9 (2) (i).

How is the reasoning of the legislator regarding the employee-employer relationship put into practice and what does this imply for the development of activities during this period? Can an employer require visitors or employees to provide specific health information in the context of COVID-19? The application of the principle of proportionality and data minimization is particularly relevant in these cases. We believe that the employer should request information about the employee's health only to the extent permitted by national law.

In order to fulfill its duty of care to its staff, each employer may need to introduce extraordinary measures. With regard to the disclosure of personal data concerning a suspected or confirmed case of contamination by COVID-19, a very thorough assessment of these procedures must be completed and, on the one hand, the interest in public health and the vital interest of others, and on the other hand, interference with the integrity of privacy.

In our opinion, the publication of the names of people who have tested positive or suspected of having the disease should mainly be avoided. Alternative methods should be sought to identify who may have come into contact with the person. The transmission of this data to other institutions should also be avoided, with the exception of medical authorities and bodies for the fulfillment of legal obligations.

The information collected through an employee's temperature checks, even if noted as "high" or "within a normal range", will constitute "health data" within the GDPR. By recording such data, a "special category of personal data" will be processed. The GDPR generally prohibits the processing of such data unless it can be demonstrated that one of the legal grounds provided for in Article 9 (2) is satisfied.

The legal grounds applicable in these situations are: (1) the rights and obligations of the employment law, (2) the explicit consent of the data subject, (3) health (occupational medicine) and (4) public health. To meet reasons (3) or (4), checks should be performed by a healthcare professional, which is unlikely to be an option for many organizations. In any case, valid explicit consent is very difficult to secure in an employment context, but even where it is valid, employees must be able to refuse to

check the temperature without causing them any real harm. It is well known that personal data that are necessary to achieve the objectives pursued must be processed for specific and explicit purposes. In addition, data subjects should receive transparent information about the processing activities that take place and their main characteristics, including the retention period for the data collected and the purposes of the processing. The information provided should be easily accessible and provided in clear and simple language. It is important to adopt appropriate security measures and privacy policies to ensure that personal data is not disclosed to unauthorized persons. The measures implemented to manage the current emergency and the decision-making process should be properly documented.

2.1 *The practice of EU member states*

Examples of good practice noted so far from the work of the governments of the U.E. crystallizes in two directions: on the one hand, the maintenance of a high standard of protection of sensitive personal data, by presenting exclusively the data corresponding to the need for public information in a statistical, anonymised form; on the other hand, in special cases involving persons with a higher exposure, the above-mentioned standard has been derogated from by mentioning the function of the person concerned. This outlines a tendency to differentiate the need for proportionality and the need to process sensitive personal data, the decisive criterion being the quality of the data subject.

This differentiated approach is not unique, a precedent in this respect being established by the jurisprudence of the European Court of Human Rights, which established in a request for violation of the right to privacy, that eliminating the risk of exposure of medical personnel to infection with a virus and the avoidance of its transmission within the hospital justifies informing the doctors about the state of health of the complainant-patient, prevailing the reasons of public health.

Of the four reasons identified, "labor law rights and obligations" is probably the most widely used basis in a pandemic situation. To satisfy this reason, the processing of sensitive employee data (ie, temperature verification) must be necessary for the purpose of exercising or fulfilling obligations or rights imposed or conferred by law in relation to employment, social security or social protection. For example, in the U.K., this could be the employer's obligation to provide a safe work environment in accordance with the Occupational Health and Safety Act 1974.

However, conducting temperature checks as an aid in protecting the health and safety of employees in relation to the COVID-19 pandemic is not a measure recommended by European authorities or the World Health Organization. Consequently, there is a risk of a breach of the rights of data subjects, as such processing is not strictly "necessary" for an employer to fulfill its legal obligations to hire.

A more effective method, without being intrusive in the private life of the individual adopted lately is represented by the advice of the employees to work from home, in isolation, in order not to be subjected to any risk of contacting the virus.

Equally, another factor in the variation of approaches is the differences between cultural norms around privacy in different Member States of the European Union. For example, while the U.K. Data Protection Authority (ICO) did not issue specific

guidance on collecting employee temperatures, however, it stated that employers have an obligation to protect the health of employees. [14] On the other hand, for supervisors in Belgium, France, Italy and Hungary, the taking over of workers 'and visitors' temperatures and other general and systematic controls have been excluded and are not considered proportionate measures in accordance with data protection legislation.

Most data protection authorities, including the National Commission for Informatics and Freedoms (CNIL), the French data protection authority, say, for example, that it is not okay to take the temperature of an employee at the entrance to a building or office space, as this would exceed their duty of care as an employer. [15]

2.2 *Geo location*

Can Member States governments use personal data related to the geo-location of individuals' mobile phones in their efforts to monitor and mitigate the spread of COVID-19?

The European Data Protection Board EDPB considers that, when processing sensitive personal data needed to manage the COVID-19 pandemic, data protection is indispensable, as the virus knows no borders, it seems possible to develop a European application in response to the crisis. current. The general principles of effectiveness, necessity and proportionality should guide any measures taken by the Member States of the European Union involving the processing of personal data to combat COVID-19. [16]

In some Member States, governments are considering the use of mobile location data as a possible way to monitor or prevent the spread of COVID-19. This would involve, for example, the ability to geo-locate individuals or send public health messages to individuals in a specific area by phone or text message. [17] As regards information, including location data, collected directly from the telephone number of data subjects, Article 5 (3) of the ePrivacy Directive applies. [18] Therefore, storing information on the user's device or gaining access to it information already stored is permitted only if (i) the user has expressly and unequivocally consented [19] or (ii) storage and/or access is strictly necessary for the information service explicitly requested by the user. By way of derogation, however, the rights and obligations set out in the ePrivacy Directive are possible in accordance with Article 15, where they constitute a necessary, appropriate and proportionate measure in a democratic society for certain well-established objectives [20]

In view of the above considerations, we believe that public authorities should first start processing location data in an anonymous way (ie processing data in a way that people cannot identify), which could allow the generation of data. mapped reports on the concentration of mobile devices in a given location. The rules on the protection of personal data do not apply to data that has been properly anonymised.

With regard to the processing of additional information, including health data for the purpose of protecting public health, the data must be collected and stored properly, as contaminated persons and persons at risk of disease must be identified to fulfill the obligation to limit the spread of the pandemic.

People who may have come in contact with individuals tested positive are informed that they may have come in contact with a positive COVID-19 colleague. In accordance with the principle of data minimization, staff members who have been

identified as close contacts of an infected person receive only the anonymised information mentioned above, as the identified contacts do not need to know the identity of the infected person or suspected of being contaminated in order to protect themselves and follow the instructions in the given situation.

The data, including health information, collected in the context of the COVID – 19 emergency situation are intended to be kept no longer than is necessary for this specific purpose. Consequently, data should only be retained as long as the pandemic crisis situation is maintained, with a possible retention period for various reports until the data is deleted or destroyed.

In terms of scientific research, sensitive and geo-location data will be able to be used as long as it is anonymised. In order to avoid stigmatizing or discriminating against individuals, no name or other information that may lead to individual identification shall be used. For situations where we are talking about statistics, the principle of anonymisation should govern once again.

The concept of anonymization is often perceived incorrectly being confused with pseudonymization. While anonymization allows the use of data without any restrictions, pseudonymized data is still within the scope of the GDPR. There are many options for effective, but careful, anonymization [21]. In this sense, any encryption intervention can be considered in the best case a pseudonymization. The anonymization and pseudonymization processes are differentiated by the fact that the former are final processes, when, in the case of pseudonymization, with the appropriate code, the data will return to the initial state.

However, if the processing of data is based on another legal basis, such as consent (Art. 6 (1) (a)) (Controllers must pay particular attention to consent, which should not be considered free, if the natural person does not have the possibility to refuse or withdraw his consent without prejudice to his right) Moreover, the use of an application to combat the COVID-19 pandemic leads to the collection of health data (for example, the condition of an infected person). The processing of such data is permitted when such processing is necessary for reasons of public interest in the field of public health, fulfilling the conditions of art.9 (2) (i) GDPR or for health care purposes described in art.9 (2) (h) GDPR. Depending on the legal basis, it may also be based on the explicit consent of the data subject (Article 9 (2) (a) GDPR)

3 Conclusions

The current health crisis should not be used as an opportunity to avoid respecting the rights of data subjects. The limitation of data storage should be in line with the real needs of controllers in fulfilling their legal obligations and personal data could only be kept for the duration of the COVID-19 crisis. After that, as a general rule, all sensitive personal data would be recommended to be either deleted or anonymized. [22] The European Data Protection Regulation allows for the responsible use of personal data for health management purposes, while ensuring that individual rights and freedoms are not eroded in the processing process and that it is not excessive.

The measures adopted must be in accordance with the Charter of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms and subject to the control of the European Court of Justice and the

European Court of Human Rights. In the event of an emergency, they should also be strictly limited to the duration of the emergency available.

Therefore, Article 9 of the European Regulation on the protection of personal data 679/2016 is extremely tender in ensuring the legal processing of data of data subjects. Throughout the legislative text, controllers will find clear directions both on the bans and on the cases in which the processing will be in accordance with the requirements of the Regulation.

In our opinion, the statistical information transmitted to the public tends to respect both the provisions of the Regulation and those of the European Convention on Human Rights, respecting the proportionality between the need to inform the general public and the protection of the rights of data subjects. This is by far the most difficult time since the entry into force of the Regulation and until now, when Member States have to fulfill their obligation to respect the rights of data subjects with regard to personal data rights. During the global health crisis, the Covid-19 pandemic, it is impossible not to process sensitive data on employee health, for example, but the situations must be addressed in relation to the GDPR principles: transparency, minimization, confidentiality and last but not least, storage limited to the crisis period. Any deviation from the regulation can irreversibly affect a person's privacy more than ever in the particularly delicate situation of the health crisis in which humanity is.

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Crimes against humanity committed by officials of the Romanian state during the communist era and ignored by justice

Doană V.

Doctoral student (ROMANIA)
E-mail: doana.vasile@yahoo.com

Abstract

Thus far, Romanian justice has not initiated investigations to hold accountable those responsible for committing crimes against humanity during the communist period, thus being able to state that, on this matter, I.V. Stalin's principle still applies, respectively: "*The death of a man is a tragedy but the death of a million people is a mere statistic*".

Keywords: crimes against humanity, the forcibly displaced, deportees, persons who illegally crossed the border, peasantry repression.

1 Introduction

On 01.02.2014 the New Penal Code entered into force, which incriminates, in Title XII, "Crimes of genocide, against humanity and of war", to be specified that in chapter I of this title, art. 438-439, the crimes of genocide and against humanity are foreseen, both criminal acts having imprescriptible character; the two offences were for the first time provided for by the Statute of the International Criminal Court of Nurnberg and subsequently legislated by international conventions to which Romania adhered [1], thus introducing its two offences into the national criminal law.

The crime of genocide has been incriminated in the Romanian criminal law, from 1960 until now [2], under the same title, while crimes against humanity [2] have been consecrated under this title only since 01.02.2014, with the specification that these have existed previously in the Romanian criminal law but under another title, respectively that of "inhumane treatments", provided for by art. 358 of the Old Penal Code, 1968, mentioning that the constitutive content of the two acts is the same.

For this reason, the High Court of Cassation and Justice has recently pronounced, the final conviction in the files of former penitenciary commanders, generically referred to as the "files of the torturers", defendants Vișinescu Alexandru [3] and Ficior Ion [4], both were sent to trial for crimes against humanity, even though the acts held against them were committed between 1959-1963. The Supreme Court has ascertained the existence of the continuity of incrimination for this type of acts, from the date of their perpetration until the present moment, but made the application of art. 5 Penal Procedural Code, which enshrined the principle "mitior lex", thus applying the most favorable law to the defendants, identified by the supreme court as being the Penal Code of 1968.

Arising from the text of the genocide crime is the legislator's intention to protect, both during time of peace and during war, entire segments of the population against manslaughter, physical and mental injury, preventing births, submission to conditions of existence which are likely to lead to physical destruction of certain ethnic, religious, racial or national groups.

In the case of crimes against humanity, the legislator protects the civilian population in the event of a generalised and systematic attack aimed against them, during which a series of acts are committed, such as: manslaughter; deportation or forced transfer, with the violation of the general rules of international law, of persons legally present in a given territory, by expelling them to another state or to another territory or by using other measures of constraint; imprisonment or other form of deprivation of liberty in violation of the general rules of international law.

In current regulation, the texts of the two international crimes have been taken up, in the Romanian criminal law, from the provisions of the Statute of the International Criminal Court.

The efforts made from 1990 until now by the Romanian judicial bodies to investigate criminal cases regarding the commission of these imprescriptible crimes, have a sporadic character, being located in time (except for the files of the Ceausescu couple, of Nicu Ceausescu and the case in which the former members of the Executive Political Committee of the Romanian Communist Party were convicted, all these files being dealt with in the early 1990's), only after the appearance of the New Penal Code.

This sporadic character is due to the fact that, until now, starting from 01.02.2014 only six criminal cases bearing as subject crimes against humanity, were investigated and prosecuted, as follows: the cases regarding former penitentiary commanders, Vișinescu Alexandru, Ficior Ion, Petrescu Marian; the files named generically, "The Mining File of 13-15 June 1990", and "The Revolution File", as well as the criminal file drawn up by the security officers who investigated the dissident, Gheorghe Ursu.

In fact, the judicial bodies had the legal obligation to perform, besides these six cases, the investigation of all the criminal acts generically called "Crimes of Communism", as long as they are imprescriptible and the estimated number of victims is two million people [5].

In antithesis with this almost general state of "non-combat" of the Romanian justice, the Polish justice instrumentalised around 22,000 criminal cases which had as object the crimes of genocide but also against humanity, generically also called in Poland "crimes of communism" [6].

2 The Displaced

Coming back to the political efforts made in Romania regarding the official recognition of the existence of crimes in the communist period, in 2006 the *Presidential Commission for the analysis of dictatorship in Romania prepared a Final Report* which was presented, in the same year, in the plenary session of the Parliament, by the President of Romania.

According to the documents supporting the preparation of this report, it is clear that during the communist dictatorship, in Romania, entire segments of the population were subjected to a regime of terror and even extermination by the repression forces of the totalitarian state, the repression in question having at its basis mainly Stalinist political criteria, the victims being considered "*enemies of the people*".

At the end of the report, the President of Romania formally asked the judicial bodies to conduct investigations on the commission of crimes against humanity regarding all the victims that were: killed, physically and mentally injured, deported, forcibly displaced, forcibly hospitalised in psychiatric institutions without suffering from any illness, arrested and convicted without breaking the state criminal laws, arrested and subjected to forced physical labor for five years, their detention being in the absence of a legal mandate issued by a prosecutor or judge, as provided for in the Constitution.

In the introductory part of this report, a brief enumeration is given of the acts which may fall under the category of "*crimes of the communist regime*", as being imprescriptible crimes which require to be investigated by the Romanian judicial bodies, as follows: "*The historical and moral culpability of the Romanian Communist Party and of the Security seems to us to be fully proven today. When we talk about hundreds of thousands of victims (arrested, imprisoned, deported, killed), there is no doubt that the regime committed crimes against humanity. It turned Romania into a huge prison colony, populated by delators, collaborators and Security officers…it has prowled national minorities, while claming that their rights are protected. It declared insane, the people who dared to doubt the benefits of socialism. The system used psychiatry as a political weapon. It cruelly persecuted those who dared to demand free trade unions. The most perverse diversions possible were used to compromise the opponents of the regime. It attacked the anti-communist exile and tried to counter in all ways the free radio stations in the West and first of all, the Romanian section of the radio station "Free Europe". And all these were done in the name of the " the singing dawn*"[7].

Following the research on this topic it was revealed that the generic category of victims of communism actually falls into several categories of such victims, such as: political prisoners and forcibly displaced; dissidents illegally hospitalised in psychiatry wards; the peasantry, as a result of forced collectivisation; clergy; those tortured in arrests or places of detention; people killed while trying to cross borders; institutionalised children; the participants in the student and worker uprisings, the women suspected of having caused an illegal abortion, etc.

The most numerous category of victims is considered to be the deportees

From the documents in the archive of the National Council for Studying the Security Archives (CNSAS), regarding the procedures used by the repression bodies in

order to select the opponents of the system for the relocation and submission of the extermination regime through forced labor, it turns out, for example, that the people in management of the Black Sea Danube Canal demanded a certain number of workers for its construction; The Interior Ministry entrusted this task to the Directorate of Investigation, which, in its turn, transmitted the order to the Security Regions, the latter made lists of "*reactionaries", "parasites", "enemies of the people*" who were to be arrested, deported and thus compelled, for five years, to forced labour.

After analysing the information and documents made public from the concerned archives, it was found that for the implementation of such a policy of extermination by displacement and submission to forced labour, on political criteria and not only, of entire segments of civilian population, the judicial bodies of the totalitarian communist state issued a series of normative acts of lower rank (decrees, orders, etc.), all of them secret, all unconstitutional and contravening all international conventions in the field, to which Romania was or was to become a party, through which Romanian citizens could be detained, arrested, deported and forced to work by the mere decision of the security bodies, without the respective citizens having violated any laws of the country, without having committed criminal acts and without having a criminal case against them filed by a prosecutor or judge.

Thus, at the beginning of 1950, the Presidium of the Grand National Assembly of the Socialist Republic of Romania adopted a secret decree [8] for the establishment of work units, thereby opening the way for abuses that are difficult to imagine today. The decree stipulated that the following would be sent to work units:

– "*those who by their acts or manifestations, directly or indirectly, endanger or attempt to jeopardize the regime of popular democracy, make it difficult or attempt to impede the construction of socialism in the Romanian. P.R., as well as those who, in the same way, defame the state power or its bodies, if these acts do not constitute or cannot constitute, by analogy, crimes.* "

Under the mentioned decree, The General Directorate of People's Security within the Ministry of Internal Affairs issued a secret order that specifically established the categories of citizens which were to be the subject of the security forces alongside with proposals for sending them to work units, as follows [9]:

- "*all those who launch or spread alarmist, tendentious, hostile rumors; listen to and broadcast deprived propaganda from imperialist radio stations";*

– *"all those who insult the Romanian Labour Party, its leaders and the countries with popular democracy";*

- *"all those Romanian citizens who maintain friendly relations with foreign legacies, who attend or have frequented libraries, concerts and in general the propagandistic manifestations of imperialist legacies as well as all those who are in relation with the families of the officials of the imperialist embassies";*

- *"instigators of non-compliance or non-execution ... especially regarding: collectivizations, collections, cultural plans ...";*

– *"those who by domestic or international correspondence take a hostile attitude, transmit tendentious, alarmist, hostile news, reactions, instigate*."

In the same order it was stated that: "The following shall be sent in the work units, those elements that commit certain hostile acts, and their activity does not fall under the law".

The aberrant nature of these provisions led, for example, to the arrest of three hundred medical students from Bucharest who, while in the examination session, lacking textbooks, attended the French Library that held these textbooks, thus preparing for the examination. Only for this reason the students were arrested by the security and incarcerated at Jilava Penitentiary [10].

In 1952, the Council of Ministers of the Romanian People's Republic adopted a secret decision for the establishment of labour colonies, compulsory domicile and labour battalions [11], thus completing the infernal Stalinist type of extermination mechanism of all those who opposed, or could have opposed, the communist regime.

By this normative act, all the categories of persons established by Order 100/1950 were being maintained, which had been forcibly displaced and subjected to compulsory work in the "*work units*", now transformed into "*work collonies*", to these adding other categories, such as:

"- *officers in duty of the bourgeois-landlord parties*

- relatives of the country's traitors and spies, who fled abroad since 1945 (father and children over 18, men);

- relatives of the elements which are enemies of the regime, who fled abroad before 1944 (the main members of the former bourgeois-landlords parties ... father and children over 18, men);"

The new normative act also regulated that internment in labour colonies shall be done by a Special Commission within the Ministry of Internal Affairs, which would make decisions based on the proposals of the General Directorate of State Security.

Furthermore, this normative act regulates the institution of "*compulsory domicile and compulsory place of work*", establishing also the categories of persons who were to be subjected to such measures, of which we exemplify:

– former tradesmen, former bankers, former big merchants who traded wholesale or retail, who were expropriated or whose goods were nationalised according to the laws in force, former manufacturers whose enterprises were nationalised "

The same normative document also set the competent bodies to order the establishment of compulsory domicile and employment:"*a regional commission formed by the party secretary, the head of the state security region and the head of the militia region; the proposals of this regional commission were to be sent for validation to the Central Commission of the Ministery of Internal Affaires*."

The order also regulated the measure of establishment of the labour battalions where the following categories of persons were to be sent:

– "*traders, small speculators, craftsmen without authorization and unemployed, those who live from the sale of accumulated personal objects and who do not fit into the field of work, etc*."

Regarding the selection of the persons who were to be subjected to such measures, the document in question establishes that the same regional committees are competent, which in turn shall send their proposals to a second commission composed of: a representative of the regional popular Council, a representative of the security and a representative of the militia.

After observing other normative acts, also of lower rank (instructions), it was found that in the prisons or in the colonies of forced labour, a large number of persons

were not released, although the criminal conviction or the so-called administrative measure had expired according to the law.

Thus, by strictly secret instructions, the Council of Ministers of the Romanian People's Republic ordered the formation of a Central Commission consisting of the Minister of State Security, the Minister of Internal Affairs, the Minister of Justice and also the Attorney General of the R.P.R., who would coordinate the activity of the other regional committees set up under the same instructions, all these committes having the task of immediately releasing all prisoners from prisons and labour colonies who had served their sentence, but a series of categories of persons would still not be released, although their period of detention had ended, they belonged to the category of the enemies of the people, respectively [12]:

- "*the detainees who served the penalties but held the function of prefect, mayor in municipalities or urban communes, former senior officials ...";*

- *"... also those who held positions in the management of historical parties, including up to the county committee ";*

– *"the prisoners who were part of the bourgeois security apparatus and other information and counter-intelligence bodies";*

– *"those detainees who were dignitaries of the bourgeois regime (ministers, undersecretaries of state, general secretaries or with similar functions) as well as senators and deputies*".

The same instructions also refer to a category of prison inmates for whom there had never been a sentence of conviction, thus being imprisoned illegally, demanding that they be released.

3 The cases of Vișinescu Alexandru and Ficior Ion, the only ones solved by a final ruling in Romanian justice. Legality of incrimination.

According to previous statements, after the entry into force of the New Penal Code (February, 2014) which incriminated for the first time crimes against humanity, the Romanian judicial bodies investigated and prosecuted only six cases that had as object this international crime. Of these, until now, the national courts issued final rulings in only two cases, respectively in the cases of former penitentiary commanders Vișinescu Alexandru [13] and Ficior Ion [14], convicting them to imprisonment.

Given that the two defendants committed the acts between 1956 and 1963, when the Penal Code of 1936 was in force, which did not incriminate crimes against humanity, it is interesting to analyse how the courts resolved the issue of **legality of incrimination**, so as not to violate the two basic principles of criminal law, namely "*nullum crimen sine lege*" and "*nullum poena sine lege*".

It is understandable that the reasoning identified by the two courts in order to be able to comply with these principles in both cases, is applicable to all cases involving criminal acts which are generically called "crimes of communism".

From the comparative analysis of judgments and decisions in both cases, we also found that the reasoning and arguments put forward by the courts, on the legality of the incrimination, in both cases are identical.

After studying the documents drawn up for the criminal investigation, it was also found that, in both cases, the prosecutor's office, when sending the two cases to court, legally classified the acts of the two offences, as crimes against humanity, according to art. 439 of the New Penal Code.

In both cases, however, the courts first changed the legal classification of the acts in the crime of inhuman treatment, incriminated in art. 358 of the Old Penal Code, thus finding that from the commission of the acts until the conviction of the defendants, a succession of laws in time intervened, and the law most favorable to the defendants was identified as the criminal law of 1968, applying the principle "mitior lex ".

Thus, in their reasoning, the courts consider that the defendants committed the acts in a continuous form, in several repeated material acts and that regarding the material acts that began in 1956, in the case of defendant Vişinescu (at the same time, the defendant, taking over the position of commander of the Penitentiary Râmnicu-Sărat,), which ended on June 17, 1960 (when the provisions of Decree no. 212/1960 came into force, to be mentioned later), their incrimination was provided for by art. 245, art. 248, art. 471 and art. 4641, paragraph 1 and 2, in conjunction with art. 463 of the Penal Code of 1936 (republished in 1948), these making up the constitutive content of the offences of abuse of authority, abusive conduct, injury to bodily integrity or health and, respectively, manslaughter.

Therefore, according to art. 245, Title III "Crimes and offences against public administration" Book II, Penal Code of 1936 (republished in 1948), the crime (offence) of abuse of authority, punishable by correctional imprisonment from 2 to 10 years or a fine, is the act of the civil servant who, by exceeding or by abusive use of his attributions or by violating or not respecting the obligations imposed by legal provisions, among others, causes a damage to the legal interests of the citizens.

According to art. 248 of the same title, Penal Code of 1936 (republished in 1948), the act which constitutes the crime (offence) of abusive conduct, punishable by correctional imprisonment from one to 3 months, is the act of the civil servant who, while in exercise of his function, uses violence against a person, if the act does not constitute a more serious crime.

Pursuant to art. 471 of the Penal Code of 1936 (republished in 1948), the crime (offence) of injury to bodily integrity or health, punishable by correctional imprisonment from 2 months to 1 year, is the act of the person who harms, in any way, bodily integrity or health of a person.

Furthermore, art. 4641 paragraph 1 and 2 in conjunction with art. 463 of the Penal Code of 1936 (republished in 1948 and amended by Decree no. 469/1957), incriminated, as a crime (murder) of manslaughter, the act of killing, inflicted upon a person using cruelty or torture or upon two or more persons, either at once or by different actions, the punishment provided by this norm of incrimination being death.

The completion of defendant's Visinescu acts, incorporating similar material acts, in this case, occurred on April 13, 1963 (at the same time with the transfer of the last batch of political detainees from Râmnicu-Sărat Penitentiary). This moment occurred

after the amendments and completions brought to the Penal Code of 1936 by Decree no. 212/1960.

Thus, in the Penal Code of 1936, Book II, a new title was introduced, Title no. I bis, referring to crimes against peace and humanity (art. 2311-2315), including the crime of inhuman treatment. (art. 2314).

According to art. 2314, paragraph 1, Penal Code of 1936 (amended and supplemented by Decree no. 212/1960), the submission to inhuman treatment of any person under the power of the opponent, shall be punished with forced labor from 5 to 20 years, and, in paragraph 3, an aggravating variant of the crime is set out, consisting of the murder, mutilation or extermination of those provided for by paragraph 1, for which the punishment is death.

Material acts prior to June 17, 1960 and similar acts committed as from that date, based on a single criminal resolution and directed against the same group of political detainees, while under the power of the defendants being considered "enemies" (opponents), constitute a legal unit of crime, in continuous form, according to art. 107, Penal Code of 1936 (republished in 1948), thus achieving the constitutive content of a single crime, provided for, at the moment of its exhaustion, by art. 2314 para. 1 and para. 3 of the same Code, which establishes, for this, the death penalty, the same as the one provided for in the regulation under whose rule the first material acts were committed, for the crime of murder (in the aggravating variants to which those acts which resulted in the death of three political prisoners are circumscribed).

The courts' finding regarding the existence of this adversity report, as a prerequisite for the crime of inhuman treatment, is in accordance with the jurisprudence of the High Court of Cassation and Justice, which, in the recital of Decision no. 2579/2009 (issued by the Criminal Section in File no. 61/81/2008), referring to the same crime, holds that, regarding the historical-political period during which the acts that are subject of the trial in the two cases were committed, the existence of a situation of conflict between the state agents working in places of detention, whom the communist state authorities allowed or tolerated them to act as true torturers, on one hand, and the victims, deprived of their liberty, through their actions of physical and mental suppression, on the other.

The acts which resulted in the death of several political prisoners (in both cases) were considered by the courts to be more than mere acts of murder, thus being held as acts of extermination, since, as highlighted in the recitals of the two judgments, them being in reality the consequence of some unconcealed actions or inactions of the defendants who were performing their functions of commanders at that time, diligently pursuing that result, for the obtaining of which various means were used, causing lasting, intense and torturous suffering most of the time being combined (starting from cruel starvation and deliberate lack of medical assistance to beatings applied with the defendants' direct participation or tolerated by them in total indifference).

Furthermore, crimes against humanity, regardless of their commission, in time of war or peace, were already defined and incriminated, at the time of commission of all material acts held against the two defendants (which could thus ensure their liability for such crimes), by the Statute of the Nuremberg International Military Tribunal, adopted on August 8, 1945 (art. 6, letter c).

Taking intro account all the above considerations, the two courts concluded that the acts (actions and inactions) charged against the defendants were provided for in the criminal law in force at the time of their commission, thus realizing, in relation to the date of exhaustion, the constitutive content of the crime of inhuman treatment, in continuous form, provided for by art. 2314 para. 1 and 3 in conjunction with art. 107, Penal Code of 1936 (amended and supplemented by Decree no. 212/1960), which entails their criminal liability, a fact that they themselves could have anticipated, with a minimum effort of reflection, as the provisions of that law in question were predictable and accessible.

The crime of inhuman treatment was acquired "*ad literam*", also as a crime against peace and humanity, in Title XI, Special Part of the Penal Code of 1968, which entered into force on January 1, 1969.

According to art. 358 paragraph 1, Penal Code of 1968, subjecting any person while under the power of his/her opponent, to inhuman treatment, is punishable by imprisonment from 5 to 15 years, and in paragraph 3, an aggravated variant of the crime is stipulated, consisting in the torture, mutilation or extermination of those provided for by paragraph 1, punishable by death or imprisonment from 15 to 20 years.

Continuing this line of reasoning, the two courts compared by examining the constitutive content of all crimes under previous laws which punished the defendants' acts with the constitutive elements of crimes against humanity, incriminated by the entry into force of the New Penal Code, on 1'st of February, 2014, finding that those are similar enough to be considered absorbed into each other, in the order of their succession, by indicating that the last operation of this kind, took place at the moment of the entry into force on 1 February 2014 of the new criminal law, at which point, the crimes against humanity incriminated by the new law in art. 439, absorbed the crimes of inhuman treatment that was provided for by art. 358 of the Old Penal Code.

This is not for the first time in the modern history of the Romanian justice when it is faced with such a situation related to the legality of the incrimination in the matter of crimes against humanity.

Let us remember that, externally, crimes against humanity were first defined and established in international law on 8 August 1945 by the Statute of the International Military Tribunal in Nuremberg.

Towards the end of the Second World War, as a defeated power, Romania agreed to sign the Armistice Convention on September 12, 1944, in Moscow.

The text of this convention reveals for the first time, enshrined in a Romanian normative act, the notion of war crimes, as follows:. ".. *The Government and the Romanian High Command undertake to cooperate with the Allied (Soviet) High Command, in the arrest and prosecution of persons accused of war crimes* ".

According to the provisions of the armistice, the Romanian judicial authorities had the obligation to investigate and prosecute all persons who committed war crimes and crimes against humanity on the territory of Romania.

Judging by the contents of this paper, it results that at the time of conclusion of the armistice, neither internationally, nor on a national level were such acts defined in legislation or incriminated, therefore the Romanian judicial authorities were in the situation of apparent retroactive application of the content of the criminal law norms which were to be established by the future normative acts, necessary to be adopted for

the fulfillment of the obligations assumed by Romania by art. 14 of the Moscow Armistice Convention.

Furthermore, prosecutors and judges of the International Military Tribunal in Nuremberg were in the same situation, respectively, having to prove that, even in such a case, the principle *nullum crimen sine lege* is not being breached.

Crearly, this situation was the strongest argument that the defendants' lawyers in this trial were able to put forward, when demanding the acquittal of their clients.

Prosecutors appointed to represent the indictment, countered these defense claims by arguing that, although these crimes had been introduced in the Tribunal's Statute in 1945, thus after the commission of the acts to be judged, a fact that had to be considered is that the incrimination of these international crimes was noted over time, in various conventions but also international customs, long before the outbreak of war and the commission of acts brought to trial, therefore it could not be argued in favour of the accused, that they would be judged for acts that were not incriminated at the time of their commission.

Judges of the international military court ruled in favour of the prosecution and convicted or acquitted the defendants, depending on the consistency of the evidence administered in relation to each of them, thus removing the defendants' defense that they were being judged for criminal offences which were not incriminated at the time of their commission.

The solution presented above was also the one chosen by the Romanian judicial authorities when they proceeded to judge the war criminals, according to their obligations following the peace armistice.

In the same sense as already mentioned, is the case law of the European Court of Human Rights, which had been notified on the alleged breach of the provisions of Article 7 of the Convention for Protection of Human Rights and Fundamental Freedoms, judging from the perspective of the principle of legality of incrimination, regarding two cases in which the national courts handed down, after 1990, convictions for acts committed by state agents during the communist regimes in the respective countries (Streletz, Kessler, Krenz v. Germany and Polednova v. Czech Republic cases), found that the considered provisions were not breached, that the fact of not conducting investigations, criminal prosecution and conviction at that time, after the restoration of democratic regimes, does not mean at all that the established acts did not constitute crimes under the national law of each of those states, at the moment of their commission.

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Remarks on the active subject of the offense of embezzlement

Toma G.[1], Nistor I.[2]

[1] *PhD, Assistant Professor, "Hyperion" University, Bucharest (ROMANIA)*
[2] *PhD, Assistant Professor, "Titu Maiorescu" University, Bucharest (ROMANIA)*
E-mails: geo_toma87@yahoo.com, nistoriulia@ymail.com

Abstract

Once with the entry into force of the new Criminal Codes, the legislator intervened and conducted a series of modifications regarding the content of the definition of the offense of embezzlement..

This rethinking of the incriminating framework comes as a consequence of problems signaled by both judicial doctrine and practice, aspects that were signaled long before February 1, 2014.

With regard to the active subject of embezzlement, the person who may have this capacity must meet a number of special conditions which refer to the exercise of a position involving public duties, or which can be found in one of the situations listed in Article 308 of the Criminal Code (manager or administrator of the embezzled money, assets or goods).

Establishing the quality of active subject of embezzlement requires a complex analysis of the *de facto* and *de jure* situation that characterizes the crime, because there are many similarities with other similar acts with which it can be confused.

Keywords: offense, embezzlement, active subject, manager, administrator.

1. Introduction

The legislator provided for the offense of embezzlement in Article 295 of the Criminal Code, Title V – Corruption and offenses in public position, Chapter II – Offenses in public position [1] where it is shown that, "acceptance, use or traffic of money, valuables or any other assets managed or administrated by a public servant, on their or on another person's behalf, shall be punishable by no less than 2 and no more than 7 years of imprisonment and the ban from exercising the right of holding public office."

From the content of the incriminating norm we notice a first modification that the legislator operated, by including the crime among the public office ones, although previously in the old of the Criminal Code, it was appreciated as an offense against property. Thus, in the first form of the Criminal Code of 1969, it was provided for in Title IV, Crimes against Public Property, Article 223. After a number of changes were made it was included in Article 215^1 where it was stated that: "(1) acceptance, use or traffic of money, valuables, and other assets managed or administrated by a public servant, are punishable by no less than 1 and no more than 15 years of imprisonment. (2) In the case in which the embezzlement had serious consequences, it is punishable by no less than 10 and no more than 20 years of and deprivation of certain rights."

The motivation of the new Criminal Code shows that "embezzlement, in the Criminal Code in force, is part of the crimes against property, in the project this offense was brought where it belonged, in the group of offenses in public position because by committing it, the public social service relationship was harmed first and foremost, and only secondarily is the patrimony of a legal person affected. (...)The solution of including the crime of embezzlement is traditional for our law, as it is also enshrined in the Criminal Code of 1936 (Article 236)." [2]

As shown even in doctrinal studies [3] even if this rethinking of the text of the law appears to be insignificant, as long as the conditions of incrimination have not been change, it bears importance, because the concrete examination of the committed act and the assessment of whether or not it is a offense is made from the perspective of the damages that were incurred by the public service relations and only afterwards by the damage suffered by the passive subject of the offense.

The change made by the legislator appears to be a natural one if we consider the most important legal systems in Europe where the classification is similar, the embezzlement being provided together with offenses of public position (Article 432 of the Spanish Criminal Code, Article 314 of the Italian Criminal Code, Article 432-15 of the French Criminal Cod).

The offense of embezzlement provided for in Article 295 shall constitute the standard offense, representing the basic form of embezzlement, and Article 308 – the mitigated version of the crime, which results both from the reduced punishment limits of the crime and from the lower degree of social danger compared to embezzlement in the basic form, determined by the quality of the active subject [4].

2 The active subject of the embezzlement offense

One of the changes made by the legislator regarding the scope of the active subject of the offense of embezzlement is the definition of the notion of public servant that we find in Article 175 of the Criminal Code, respectively, its extension to persons who may be fall into other categories according to Article 308 of the Criminal Code [5].

According to this legal provision, from the perspective of the criminal law, by public servant we understand that it can be a person "who, on a permanent or temporary basis, with or without remuneration:

a) shall exercise the duties and responsibilities, set under the law, to implement the prerogatives of the legislative, executive or judiciary branches;

b) shall exercise a function of public dignity or a public office irrespective of its nature;

c) shall exercise, alone or jointly with other persons, within a public utility company, or another economic operator or a legal entity owned by the state alone or whose majority shareholder the state is, responsibilities needed to carry out the activity of the entity.

At the same time, for the purposes of criminal law, the following shall be deemed a public servant: the person who supplies a public-interest service, which they have been vested with by the public authorities or who shall be subject to the latter's control or supervision with respect to carrying out such public service."

In the version contained in Article 308 (1) of the Criminal Code, the active subject of the offense may also be represented by "persons who carry out, on a permanent or on a temporary basis, with or without remuneration, a duty irrespective of its nature in the service of a natural person of those provided under Article 175 (2) or within any legal entity."

We note that the amendments made to the definition of the civil servant resulted in a resizing of the offense of embezzlement compared to the old regulation where it was necessary to hold the status of civil servant within the meaning of Article 147 of the 1969 Criminal Code. Thus, included in this category could be "any persons who carry out, on a permanent or on a temporary basis, with any position, regardless of how they were invested, a duty of any nature, with or without remuneration, in the service of one of the units to which Article 145 refers. (2) By "servant" we understand any person mentioned in section (1) as well as any employee performing a task in the service of a legal person other than those provided for in that paragraph."

The analysis of the legal text shows that previously there was a double circumstance regarding the active subject, however, the quality of civil servant did not have to be fulfilled and the quality of civil servant was sufficient, within the meaning of the provisions of Article 147.

The conditions provided in the text of the law show us that the bearers of this status are persons who work in a special quality, be it in public or private service, a status to which we associate, in the case of embezzlement, the duties of manager or administrator for the active subject. These considerations justify the fact that the property protected by the incriminating text belongs to both the legal and private entity [6].

It follows from the aforementioned that the notion of "public servant" is sufficiently broad and the emphasis is on the *de facto* exercise of the activity, regardless of the title, the method of investment, the remuneration or the duration of the assignment in the service of a public legal person. [7].

In order to remove possible confusions, the legislator has chosen to provide this detailed definition, as the analysis of the solutions pronounced in the judicial practice shows incorrect classifications.

A careful analysis of the conditions under which the perpetrator carries out his activity can help to outline a complete and correct opinion on the legal framework and to avoid investigation and trial for another act.

In view of these aspects, the doctrine shows that the person who receives, keeps and releases goods and values for a legal person with whom he does not have an employment relationship deriving from an individual employment contract cannot be an

active subject of the crime of embezzlement with the object being the respective goods or values, such deed being able to be included in the provisions Article 238 (abuse of trust) or Article 242 (fraudulent management) [8].

In a decision of the High Court of Cassation and Justice, it was pointed out that "the appropriation by the employee, through a service provision contract, of the money received for the purchase of goods constitutes the crime of abuse of trust, and not of embezzlement, the perpetrator not having the quality of servant" [9]. From the content of this solution, we note that the relationships arising from a service provision contract do not amount to acquiring the quality necessary to have the crime of embezzlement even if the duties may bear resemblance to those conducted by the perpetrator of such an act.

The solution pronounced by the Supreme Court shows that we cannot extend the notion of management to other persons who do not have the quality of employee, carrying out an occasional activity, following a verbal agreement or a service contract, as such these persons cannot have the quality of active subject of the embezzlement crime. A contrary interpretation would also be incorrect because it would ignore the existence of an adjacent legal object of the offense of embezzlement, namely that of the duties involved. [10].

The distinction is very important because in the case of the offense of embezzlement, the criminal action is initiated *ex officio*, while in the case of crimes of abuse of trust or fraudulent management, the criminal action is initiated upon the prior complaint of the injured person. The lack of notification of the criminal investigation bodies by the victim of the crime or the withdrawal thereof, is equivalent to the impossibility of prosecuting the perpetrators in the case of these offenses.

Along with these changes, the question arose as to whether the solution pronounced by the supreme court in an appeal in the interest of the law regarding the legal classification of the act committed by the administrator of an association of tenants is still relevant. As such, it is stated that "the administrator of the association of owners or tenants has the quality of public servant. The act of embezzling, using or trafficking, money, valuables or other property that he manages or administers in his own interest or for another's, constitutes the crime of embezzlement" [11].

In order for such a crime to take place, it is necessary that the owners association be constituted according to the law, in the sense of acquiring legal personality. In the absence of fulfilling the legal steps mentioned in the law of owners' associations, the administrator does not have the status required by the incriminating text and cannot be held accountable for embezzlement.

The need to meet the criteria provided by law on the establishment and organization of the owners' association is imperative, as in their absence we cannot have the crime of embezzlement..

In the doctrine [12] The view was held that between the old Criminal Code and the new Criminal Code, there were no major differences between the provisions which would lead to the ineffectiveness of the provisions of that judgment.

We agree with this perspective, since even in the judgment I mentioned, the Supreme Court stated that "from the corroboration of the provisions contained in the two paragraphs of Article 147 of the Criminal Code, it follows that both a person who is a civil servant within the meaning of the first paragraph of this article and any employee

who performs a task in the service of a legal person other than public authorities, institutions or other legal persons of public interest has the status of public servant referred to in the Article 145 of the Criminal Code."

The opinion is also supported by the changes that we have previously reported and which refer to the widening of the categories of people that can be investigated for embezzlement, because there is no need for the existence of an employment contract, as it is more than sufficient for a person to perform his duties within the meaning of the provisions of Article 175 of the Criminal Code.

As we have shown above, the active subject of the offense of embezzlement is twofold, in the sense that he must be a public or private official, respectively a manager or administrator of the embezzled property. The two features must be fulfilled, the absence of either of them leading to the non-fulfillment of the basic feature of the act.

Regarding the quality of manager necessary in order to retain the crime of embezzlement, the definition we find in Law no. 22/1969 [13] continues to be used and accepted, on the employment of managers, the provision of guarantees and liability in connection with the management of the assets of economic operators, public authorities or institutions, which in Article 1 (1) provides that: "The manager, within the meaning of this law, is the employee of a legal person provided for in Article 176 of the Criminal Code whose main duties are to receive, store and release assets in his administration, use, or even in temporary possession."

From the interpretation of this text of law it results that the management activity carried out by the civil servant is first of all, an activity of receiving some goods, i.e. receiving the quantity, quality and assortment specified in the accompanying documents, and, secondly, it is a storage activity, which means keeping the assets in storage, ensuring their integrity in order to carry out, in a normal setting, the movement of the assets under management. If the integrity of the goods is not preserved, if bad faith is found, the deed will be classified as fraudulent management (Article 242 of the Criminal Code), and if the damage to the integrity of the goods is due to fault, under certain conditions, the offense of negligence in office may be retained (Article 298 of the Criminal Code). Storing also involves appropriate documents (records, registers, documents) showing exactly the quantity of goods and the quality of the goods that were kept. Third, it is an activity of release, handing over the goods. By the release of the goods we mean the handing over is to be made by that official to those who should receive them in the quantity, quality and assortments mentioned in the release documents[14].

Summarizing the idea cited above, in order to be in the presence of a crime of embezzlement, it is necessary for the manager to come into direct, material contact with the goods that were given to him for safekeeping, respectively release. In the absence of direct contact with these goods, we are not dealing with the crime of embezzlement, but with another possible offense.

The aforementioned idea is developed by the court in the motivation of a decision, even conducting a comparative examination to the crime of fraudulent management, in the sense that "a good is considered as such when the person takes possession of it, can consume it, use it, fully applicable situations in the case at hand. In the case of the offense of fraudulent management, the property entrusted to management presupposes a

universality of assets, a situation not applicable in the present case, since the defendant was not managing all the assets of the civil party but only a part of them[15]".

In all situations where the employee of a legal person holds a position by which, according to the law, he acquires the quality of manager, he is considered a *de jure* manager. We may also encounter factual situations in which other employees or even private individuals (for example: the spouse, a relative of the employee) perform acts specific to the management activity, although they do not hold a position that justifies this activity. It can be considered that even this management, which is known as *de facto* management, assigns to the person who exercises it, the quality of manager, with all the consequences that it generates [16]. Therefore, the *de facto* manager is the person who performs specific acts of managing the assets of the legal person, without having obligations in this regard. In order to have the status of active subject of the crime of embezzlement, it is necessary for the legal person to be aware of the actual exercise of the activity, because, otherwise, the perpetrator cannot be considered as having a duty in the service of a public body [17].

Studies have highlighted the need to differentiate between a veritable manager, who does not lack the prerogatives of keeping and releasing assets, and a simple person guarding or transporting the aforementioned, who could have direct contact with the goods by virtue of handling them, which can often materialize on the basis of the guarding or moving of said assets [18].

Without these conceptual clarifications provided by the doctrine, as well as by some of the solutions pronounced in the judicial practice, one could reach confusions that would materialize by the promotion of wrong solutions. Thus, special attention must be paid to the duties and the relationship that is established between the employee and the employer, in order to establish the correct legal framework..

The practical analysis shows situations in which the courts have ordered convictions for committing the crime of embezzlement when the persons convicted fulfilled the quality of *de facto* manager. Thus, it is stated in a recent decision that the act of the defendant who, as a *de facto* manager at the point of work of a company, having appropriated a sum of money from the sale of the company's assets, having given the reasoning that due to family problems he stole the money and said that he would return it later, forms the content of the crime of embezzlement [19]. The motivation of the court is that damage occurred in the company's assets, the perpetrator acted with a form of guilt, meets the quality required by law and the damage, even if it is subsequently covered, was created and cannot be covered later by replacing the property.

The incurring of criminal liability for the *de facto* manager is also dealt with by the doctrine [20], pointing out that the notion of "private servant" is not related to the fulfillment of the condition regarding the existence of the quality of employee, and that the *de facto* manager can be held accountable for embezzlement, but only if he is an employee of the civil servant within the meaning of Article 175 (2) of the Criminal Code or of the legal entity (in the sense of the existence of a work relationship).

A number of clarifications are also needed regarding the notion of administrator, because given the breadth that this term can represent, it can lead, as we have shown before, to confusions in practice.

From the perspective of criminal law, by administrator we mean the official who has among his duties those regarding the conclusion of acts of disposal for the goods of the injured person, or to administer these goods (for example: the director of a legal person) [21].

The administrator, by virtue of the position he holds within the legal entity, may conclude acts of disposition related to the planning, supply, sales, distribution of expenses, etc., such acts most often being attributed to the persons holding management positions within legal entities.

The two notions, even if they seem similar at first sight, involve, as it results from the presentation, a series of essential differences, among which is the fact that the manager comes into direct and material contact with the goods, due to his position, while the administrator maintains a virtual, legal contact with the goods he manages [22].

Another criterion that is important in order to establish the quality of the investigated person is typicality, which has been defined in the legal literature as "the correspondence between the features of the concrete act and the abstract (basic) model provided by the criminalization rule" [23].

The objective typicality presupposes the accomplishment of a comparative evaluation of the legal provision and of the concrete act starting from the quality of the perpetrator, the incriminated action or inaction and its consequences [24].

Even the legislator in the Explanatory Memorandum of the new Criminal Code shows that "the provision of the act in the criminal law presupposes the requirement that the act actually committed, in order to be qualified as an offense, must fully correspond to the description that the legislator makes in the criminalization norm. This correspondence is made in terms of the elements of an objective nature (action, consequence, quality of the active or passive subject, etc.) as well as the elements of a subjective nature (the form of guilt)."

Therefore, we consider that these assessments are mandatory, for in the absence thereof the objective criterion referring to the typicality of the active subject of the embezzlement offense is not met, so that the act cannot form the content of such an offense.

Although such ideas have been promoted and supported with similar arguments before the courts, in practice there are solutions that have convicted people in the first court of trial [25] and maintained in ordinary appeals, although there were all grounds for correcting the error contained in the judgment of the first court [26].

The only solution to be able to correct such an error is to file a cassation appeal based on the provisions Article 438 (1) 7) of the Code of Criminal Procedure, in this sense there even being a resolution of the supreme court [27] showing that, in the case of a conviction for an offense which does not meet the criteria of objective typicality, that is the procedural means of correcting the decision given with regards to that act.

3 Conclusions

Starting with those presented during this paper, we note that it is necessary to make a complex assessment to establish the fulfillment of the criteria regarding the quality of active subject of the crime of embezzlement.

Although these criteria are known and problems have been reported with the interpretation of the notions that characterize the active subject of embezzlement, judicial practice still faces erroneous solutions that can lead to wrongful convictions.

These problems can be remedied by a thorough investigation by the criminal investigation bodies on the activity carried out by the person who has the quality of manager or administrator, respectively by the careful assessment by the courts of the criteria that characterize these notions.

The interpretation of legal provisions can raise serious issues, so even a series of clarifications would be required to prevent possible mistakes. It is also the provisions of Law no. 22/1969, a normative act that surprisingly remained in force with very few amendments, which should be reconsidered, as it should be adapted to current needs.

Reassessing the definition of the active subject for the mitigated form of embezzlement should be a priority for the legislator, as, at this time, the advantage granted to private legal persons and those covered by Article 175 (2) of the Criminal Code is not justified.

The problems we have pointed out in this study are some of the reasons for the existence of a non-uniform practice in the investigation and prosecution of embezzlement offenses, so that a careful assessment of them is required in order to ensure the correct application of legal provisions in the future.

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Interpretation of the provisions of art. 155 par. 1 of the Penal Code

Halil A.[1], Dumitru B.M.[2]

[1]"Titu Maiorescu" University, Bucharest; Doctoral School in Law; Judge Galati Court (ROMANIA)
[2]"Titu Maiorescu" University, Bucharest; Doctoral School Law Field; Judge Constanța Court (ROMANIA)

Abstract

By the Decision no. 297/26.04.2018 of the Constitutional Court published in the Official Gazette of Romania no. 518 of 06.25.2018 has not been removed from positive law the institution of the interruption of the course of the prescription term of the criminal liability, but it was practically returned to the regulation of the interruption of the course of the prescription term from the previous Penal Code.

The limitation period of the criminal liability will be interrupted on the occasion of the accomplishment of a procedural act that must, according to the law, be communicated to the suspect/defendant.

The time when the limitation period is interrupted and a new limitation period begins to run is the date on which the procedural act was performed by the competent judicial body and not the date on which the procedural act was communicated to the suspect or defendant.

Effects of the Constitutional Court Decision no. 297/26.04.2018 occur in pending criminal cases except those who fulfilled special limitation of criminal liability before the publication of the decision in the Official Gazette.

Keywords: criminal liability, limitation period, interruption of the limitation period, special limitation period.

1 General considerations

Criminal liability leads to the creation of a legal relationship of coercion, as a result of committing a crime. It is therefore a legal liability form of result of non-compliance with a rule of criminal law.

The criminal legal report includes the state right to prosecute the person who committed the crime by applying the sanction regulated by law and the obligation of that person to enforce the sanction applied.

However, the right of the state to prosecute offenders it goes out if it is not exercised within a certain period of time.

The prescription of criminal liability is an extinguishment cause of criminal liability, determined by the influence of the passage of time on the need to resort to criminal coercion.

The prescription of criminal liability represents at the same time a legal institution of substantial criminal law (fulfillment of the term being a cause that removes criminal liability), but also an institution of criminal procedural law (fulfillment of the prescription term no longer makes possible the initiation or exercise of criminal action)

The limitation period for criminal liability is the period of time provided by law within which the judicial bodies must identify the perpetrator and bring him to criminal liability by a final decision.

Interruption of limitation for criminal liability is to negate the effectiveness elapsed until the intervention pleading switch, and, accordingly, to run a new limitation period.

2 The evolution of the regulations regarding the interruption of the prescription of criminal liability

Art. 166 of the Penal Code of 1936 took effect between March 18, 1936 – December 31, 1968 and provided for three cases of interruption of the course of prescription of criminal liability, respectively when acts of prosecution or instruction were made; when they have been validly fulfilled before the court any procedural documents that according to the law must be communicated to the offender; when the court handed down a not even final decision.

1968 Penal Code, which entered into force on January 1, 1969 and repealed with effect from February 1, 2014, cover art. 123 interruption of the course of the limitation period by fulfilling any act which, according to the law, it must be communicated to the suspected or the accused person in the course of the criminal proceedings. [1]

In Law no. 286/2009 regarding the Penal Code, art. 155, in its current form, provides that the interruption of the course of the limitation period of criminal liability occurs by the fulfillment of any procedural act in question. [2]

It is therefore established that the provisions governing the interruption of the limitation period of criminal liability have undergone essential changes over time, in particular as regards acts capable of interrupting its course.

Relative to the 1936 Penal Code, conducting an analysis of the legal text, it is observed that although, at first sight, the legal provision seems to be an exhaustive list of cases of application of situations of interruption of prescription, in reality it is only an illustrative enumeration structured according to the stages of the criminal process. Moreover, each of the first two cases exemplified by the legislator of the 1936 Penal Code is subsumed under a multitude of procedural acts, and the third case is only a particular hypothesis for the application of the second case, the court decision being a procedural act.

On the other hand, by referring to the Penal Code of 1968, it is found that, regarding the phase of the criminal investigation, the content of art. 166 of the 1936 Penal Code allowed the inclusion of any act of prosecution or instruction in the scope of procedural acts capable of interrupting the limitation period of criminal liability, while, according to the law, the text of art. 123 excluded from this sphere the documents related to the criminal investigation that should not be communicated to the accused or defendant.

By law, the Romanian legislator has opted for the regulation of an extended field of acts that interrupt the limitation period of criminal liability, including in this category any procedural act performed in criminal proceedings, without distinguishing between those which must be communicated to the suspect or defendant and those which must not be communicated. The legal provision, as regulated, is similar to that of the 1936 Penal Code, with the difference that, according to the provisions of the 2009 Penal Code, the list of interruptive acts of prescription included those issued at trial and not must be communicated to the defendant in accordance with the law.

This legislative solution was appreciated by some of the people involved in the performance of the act of justice as arbitrary, an aspect that led to the notification of the Constitutional Court with the exception of the unconstitutionality of the provisions of article 155 par. (1) of the current Penal Code.

3 Rules interpretation on the interruption of the limitation period of criminal liability

The criminal code of 1969 regulated at art. 123 that the course of the prescription is interrupted by the fulfillment of any act which, according to the law, must be communicated to the accused or defendant in the course of the criminal proceedings.

Therefore, it is observed that the prescription of criminal liability is interrupted by the fulfillment of any act which, according to the law, must be communicated to the accused or defendant in the course of criminal proceedings.

The procedural stage of the case in relation to the act performed is irrelevant.

Thus, the aforementioned text of law refers to the phrase "any act", so it does not concern the nature or type of act performed in question, but only the condition that according to law there is an obligation to communicate it or it is performed in the presence of the accused/defendant.

It follows that it is necessary to start the criminal investigation in personam, as a condition in question.

Within the syntagma meaning "any act" we can include summonses, bringing to light the accusation, initiating criminal prosecution, setting criminal proceedings into action, hearing the defendant.

It does not constitute an act that interrupts the course of the limitation period of criminal liability for the hearing of the perpetrators, as the text of the law refers to the act that must be communicated to a person who has acquired at least the quality of accused.

The 2009 Criminal Code provides for a new provision regarding the institution of the prescription of criminal liability in the sense that the interruption is possible by

fulfilling any procedural act performed during the case, regardless of whether or not, according to law, it must be communicated to the defendant.

Nor is relevant procedural stage in the case involving the act is performed.

According to the new text of the law, it does not matter the nature, the type of procedural act performed in the case or whether the respective act was communicated.

The legislator has practically extended the scope of the acts leading to the interruption of the course of the limitation period. Thus, documents that do not have to be communicated to the suspect/defendant produce the interruptive effect provided by art. 155 of the Penal Code.

We note that the legislator uses the term "procedural document", but that term is not defined by the previous Penal Procedure Code nor the current.

Without having a clear definition of procedural acts, we can still appreciate that they represent ways in which all activities are carried out during a criminal trial, ie they can be remedial documents, procedural acts or procedural documents, as the case may be.

Whatever the procedural act in question, it must be performed by the competent judicial bodies, in accordance with the legal provisions, so without being declared null and to be made before the expiry of the limitation period.

By Decision no. 297 of 26.04.2018 published in the Official Gazette of Romania, Part I no. 518 of 25.06.2018, the Constitutional Court admitted the exception of unconstitutionality and found that the legislative solution that provides for the interruption of the limitation period of criminal liability by fulfilling "any procedural act in question" in the provisions of art. 155 para. 1 of the Penal Code is unconstitutional.

In recitals of that decision the Court held that "art. 155 para. 1 of the Criminal Code are unpredictable and at the same time contrary to the principle of legality of incrimination, as the phrase "any procedural act" in them also includes acts that are not communicated to the suspect or defendant, not allowing him to know the aspect of interruption of prescription and of the beginning of a new limitation period for his criminal liability."[3]

The Court also found that "the previous legislative solution, provided in art. 123 para. 1 of the 1969 Penal Code, fulfilled the conditions of predictability imposed by the constitutional provisions analysed in the present case, as it provided for the interruption of the prescription of criminal liability only by fulfilling an act which, according to law, had to be communicated, in the case the person concerned have the status of accused or defendant."[4]

It follows from the considerations set out by the Court that in the phase of the preliminary acts and of the criminal investigation carried out in rem, on the previous criminal legislation, and respectively in the phase of the criminal investigation in rem in the current regulation, the course of prescription does not interrupt.

However, Decision no. 297 of 26.04.2018 of the Constitutional Court generated different interpretations of art. 155 para. 1 of the Penal Code.

Thus, in a first case-law, it has been held that that decision is not an interpretative one, but one declaring unconstitutionality of part of art. 155 alin.1 of the Penal Code, so that the phrase 'compliance with any procedural act in question' is suspended by law, and in the event that the legislator does not intend to intervene within 45 days of the publication of the decision, its effects shall cease. As this term has expired, it was

appreciated that the provisions of art. 155 have the following content: "The course of the prescription term of criminal liability is interrupted." Moreover, in this interpretation, the provisions of art. 155 of the Penal Code as a more favorable criminal law, finding at the same time that only the general terms of prescription of criminal liability are operable, not being regulated the causes of interruption of period limitation of the criminal liability. It was appreciated that in fact, the only case of interruption of the course of the prescription term is the one provided by art. 155 para. 4 of the Penal Code regarding the admission in principle of the request for reopening the criminal process.[5]

In another jurisprudential orientation, it was appreciated that the interruption of the course of the prescription of criminal liability will take place through an act that was communicated to the suspect/defendant.[6]

Considering the different practice of the courts, the High Court of Cassation and Justice was notified with the settlement of an appeal in the interest of the law aiming at the unitary interpretation and application of the provisions of art. 155 para. 1 of the Penal Code regarding the interruption of the course of prescription of criminal liability by fulfilling any procedural act in question, subsequent to the publication in the Official Gazette of Decision no. 297 from 26.04.2018 of the Constitutional Court.

By decision 25 of 11.11.2019 High Court of Cassation and Justice – Panel for resolving the appeal in the interest of the law in file no. 2060/1/2019, published in the Official Gazette of Romania, Part I no. 86 of 06.02.2020 rejected as inadmissible the appeal in the interest of the law declared by the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice regarding "the interpretation and application of the provisions of art. 155 para. 1 of the Penal Code regarding the interruption of the course of prescription of criminal liability by fulfilling any procedural act in question, subsequent to the publication in the Official Gazette of Decision no. 297 from 26.04.2018 of the Constitutional Court.

It was taken into account that the issue of law exceeds the competence of the supreme court, which does not aim at interpreting the law, but establishing the effects of the Constitutional Court no. 297 from 26.04.2018 Decision.

4 Conclusions

In our opinion, we appreciate that the provisions of art. 155 of the Penal Code continues to take effect, the interruption of the limitation period taking place under the conditions set out in paragraph 34 of the said decision, respectively by performing an act which, according to law, must be communicated to the suspect or defendant.

Obviously, we are talking about remedial or procedural acts that are not sanctioned with absolute or relative total nullity in the preliminary chamber procedure, because the sanction would lack legal effects and efficiency.

Each interruption gives rise to a new limitation period, and this number is not unlimited.

It is true that the law does not regulate the number of interruptions, but these interruptions must not lead to the imprescriptibility of the crime. By the provision provided in art. 155 para. 4 of the Penal Code, a maximum term has been set, after the expiration of which the prescription operates regardless of the number of interruptions. What we

see in art analysis. 155 para. 4 of the Penal Code is the fact that the special prescription is kept within the general institution of the prescription of criminal liability, but it has lost its identity.

The interruption of the prescription course produces effects in rem, by reference to the committed criminal acts and not in personam, different from one person to another.

The time when the limitation period is interrupted and a new limitation period begins to run is the date on which the procedural act was performed by the competent judicial body and not the date on which the procedural act was communicated to the suspect or defendant. This conclusion emerges from paragraph 28 of the Constitutional Court Decision no. 297/26.04.2018.

Indeed, the Court's decisions have effect only for the future, but it must take into consideration that its effects concern criminal cases still pending before the judiciary. The decision has no effect on criminal cases definitively resolved until the date of its publication, unless the objection of unconstitutionality has been invoked in that case and it has been admitted, which is in fact the subject of the review.

The effects of the mentioned decision occur in the pending criminal cases, except for those in which the term of special prescription of the criminal liability was fulfilled prior to the publication of this decision in the Official Gazette of Romania.

We do not agree with the interpretation that the consequence would be that interruptions in the course of prescription preceding the publication of the decision, as a result of procedural acts not communicated to the suspect or defendant, cannot be deprived, retractive effects, as the Constitutional Court in its jurisprudence has ruled in principle that the binding force accompanying judicial acts, and therefore also the decisions of the Court, is attached not only to the operative part but also to the considerations on which it relies.[7]

However, by the Constitutional Court no. 297/26.04.2018 Decision not only the unconstitutionality of the legislative solution was found, but also an interpretation of the respective syntagma declared unconstitutional was given by referring to the regulation from the previous Penal Code.

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[2] Law no. 286/2009 on the Penal Code, with subsequent amendments and completions, "Art. 155 Interruption of the course of prescription of criminal liability: (1)The course of the limitation period for criminal liability shall be interrupted by the performance of any procedural act in question; (2) After

each interruption, a new prescription period begins to run; (3)The interruption of the prescription course has effects towards all the participants in the crime, even if the act of interruption concerns only some of them;(4)The terms set out in art. 154, if they have been exceeded once again, it will be considered fulfilled no matter how many interruptions would occur;(5)Admission in principle of the request for reopening of the criminal trial gives rise to a new limitation period for criminal liability.".

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Mode of consummation of the money laundering offence in relation to the predicate offence of tax evasion

Judge PhD cand. Toader M.-C.

Doctoral School in Law "Titu Maiorescu", University of Bucharest (ROMANIA)
e-mail: costin.toader89@yahoo.com

Abstract

Within this scientific article the author will briefly approach one of the solutions of the judicial practice relating to the assessment of the relationship between the premise offence of tax evasion and the subsequent offence of money laundering in respect of the time of consummation of the principal offence, by tracing fine lines between the concepts of prejudice and proceeds of crime, and at the end of the study will drawn his own conclusion on the case-law solution analyzed in the doctrine of speciality.

Keywords: tax evasion, money laundering, premise offence, prejudice, proceeds of crime, offence consummation

1 Introduction

This scientific approach seeks to address the dichotomous relationship between the tax evasion offence and money laundering by disclosing the general relationship between the two acts and highlighting a few particularities derived from the juxta-position of these acts in judicial proceedings.

Thus, the money laundering offence is a criminal act, conditional upon the existence of a predicate (or premise) offence which produces illicit funds (money or movable or immovable property), resulting in the dissimulation of their illicit origin by means of legitimate transactions. Thus, this offence has a derived correlative character, for its existence is conditional on the prior commission of an offence from which the property subject to a laundering operation derives (it is about a primary-principal offence)[1].

[1] A. Boroi, M. Gorunescu, I.A. Barbu, *Dreptul penal al afacerilor (Business criminal law)*, 5th edition, C.H. Beck Publishing, Bucharest, 2011, p. 290.

But recycling the proceeds of crime by means of fraudulent manoeuvres falling within the objective side of the money laundering offence is conditional on the prior existence of a predicate offence which must be an offence likely to provide a material gain, whose origin may be disguised by deceptive manoeuvres.

Hence, in the dynamic evolution of judicial practice, one of the classic offences having generated the subsequent incidence of the money laundering offence is the tax evasion offence. As an example, in the judicial practice it was held that *as far as it concerns the activity of the defendant C. – limited liability company, it was held that it omitted the registration in the accounting records of all financial transactions and incomes earned by the company, and entered fictitious financial transactions into the accounting records, thereby causing a prejudice amounting to RON 8.972.231 to the State budget, and by means of contracts and fictitious financial transactions disguised the illicit origin of the property obtained, (acts gathering the constituent elements of the tax evasion offence laid down in art. 9 lett. b) and c) of the Law no. 241/2005 as well as of the money laundering offence laid down in art. 29 par. (1) (ex art. 23) of Law no. 656/200).*[2]

The subject of the present article focuses on a case highly discussed by the doctrine of speciality[3], according to which *where there has been no prejudice due to the fact that tax liabilities have not yet matured, it does not mean that the (tax evasion) offence has not been consumed. The tax evasion offence laid down in art. 9 letter c) of the Law no. 241/2005, is consumed when in the accounting records or legal documents have been entered expenses which do not rely on real transactions or have been entered fictitious transactions with the purpose of avoiding tax liabilities, without the existence of the offence to be conditional on the existence of a current prejudice, for the argument that by the money laundering offence the prejudice caused by the offence of tax evasion is whitened in all cases is theoretically erroneous, since this prejudice appears at the time when tax liabilities are due, which is not the same with the time of consummation of the offence; in fact, what is laundered are the proceeds of crime obtained immediately after the consummation of the offence, that is after the entry in the accounting records or other legal documents of expenses which do not refer to real expenses.*

2 Overview of the hypothesis of research and presentation of the personal point of view

Inherently, in order to solve the case-law issue considered above, we will analyze the time of consummation of the tax evasion offence in this case, laid down in art. 9 lett. c) of the Law no. 241/2005 on the prevention and fight against tax evasion.

Hence, although in the doctrine of speciality there are fierce debates on the qualification of the tax evasion offence as an offence of danger/result, in our opinion,

[2] The High Court of Cassation and Justice, Criminal Section, Decision no. 221/A/2019 of 24.06.2019, available on http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=156059.

[3] Bucharest Court of Appeal, Criminal Section I, Decision no. 1520/A of 3rd November 2017, reedified in L. Criştiu Ninu, *Caracterul subsecvent al infracţiunii de spălare a banilor în raport cu infracţiunea predicat (Subsequent nature of the money laundering crime in relation to the predicate crime)*, Romanian Case Law Review no. 1/2019.

the commission of any of the acts laid down in art. 9 par. (1) letters a) to g) of the Law no. 241/2005, without having caused a patrimonial prejudice to the general consolidated budget, must not be considered by the judicial bodies as a tax evasion offence, but, depending on the offence of the tax evasion committed, it could be qualified as the constituent content of other offences (for instance: committing the act of substitution, degradation or alienation by the debtor or third parties of goods seized without causing a material prejudice to the general consolidated budget, could constitute the offence of avoiding seizure, as set forth in art. 261 of the Criminal Rules. Under the terms above, the tax evasion offence must be considered and dealt with as an offence of result, in its substance, considering that the hypothesis according to which it is an offence of danger cannot be accepted, and both doctrine arguments and orientation of judicial practice are able to underlie the theory that tax evasion offences are prejudice offences, since they immediately result in a damage to the general consolidated budget. In default of such a damage, judicial authorities are under the obligation to deal with these acts either as other distinct offences, or as an attempt to the tax evasion offence, possible, but not criminalized by the law, considering *that* when the result required in the incriminating provision has not been created, the offence was not consumed and did not go beyond the attempt stage[4].

Thus, examining further the scientific hypothesis submitted to this research, in respect of the time the tax evasion offence was consumed, in a specialized study[5] it was shown that this consummation of the act takes place at the time of commission of the offence constituting the material element of the objective side, that is, at the moment of entering fictitious transactions into the legal documents, or, in the aggravating hypothesis set forth in art. 9 paragraphs (2) and (3) of Law no. 241/2005, the consummation of the act takes place when the prejudice required by the criminal law is produced.

Having regard to the foregoing arguments, we adhere to the premise that the tax evasion offence has one single moment of consummation, namely at the time of entering unreal commercial transactions into the accounting records. Nevertheless, the thesis according to which its consummation is independent of the time tax liability is due and, therefore of the existence of a prejudice, is questionable, and legitimating such a scientific hypothesis would essentially convert this offence into an act of danger.

Hence, it must be noted that the tax evasion offence contemplates two aggravating circumstances, as foreseen in art. 9 par. (2), *where the acts provided for in par. (1) caused a prejudice exceeding the equivalent of EUR 100.000 in national currency, the minimum limit of the punishment set forth by the law and its maximum limit are increased by 5 years*, and art. 9 par. (3) of the law, *where the acts provided for in par. (1) resulted in a prejudice exceeding the equivalent of EUR 500.000 in national currency, the minimum limit of the punishment set forth by the law and its maximum limit are increased by 7 years.*

A systematic and logical interpretation of these aggravating circumstances leads to the conclusion that art. 9 par. (1) of Law no. 241/2005 which criminalizes the offences

[4] M.-C. Toader, *Este sau nu infracţiunea de evaziune fiscală, infracţiune de pericol? (Is tax evasion or not an offence of danger?)*, published on 17.03.2015, available on www.juridice.ro.
[5] B. Vîrjan, *Infracţiunile de evaziune fiscală (Tax evasion criminal offences*), 2nd Edition, C.H. Beck Publishing, Bucharest, 2016, p. 142.

of tax evasion themselves, envisages as a premise the fact that these offences caused to the general consolidated budget a prejudice not exceeding EUR 100.000. If we accept the idea that tax evasion offences are danger offences, then, in the hypothesis in which the commission of such an offence did not cause any prejudice, judicial bodies will have to consider the commission of the tax evasion offence as provided for in art. 9 par. (1) of Law no. 241/2005. Until 1st February 2014, the tax evasion offence provided for in art. 10 the grounds for impunity and mitigation of punishment, as follows: *where a tax evasion offence laid down in this law has been committed, whether during criminal prosecution or criminal proceedings before the court, the accused person or defendant covers the entire prejudice caused by the first trial date, the limits of the punishment set forth by the law for the offence concerned are reduced to half. Where the prejudice caused and recovered under the same conditions does not exceed the equivalent of EUR 100.000 in national currency, the court may impose a fine penalty. If the prejudice caused and recovered under the same conditions is of up to EUR 50.000, expressed in national currency, the court may impose an administrative fine which is entered into the criminal record.*

Currently, art. 10 of Law no. 241/2005 provides only a ground of reduction in sentence, as follows: *where a tax evasion offence provided for in articles 8 and 9 has been committed, whether during criminal prosecution or criminal proceedings before the court, the defendant covers in full the civil party's claim, the limits laid down by the law for the offence committed are reduced to half.*[6] *Although currently, the amendments to the law on tax evasion do not provide the possibility that the accused person/defendant may benefit from a ground for removing criminal liability, namely a ground for impunity, following the payment in full of the prejudice within the timescales set out by the law, the past existence of such ground of impunity has indeed a practical importance, since as a substantive legal provision, judicial bodies will keep taking it into due consideration, when they will proceed to the enforcement of the most favourable criminal law, in accordance with the provisions of art. 5 of Criminal Rules, in considering the offences of tax evasion committed before 1st February 2014. By accepting the idea that tax evasion is an offence of danger, without being necessary a prejudice, but only the intent to produce it, we would come to the absurd and obviously discriminatory situation, from a legal point of view, that a defendant accused for committing the tax evasion offence who paid in full the prejudice of up to EUR 50.000 caused, before the first trial date, may benefit from the clemency of the court by a decision of case dismissal or termination of criminal proceedings against the defendant concerned based on a ground for impunity, while a defendant, for committing such an offence which did not produce a prejudice, an act which obviously gives rise to a concretely much lower degree of social danger, may not benefit from this impunity ground, because, as there is no prejudice, the defendant cannot cover it.*

Another argument in support of the idea that tax evasion offences must be dealt with as prejudice offences follows from an in-depth interpretation of art. 11 of Law no. 241/2005 which contemplates that *where there was committed an offence provided for by this law, the taking of precautionary measures is mandatory*. Therefore, the law compels judicial bodies (prosecutor, court of law) to take the precautionary measures

[6] M.-C. Toader, *op. cit.*

for the offences provided by the Law no. 241/2005, especially when a tax evasion offence has been committed. The article 249 of the Criminal Procedure Rules regulates the purpose of precautionary measures, *namely, avoiding concealment, destruction, disposal or removal of goods that may be subject to special or extended confiscation, ensuring the enforcement of the fine penalty or judicial costs or the compensation of the damage caused by the criminal offence.* The fact that the law chose to require judicial bodies to adopt the precautionary measures, on a mandatory basis, to the detriment of the option to leave at the choice of the judicial bodies the possibility to take such measures, is mainly due to the patrimonial nature of the tax evasion offences, for the overriding purpose of precautionary measures in tax evasion-related cases is the recovery of the prejudice caused to the general consolidated budget. Moreover, in almost all cases relating to tax evasion, precautionary measures are adopted in order to recover the prejudice, on property belonging to the suspect/defendant/party incurring civil liability up to the payment of the entire possible value of the damage.

In conclusion, we consider tax evasion offence is an offence of result and it is consumed upon recording unreal or fictitious commercial transactions into the accounting books, while these concepts are not perfectly equivalent, in the case of the criminalization provided for in art. 9 lett. c) of Law no. 241/2005, but under the express condition that tax liabilities avoided by these fraudulent maneuvers reach to "maturity" and subsequently become payable, and therefore to have caused a material prejudice to the general consolidated budget.

By solving in this manner the contested issue approached, we hold that the case decision rendered at the start of this scientific study, according to which if there is no prejudice because tax liabilities have not reached maturity, does not mean that the criminal offence has not been consumed, and the evasion offence laid down in art. 9, letter c) of Law no. 241/2005, is consumed when in the accounting records or legal documents have been entered expenses which do not rely on real transactions or have been entered fictitious transactions with the purpose of avoiding payment of tax liabilities, without the existence of the criminal offence to be conditional on the existence of a current prejudice, for the argument that by the offence of money laundering the prejudice caused by the tax evasion offence is whitened in all cases is theoretically erroneous, since this prejudice rises at the time when tax liabilities are due, which is not the same with the time of consummation of the criminal offence, but what is whitened is the proceeds of crime which are obtained immediately after the consummation of the criminal offence, that is after the entry in the accounting records or other legal documents of expenses which do not relate to real expenses, reflects a fair manner of application and interpretation of legal provisions in this matter.

Thus, the criminal offence of money laundering does not always seek to disguise the prejudice caused by the premise offence of tax evasion. The dissimulation of illicit origin of the amounts of money originating from the commission of the tax evasion offence has to do with the proceeds of crime (*fructus*), which may or may not coincide with the prejudice caused by the criminal offence. As a matter of fact, as far as it concerns the quantification of the prejudice caused by the tax evasion offence, in another study[7] it was shown that it is considered the fact that the determination of the

[7] M.-C. Toader, *Evaziune fiscală. Prejudiciu. Latură penală. Latură civilă (Tax evasion. Prejudice. Criminal side. Civil side)*, published on 08.06.2015, available on www.juridice.ro.

prejudice must be related to its definition in civil law, according to which this is a material damage consisting in both actual prejudice transposed in the amount of liabilities whose payment was avoided by the tax payer, and the failed benefit of the owner of these revenues (the State, through its appointed authorities). The High Court of Cassation and Justice delivered a similar decision in a case brought in front of a court of appeal[8]; and we consider that said decision, despite focusing on other substantial criminal institutions, is fully applicable in order to solve the issues submitted for debate in this study: "*(...) but in this case, the defendant may not benefit from the provisions of the more favourable criminal law because he has not fully covered the prejudice brought to the public budget. In solving the civil action, the court must comply with the principle of full compensation of the prejudice caused, which involves both the reparation of the actual damage – lucrum cesans – and the coverage of the material gain, of the loss incurred by the civil party – damnun emergens. In this case, the defendant paid the tax liabilities avoided by the company whose manager he was (the value added tax) amounting to Lei 3.731 and corporation tax on profits amounting to Lei 3.147, but he did not pay the late payment penalties* (damnun emergens) *corresponding to the amount paid, calculated in accordance with the Tax Procedure Code starting from the 25th October 2005, when payment obligations became due, until 11th January 2011 when the defendant paid the actual damage*".

3 Conclusions

In the case of the criminal offence of tax evasion, the product of the offence is immediate and consists of obtaining an eminently material gain. For instance, the proceeds of crime may be the corresponding value of the amounts of money from which a company benefits as a result of the sale of goods (accounting inputs), insofar as their acquisition appears in the accounting records by entering fictitious transactions or operations which do not rely on real transactions, cash collections which may be "whitened" by various manoeuvres which may fall under the single criminal offence of money laundering. In this circumstance, the prejudice of the criminal offence is different from its product and cannot be entirely recycled, because the material damage represents the amount of tax liabilities generated by applying an algorithm set out in the Tax Procedure Code, while the proceeds of crime are represented by the total amount of the payments received by the author. Hence, the definition of the concept of proceeds of crime is found in Directive no. 2014/42/EU of the European Parliament and the Council of 3rd April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union[9]. In accordance with art. 2, point 1, the term "proceeds" means *"any economic advantaged derived directly or indirectly from a criminal offence; it may consist of any form of property and includes any subsequent reinvestment or transformation of direct proceeds and any valuable benefits*". On the other hand, according to art. 248, par. (3) of Law no. 302/2004 on international judicial cooperation

[8] Criminal decision no. 4144/06.12.2011 of the High Court of Cassation and Justice, rendered in appeal, available on http://www.scj.ro/1093/Detaliijurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=86651.

[9] Published in the Official Journal of the European Union no. 127/39 of 29th April 2014.

in criminal matters, *the proceeds of a criminal offence refers to any economic advantage deriving from the commission of the criminal act. It may consist of any form of property created following a criminal offence.*

Consequently, the terminological definition of proceeds of crime is a very comprehensive one and also includes, but not limited to, the prejudice of the criminal offence.

In conclusion, having regard to all the foregoing issues of fact and law, we consider the criminal offence of money laundering in connection with the predicate offence of tax evasion is possible, independently from the prejudice of the offence obtained as a result of committing the criminal offence of tax evasion, provided that such a prejudice exist, because, as shown *supra*, in default of the prejudice, the criminal offence of tax evasion cannot be consumed. The subsequent criminal offence of money laundering aims at disguising the proceeds of crime, which may or may not coincide with the material damage generated by committing the premise offence of tax evasion, and therefore becomes feasible the thesis according to which by the money laundering offence the prejudice caused by the tax evasion offence is not always whitened, for this prejudice appears at the time tax liabilities are due, which is not the same with the time of consummation of the criminal offence, but, what is whitened are the proceeds of crime obtained immediately after the consummation of the criminal offence, namely after the entry in the accounting records or other legal documents of expenses which do not rely on real transactions.

The procedural remedy in the situation of non-capitalization of the legal benefit regulated by art. 19 of Law no. 682/2002 on the protection of witnesses

Pușcă C.-C.

PhD, "Titu Maiorescu" University, Faculty of Law in Bucharest (ROMANIA)
E-mail: cpm84ro@yahoo.com

Abstract

Considering the fact that the effects of the denunciation, provided by art. 19 of Law no. 682/2002 on the protection of witnesses, presuppose a duration in time, its judicial recovery may take place after the final judgment of the conviction of the denouncing witness remains final, context in which we find the existence of a differentiated legal treatment to persons in a similar legal situation, which, due to causes external to their will and conduct, find themselves in the situation of not having recognized the benefit conferred by the provisions of art. 19 of Law no. 682/2002 on the protection of witnesses. This article aims to present and analyze the possibility that the denouncing witness may benefit from the provisions of art. 19 of Law no. 682/2002 also in the case of his conviction before the capitalization of the denunciation.

Keywords: Reduction of punishment, Procedural remedy, Enforcement appeal, Cassation appeal, Right to a fair trial, Legal issues, Non-unitary practice, Code of Criminal Procedure, Law no. 682/2002 on the protection of witnesses.

1 Introduction. Legal provisions subject to analysis

Article 19 of Law no. 682/2002, republished, regarding the protection of witnesses stipulates that "The person who has the quality of witness, within the meaning of art. 2 lit. a) point 1, and who has committed a serious crime, and before or during the criminal investigation or trial denounces and facilitates the identification and prosecution of other persons who have committed such crimes benefit by halving the sentence provided by law".

According to art. 2 lett. a) of the same law, the *witness* is the person who is in one of the following situations: (point 1) has the quality of witness, according to the Code of Criminal Procedure, and through his statements provides information and data of a decisive nature in finding out the truth regarding serious crimes or which contribute to the prevention of the occurrence or to the recovery of special damages that could be caused by committing such crimes;"

It should be noted that art. 1 of Law no. 682/2002 regarding the protection of witnesses provides that "This law regulates the provision of protection and assistance to witnesses whose life, bodily integrity or liberty is threatened as a result of their possession of information or data regarding the commission of serious crimes, which they – have provided or have agreed to provide to the judicial bodies and which have a decisive role in the discovery of criminals and in solving certain cases".

Relevant for the legal issue analyzed is Decision no. 67 of February 26, 2015 of the Constitutional Court of Romania[1], by which, following the admission of the exception of unconstitutionality, it was found that " *the legislative solution regulated by art. 19 of Law no. 682/2002 on the protection of witnesses which excludes from the benefit of halving the limits of the punishment provided by law the person who has the quality of witness, within the meaning of art. 2 lett. a) point 1, and who has not committed a serious crime is unconstitutional".*

In the argument of this decision it was shown that "(…) the grounds for reducing the limits of punishment regulated by the rule subject to constitutional review is to establish an effective tool for combating serious crime, by determining the persons who have decisive information in this regard to provide them to the judiciary bodies. Therefore, decisive and sufficient to grant the benefit of reducing the limits of the sentence is the action of the witness to report and facilitate the prosecution of other persons who have committed serious crimes, regardless of the nature and gravity of the act committed by himself. (…)Thus, the commission by the witness of a crime that does not fall into the category of serious crimes, as they are defined in art. 2 lett. h) of the law, cannot be an element that excludes him from the benefit of the cause of reduction of the punishment limits. As a result, the difference operated by the norm subject to constitutional review between the two categories of witnesses, according to whether or not they committed a serious crime, is not based on a rational criterion and does not justify a differentiated legal treatment (…)".

The constitutional litigation court ruled that, according to the Explanatory Memorandum of Law no. 682/2002 on the protection of witnesses, the legislator aimed to establish a system of measures to ensure the protection of the safety of witnesses who report and facilitate the identification and prosecution of persons who have committed serious crimes. In this regard, in addition to the measures to include witnesses in a special protection program, the legislator also provided for a cause of reduction of the punishment established by the criticized legal text which is, in turn, an effective tool to combat serious crimes, by determining the persons who have decisive information regarding the commission of such an offense to provide that information to the judicial bodies.

[1] Published in the Official Gazette of Romania no. 185 of March 18, 2015.

Subsequent to the publication in the Official Gazette of Romania of the Decision no. 67/2015 of the Constitutional Court, the scope of the provisions of art. 19 of Law no. 682/2002 on the protection of witnesses was much extended, the mitigating effect of the complaint made by the witness – participant in a criminal act occurring, to the extent of meeting all legal requirements, on any crime committed by him, regardless of its nature or gravity.

From the analysis of the legal provisions previously stated, it results that, for reasons related to the discovery of serious crimes, the legislator understood to confer on the person who has the quality of witness, within the meaning of art. 2 lett. a) point 1 of Law no. 682/2002, republished, on the protection of witnesses, and who committed an offense, in the event that he denounces and facilitates the identification and prosecution of other persons who have committed serious crimes, the benefit of a case of halving the sentence.

2 The legal nature of the provisions of art. 19 of Law no. 682/2002 on the protection of witnesses and the conditions of application

The legal issue under analysis is the situation in which the reporting witness has taken all steps to facilitate the identification and prosecution of other persons, his witness statements being used by the judiciary bodies, but the legal benefit regulated by art. 19 of Law no. 682/2002 was not granted to him.

The legal nature of the provisions of art. 19 of Law no. 682/2002 on the protection of witnesses was unequivocally established by the Decision of the Constitutional Court of Romania no. 67/2015, as well as by the Decision no. 3 of February 28, 2018 ruled by the High Court of Cassation and Justice – The panel for resolving legal issues in criminal matters[2].

The decision of the constitutional contentious court showed that the legislator provided through the legal text subject to constitutional review a *cause for reducing the punishment limits* (par. 13 and 16 of Decision no. 67/2015).

Subsequently, by the Decision no. 3/2018 ruled by the High Court of Cassation and Justice – The panel for resolving legal issues in criminal matters, the analysis of the institution provided by art. 19 of Law no. 682/2002 was developed, stating that it has the legal nature of a special *legal cause for the reduction of the punishment, with a personal character*, the applicability of which is conditioned by the cumulative fulfillment of certain requirements.

The same legal nature was retained in the doctrinal works in criminal matters[3], showing that the institution regulated by art. 19 of Law no. 682/2002 constitutes a special legal status, subdivision of *attenuation of the punishment causes,* with direct effect on the process of judicial individualization of the punishment.

Thus, it was shown that art. 19 of Law no. 682/2002 is not a cause of reduction of the punishment appeared after the finality of the case, but a special cause of reduction of

[2] Published in the Official Gazette of Romania no. 327 of April 13, 2018.
[3] F. Streteanu, D. Nițu, *Criminal Law. General Part,* vol. II, Universul Juridic Publishing House, Bucharest, p. 384.

the punishment, with temporary applicability, until the date of the finality of the conviction decision[4].

The legal nature of the provisions of art. 19 of Law no. 682/2002, respectively of special cause, with personal character, of reduction of the punishment limits has as effect their capitalization exclusively within the process of judicial individualization of the punishment, of course subject to the fulfillment of all the legal conditions. Specifically, if the court finds that the legal conditions for retaining the evoked legal provisions are met, it will take into account, when individualizing the sanction, the punishment limits provided by law reduced by half, and will give efficiency where appropriate to the other individualization criteria.

Regarding the requirements to be met for the application of the provisions of art. 19 of Law no. 682/2002, they refer to the *quality of the person* invoking them, the *procedural conduct* that it must adopt and the stage of the case in which the mitigating effects of punishment are pursued.

Thus, the High Court of Cassation and Justice, in the Decision no. 3/2018, showed that, from the perspective of the requirements regarding the *person of the beneficiary*, the analyzed mitigation case can be invoked by the person who has, cumulatively, both as a witness, provider of information and data of decisive character in solving criminal cases serious, in the meaning given to the latter notion of art. 2 lit. h) of the law, as well as the quality of a person who, in turn, *has committed a crime.*

The category of requirements relating to the *conduct of the beneficiary* of the effects of the legal cause of reduction of the sentence subsumes, on the one hand, the formulation by the witness participating in a crime of a complaint against other persons who have committed serious crimes and, on the other hand " by the same witness-complainant, of the identification and prosecution of the accused persons. Both requirements have a cumulative character, the simple denunciation made by the person provided in art. 2 lett. a) point 1 of Law no. 682/2002 on the protection of witnesses, not followed by an active attitude to facilitate the identification of the denounced persons and their prosecution, being insufficient for the capitalization of the benefit provided in art. 19 of Law no. 682/2002 on the protection of witnesses.

It was also shown that the recognition of the effects of the mitigation case requires the intervention of an active attitude of the witness, materialized both in the denunciation and in facilitating the prosecution of other persons, at the latest until the date of final judgment of the case having as object the crime committed by the witness himself.

The law, thus, establishes *a maximum time frame,* the denunciation and collaboration of the interested party may occur at any other time before, regardless of whether he is placed "before the prosecution", "during the criminal investigation" or "during the trial".

Consequently, we can appreciate that this special legal case of reduction of the punishment must intervene at the latest during the trial of the case in which the denouncing witness has the quality of defendant. The legal regulation, as well as the interpretation made by the High Court of Cassation and Justice, take into account that

[4] N. Volonciu, A.S. Uzlău, D. Atasiei, C.M. Chiriță, T.-V. Gheorghe, C. Ghigheci, R. Moroșanu, G. Anghel-Tudor, Victor Văduva, C. Voicu, *The New Code of Criminal Procedure commented,* Hamangiu Publishing House, Bucharest, 2014, p. 1421.

such a special legal case for reducing the sentence, personal, can be applied exclusively in the process of judicial individualization of the sentence applied to the defendant in another case.

The process of judicial individualization of the punishment by the court presupposes first the application of the legal causes for the reduction of the punishment, then, within the new limits, the establishment of the concretely applied punishment. The judicial individualization of the punishment, with the two mentioned stages, represents a matter related to the merits of the case and can be carried out both by the first instance and by the court of appeal.

In this sense, the High Court of Cassation and Justice ruled, by a decision of this case[5], in which it was held that the application of the provisions of art. 19 of Law no. 682/2002 regarding the benefit of halving the punishment limits is a matter of substance, which must be taken into account by the court in the judicial individualization of the punishment as an objective criterion. The application of these legal provisions has consequences on the punishment limits provided for the crime deduced to the court, in the sense of reducing them by half and establishing a punishment between these limits in the complex process of individualizing the punishment made during the trial on the merits.

3 Practical issues regarding the judicial capitalization of the legal benefit provided by art. 19 of Law no. 682/2002 on the protection of witnesses and the procedural remedy in case of its non-application

The hypothesis in which a person made a complaint, was assigned the quality of witness and was heard until the moment of settlement by final decision of the case in which the person is accused of committing a crime, and until the final settlement of the case and the effect occurs facilitating the identification of the denounced persons and holding them liable for the criminal responsibility is one that does not raise problems of interpretation and application of the legal norm.

Thus, the finding of meeting all the cumulative legal requirements, regarding the person and conduct of the witness, as well as the procedural stage of the case in which he is prosecuted or tried, will determine the full attribution of the benefit of halving the special punishment limits.

However, the effects of the denunciation provided by art. 19 of Law no. 682/2002, presuppose a duration in time, respectively the date of formulating the denunciation does not equate with the meeting of the conditions provided by art. 19 of Law no. 682/2002 on the protection of witnesses, in order to operate a reduction of the legal limits of punishment being necessary to carry out procedural acts leading to the identification and prosecution of other persons who have committed such crimes and, consequently, to produce the effects desired by the denouncing witness.

[5] The High Court of Cassation and Justice, Criminal Section, Decision no. 767 of September 20, 2018.

Thus, the court that orders the conviction cannot apply art. 19 of Law no. 682/2002 on the protection of witnesses if at the time of the final conviction no procedural acts are performed as a result of the formulation of the denunciation.

In practice, in most cases, the prosecution of the denounced persons takes place after the denouncing witness has been definitively convicted.

In those circumstances, the question arises whether, in the event that the criminal proceedings in question in which the witness gave statements is extended beyond the time of completion of the proceedings in his own case, the complainant may also invoke the application of the special case to reduce the sentence.

In this regard, the High Court of Cassation and Justice, in the recitals of Decision no. 3/2018, revealing the legal nature of the cause of reduction of the punishment of the institution regulated by art. 19 of Law no. 682/2002, confined its application to the scope of the process of individualization of the punishment and underlined the dependence on the application of the provisions of art. 19 of Law no. 682/2002 of the existence of a criminal process which has as object the deed or deeds committed by the beneficiary of the cause of reduction of the punishment.

Moreover, this perspective on the legal issue analyzed was constantly reflected by the jurisprudence of the High Court of Cassation and Justice, showing that the application of the provisions of art. 19 of Law no. 682/2002 on the protection of witnesses can be invoked only on the occasion of the resolution of the case on the merits[6].

In these circumstances, in order to cover the situations in which the judicial recovery of the denunciation takes place after the conviction of the denouncing witness remains final, some courts have tried to make up for this lack of regulation by interpreting extensively the ground of appeal provided by art. 598 para. (1) lett. d) of the Code of Criminal Procedure.

Thus, even if the doctrine[7] has ruled that the non-retention of a special legal cause for the reduction of the punishment cannot be invoked by way of the enforcement appeal, this not having the nature of a cause for the reduction of the punishment within the meaning of art. 598 para. (1) lett. d) of the Code of Criminal Procedure, in practice, some courts, in order to remove the situation of inequity that would arise from the acceptance of the situation in which the applicability of art. 19 of Law no. 682/2002 would be made only during the trial, interpreted the above provisions in the spirit of the rule, respectively in the sense that these provisions are capable of producing legal effects.

In this regard, it was appreciated that, in the situation where the denunciation formulated during the trial materialized after the final settlement of the case, the provisions of art. 19 of Law no. 682/2002 are applicable by way of the enforcement appeal pursuant to art. 598 para. (1) lett. d) of the Code of Criminal Procedure, being a case of reduction of the punishment.

Perpetuating this non-unitary practice between the solutions of the courts that tried to find a procedural remedy in the situation of non-capitalization of the legal benefit provided by art. 19 of Law no. 682/2002 and those that were limited to finding that the

[6] H.C.C.J., Criminal Section, Decision no. 1478 of March 7, 2006; Decision no. 1292 of October 6, 2016, Decision no. 1375 of November 1, 2016, Decision no. 767 of September 20, 2018.
[7] M. Udroiu, *Sinteze și grile, Procedură penală. Partea specială,* ed. 5, Ed. C.H. Beck, Bucharest, 2018, p. 828.

procedural framework in which this legal benefit could be capitalized was exceeded, the High Court of Cassation and Justice was notified with the resolution of this legal issue, the referring court requesting to find " *If the provisions of art. 19 of Law no. 682/2002 can be interpreted as representing a cause of reduction of the punishment, within the meaning of art. 598 para. (1) lett. d) of the Code of Criminal Procedure?".*

By the Decision no. 4 of 13 February 2020[8], the High Court of Cassation and Justice, the Panel for resolving legal issues in criminal matters, resolved this legal issue, establishing that the provisions of art. 19 of Law no. 682/2002 on the protection of witnesses does not represent a cause of reduction of the punishment within the meaning of art. 598 para. (1) lett. d) of the Code of Criminal Procedure.

The supreme court held, in the recitals of the aforementioned decision, that, in the concrete case of the provisions of art. 598 para. (1) lett. d) the final sentence of the Code of Criminal Procedure, the cause of reduction of the sentence must have arisen after the finality of the criminal judgment, but before the start of execution, during execution or even after its execution, without being able to consider substantive issues or to question the authority of res judicata. However, the judicial individualization of the punishment, including from the perspective of determining the limits provided by law for it, is an intrinsic matter of the merits of the case and acquires the authority of res judicata once the court decision remains final.

Unlike the special legal cause provided by art. 19 of Law no. 682/2002 on the protection of witnesses, which produces effects on the limits of punishment provided by law and which can be used exclusively in the process of judicial individualization of the criminal sanction, the provisions of art. 598 para. (1) lett. d) of the Code of Criminal Procedure, in the variant of any other cause of reduction of the punishment, aims at the occurrence of a subsequent circumstance that may produce effects on the individually determined punishment applied to the convicted person by the final decision, excluding the possibility of judicial reindividualization of the same criminal sanction.

Consequently, at this moment, the procedural remedy that certain courts tried to offer in the situation where the effects of the witness's denunciation could not be capitalized in the light of the provisions of art. 19 of Law no. 682/2002 on the protection of witnesses, for reasons beyond the control of the denouncing party, can no longer be applied given the binding nature of the decision of the supreme court.

Even if, in the case in which the person made a complaint, he was assigned the quality of witness and was heard until the moment of settlement by final decision of the case in which he is accused of committing a crime, but only after this moment occurs the effect of facilitation of identification of the denounced persons and their criminal liability, it was decided that it exceeds the scope of regulation of the provisions of art. 19 of Law no. 682/2002 on witness protection, the recognition of the benefit conferred by the provisions of art. 19 is impeded by a cause external to the will and conduct of the person who filed the complaint and leads to the existence of a differentiated legal treatment from the person in a similar situation, but whose complaint and active attitude have produced the effect of facilitating the identification and prosecution of the perpetrator of a serious crime, materialized in acts and procedural measures, before the final settlement of the case in which the party is accused.

[8] Published in the Official Gazette of Romania no. 278 of April 2, 2020.

However, to exclude an attenuated criminal liability, based on the complaint, the application of the benefit of substantial criminal law derived from the rule under review being conditioned or influenced by factors outside the will and procedural attitude of the reporting witness, such as various procedural incidents, the degree of load of the activity of the judicial bodies or circumstances related to the organization of justice, leads to inequities contrary to the will of the legislator as persons in identical situations, due to an aspect independent of their conduct, end up receiving a different legal treatment on the punishment to be applied.

The application of such treatment leads to the violation of the constitutional principle regarding equality before the law, this differentiated treatment having no reasonable justification as long as the meeting of the second condition imposed by the provisions of art. 19 of Law no. 682/2002 on the protection of witnesses, which aims to prosecute the person/persons indicated in the complaint (capitalization of the complaint), is related to a random element and outside the will of the complainant.

All this was generated by legislation that does not regulate this procedure by which the legal benefit of reduced punishment is applied. In this situation, the jurisprudence has the role of clarifying the way in which the denunciation and facilitation of the identification and prosecution of other persons who have committed crimes is capitalized.

In this regard, practical issues have been raised regarding the judicial body that assesses the fulfillment of the conditions for capitalizing the denunciation (the prosecutor conducting the criminal investigation in the case in which the witness cooperated, the court that solves the case in which the collaborating witness is a defendant), what is the use of the denunciation (the denunciation followed by the continuation of the criminal investigation against the suspect, the initiation of the criminal action, a disposition to sue or even the pronouncement of a conviction, in the first instance or even final), the procedural act which facilitates the prosecution of criminal liability.

Consequently, an express regulation of those conditions, even of the notion of a complainant and the procedure for granting such a status, would put an end to these legal issues and would no longer give rise to a non-uniform practice of the courts.

Another procedural remedy by which the denouncing witness tried to obtain the reduction of the punishment in the analyzed legal situation was represented by the cassation appeal as this appeal, following the admission, could lead to the abolition of the res judicata authority and would bring back the debate of the merits of the case definitively judged, respectively the possibility of applying the legal benefit provided by art. 19 of Law no. 682/2002 on witness protection.

The cassation appeal is conceived as an extraordinary appeal, representing a last level of jurisdiction in which the parties may request the reform of a final decision, the criminal procedural provisions governing the appeal ruling that the cassation appeal seeks to submit to the High Court of Cassation and Justice judging, in accordance with the law, the conformity of the contested judgment with the applicable rules of law. However, the legality analysis of the court of appeal is not an exhaustive one, but limited to violations of the law regulated in art. 438 para. (1) of the Code of Criminal Procedure, by limiting the cases in which it can be promoted, this extraordinary appeal ensuring the balance between the principle of legality and the principle of respecting the res judicata, the legality of final decisions can be verified only for express and limiting reasons law.

Consequently, in the legal issue analyzed, in order to grant the legal benefit provided by art. 19 of Law no. 682/2002, the provisions of art. 438 para. (1) point 12 of the Code of Criminal Procedure which stipulates that judgments are subject to quashing if "*punishments have been applied within limits other than those provided by law*", the case of quashing being incidental in the situation where the established and applied punishment is illegal.

The constant practice of the supreme court[9], in the matter of the cassation appeal, was outlined in the sense that the retention or not of the legal cause of reduction of the punishment provided by art. 19 of Law no. 682/2002 on the protection of witnesses is a matter for the court of first instance, respectively for appeal, being able to establish whether or not a defendant has reported and facilitated the identification and prosecution of other persons who have committed crimes. Retention of the legal cause of reduction of the punishment provided by art. 19 of Law no. 682/2002 is part of the process of judicial individualization of the criminal sanction and is exclusively related to the assessment of the courts of first instance and appeal, the only ones able to apply, under this aspect, the provisions of art. 19 of Law no. 682/2002.

However, in a recent decision[10] (separate opinion), the Supreme Court found that "what is denied is the possibility of applying the state, cause or circumstance of mitigation or aggravation directly in the cassation appeal, without distinction as debated or was foreign to the cause. In a separate opinion, it is considered that any issue that has been debated and can influence the amount of punishment, respectively any state, cause or circumstance of mitigation or aggravation not applied, must be able to be retained directly in the cassation appeal. The hypothesis of direct application in the cassation appeal, if, although initiated and evaluated, the retention of the state, cause or circumstance was rejected by the previous courts, is not essentially different from the hypothesis assumed by the jurisprudence. The evaluation will cover exactly the same limits and conditions as in the case of the state, cause or circumstance already capitalized and applied, respectively on the (legal) conditions, on some aspects of law, and not on the factual elements specific to the accusation.

As a result, not only the application of the rules or institutions of criminal law with the related effects, but also the exclusion of the application should be evaluated in this case of cassation."

Consequently, (in a separate opinion) it was appreciated that the court of appeal in cassation can capitalize and apply the provisions of art. 19 of Law no. 682/2002, in the situation in which this legal cause of reduction of the punishment was not retained.

But we cannot talk about a change in jurisprudence as it is an isolated opinion in this matter. Even if such a view would be outlined in the future, this procedural remedy is also conditioned by the fulfillment of the other conditions regarding the cassation appeal, and the problems generated by the prolongation in time of the capitalization of the denunciation, after the final conviction of the denouncing witness, will persist the exceeding of the term provided by art. 435 of the Code of Criminal Procedure.

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[9] The High Court of Cassation and Justice, Criminal Section, Decision no. 23/RC of 19.01.2017, Decision no. 37/RC of 31.01.2017, Decision no. 467/RC of 23.11.2017, Decision no. 75/RC of 09.03.2018, Decision no. 155/RC of 02.05. 2018, Decision no. 40/RC of 7.02.2019, Decision no. 92/RC of 14.03.2019, Decision no. 166/RC of 10.05.2019.

[10] High Court of Cassation and Justice, Criminal Section, Decision no. 490/RC of 19.12.2019.

4 Conclusions

Even if some courts, in the absence of an adequate regulation, have tried to find certain procedural remedies that would allow the application of the benefit provided by art. 19 of Law no. 682/2002 and in the situations in which the judicial capitalization of the denunciation takes place after the final decision of the denouncing witness remains final, we further find the existence of a differentiated legal treatment towards persons in a similar situation, which, due to external causes and their conduct, they find themselves in the situation of not having recognized the benefit conferred by the provisions of art. 19 of Law no. 682/2002 on the protection of witnesses.

In the absence of a regulation that would allow the re-assessment of the sentence after the conviction has become final as a result of the intervention of a special legal cause to reduce the sentence, in a personal capacity, the application of this case provided by art. 19 of Law no. 682/2002 on the protection of witnesses has a maximum time limit which is represented by the final judgment of his case.

This aspect requires the defendant to show a special diligence in requesting the court to apply the legal benefit provided by art. 19 of Law no. 682/2002 during the procedure in which he has the quality of defendant until the latest at the moment of the judgment on appeal.

If the denouncing witness has not made such a request or, although it has been made, has been rejected by the court, he no longer has a real possibility to obtain a new judicial individualization of the sentence in order to capitalize on the legal benefit provided by the provisions of art. 19 of Law no. 682/2002 on the protection of witnesses.

In view of an obvious discriminatory situation generated by the differentiated legal treatment applied to persons in a similar situation, it is necessary to regulate this unfair situation which raises constitutional issues having regard to the principle of equality before the law and the principle of fairness of criminal proceedings.

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The evolution of regional development in Romania

Petcu A.A.N.

Master's student, "Titu Maiorescu" University, Faculty of Law (ROMANIA)
E-mail: petcu.aidaan@gmail.com

Summary

Regional development policy is one of the most important and complex policies of the European Union, with its objective of reducing economic and social disparities between various regions of Europe, it acts on areas important for development, such as economic growth and the small and medium-sized enterprises sector, transport, agriculture, urban development, environmental protection, employment and training, education, gender equality, etc. A policy of solidarity at European level, it is mainly based on financial solidarity, part of the Community budget achieved through the contribution of the Member States is redistributed to less prosperous regions and social groups (regional development) in order to raise the level of development of regions within the various EU Member States to an average European standard.[1] The evolution of regional development in Romania is an important element of analysis both for the period before joining the Union, as well as during the integration.

Keywords: Europeanization, solidarity, accession, integration, regional development.

1 The support received from the EU in the process of accessing regional development funds

Economic and social cohesion became an area of competence of the European Community with the adoption of the Single European Act of 1986. The Treaty of Lisbon introduced in 2008 another dimension of cohesion in the EU, territorial cohesion. These three aspects of cohesion are supported by cohesion policy and the structural funds, creating the premises for European integration and a new administrative and legal framework for regional and local actors[2]. As for Romania's internal post-communist evolution, it did not correspond to EU conditions for operational and efficient planning and implementation of the Structural Funds. Therefore, it is precisely that this gap has put Romania under considerable pressure by the EU to meet the accession criteria in terms of regional policy rules and principles.

The development of joint projects within the Framework Programs IV, V and VI for research and development, PHARE, TEMPUS, Socrates or e-Europe + programs were an exercise of integration and knowledge of the rules and regulations by Romanian organizations and society[3]. The functioning of the solidarity instruments at regional level was done according to the system of NUTS (Nomenclature of Territorial Units for Statistics) of the European Union. It provides that EU regions were divided according to their population into three categories: NUTS 1 – with a population between 3.000.000 and 7.000.000 inhabitants; NUTS 2 – with a population between 800 000 and 3.000.000 inhabitants; NUTS 3 – with a population between 150,000 and 800,000 inhabitants. The level at which the regional development policy is implemented in the EU member states is NUTS 2, therefore it was important for Romania to take this first step.

Romania has integrated in the process of accession to the European Union, has successfully harmonized the legislation related to cohesion policy with national norms and has created favorable premises for the development of a system of regions at national level, which allows accessing funds for regional development. The aim was to use these funds to raise the level of development of the newly created regions within the country to a higher level of development, competitive with other European countries.

2 EU recommendations on regional policy

The European Commission highlighted the need to consolidate, plan and implement significant regional policies. The European Commission's regular reports indicate that, in the area of regional policy, there has been no regional reform scheme or model for the candidate countries and therefore not for Romania. National policies and regional development plans take into account the specific characteristics of the areas in which they apply, ensuring their specificity is essential for achieving sustainable development[4]. The European Union, through the European Commission's annual reports, identified several issues that needed harmonization, both at national and subnational level of Romania, to meet the accession criteria. However, Romania did not have to follow a certain model that already works in one of the EU Member states. According to the European Commission, the acquis on regional policy did not specify how the management structures of the Structural and Cohesion Fund should have been established but left that to the discretion of the Member States[5]. The European Commission coordinating with the Member States, mapped Euroregions organized at different levels of NUTS and guided states with a predominantly centralized organization to adopt more decentralized governance systems that reproduce the ideas of multi-level governance European level.

Romania's official application for membership of the European Union was submitted on June 22, 1995, together with the National Strategy for Preparation for Accession, almost 5 months after the entry into force of the European Association Agreement, thus expressing a strong desire to be a Member State of the European Union. Following the visit to Romania of Jacques Santer, President of the European Commission [6], on 15 July 1997 a first opinion of the European Commission was expressed on Romania's application for membership for the European Union through Agenda 2000. Romania had to implement specific regional policy instruments while

respecting the principles, objectives and procedures that were to be operational at the time of accession. The European Commission has identified certain pathways to adaptation and internal transformation that correspond to EU regional policy and procedures, instruments and cohesion objectives, and has stated that "*Each partnership takes the form of a multiannual program containing, in a single document, specific commitments from part of the requesting country (on democracy, macroeconomic stabilization and nuclear safety), a national program for the transposition of the acquis communautaire and the financing that the Union will commit to support the preparations of the requesting country*". [7] The measures recommended by the European Commission were related to areas such as legislation, institutional framework and public administration, both at national and local level. The following assessment of the European Commission was expressed in the 1998 Regular Report and refers mainly to the adoption by the Romanian government of the Law on Regional Development [8], considered an important step in adapting regional policy to EU procedures, objectives and principles. The law constitutes the legal basis of the Romanian regional policy and defines the structures at national and regional level for the regional policy. This internal harmonization was considered necessary for the recommendations of Agenda 2000, regarding "*the creation of institutional structures and sectoral coordination mechanisms necessary for Romania's participation in EU structural policy*"[9]. In the 1999 Report, the European Commission states that Romania managed to establish a legal and institutional basis for the development of regional policies, but future progress depends on the successful implementation of this legal basis, as well as the organization of budgeting procedures, including co-financing and multiannual commitments: "*at regional level, the functioning of the system will depends on the capacity of the Regional Development Authorities to strengthen their authority and to develop regional strategies and priorities*"[10].

Through the Regular Report for 2000 [11] the European Commission made efforts to define the main sectors related to the development of regional policy that needed to be harmonized internally for Romania to meet the EU conditions in the field: territorial organization, legal and institutional structures, legislative framework, preparation for programming, financial management and control capacity, statistics, partnership principle, monitoring and evaluation. The evaluation highlighted Romania's modest progress in terms of regional development. One of the main recommendations of the European Commission was to clearly allocate responsibilities in the regional field: "*at national level, between the administrations involved in the future management of funds (ANDR – National Agency for Regional Development and line ministries) and between the participants involved in the Regional Development Councils* ". The 2001 Periodic Report [12] recalls that Romania has a legislative and administrative framework for regional policy in accordance with the acquis communautaire, including territorial organization in 42 counties (corresponding to the level of NUTS 3) and eight groups of counties, called development regions (corresponding to NUTS 2 level).The European Commission considered promising the creation of the Ministry of Development and Forecast for the establishment of a functional institutional basis for regional policy, which had the main responsibilities in this area. Therefore, recommended ensuring greater authority for the new ministry, strengthening regional development institutions by recruiting a sufficient number of qualified staff and allocating sufficient financial

resources to local authorities. The same instructions and recommendations were found in the Periodic Report for 2002 [13]. The European Commission considered that it was necessary to increase the quality of the already existing National Development Plans in accordance with the budgeting and policy-making processes at national level, good monitoring and evaluation in accordance with the requirements of the Structural Funds. The 2003 periodic report highlights the lack of significant progress made by Romania in preparing for the implementation of structural policies and maintains the same recommendations. According to the European Commission, the country's institutional framework for regional development remains poorly defined, "*more efforts are needed to align administrative capacity to the required level, especially in terms of programming, monitoring and evaluation, financial management and control*"[14]. However, the European Commission Delegation in Bucharest issued a press release in April 2003 giving Romania the freedom to choose the right measures: "*The European Commission fully respects the sovereign decisions of the Romanian Government regarding finding the most appropriate institutional and administrative measures*"[15].

In its 2004 Regular Report, the European Commission notes that "*progress has been made on regional policy and coordination of structural instruments, in preparation for the implementation of structural policies, by designating the Managing and Paying Authorities and establishing their responsibilities, and on adopting the National Development Plan. Development during 2004-2006 states that efforts to align administrative capacity to the required level must be continued, so that Romania can make the most of structural instruments*"[16]. In the same context, the European Commission maintains the above-mentioned conclusions "*Institutional framework for regional and the coordination of structural instruments is not yet clearly defined and certain arrangements for financial control and management have yet to be made. Considerable efforts are still needed to strengthen administrative capacity*" [17].

3 Romania's response to the European Commission's recommendations

3.1 *Period 1989-2000*

Starting with January 30, 1991, Romania was included among the Eastern European countries receiving PHARE assistance, the regional development policy in Romania starting to take shape. The framework agreement on the PHARE assistance program was signed in Bucharest on March 12, 1991. Therefore, the initial process of regionalization began to be seen in the context of the European enlargement process, being an illustration of Romania's interest in having access to structural funds in the period following accession.

Also, in 1991, a first Law of local public administration was adopted, which established the current structures of the local organization on two levels. The first level consists of local administrative units: rural communes, cities and municipalities. The second level consists of 41 counties, which combine specific elements to self-government and decentralized state administration. This Law on local public administration

does not mention the regions as part of the administrative-territorial units of the Romanian state and does not question the centralized and unitary nature of the state.

Confronted with the requirements expressed by the EU in favor of regional adaptation, an institutional reform was initiated in Romania in the period 1997-1998, which aimed to create 8 development regions by voluntary association of neighboring counties, without being a territorial administrative unit and without legal personality. Therefore, the most important step towards regional development was the adoption of Law no. 151/1998, which established the legal framework for the development of the regions and established the objectives of the national policy in the field, the institutions involved, the competences and the specific instruments for the promotion of the regional development policy. Romania has agreed with the European Commission on the territorial organization according to the NUTS classification, this being considered a progress in the negotiation process for EU accession. According to the European NUTS system [18], Romania was organized in 8 NUTS 2 level regions (North-East, South-East, South Muntenia, South-West Oltenia, West, North-West, Center, Bucharest – Ilfov) and 42 counties NUTS level 3. Two institutions have been provided at the level of each region: a Regional Development Agency (executive authority) and a Regional Development Council (advisory authority). At the national level, two representative institutions have also been created, the National Agency for Regional Development (NADR) and the National Council for Regional Development (NCRD).

3.2 *Period 2000-2007*

The initiatives formulated during this period refer to the adoption of laws in order to develop the decentralization process such as the Law on Local Public Administration [19] and aim to introduce a series of institutional changes that reflect the requirements and recommendations of the European Commission in the annual reports. In the 2000 Regular Report, the European Commission welcomed the measure of dividing the National Agency for Regional Development (ANDR) into the Ministry of Development and Forecast and the Ministry of Small and Medium Enterprises. However, in June 2003, the Ministry of Development and Forecast was abolished and its powers were redistributed to other ministries and agencies. The European Commission criticized this action through 2003 Regular Report [20]: "*Subsequent government reshuffles have reduced the number of ministries (through the merger and redistribution of powers), thus affecting the structures designated for the programming and management of post-accession structural funds. The abolition of the Ministry of Development and Forecast, as well as the transfer of its competencies at regional level for the benefit of the Ministry of European Integration are extremely significant from this point of view*". Therefore, in the case of regional policy, in Romania it can be seen that decentralization on paper was not automatically followed by a real delegation of power from the center to regional institutions and actors.

3.3 *Post-accession period*

In the context of Romania's accession to the European Union in 2007, Romania's national development policy has adapted more and more closely to the policies, objectives, principles and regulations in the field community, in order to ensure a European socio-economic development and significant reduction of disparities with the European Union [21]. According to statistical data published by the European Commission in 2006-2007, Romania registered a significant improvement in real convergence in terms of gross domestic product/capita purchase, the level of this indicator reaching in 2006 about 37% of the EU average, compared to 2000 when it was about 25.2%.

This being positive, we note that Romania, as an EU member state, has set itself the objective of promoting economic and social cohesion by reducing disparities between the levels of development of its various regions, no matter how late or less favored it were. The aim was to increase trade and economic integration, which would spontaneously lead to convergence. Capital investments should be targeted at less developed regions, which tend to be relatively under-capitalised and where, as a result, capital can make higher profits. Increasing investment should translate into improved productivity, which in turn should lead to higher levels of income and real convergence at EU levels [22].

4 Concepts specific to European economic and social cohesion policy

4.1 *National Regional Development Plan*

The National Regional Development Plan (NRDP) is the document of strategic planning and multiannual financial programming that guides and stimulates the socio-economic development of Romania in accordance with the Cohesion Policy of the European Union. Based on the technical discussions with the European Commission on Chapter 21 "*Regional policy and coordination of structural instruments*", the elaboration of the NRDP 2007-2013 was started in 2004 based on the idea that this document was mainly focused on priorities and objectives compatible with the areas of intervention for Structural and Cohesion Funds. The plan tried to reflect as accurately as possible Romania's stringent development priorities at national, regional and local level and proposed to support them through concentrated public investments, allocated on the basis of programs and projects. Regarding the NRDP Strategy, taking into account the global objective of reducing development gaps with the EU and starting from a comprehensive analysis of the socio-economic situation, six national development priorities have been established: increasing economic competitiveness and developing the based economy knowledge, development and modernization of transport infrastructure, protection and improvement of environmental quality, development of human resources, promotion of employment and social inclusion and strengthening of administrative capacity, development of rural economy and increasing productivity in the agricultural sector, reducing development disparities between regions.

The National Regional Development Strategy (NRDS) represents the vision of the Romanian Government through which the development priorities of the regions are established. For the period 2014-2020, NRDS aims to continue and update the development directions formulated in the National Regional Development Plan 2007-2013, which contain elements of strategy implemented through the Regional Operational Program 2007-2013, as well as other national programs. The content of NRDP 2007-2013 under the priority *"Reducing development disparities between the country's regions"* and the ROP 2007-2013, in terms of investment priorities, remains valid in the period 2014-2020, in the context of cohesion policy for the period 2014-2020.

The dialogue with the European Commission has consistently emphasized the need for the existence and continuity of a long-term strategic vision for regional development at national level (20 years), as well as the need to use existing structures experience from the period 2007-2013, where it is possible, instead of radical changes, which involve high financial and operational costs [23].

We can underline that the continuation of national medium and long-term development plans, as well as access to financial resources for regional development and the implementation of objectives, is an important element of stability and a premise for increasing the level of development of the 8 regions from Romania.

4.2 *Regional Operational Program*

The Regional Operational Program (ROP) is a program that implements the important elements within the National Regional Development Strategy, contributing to the achievement of the general objective of the National Regional Strategy, namely the reduction of disparities between the regions of Romania. The Regional Operational Program started in 2007-2013 and was continued by ROP 2014-2020. The financial allocation was progressively higher, from EUR 4.71 billion to EUR 8.25 billion, representing approximately 23% of the total financial allocation for the period 2007-2013 (19.677 billion euros) [24] and approximately 36% of the financial allocation for the period 2014-2020 (22.4 billion euros) [25]. The Program is being financed from the state budget and co-financed by the European Regional Development Fund, one of the Structural Funds of the European Union.

The comparative analysis of the development regions highlights after 1990 a process of increasing the disparities of economic and social development between the regions. The differences between the most developed region (Bucharest-Ilfov) and the least developed (North-East Region), in terms of GDP/inhabitant, have increased almost three times. At the same time, there has been an increase in disparities between the regions located in the western half of the country (North-West, Center and West), with positive economic developments and a growing level of numerous indicators of economic and social development, and the least developed located in the eastern half of the country (North-East, South-East, South and South-West). The impact of economic restructuring especially in mono-industrial areas, whose population has been affected by unemployment due to the closure of unprofitable state-owned enterprises, the preponderance of rural activities and the inability to attract foreign direct investment have led to increasing disparities within regions. Thus, we can mention the border regions with the Republic of Moldova and Ukraine and the less developed regions along

the Danube. With the exception of Bucharest, whose situation is special, economic growth has followed a west-east direction due to the proximity of western markets and their lower dependence on the primary sector, which benefit to a greater extent from foreign direct investment. The objective of the program, established through these analyzes, was to support the lagging regions in terms of development by capitalizing on their specific resources, in order to accelerate economic growth.

Another concrete example of the positive effects of European integration is the way to achieve this specific objective of the program, the differentiated allocation of EU regional development funds, depending on the general level of development of the regions (inversely proportional to the level of GDP/capita). Thus, less developed regions should benefit proportionally from a higher financial allocation.

Philippe Martin, based on the principles of "*economic geography theory*", explains the role of regional policy[26]. Firms benefit from the effects of congestion (resulting from the quality of infrastructure, concentration of human resources, etc.) and economies of scale. When markets open up and transaction costs are low, firms naturally tend to gather in areas where these agglomeration effects are strongest or can best exploit economies of scale (i.e., closer to major markets) consumption. If labor markets are rigid, the concentration of activities can lead to higher unemployment disparities in the regions than is politically bearable. Therefore, the role of regional policy: to bring jobs to the people.

5 Implications of the Brexit negotiation process in regional development

Following the United Kingdom's decision to withdraw from the EU, a process of political reflection on the implications of this approach has been launched at Union level. The EU-27 negotiations were conducted on the basis of guidelines adopted by the Special European Council (art. 50) of 29 April 2017. Romania's interest in the negotiation process followed three strategic axes: the respect for the rights of Romanian people located in Great Britain, the concern for financial allocation for European funds (cohesion, regional development and agriculture) and the ensuring for unaltered effectiveness of the formats of cooperation in the field of defense and foreign policy to which the United Kingdom is a party, with the aim of guaranteeing national security[27].

From the perspective of budgetary implications, Romania supported the United Kingdom's compliance with the financial commitments assumed for the period 2014-2020, so that the envelope of EU funds is not affected, as well as the package approach of all financial-budgetary aspects, through a single statement financial. Romania's mandate on the financial statement aimed at the United Kingdom to comply with its obligations regarding the financial contribution to the European budget (according to Eurostat in 2015 the share of the United Kingdom's contribution to the EU Budget was 15.35%) assumed in the current Multiannual Financial Framework, including payments to be made after the date of withdrawal from the EU. This objective is justified by the need not to affect the budget of European funds, in particular agriculture (direct payments – Pillar I of the CAP and rural development – Pillar II of the CAP) and regional development.

6 Conclusions

Romania has expressed its determination to follow the path of European integration by promoting a series of actions designed to meet the requirements of the European Union in the field of regional policy. On the one hand, legislative projects were issued and institutional measures were taken related to the issue of administrative-territorial reform. On the other hand, proposals were made to reform the state organization, proving the central concern for this issue.

Europeanization and the EU's impact on Member States and candidate countries, specific conditionalities in the field of regional policy, as well as the fact that the EU has not imposed a model of regional reform for candidate countries, bring to the foreground some key features that characterized regionalization in Romania. First, the issue of regionalization has lost its inflammatory character since the first years of the transition and has become a part of the internal reform process. Secondly, the prospectus for regional reform emerged mainly as a result of European conditionality, as the main mechanism for Europeanisation and led to the creation of a regional level, consisting of 8 development regions corresponding to the NUTS 2 system.

Reducing economic disparities is a long process, whether it is about discrepancies between countries or between regions of the same country. Therefore, we can say that the favorable effects of Europeanization in the field of regional policy have led Romania to a positive evolution in terms of the development of the newest created regions and the reduction of economic and social disparities in these regions.

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Considerations regarding the systematization of political and diplomatic instruments of international dispute settlement

Damaschin R.[1], Mihăilă M.G.[2]

[1]Alexandru Ioan Cuza University, Iași, Faculty of Law (ROMÂNIA)
[2]National University of Political Studies and Public Administration, Faculty of Public Administration (ROMÂNIA)
E-mails: robert.damaschin@yahoo.com,
georgiana.mihaila20@administratiepublica.eu

Abstract[1]

The current paper seeks to analyze the main political-diplomatic methods that apply in the event of an international dispute between two or more states. Thus, based on the principles of strict limitation on the right to use force against another state, states faced the challenge of solving international disputes through means that do not rely on the use of force or the threat of it. In compliance with article 33 of Charter of the United Nations[2] which states that in case there is any dispute that can endanger the maintenance of international peace and security, the parties need to determine, through peaceful means, the suitable solutions. The peaceful settlement instruments of international disputes are divided into three categories: political-diplomatic means, judicial means, and settling disputes through international organizations. However, the current paper will only focus on analyzing the political-diplomatic means of dispute settlement, as these methods are the most pervasive considering their intrinsic advantages.

Keywords: political-diplomatic instruments, dispute, equity, sovereign, jurisdictions, United Nations.

[1] Coord. PhD Associate Professor C.-M. Diaconu, *Ion Ionescu de la Brad*, University of Agricultural Sciences and Veterinary Medicine of Iași, Faculty of Agriculture, Department of Agro-Economics.
[2] United Nations, United Nation Charter, (n.d.), available online at https://www.un.org/en/charter-united-nations/, visited on 27.03.2020.

1 Introduction

Trough an overview of the means that states chose in order to settle disputes throughout history, armed aggressions are identified at the forefront. Thus, the states that had good military strategies, capacity, and technical prowess, managed to inflict their authority. With the evolution of society and the principles that govern it, the interest to have collaborative relationships between states and to find means to maintain them also heightened.

The Permanent Court of International Justice (or the World Court, created in 1920 and replaced with the International Court of Justice in 1945) defined the concept of an international dispute as a disagreement on a point of law or fact, a contradiction, an opposition of legal views or interests. The term international dispute is often used to describe the situations in which the parties of international law are in dire situations due to disagreements, litigious behavior or have conflicting interests regarding a subject. The term does not have a precise meaning, as it is not defined in any international documents. Based on the United Nations Charter, the term can be understood as related to any action that can endanger international peace.[3] The literature, however, correlates disputes with conflicts and lawsuits.[4]

With reference to armed attacks, peaceful means of dispute settlement have been constructed with the political-diplomatic aspects in mind. Some of the instruments regulated are negotiation, good offices, mediation, international conciliation, international enquiry. In article 33, chapter VI of the United Nation Charter[5] it is affirmed that states that are part in any dispute which is likely to have repercussions on the maintenance of international peace and security have the duty to commit to seeking a solution to their dispute through treaties, enquires, mediation, conciliation, arbitration, or to resort to regional agencies or arrangements.

Each of the politic-diplomatic instruments of settling disputes between states is based on one of the essential principles of international law, primarily the principle of peaceful settlement of international disputes. The first document that professed the principle in its contents is the Hague Convention of 1907. The Covenant of the League of Nations or the charter of the League of Nations signed on 28 June 1919 represents the document that founded the League of Nations, one of the organizations which sought to the maintenance of peace and, at the same time the implementation of the nonaggression principle and the creation of diplomatic instruments for solving disputes as its primary goals. A third document that impacted the domain is the Briand-Kellogg Pact, known as Pact of Paris (27 August 1928). The importance of it is embedded in the history of the 20th century as it advocated for eliminating war as an instrument and method of solving disputed and political differences.[6]

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[3] L.M. Trocan, *Considerații generale privind diferendele internaționale,* Analele Universității "Constantin Brâncuși" din Târgu Jiu, nr. 2/2012.

[4] D. Popescu, A. Năstase, *Drept internaţional public*, Casa de Editură şi Presă "Şansa", Bucureşti, 1997, p. 320.

[5] Issued by United Nations, San Francisco, 26 June 194, published in Monitorul Oficial României from 26 June 1945.

[6] In order to reach the set goal efficiently in 1920 The Permanent Court of International Justice was founded, also known as the World Court.

Regarding Romania's position on this issue, it is noteworthy that the Romanian state welcomed the idea of the Briand-Kellogg Pact, since the beginning of negotiations for it, between the government of France and the United States of America. With the signing of the Litvinov Protocol[7], in Moscow, by which its signatories undertook to renounce war as part of state policy: "Protocol for the Immediate Entry into Force of the Treaty of Paris of August 27, 1928, Regarding Renunciation of War as an Instrument of National Policy"[8]. Also, Romania became a member of the United Nations, the forerunner of the League of Nations or also called the League of Nations, only in 1955, on December 14, Romania's desire to be part of this organization was officially expressed from the beginning 1946. Romania's accession to the United Nations was achieved by the resolution of the UN General Assembly, respectively A/RES/995 (X), together with 15 other states.[9]

In addition to the non-jurisdictional framework and methods set out above, there is also a certain institutional jurisdictional framework for resolving international disputes. They are characterized by the fact that the solution offered is binding on the parties. This category refers to international arbitration, through an agreement, the states expressing their consent to grant the dispute to a third party, subject to its final decision. Over time, arbitration has taken many forms, sometimes resorting to arbitration offered by the head of state, as in the case of the arbitral award handed down by the King of Spain in 1906 in respect of Honduras and Nicaragua. Art. 37 of the 1907 Convention: "The purpose of international arbitration is to resolve disputes between states through judges elected by them and on the basis of respect for the law. Recourse to international arbitration implies the obligation of the parties to submit to the arbitral award in good faith".[10]

Among the entities with international and even global impact, in terms of political and diplomatic methods of resolving disputes, we turn our attention to some of them, such as the United Nations, founded on October 24, 1945, with a threefold purpose, namely the prevention of disputes. internationalization, the settlement of conflicts that may arise, the establishment of collective measures to prevent and blur the use of force. The International Court of Justice is the main judicial body of the United Nations, which operates in accordance with its statute, is permanent and, according to the provisions of art. 3 of the Statute, "the court is composed of 15 members". The jurisdiction of the International Court of Justice shall be governed by all cases brought before it by the parties and by all matters referred to in the Charter of the United Nations or in the Treaties and conventions in force. (art. 36 of the Statute). States agree to accept the jurisdiction of the International Court of Justice, which becomes binding, in relation to any other State accepting the same obligation, its jurisdiction being binding on all legal disputes concerning: the interpretation of a treaty, any international matter, the existence of any fact, whether would have established, would constitute a

[7] 9 February 1929, Moscow.
[8] Moscow Protocol/Litvinov Protocol – Moscow, February 9, 1929 – named after the chief Soviet diplomat, Maxim Litvinov.
[9] Ministry of Foreign Affairs, (n.d.), available online at https://www.mae.ro/node/42818, visited on 27.03.2020.
[10] C. Moldovan, *Drept Internațional Public: principii și instituții fundamentale,* Ed. Hamangiu, 2017, p. 440.

breach of an international obligation, the nature or extent of a remedy due for a breach of an international obligation.

In certain situations, "ad hoc" courts may be set up, ie for a specific case, such as the International Criminal Tribunal for the former Yugoslavia, which was established by Decision no. 827 of the UN Council, approved on May 23, 1993, is based in The Hague, and it should not be confused with the International Criminal Court, also with its permanent headquarters in The Hague. Another court of law established for a specific purpose is the International Tribunal for Rwanda, which by its statute is empowered to try persons found responsible for serious violations of international humanitarian law, committed in the territory of Rwanda and Rwandan nationals responsible for such violations. on the territory of neighboring villages between 1 January 1994 and 31 December 1994. (Article 1 of the Statute of the International Tribunal for Rwanda).

These universal entities are joined by regional organizations such as the Organization of American States. It is based in Washington DC, and includes 35 member states and 24 observer states. Its main purpose is continental security and the peaceful settlement of disputes between Member States. In the same vein, we identify the Organization of African Unity, created in 1963 and replaced in 2002 by the African Union., conflict prevention, resolution and management. To the latter, in the same idea, we remind organizations such as the Arab League and the Organization for Security and Cooperation in Europe.

2 Main political and diplomatic methods of dispute settlement

2.1 *Negotiation*

Negotiation is the main method that involves the existence during the negotiation process of at least two partners, in this case, of at least two states in international conflict, which aim to reach a consensus, each adjusting its requirements in -a flexible manner and each exposing his desires. International law has established negotiation as the main method of resolving disputes between two states, which is also the very basis of diplomacy. Direct negotiations are the most dynamic and effective means, the least expensive and available to the parties, which, depending on the breadth and scope, can be bilateral or multilateral. Also, during the negotiations, states can accept various forms and methods of resolving disputes between them. In practice, some authors argue that all peaceful means of resolving disputes are initiated in the form of negotiations, ending under their auspices.[11]

Among the characteristics of this method we can mention the flexibility it has in resolving disputes and the extended applicability, in the sense that it can be used in resolving several types of disputes, such as political, legal or technical.[12]

[11] C. Moldovan, *Drept Internațional Public: principii și instituții fundamentale,* Ed. Hamangiu, 2017, p. 433.
[12] A.M. Hamza, M. Todorovic, *Peaceful settlement of disputes,* Global Journal of Commerce & Management Perspective, Global Institute for Research & Education, 2017.

As for the results of the negotiations, they may or may not be successful. Where the result requires the agreement of the parties, they shall issue a document attesting to the terms of the agreement. The issued document can be an agreement, a declaration, a communiqué or a memorandum, depending on the complexity of the issue and the established terms. If, as a result of the negotiations, the parties do not reach a common ground, then the parties may postpone the negotiation process or issue a statement attesting to the inefficiency of the negotiation. If the negotiations have referred to the interpretation of a treaty or have concerned its application, one of the parties may denounce the other.[13]

Regarding the "negotiation" method in relation to pre-defined doctrinal ideas, they can be divided into several levels, including negotiations between two or more states, on the conduct of a conflict or negotiations on certain international negotiations, government policies or collaborations between states. Over time, the concept of negotiations has grown, finding its applicability in many spheres of social life, concluding that "everything is negotiable." That said, negotiation in international law has a very strong outline and applicability, especially with regard to state policies and actions taken by a particular state, which also has effects on other states. According to A. Rivier, "diplomatic negotiations are not executive and do not necessarily involve a dispute, an international conflict, a divergence of views. States often negotiate in order to achieve, by mutual agreement, the international process".

2.2 *Good Offices*

In 1899, the first conference on the normative framework of wars and war crimes was held in the Netherlands, in The Hague. The signatory powers of the Hague Convention of July 29, 1899, after negotiations, decided to replace the methods of resolving disputes between them, used by them until then. Title II, Article 2 of the 1899 Convention, states: "In the event of total disagreement or conflict, before recourse to arms, the signatory Powers, persuaded to have recourse, other friendly powers "(a. trans.)*[14]*. This 1899 Hague Convention, the Netherlands, was succeeded by the 1907 Hague Convention. Good offices, according to the Dictionary of Public International Law, are defined as "a peaceful means of resolving international disputes, which consists in the action taken against the States Parties to the dispute by a third party – a State or an international organization, on its own initiative or at the request of the Parties – in order to persuade the Parties to settle the dispute through diplomatic negotiations. A second definition of good offices is the interposition of a third party in conflicting interstate relations in which direct contact between them is impossible due to political obstacles, doubled by legislative difficulties.[15].

Making an analogy between the two definitions, the first offered by the Dictionary of Public International Law in 2006, and the second, offered by D. Chilea, in his book Public International Law, it can be seen that good offices involve, in an indispensable

[13] United Nations, *Handbook on the Peaceful Settlement of Disputes between States,* United Nations Publication, New York, 1992.
[14] Yale Law School, Lilian Goldman Law Library, The Avalon Project- Laws of War – Text of Convention Hague (I).
[15] D. Chilea, *Drept Internațional Public,* Ed. Hamangiu București, 2007, p. 128.

way, the presence of a third state or of an international organization, or even a person with special influence, which will facilitate the negotiations carried out, peacefully, in order to resolve the conflicting aspects between two states. One of the mandatory conditions for using the "good offices" method is the acceptance, by both states, of this initiative. Such action may be taken both at the request of the parties to the dispute and at the own initiative of the third State or of an international organization, which will require the prior consent of the States in dispute. The method of resorting to one of the peaceful means of resolving conflicts, namely "good offices" has as its primary purpose the facilitation and development of a favorable context for bringing to the table the negotiating states in conflict, as well as ensuring the highest standard in order to achieve them.[16]

The 'good offices' method, in which a third country, which is outside the existing conflict between other states, intervenes in order to facilitate communication between states in conflict situations and which has the role of even diminishing and smoothing the possibility of new divergences, some relevant examples in this regard are: The case of good offices undertaken by the USSR on the India-Pakistan conflict of 1965. Thus, by the intervention of the great powers, the "Tashkent Declaration" was given[17], through the content of which the two countries in conflict put an end to the misunderstandings arising from the desire to take over the authority of the Jammu and Kashmir regions, as well as their population and resources.

In 1918 the United States used the method of good offices, intervening in the case of the states of Chile and Peru, regarding the border between Arica and Tacna. The United States intervened in this case, with a view to creating premises aimed at resolving the disputes between Peru and Chile over borders.[18]

In the same vein, "good offices" are not only undertaken by states, in this sense, an emblematic situation is that in which the Secretary-General of the United Nations, in October 1962, granted good offices in the dispute over the crisis. from the Caribbean, the United States and the U.S.S.R.

2.3 *Mediation*

American authors Robert A. Baruch Bush and Joseph Folger,[19] notorious in the mediation procedure, they defined it as "an informal process in which a neutral third party, without the power to impose its solution, helps the conflicting parties to reach an acceptable agreement". Applicable in public international law, mediation proposes a system through which a third state, having no involvement in the respective dispute between the states it will mediate, to intervene in order to conduct a formal framework of negotiations, which also makes proposals for a solution. states. The process must be

[16] L.M. Trocan, *Bunele oficii, mijloc paşnic de soluţionare a diferendelor internaţionale*, Analele Universității " Constantin Brâncuși", Târgu Jiu, Seria Științe Juridice, nr. 3/2011.
[17] Un document prin intermediul căreia a fost aplanat conflictul dintre India și Pakistan, semnat la 10 ianuarie 1966.
[18] Annals of the "Constantin Brâncuși" University of Tg. Mureș, Juridical Sciences Series/Issue 3/2011, pp. 163-164.
[19] The Promise of Mediation: The Transformative Approach to Conflict, Publisher John Willey & Sons 2004-11-09.

governed by the principle of fairness and take into account the fundamental principle of each state, namely their sovereign equality and equality of rights. From this point of view, mediation is an instrument of foreign policy, the international mediator having to provide different strategies and tactics for conflict management and resolution. Among the tactics and strategies used in the mediation process, I mention: communication-facilitation strategies – involve the third party to arrange the meeting of the parties, try to improve relations between them or at least, try to send messages between states; formula strategies – the mediator formulates an agenda, suggests new ways of approaching problems, proposes possible solutions; manipulation strategies – through which the mediator can threaten or put pressure on the parties to make concessions and reach a compromise.[20] From the perspective of some authors, the mediation was based on the fact that always, in a conflict between at least two parties, there will always be a conflict of interests, for which there may not be the possibility of reaching a consensus, conducive to both states., from their perspective, thus, mediation coming as a method that creates the premises of what no party can achieve individually, through its own, objective means.[21]

Mediation, as a peaceful way of resolving disputes between certain states, has found its applicability in different contexts. For example, between 1979 and 1984 between Argentina and Chile, he acted as mediator to the Pope of Rome, who did not resolve the arbitration over the Beagle Channel. Another mediation was also made by the President of the United States of America, Carter, at Camp David, between Egypt and Israel. Notorious for this method of mediation is also the case where the Norwegian state in 1993 assumed the role of mediator regarding the secret contacts between Israel and the Palestine Liberation Organization.

Therefore, mediation is a method of peaceful settlement that facilitates dialogue between the parties involved in order to reduce the hostile and tense situation. Thus, this instrument leads to an amicable settlement of the international dispute, and the main advantage of this solution is the peaceful approach of the dispute by the parties. In terms of results, the mediator proposes solutions, but the parties are not obliged to adopt them, but the options proposed by the mediator may be options for resolving the dispute. The moral guarantee provided by the mediation process can substantiate the decision of the parties to continue the negotiations.[22]

2.5 *International conciliation*

International conciliation is one of the means of resolving disputes, peacefully, but which requires a more complex procedure. Thus, it involves an analysis of the conflict in all its aspects and implications by a conciliation commission.[23] The framework in which the conciliation procedure takes place is a preconstituted one, which implies the existence of lists of conciliators, but before a non-jurisdictional body, the conciliation

[20] D.-I. Ancheș, *Medierea în viața social politică,* Cluj-Napoca, 2010.
[21] I. Crăciun, *Prevenirea conflictelor și managementul crizelor,* Ed. Universității Naționale de Apărare, Carol I, București, 2006.
[22] United Nations, *op. cit.*
[23] A. Rațiu, *Modalități și mijloace de reglementare a unor diferende internaționale. De la diplomație la forța armată,* Buletinul științific XII, 2003.

commission. At the end of the procedure, states may or may not accept the agreed solution. Provisions on the organization and operation of the Conciliation Commission were adopted in 1992, at the proposal of the United Kingdom, and complemented the framework provisions of the Valletta procedure, with the following characteristics: "If States so agree, the dispute may be submitted to view of settlement through the method of conciliation; the conciliation procedure may also be initiated unilaterally, if there is prior agreement on it in unilateral, reciprocal declarations. " There is also a certain guided conciliation, which was established in 1922 in Stockholm, which involves the British conciliation procedure or the procedure provided for in the Convention on Conciliation and Arbitration within the Organization for Security and Cooperation in Europe, Romania ratifying it by Law 5 of March 7, 1996. Thus, the Court of Conciliation and Arbitration was established in order to reconcile or arbitrate the disputes that will be submitted to it.

The conciliation procedure involves two phases: the first, the one in which an investigation is carried out consisting in the examination of the facts and the administration of evidence, and the second phase, the one in which the actual conciliation is carried out by listening to the parties. In the end, the commission decides on all aspects, by drawing up a report that will be motivated both in fact and in law.[24] If, during a conciliation procedure, the States reach an agreement, the Commission shall draw up a report recording the points in dispute, taking note of the agreement of the parties, and if there is no possibility of an agreement between the States. parties, it will be recorded and it will be noted that the dispute was submitted to conciliation, but the parties did not agree in any way (art. 34 of the Convention).[25]

With regard to the possibility of recourse to conciliation, the Court of Conciliation and Arbitration was established in accordance with the Convention on Conciliation and Arbitration. It operates within the Organization for Security and Cooperation in Europe (O.S.C.E). This Court shall operate in Geneva, and shall have as its object the settlement of disputes by the conciliation or arbitration procedure between two or more States, which bring their dispute before this institution. Also, this convention was ratified by Romania, as I mentioned at the beginning of this work. An emblematic example to demonstrate the functionality of this method is the "East Timor Conciliation Commission Australia", which operates in accordance with Annex V on the Law of the Sea.[26]

2.4 *International Investigation*

The international inquiry is part of the system of methods established to achieve a peaceful settlement of the dispute. This implies the establishment of a team that will establish and verify the factual situations that have resulted in the establishment of the disputed status between states. The Commission of Inquiry shall verify, inspect and supervise in an institutionalized manner all such matters. Article 90 of the Additional Protocol I to the Geneva Convention of 12 August 1949 on the Protection of Victims of

[24] A. Năstase, B. Aurescu, C. Jura, *Drept Internațional Public – sinteze pentru examen,* Ed. C.H Beck, București, 2010, p. 350.
[25] C. Moldovan, *Drept Internațional Public: principii și instituții fundamentale,* Ed. Hamangiu, 2017, p. 437
[26] B. Aurescu, *Actualitatea internațională*, Curierul Judiciar, nr. 10/2016, pp. 506-518.

International Armed Conflict states: and known impartiality. " Also in Additional Protocol I of the Geneva Convention, the procedure to be followed in the application of this method is provided. As a first step, following the request for an inquiry, the President of the Commission shall set a time limit for the parties, to which they shall be invited to attend and present their submissions, and the evidence they have in mind for substantiating such submissions. This stage is followed by a proper investigation, where the Commission has a key role to play, being required to be impartial and fair, and fair administration of evidence to be required. At the end of this procedure, the Commission shall submit to the disputed States a report containing all the elements of the investigation, as well as the results of the investigation, and the recommendations which it shall make to the parties.

The emergence of this method was based on the impediments identified in the process of finding the actions that led to the dispute between the appellants.[27]

The politico-diplomatic method of an international investigation has found its applicability in the case of our country as well. Thus, in 2004, Romania on August 19, initiated the establishment of an International Inquiry in accordance with art. 3 para. (7) and Annex IV of the Convention on Environmental Impact Assessment in a Transboundary Context, "to determine whether the Bâstroe Canal works in the Ukrainian Danube Delta are likely to have a significant adverse transboundary impact in the Romanian part of the Danube Delta"[28]. On 10 July 2006, the Commission unanimously stated that the works were likely to have such a negative, cross-border impact.[29]

3 Conclusion

The demand to resort peaceful instruments through which states can solve their disputes has had a tumultuous evolution in the context where a few years before its introduction, war was considered a legal mechanism in international law. The document that generated the paradigm shift is the General Treaty for Renunciation of War as an Instrument of National Policy, also known as the Briand-Kellogg Pact or Pact of Paris, created developed in 1928. Through this document, war was prohibited and the principles of settling international conflicts using peaceful means were elaborated. Though the act introduces a new archetype in relation to solving international disagreements, the impact of these instruments is limited as it is often regarded as non-compulsory, even though choosing to use armed force can have grave repercussions on the international security level.[30]

To conclude, in international law the obligation to apply peaceful settlement mechanisms can be found, but the parties are not constrained to a specific one. Therefore, the states can choose between judicial methods or diplomatic ones. Even though these methods present a plethora of advantages, the detriment common to all political-diplomatic instruments is that the obligation to fulfill the resolution is

[27] A.M. Hamza, M. Todorovic, *op. cit.*
[28] C. Moldovan, *Drept Internațional Public: principii și instituții fundamentale*, Ed. Hamangiu, 2017, p. 439.
[29] A. Năstase, B. Aurescu, *op cit.,* p. 300.
[30] I.O. Vladu, *Mecanisme politico-diplomatice pentru rezolvarea conflictelor armate,* Buletinul Universității Naționale de Apărare "Carol I", 2017, pp. 150-145.

inexistent, thus highlighting the legal limitations of it. Lastly, we conclude that the instrument of political-diplomatic settlement of disputes is based on its non-judicial character which offers the possibility for the states to appreciate *in concreto* what is the best solution for their litigious situation.

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[5] B. Aurescu, *Actualitatea internațională*, Curierul Judiciar 10/2016, pp. 506-518.

[6] C. Moldovan*, Drept Internațional Public: principii și instituții fundamentale*, Ed. Hamangiu, Bucharest, 2017, p. 437.

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[13] L.M. Trocan, *Bunele oficii, mijloc paşnic de soluţionare a diferendelor internaţionale*, Analele Universității "Constantin Brâncuși", Târgu Jiu, Seria Științe Juridice, nr. 3/2011.

[14] L.M. Trocan, *Considerații generale privind diferendele internaționale,* Analele Universității "Constantin Brâncuși" din Târgu Jiu nr. 2/2012.

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[16] United Nations, *Handbook on the Peaceful Settlement of Disputes between States,* United Nations Publication, New York, 1992.

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The Right to Silence – a Fundamental Right of the Defendant

Prof. PhD Paraschiv C.S.

"Titu Maiorescu" University, Faculty of Law (ROMANIA)

Motto:" The swan is silent all its life so that it can sing perfectly once. Man of genius! Stay in the shadows and remain silent until the moment when you will be able to appear with all the brilliance of a fame that no one can deny anymore."
Pythagoras – Les Lois Politiques et Morales

Abstract

The right to silence (the right not to make any statements during criminal proceedings) was established in the laws of democratic states long ago. Thus, the person suspected of committing a crime had the possibility to refuse to answer the questions addressed to him in connection with the accusation brought against him.

In the current Code of Criminal Procedure, the right to silence is one of the fundamental rights of the defendant provided by Article 83, a right which the suspect also has (Article 78 Code of Criminal Procedure).

Thus, the defendant has the right not to give any statement during the criminal trial, being informed that if he refuses to give statements he will not suffer any unfavorable consequences, and if he gives statements, they may be used as evidence against him.

Keywords: the rights of the defendant (suspect), the right to silence (the right not to give any statement), silence – a variant of "communication", the presumption of innocence, evidence, physical coercion and moral coercion.

Starting from the aphorism of Pythagoras, the silence, often perceived as an answer, has received different meanings over time. In the past, writers and scientists have described silence as a sign of caution or "one of the hardest arguments to refute." (Josh Billings). The English writer and lawyer Sir Thomas More claimed that "Guilt is found in the words spoken or the deeds done, not in silence…", and Pythagoras also urged to silence "as long as you can say no more than silence".

The right to silence was established in the laws of democratic states, so that the person accused of committing an antisocial act (suspect or defendant) had the opportunity to refuse to answer questions related to the accusation against him. This

right refers only to the explanations that must be given in connection with the facts and circumstances of the case being investigated or judged. The person exercising the right to silence cannot use it with regard to their identity, this being a legal obligation.

In the US, the equivalent of the right to silence is the "Miranda" amendment. According to the American legal system "defendants have the right to refuse to answer any question asked by the prosecution during the trial (by invoking the Fifth Amendment) and also have the right not to appear at all as a witness. Moreover, the prosecution is prohibited from commenting on the defendant's silence or refusal to testify as witness."[1].

The right to silence can be considered as the institution, the possibility of the natural or legal person guaranteed by law, not to answer explicitly, not to communicate the requested information or simply to communicate only in silence, when the informative content of the silence and its effects were provided by law.[2]

We can consider that silence is a form of defense, a real privilege against self-incrimination.

In Ancient Rome it was argued that "he who is silent does not consent, he only does not deny." ("tacens non videtur consentire attamen nec negat"). It is not a question of silence as a form of communication, the equivalent of the verb "not to speak" or in the sense that the one guilty of committing a criminal act would admit to the accusation or that he would try to mislead the judicial body. The offender's right to silence has its source in the freedom of expression regulated in Article 30 of the Constitution, as well as in Article 17 (3) of the International Covenant of Civil and Political Rights.[3]

We can conclude that silence is a variant of communication or a means of defense against the accusations brought against the person about whom there is a reasonable suspicion.

In no case can the right to silence be regarded as a lack of defense. As long as this right was invoked, it cannot be subsequently argued that it affected the defense of the suspect or defendant because he did not have the opportunity to state what he would have wanted. It was his choice of the accused, from the moment they were informed about their rights provided by law for their specific procedural quality (suspect or defendant).

A person's right to not incriminate himself as its main purpose to protect the freedom of will regarding the production of self-incriminating evidence; the right to silence concerns strictly the statements of the suspect or the defendant, the scope of the right to silence being narrower, as it is included in the wider scope of a person's right not to incriminate himself.[4]

Among the fundamental rights of the person is, as I mentioned, the right to silence which, even if manifested *expresis-verbis* during a criminal trial, we cannot deny that it is exercised and manifested in the field of social communication, in accordance with the

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[1] R.M. Bohm and K.N. Haley, *Justiţia penală, o viziune asupra modelului american,* Expert Publishing House, Bucharest, 2002, p. 177.
[2] V. Dabu, A.M. Guşanu, *Dreptul la tăcere, drept fundamental*, in the "Dreptul" Review, no. 9/2003, p. 126.
[3] Ratified by Decree 212/1974, of October 31, 1974. The text of the act was published in the Official Gazette, no. 146/20 November 1974.
[4] C. Oncescu, *Studiu referitor la istoria şi aplicarea principiului prezumţiei de nevinovăţie în procesul penal român*, in the "Dreptul" Review, no. 11/2012, p. 183.

other fundamental rights and freedoms, enshrined in the fundamental law – the Constitution. It is obvious that even through "silence"[5] information can be communicated, which can lead, in certain situations, to the achievement of the evidentiary procedure in criminal cases.

Therefore, the information communicated by "silence" can take different forms and as a rule, it is deduced from the circumstance in which the silence is manifested, but especially from the definition and regulation given by the legislator and we exemplify with formulas that we encounter during the criminal trial in the activity of the judicial bodies (for example the tacit approval of the higher hierarchical body, tacit refusal, tacit opinion, tacit agreement, all of the higher hierarchical body, tacit authorization, etc.). In this context, the consistency of the adage of Roman law "*tacio facit ius*" is justified.

In criminal procedural law, the right to defense is exercised in multiple ways, one of which is represented by another fundamental principle of criminal proceedings, namely the "presumption of innocence" (Article 4 CCP).

In the criminal process, both in the criminal investigation phase and in the preliminary chamber procedure, but also in the trial phase, according to the provisions of Article 4 CCP, which regulates the presumption of innocence, the suspect or defendant is not obliged to prove his innocence, and as such, in this respect, the exercise of his right to silence cannot be imputed to him, this being a legitimate right, provided by Article 83 CCP. Thus, according to the procedural provisions "A suspect or defendant benefits from the presumption of innocence, has no obligation to prove their innocence, and has the right not to contribute to their own incrimination. In criminal proceedings, victims, suspects and parties have the right to propose the production of evidence to judicial bodies".

Any person is considered innocent until his guilt is established, by a final criminal decision.

The suspect or defendant is not obliged to prove his innocence, the task of administering the evidence falling to the criminal investigation body and the court. The defendant or the suspect has the right to prove their lack of soundness. The functioning of the presumption of innocence is much broader than the factual aspects related to probation, manifesting itself in several main directions, such as: guaranteeing the protection of persons during criminal proceedings against arbitrariness in establishing guilt and criminal liability; underlies the procedural guarantees related to the protection of the person during the criminal procedure; it is closely connected with the finding of the truth and the correct proof of the de facto circumstances of the case.[6]

Before the appearance of Law no. 281/24 June 2003, according to the Code of Criminal Procedure, the police officer or magistrate was not obliged to inform the accused or defendant of his right not to make statements, but he could not force him to answer questions through threats, promises, exhortations or violence.

Article 6 of the previous Code of Criminal Procedure was amended in 2010 and became the current Article 10, which includes the obligation for the criminal

[5] DEX – Romanian Academy – "Iorgu Iordan" Institute of Linguistics – Univers Enciclopedic, p. 1073- "Silence" is defined as "the fact of being silent, quiet, calm, lull, without speaking, without confessing, lack of affirmation, manifestation, apathy, numbness.

[6] L. Barac, *Europa şi Drepturile omului. România şi Drepturile omului,* Lumina Lex Publishing House, Bucharest, 2001, p. 215.

investigation body and the court to notify the suspect or defendant, before having his first statement taken, about the right to be assisted by a lawyer at said hearing. Thus, by consulting with the defense counsel, the suspect or defendant acquires the possibility of becoming aware of his right to silence and the limits within which the hearing can be conducted by the judicial body. According to the provisions of Article 10, paragraph 6, the right to defense must be exercised in good faith, according to the purpose for which it was recognized by law.

Thus, by Article I of Law 281 of July 1, 2003[7], on amending and supplementing the Code of Criminal Procedure, in view of the need to adapt our legislation to European legislation, the text of Article 70 (2) acquired the following content: *"The accused or defendant is then informed of the act that forms the object of the case, its legal classification, the right to defense, as well as the right not to make any statement, while being reminded that what he declares may also be used against him"*. At the same time, according to Article 70 (3) "if the accused or defendant gives a statement, he shall be required to state all that he knows about the act and the accusation brought against him in connection with it". If the accused or defendant agrees to give a statement, the criminal investigation body, prior to the hearing, will urge the suspect to give a statement, written in person, regarding the accusations brought against him.

If the person in question agrees to exercise his right to silence, his option shall be recorded in a minutes drawn up by the criminal investigation body and signed by them and the holder of the right or in the conclusion of the court hearing, drawn up by the court.

By virtue of their active role, the criminal investigation bodies and the courts are obliged not only to inform the person concerned (holder of the right to silence) of the content of the corresponding legal text, but also to explain its practical meaning.[8]

The right to silence corroborated with the presumption of innocence contributes to the protection from which the defendant benefits, concerning to the possibility of unfairness that the judicial bodies could manifest against him.

The right to silence consists of a series of attributes, namely:

a) the right not to make any statement regarding the accusation brought against the person in question;

b) the right to answer or not, knowingly, in the interrogation to which he is subjected;

c) the right not to contribute to one's own incrimination (accusation).

The first two attributes (the right not to make any statement and the right or not to answer investigators' questions) are mandatory rules of the evidence submission procedure, and the right not to testify against oneself, not to incriminate oneself, as an element of the right to a fair trial, both materially and procedurally, is a fundamental human right, with a basis in the Constitution and in international human rights law.[9]

In the exercise of the right to silence, the suspect or defendant must not be coerced or sanctioned in any way, this being his right in accordance with the law (Article 83

[7] Law 281 of June 24, 2003, on amending and supplementing the Code of Criminal Procedure. and special laws, published in the Official Gazette of Romania no. 468/01 July 2003- Legislative Portal.
[8] M. Duţu, *Dreptul la tăcere. Noţiune. Semnificaţii. Jurisprudenţă: CEDO, CJCE, franceză română*, Economică Publishing House, Bucharest, 2005, pp. 55-56.
[9] M. Duţu, *op. cit.,* p. 57.

CCP). In the Criminal Code, the general part, in Article 24 and 25 are regulated separately the physical constraint and the moral constraint, as causes of non-imputability. According to Article 23 of the Criminal Code, the act provided by the criminal law does not constitute an offense if it was committed under the conditions of any of the non-imputability causes.

An act stipulated by criminal law does not carry imputability when committed as a result of physical constraint which the perpetrator was unable to withstand or of moral constraint, exercised by threatening grave danger of the person of the perpetrator or another person and which cannot be removed in any other way.

"Exercising the right to silence does not mean denying the deed. The denial of the deed can only be done by answer, which can be a pure and simple denial or a substantive, proven denial.

There is also the situation in which the perpetrator has remained silent until the moment he was assisted by the attorney, after which, he admitted to the deed, behaved with honesty, facilitating the discovery and arrest of the participants to the offense, without having any intention of denying the deed.

In such a situation, I consider that he could benefit from the provisions regarding the reduction by half of the limits of the punishment provided by law, under the conditions of Article 9 point 2 of Law no. 39/2003 on preventing and combating organized crime[10] or the application of the mitigating circumstance provided by the Criminal Code. Article 9 point 2 of Law no. 39/2003 provides that: "If the person who committed one of the deeds provided for in (1) – (3) facilitates, during the criminal investigation, the ascertaining of the truth and prosecuting one or more members of an organized criminal group, the special limits of punishment are reduced by half".[11]

A similar regulation is included in Article 19 of GEO no. 43/2002 regarding the National Anticorruption Directorate[12]: "The person who committed one of the crimes assigned by this emergency ordinance in the competence of the National Anticorruption Directorate, and during the criminal investigation denounces and facilitates the identification and prosecution of other persons who have committed such offenses benefits by the reduction the limits the punishment provided by law by half".

The above presentations represent the conceptual expression of the possibility that at some point the silence can be replaced with the collaboration of the suspect or defendant with the criminal investigation bodies or the court, for the benefit of a good enactment of justice.

"In practice, it is rare to exercise the right to silence, the innocent accused or defendant trying to give explanations to prove his innocence, and the guilty accused or defendant trying to mislead, through inaccurate accounts, the court conducting the hearing."[13]

"The right to silence, in the complexity of its meanings, operates not only with regard to the persons heard as a witness, under oath, in the sense that if they are asked

[10] Law no. 39 on preventing and combating organized crime, of January 21, 2003; Published in the Official Gazette of Romania no. 50 of January 29, 2003, updated up until February 1, 2014.
[11] I. Tanoviceanu, *Tratat de drept si procedura penala*, vol.IV, Curierul Judiciar Press, Bucharest, 1912, p. 676.
[12] Published in the Official Gazette of Romania no. 244/ April 11, 2002.
[13] G. Theodoru, *Tratat de drept procesual penal*, 2nd Ed., Hamangiu Publishing House, Bucharest, 2008, pp. 380-381.

questions that put them in a position to accuse themselves by virtue of the answers that would be given, they have the right not to answer, invoking the right not to incriminate themselves."[14]

The criminal procedural legislation also includes other regulations that address issues related to the institution of the right to silence. For example, the provisions of Article101, (1) CCP, provides that: *"It is prohibited to use violence, threats or other coercion means, as well as to promises or inducements for the purpose of obtaining evidence"*.

At the same time, by the provisions of Article 101 (2), the law-maker provides that hearing methods or techniques affecting the capacity of persons to remember and tell conscientiously and voluntarily facts representing the object of the taking of evidence may not be used. Article 102 includes express provisions regarding the prohibition of obtaining evidence, including acknowledgement, confession, by promises or exhortations, made directly or through an intermediary such as a relative, friend, or informant. Obtaining a confession in this way is illegal, as well as using it as evidence in the trial, the sanction being the nullity of the act, when an injury has occurred that can only be removed by annulling that act (Article 102 CCP).

We mention some hypotheses regarding the violation of the right not to give any statement by coercing the suspect or defendant:

- when the suspect or defendant has been convinced to turn himself in;
- when he was convinced to take another person's guilt upon himself for financial, religious, sentimental, political reasons, etc;
- when he was challenged to escalate the truth (boasting of the crime in which he did not participate or amplifying the contribution he had);

The manner of obtaining such confessions must be "condemned, being both inhuman and dangerous for establishing the truth".[15]

The right not to incriminate oneself is not expressly enshrined in the European Convention on Human Rights. The European Court, in its case law, has shown that Article 6 (1) of the European Convention on Human Rights guarantees two distinct rights: the right to remain silent and the right not to contribute to one's own incrimination.

In order to assess whether a procedure infringed the right not to incriminate oneself, the European Court examines the following elements: the nature and degree of coercion applied to obtain evidence, the importance in the public interest of prosecuting a crime and sanctioning the offender; the existence of adequate safeguards in the proceedings, as well as regarding the use of the evidence obtained.[16]

The right to silence, or the right not to make any statement, is a component of the "Right to defense", regulated by the provisions of Article10 CCP, which we encounter exercised throughout the criminal process and whose violation may lead to a series of sanctions.

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[14] M. Duţu, *op. cit.*, pp. 61-62.
[15] V. Dongoroz, in I. Tanoviceanu et al., *Tratat de drept şi procedură penală*, 2nd Edition, vol. V, Curierul Judiciar Press, Bucharest, 1927, p. 46.
[16] M. Udroiu, O. Predescu, *Protectia europeana a drepturilor omului si procesul penal roman,* C.H. Beck Publishing House, Bucharest, 2008, p. 666.

PRIVATE LAW

Some aspects relating to the legal language and systematisation in the drafting of the regulations of the Civil Code

Urs I.R.

"Titu Maiorescu" University (ROMANIA)
E-mail:_iosif.urs@prof.utm.ro

Abstract

This paper highlights several aspects of legal language and systematisation with regard to some important civil law institutions, such as the professionals, the culpability, the rights of the personality, arguing for the need to harmonise and unify some expressions and structures in respect of the regulations concerned and other regulations too. The article analyses aspects relating to the name and content of some phrases referring to the rights of the personality, the inherent rights of the human being, evoking a series of parallelisms, including with regard to their regulation in the various titles and chapters of the Civil Code, and concluding that it is necessary to rearrange them in a future review of the Civil Code, so as to avoid different interpretations and to apply some unitary solutions.

Keywords: professionals, culpability, rights of the personality, dignity, inherent rights of the human being, terminology

1 Introduction

Certainly, a regulatory document having the power of law should be necessarily drafted – especially when the regulations in a social field are reunited in a unitary structure in the form of a code, besides a sound foundation which guarantees the stability and the efficiency of legislative solutions, in the consideration of social demands, based on a documentation and a scientific analysis of the domestic socioeconomic reality and of similar regulations from other states, especially those of the European

Union – in a specific regulatory legal language and style, which is concise, sober, clear and precise, excluding any ambiguity.[1]

It is unquestionably that the Civil Code which came into force on 1 October 2011 is a major legislative work, very important and necessary in the Romanian legal system and it should be acknowledged as a historical accomplishment of our time, after an existence of almost 150 years of the previous Civil Code, which was influenced and inspired by the "Napoleon" Civil Code drafted more than two centuries ago (it was reformed in 2005).

Being integrated in the reform system in the area of justice and developed concurrently with other European projects (the Unidroit Principles applicable to international commercial contracts, the Principles of European Contract Law, the European Code of Contracts etc.), our Civil Code is largely imported from the Quebec Civil Code, which was adopted in 1991, after a development spanning about 50 years, and is a modern Civil Code, which combines the institutions of continental law with those of Anglo-Saxon law and takes into account the French legal tradition. These were actually the considerations brought by the drafters of our Civil Code in terms of grounds and justification.

Irrespective of the source of inspiration and legal conception for bringing under regulation the civil law institutions and no matter the influences we accept, the language used in the drafting of legal regulations should be the legal language, neutral, compliant with the linguistic and grammar rules, it should be clear and precise, easy to be understood by the "recipients of the law", with no need for explanations and justification which complement the regulatory provision.

In my opinion, the drafting of the Civil Code is not safe from criticism, and sometimes it is even abundant in formulations which are full of ambiguities, contradictory, with possible meanings etc., going beyond the rigours of a legal language specific to the regulations of a civil code. I believe that any legal act, any civil legal institution and regulation, should be distinguished by a coherence and consistency of terminology, so much the more for those terms or words that make up the content of the regulatory legal discourse. Moreover, in the context of the harmonisation and unification of European legislations, until the development of a European Civil Code in the future – an audacious project, however with a less visible horizon – the expectations are to use a unitary terminology, free of ambiguities, with the most appropriate and well known phrases in the Romanian language, even when some regulations or legal institutions are taken *tale quale* from other legislations.

This article will dwell only on a few aspects of legal language with possible meanings, with a mention that a general review is required, one which overcomes the difficulties arising from the translation from one language into another, while ensuring the logic and homogeneity of terms and, in the end, the unity of their interpretation and application.

2 About professionals

The Civil Code stipulates in Article 3 paragraph 2, simply and confidently, that "professionals are considered all those who exploit an enterprise", where the civil

legislator preferred an *ad literam* translation from French, disregarding the possible meanings and sensibilities of those words in Romanian. Beyond the fact that the term "exploitation" or "exploit" divided Europe for more than half a century, splitting it into "exploiters" and "exploited", on one hand, and "equality and prosperity", on the other hand, leaving its mark on the conscience of some generations, and beyond the fact that the events of December 1989 in Romania determined, inter alia, the liquidation or the transformation of all enterprises establishing autonomous municipal or national companies and companies and the legal acts of that time did not even use the term of "reorganisation", which was established for such matters (Decree no. 31/1954), and about 20 years from the abolition of "exploitation" and also of enterprises (in Romanian *întreprinderi*), we have an easy come back of the phrase "exploit an enterprise" in our legislation.

Let us take the binomial 'exploitation' – 'exploit' (in Romanian *exploatare* – *exploatează*) such as we find it in dictionaries[2]. The verb 'to exploit' (*a exploata*) means an action to make the most of an asset, but also to appropriate the work of other, to use abusively, to take advantage of something. The noun 'exploitation' (*exploatare*) means an economic undertaking, a production facility (such as exploitation in mining, in forestry etc.). If we refer to the binomial 'exploiter' – 'exploited' (*exploatator* – *exploatat*), we find from the same sources that the 'exploiter' (*exploatatorul*) is a person, an individual, who exploits something, a situation, another person; the 'exploited' (*exploatatul*) is the one suffering an exploitation by other. Based on the significance of these terms, we could easily word the legal text above as this statement "Professionals are all exploiters who exploit an exploitation" or simpler "The exploiter exploits an exploitation", which would be an aberration in legislative terms. Although this was certainly not the legislator's intention, we cannot believe that there are no solutions to avoid language pitfalls in the drafting of legal regulations.

3 About serious fault

As a novelty in our civil legislation, the institution of "culpability", pertaining to the essence of criminal justice, is expressly provided for by Article 16 of the Civil Code as an essential ground for civil legal liability. The legislator defines the attributes of culpability, namely the intention and the fault, and also provides, in the same legal text, that civil liability may exist without any intention or fault, which is something praiseworthy and in line with the European doctrine and case-law trends in the matter, where strict (objective) civil liability is obviously taking shape[3]. Without pursuing an analysis of the merits of theoretical confrontations between subjective liability and objective liability, it's necessary to say that in the post-industrial age where there is an enormous risk potential with diffuse causes, located less and less in a human illicit and culpable act, we have to realise that instead of an illicit act, the "star" of subjective civil liability, the prejudice, seems to be preferred, meaning that the unjust prejudice caused to the other and which always needs to be remedied through a reparation or indemnity becomes the essential element of civil liability. (Article 1357 and Article 1369 of the Civil Code)

In these conditions, which are real and obvious, and also taking into account that, in principle, in subjective civil liability, the degrees of culpability setting out its manifestations placed between *culpa levissima* and *culpa lata* do not influence at all the seriousness of civil liability, we can see however that the civil legislator expressly qualifies the *serious fault*[4] and also provides in the same text that in matters of liability for one's act, the doer causing the prejudice shall be liable for *the least serious fault*.[5] Moreover, in matters of contractual liability, the debtor's fault in case of default is "measured" in comparison with the diligence of a "good owner" in the administration of his assets[6], while in the consideration of culpability, particular criteria, independent of the doer's person, will be taken into account[7]. All these specifications are a proof that in the Civil Code regulation culpability may actually be determined based on the seriousness of the fault, from the least to the most serious fault. Two important ideas with regard to the legislator's concern for determining the civil liability stand out, on the merits, from the manner in which culpability is regulated. The first idea is concerned with the subjective liability based on culpability, on fault particularly, while the second concerns the legislator's closeness to the objective liability, which the legislator considers applicable under the law. I think this is the meaning of the provision saying that if the law does not otherwise provide for, a person is liable only for the acts committed with an intention or fault.[8]

This undertaking is concerned with the manner in which the legislator defines the serious fault in relation to a person "*most lacking skilfulness with regard to that person's own interests"*. Setting expressly as a criterion for the seriousness of the fault of the doer who causes a prejudice the *skilfulness* or, more precisely, the lack of skilfulness of an abstract person with regard to that person's interests and deciding on the legal liability based on skilfulness seems at least inappropriate, if not speculative. The term skilfulness (in Romanian *dibăcie*) has a wide range of meanings, from understanding, wit, ingenuity, worthiness to cunning, perfidy, pretence, artfulness, trickery, deception, jesuitism, Machiavelism, Phariseism, and is understood differently according to the habits and traditions in different geographic areas. It is difficult to find how and how far we should go from the most skilful person to come close to the person "most lacking skilfulness" and decide that the doer's careless or imprudent act takes the form of a serious fault and, implicitly, calls for the appropriate civil legal liability.

4 About the inherent rights of the human being

The terminology and also the systematisation of the regulations relating to non-patrimonial rights, in general, and to the inherent rights of the human being, in particular, highlight in the regulation of the Civil Code some visible lack of correlation, confusing structural arrangements, inadvertent evaluations, repetitions or bothering overlapping, with contradictory outcomes. This undertaking lets us think that, in principle, a legal institution, any legal institution, so much the more as non-patrimonial rights and their protection are concerned, should receive some unitary regulation from the legislator, with no parallelisms, fragmentations, partial re-appearances, which cause confusion and lead to non-unitary interpretations and erroneous solutions.

The Civil Code, Chapter II named "The respect due to the human being and to the inherent rights of the human being", Title II "The natural person", naturally placed in Book I "About persons", lists in Article 58, the right to life, to health, to physical and mental integrity, to dignity, to personal image, to respect for private life. The legislator is equivocal, but careful with the terminology and the drafting of texts. So, Article 58 of the Code is named "Rights of the Personality", meaning we are cautioned that not all the rights are included, but only some of them, possibly the most important ones, but at the end of the text we are cautioned again that there are more "other such rights" provided that they are recognised by law. Of course, such a legislative technique is practiced, being motivated by an idea of stability of the legal act and the capacity of the general receiver of the legal regulation covering the social relation to which it gives legal force. However, to keep away from consequences which could be difficult to explain, the legislator is bound by the consistency of terminology and a rigorous systematisation[9].

It is worth noting that, with the title of Chapter II, singled out here above, it is the inherent rights of the human being that are taken into consideration and not some rights, as provided for in Article 58, which appear as a part of the inherent rights, but also as a part of the rights of the personality, a more restricted notion than the notion of inherent rights. The following two sections group together two categories of rights which raise confusion and questions. One first aspect is the re-appearance of the word ‘respect’ used in the title of Chapter II, in the name of the third section "Respect for private life and the dignity of the human person", while the idea of respect is dropped off for the second section, which is simply and descriptively named "The rights to life, to health and to integrity of the natural person", with no justification, at least apparently. The word ‘respect’, translated to the letter from the Quebec Civil Code could induce the idea of a conduct to be followed by all those to which the regulation is addressed, but, as a rule, the conduct required by law is reflected in the provision of that legal regulation and not in the title of some structures, a chapter or a section, in this case. If we accept the idea that the "respect" for the inherent rights of the human rights is enforceable *erga-omnes*, we can admit its use in titles requiring the imperative of respect for the rights that come under those titles, but then we still have the question why the second section does not require respect for the right to life, to health and to integrity, which it qualifies as inherent rights of the human being. The second aspect is concerned with Article 61 of the Civil Code, which lists some rights of the personality, namely the right to life, to health and integrity[10] and is named "Guarantee of the inherent rights of the human being", which means that some of the rights of the personality laid down in Article 58, namely the right to dignity, to personal image, to respect for private life, not being enumerated in Article 61 of the Code, which includes, based on its expression, all the inherent rights of the human being, are excluded from such a guarantee; however, we should not be alarmed since the legislator does not exclude them from *safeguard and protection* as stipulated by Article 252 of the Code. Are we supposed to understand that the state, the general guarantor of rights, does not assume an obligation to guarantee the exercise of these rights, but safeguards and protects them through specific means if these rights have been infringed on or threatened?

We can see that Article 252 of the Civil Code, with the subtitle "Protection of human personality" refers to the protection of the "intrinsic values of the human being",

which are rights of the personality in fact, together with the freedom of conscience and the scientific, artistic, literary and technical creation. In my opinion, even when Article 58 of the Code refers to "other such rights", the scientific, artistic, literary and technical creation could not be assimilated to the inherent rights of the human being. On the same line, the "Respect for private life and the dignity of the human person" (the title of the third section) and the enumeration of the rights coming under this title are subject to the same issues of terminology and systematisation. Therefore, we hold that the "freedom of expression", which is not included in the rights of the personality is still stipulated in Article 70 of the Civil Code giving the impression that it is closely connected with the right to private life stipulated by Article 71 of the Code, but nevertheless it is not considered an intrinsic value of the personality as it is not listed in Article 252, together with the freedom of conscience and other non-patrimonial rights. The possible explanation for this structure may be motivated by the connection existing between the freedom of expression provided by Article 70 of the Code and the right to dignity stipulated in Article 72, because the freedom of expression, however "free", cannot cause prejudice to dignity. It is also worth noting that even the legislator appears to be at least not content with the term "respect" included in the titles of the third and fourth sections, seeming to understand that it is insufficient to imperatively impose an obligation to respect, since the legislator found it necessary to provide in Article 71 paragraph 1 of the Code that any person has the right to respect for their private life, and the same wording was used again in Article 72 paragraph 1 of the Code with regard to the respect for the dignity of every person.

Apart from the fact that dignity is considered in international documents and in some national constitutions a principle governing the human rights[11] or a "supreme value" which should be guaranteed (Constitution of Romania, Article 1) etc., the Civil Code, in Article 58, establishes dignity as a right of the personality and which is protected as an intrinsic value of the human being (Article 252 of the Civil Code), and Article 72 paragraph 1 of the Code includes the express requirement of respect for the right to dignity. Considering the provision stipulated in Article 72 paragraph 1 of the Civil Code on the right of every person to respect for their dignity, in correlation with the provision of Article 72 paragraph 2 of the Code, according to which any prejudice to the **honour and reputation** of a person is prohibited, together with the constitutional text of Article 30 point 6, providing that freedom of expression cannot prejudice the dignity, **honour**, private life and the right to personal image, we wonder whether honour and reputation are inherent rights of the human being, rights of the personality or intrinsic values of dignity which substantiate this fundamental human quality.

5 Conclusions

In conclusion, in relation with the aforesaid, my opinion is that the entire subject matter of non-patrimonial rights, rights of the personality, inherent rights of the human being, of their guarantee, safeguard and legal protection should be rearranged, systematised in a new unitary and clear structure. Synthetically, the inadvertencies which require a remediation have regard to the following ideas:

- the phrase "non-patrimonial rights" includes all rights that do not have an economic content, which are defined in different ways and are placed under different titles and chapters, and this can create ambiguity. Therefore, "non-patrimonial" rights include: rights of the personality (Article 58 of the Civil Code.); inherent rights of the personality (Article 1391 paragraph 3 of the Civil Code.); inherent rights of the human being (Article 61 of the Civil Code.); rights providing protection to the human personality, which aim to protect the intrinsic values of the human being (Article 252 of the Civil Code). The enumeration seems to be exemplifying as soon as Article 58 of the Civil Code also refers to "other such" rights.
- Article 58 under Chapter II, Book I, Title II named "The respect due to the human being and to the inherent rights of the human being", lists as a matter of exemplification some rights of the personality; Article 61 of the Civil Code "guarantees the inherent (underlined by author) rights of the human being", while Article 252 of the Civil Code, under Title V "Safeguard of non-patrimonial rights" with the name "The protection of human personality" highlight the "right to the protection of the intrinsic (underlined by author) values of the human being".
- Article 253 paragraph 1 of the Civil Code, named "Means of protection" is concerned with non-patrimonial rights of the natural person which are infringed on or threatened, while Article 1391 of the Civil Code refers to "prejudices caused to the rights of the personality in relation to any law subject", including therefore also the legal person, when the text actually refers, on its merits, to a harm caused to health or bodily integrity.

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[1] See Article 36 of Law 24/2000 on the legislative technique standards for the drafting of regulatory documents, republished in the Official Gazette of Romania no. 215/2010.
[2] Nouveau Petite Larousse, Librairie Larousse, Paris, 1909, p. 380; Noul dicționar universal la limbii române, Litera Internațional, Bucharest, 2009, p. 515.
[3] Article 1375 and Article 1376 of the Civil Code bring under regulation the liability for prejudice caused by animals and things.
[4] Article 16, paragraph 3 of the Civil Code, "…The fault is serious when the doer acted with such neglect or imprudence that even the person most lacking skilfulness would not have done so with regard to that person's own interests".
[5] Article 1357, paragraph 2 of the Civil Code – the doer causing the prejudice is liable for the least serious fault.
[6] Article 1480, paragraph (1) of the Civil Code – the debtor is bound to meet his obligations with the diligence showed by a good owner in the

administration of his assets, unless otherwise provided by law or by contract.

[7] Article 1358 of the Civil Code governs the particular criteria for evaluating the fault.

[8] Article 16, paragraph 1 of the Civil Code – if the law does not otherwise provide for, a person is liable only for his acts committed with an intention or fault.

[9] Chapter IV "Drafting of regulatory documents" and Chapter V "The structure of a regulatory document", Section II "Systematisation of the content of a regulatory document" of Law 24/2000 on the legislative technique standards for the drafting of regulatory documents, republished in the Official Gazette of Romania no. 215/2010.

[10] It is worth seeing also the manner in which the rights are named: Article 58 of the Civil Code enumerates, among others, the right to health and the right to physical and mental integrity as two of the rights of the personality. In the title of Section II, the guess is that it is only for reasons of simplification that the legislator includes the "right to health and to integrity", giving the appearance of a single non-patrimonial right.

[11] The Charter of the United Nations (26 June 1945); the Universal Declaration of Human Rights (10 December 1948); the Constitution of Romania provides in Article 1 paragraph 3 that dignity is the "supreme value" which should be guaranteed. In other constitutions, dignity has the value of a fundamental principle (the Constitution of Spain) or a constitutional right (the constitutions of Germany, Switzerland, Israel, South Africa etc.).

THE FEATURES OF THE SALES CONTRACT – AS AN ACT OF COMMERCE

Prof. PhD. Angheni S., PhD

"Titu Maiorescu" University, Faculty of Law (ROMANIA)
E-mail: smaranda.angheni@prof.utm.ro

Abstract

The unification of private law, according to the monistic theory, meant the absorption by the Civil Code of the provisions of the Commercial Code in the matter of the contract of sale, provisions which, to a large extent, apply both to the sale, qualified as a civil act, as well as to the commercial sale, with the exception of those rules applicable in relations between professionals or, as the legislator often puts it, "in the operation of an undertaking".

Although, there are some applicable derogating provisions "in the operation of an undertaking", however, they do not refer only to professional traders whose activity is materialized in acts (deeds) of trade but to all categories of professionals.

On the other hand, in the absence of legal regulations on commercial acts, but especially on their characteristics, it is the role of the specialized doctrine and even of the courts to **highlight the specific features of acts (deeds) of trade.**

Keywords: acts, trade, contract, sale, price, property.

1 Introduction

The sale contract, as appointed by the legislator in the Civil Code adopted by Law no. 287/2009[1], presents certain features, whenever a deed of trade can be qualified. By repealing the Commercial Code with the entry into force of the current Civil Code following the waiver by the legislator of the duality of private law, the concepts and names "acts" "deeds" of trade have been replaced with "activities of production, trade, provision of services" (Article 8 section 2 of Law no. 71/2011 implementing the Civil Code[2]).

[1] Published in the Official Gazette of Romania no. 505 of July 15, 2011.
[2] Published in the Official Gazette of Romania no. 409 of June 10, 2011.

Even in the conditions of giving up the terminology "acts", "deeds" of trade, they still exist today, both as an economic and legal reality.

The unification of private law, according to the monistic theory, meant the absorption by the Civil Code of the provisions of the Commercial Code in the matter of the contract of sale, provisions which, to a large extent, apply both to the sale, qualified as a civil act, as well as to the commercial sale, with the exception of those rules applicable in relations between professionals or, as the legislator often puts it, "in the operation of an undertaking".

As a general remark, we emphasize that the provisions of the Commercial Code that marked features of the commercial sale are found in the Civil Code, some of which will continue to apply in the relations between professionals and, first of all, professional traders, while other provisions apply even to non-professionals[3].

Thus, the provisions of Article 1709 (2) of the Civil Code regarding the denunciation of the hidden defects of the sold item were taken from the former Commercial Code [Article 70 (2)] and applies only to professionals. Thus, according to Article 1709 (2) of the Civil Code, "*If the buyer is a professional and the good sold is tangible and movable, the term provided in section (1) is that of two working days*".

In Article 1709 (1), the legislator stipulates the need to formulate a claim for hidden defects within a reasonable time. However, the reasonable time, in the case in which the buyer is a professional is of two working days from the date of discovery of the defects.

However, there are legal institutions which, under the terms of the Commercial Code, apply only to commercial sales and which, under the new Civil Code, apply to all persons regardless of their status as professional trader, professional in general, or non-professional. One such example is the legal institution known in commercial law as **coactive enforcement**.

Currently, the Civil Code, in Article 1726, taking over the provisions of Articles 68 and 69 of the Commercial Code, "arranges" this legal institution under the name "direct enforcement" and applies regardless of the quality of professional or non-professional parties to the contract of sale[4].

Although, there are some derogating provisions applicable "in the operation of an undertaking", however, they do not only refer to professional traders whose activity is materialized in acts (deeds) of trade but also to all categories of professionals.

On the other hand, in the absence of legal regulations on trade acts, but especially of the characteristics thereof, the duty of the specialized doctrine[5] and even that of the courts[6] is to highlight **the specific features of acts (deeds) of trade.**

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[3] S. Angheni, *Commercial law. Treatise,* C.H. Beck Publishing House, 2019, p. 474-475.

[4] For more details, see: Fl. Moțiu, *Special contracts in the new Civil Code,* Wolters Kluwer Publishing House, Bucharest, 2010, p. 21-46; St.D. Cărpenaru, L. Stănciulescu, V. Nemeș, *Civil and commercial contracts,* Hamangiu Publishing House, Bucharest, 2009, p. 3-64; V. Nemeș, *Commercial Law,* Hamangiu Publishing House, Bucharest, 2012, p. 271-286; L. Stănciulescu, *Civil contract law. Doctrine and jurisprudence,* Hamangiu Publishing House, Bucharest, 2017, pp. 125-214.

[5] S. Angheni, *Commercial Law. Treatise, op. cit.,* p. 26 et seq.

[6] The Constitutional Court, Dec. no 402 of June 6, 2019, Published in the Official Gazette of Romania no. 760 of September 19, 2019.

Thus, there are features with regard to the contract of sale which qualify it as **a legal act of trade** both in terms of **the quality of the contracting parties,** which are usually **professional-traders**, respectively companies, natural persons authorized to carry out economic activities, individual undertakings, etc., as well as regarding **the commercial nature of the contract**.

2 The commerciality of the sales contract

The commerciality of the sales contract is determined, traditionally, by the **speculative intent** of the operation (purchase for resale, or sale preceded by purchase for resale or rental only) and the **idea of intermediation** or **interposition in the exchange** of goods or other values. These two features of **the** commerciality of the sales contract, **namely the intention of both parties to speculate or just one of the parties and the intermediation** were indicated by the legislator in Article 3 sections 1 and 2 of the Commercial Code. Thus, at that time, according to Article 3 sections 1 and 2 of the Commercial Code, the law considered deeds of trade: "*purchases of goods or merchandise for resale either in kind or in work or put into operation, or only for rent; also the purchase for resale of government bonds or other debt securities circulating in trade; sales of goods, sales and rentals of goods in kind or in work and sales of government bonds or of other debt securities circulating in trade, when they have been purchased for resale or rental."*

Until the date of entry into force of the Civil Code, the commercial sale was governed by the Commercial Code, in Article 60 71, provisions which were supplemented by the Civil Code of 1864. The Commercial Code did not contain any provision regarding the definition of the contract of sale, which was set out in Article 1294 of the Civil Code.

3 The legal framework, the contracting parties and the object of the sales contract – as an act of commerce

Regarding the general legal framework, the commercial sale is currently regulated by the Civil Code in Article 1650-1762 and previously by Article 60-73 of the Commercial Code.

With regard to the scope of the provisions of the Civil Code, we note the provision in Article 1651, according to which "*The provisions of this chapter on the obligations of the seller shall apply accordingly to the obligations of the alienator in the case of any other contract having the effect of transferring a right, unless otherwise provided in the regulations applicable to that contract or in respect of obligations in general.*". Therefore, by this provision the legislator marks the idea of the nature of the provisions of the Civil Code regarding the sale as the common law in the matter of alienation of goods. However, in the relations between professional-traders or between professionals and consumers, special provisions apply, respectively Law no. 296/2004 regarding the Consumer Code[7], Law no. 193/2000 on abusive clauses in contracts

[7] Published in the Official Gazette of Romania no. 224 of March 24, 2008.

concluded between professionals and consumers[8], GO no. 21/1992 on consumer protection[9], GEO no. 34/2014 on consumer rights in contracts concluded with professionals, as well as for amending and supplementing some normative acts[10].

The commerciality of the sales contract results both from the special regulations emphasized and even from the provisions of the Civil Code.

Thus, using the subjective criterion of classifying a legal act as an act of trade if the seller or the buyer is a professional trader, there is a *iuris tantum* presumption that the act of sale is an act of trade, a presumption which can be overturned if the contrary is proved.

However, the opposite was very well established by the legislator in Article 5 of the Commercial Code which provided: "the purchase of products or goods that would be made for the consumption of the buyer or his family… cannot be considered as an act of trade".

This provision is also valid under the current Civil Code, even if it is not expressly provided for. It is natural that the sale or purchase is not qualified as an act of trade to the extent that the person who is a contracting party, seller or buyer, does not act in his capacity as a professional. According to Article 3 sections 2 and 3 of the Civil Code, professionals are: "*all those who operate an undertaking*" and the operation of an undertaking means "t*he systematic exercise of an organized activity consisting in the production, administration, or alienation of goods or the provision of services".*

This, **a first feature** of the sales contract as an act of trade **refers to the contracting parties**, both of whom can be professional-traders, as well as only one of them, the seller or the buyer.

If only one of the contracting parties is a professional trader, the sale is **qualified as an -act of trade- being subject to the relevant special regulations applicable, for example, in relations between professionals and consumers.** And from this point of view, the Commercial Code had a clear solution in Article 56 which provided "*If an act is commercial for one of the parties, all the contractors are subject, as far as this act is concerned, to the commercial law..."*

Second, the commercial sales contract differs from the sale which is traditionally referred to as an act of a civil nature, through an essential element of the contract – *the subject of the contract* – both in terms of the *good sold* and in terms of *price*.

The analysis we undertake refers to the *material or the derived object* of the contract that is not confused with the object of the contract, respectively the action or inaction of which the passive subject or the debtor is held and entitled to claim the active subject or creditor[11].

In concrete terms, a distinction is made between *the object of the contract and the object of the obligation*, which obviously must meet the conditions of validity provided by law.

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[8] Published in the Official Gazette of Romania no. 543 of August 03, 2012.
[9] Published in the Official Gazette of Romania no. 208 of March 28, 2007.
[10] Published in the Official Gazette of Romania no. 427 of June 11, 2014.
[11] G. Boroi, C. Anghelescu, *Civil law course. The general part,* Hamangiu Publishing House, 2012, p. 164; V. Nemeș, G. Fierbințeanu, *Civil and commercial contract law,* Hamangiu Publishing House, 2020, pp. 36-37.

If we follow the particularities of the contract of sale, as an act of trade, regarding the object of the contract, from the practice of the professional traders it can be found that, object of the contract is usually *movable tangible goods*: goods produced by the professional trader they sell, the sale of goods produced by another trader, etc. or *intangible movable property: shares, bonds, issued by joint stock companies, shares of associates of limited liability companies, other securities circulating in trade, business, as a de facto universality or as intangible movable property*[12]**.**

On the other hand, in the practice of professional traders there are operations which, although they cannot be directly qualified sales contracts, nevertheless, the legal provisions specific to the sale are applicable to them, because the legislator provides in this respect. For example, *the legal operation of contributing to the share capital of a company* or, as the case may be, to the company's assets, *is assimilated to the sale,* whenever the *right of ownership* over the good brought into the company is transferred to the company. (Article 1896 (1) of the Civil Code "*the associate who contributes to the property or another real right over a good is responsible for making the contribution exactly to a seller...*")

Likewise, in the case of **the supply contract**, the provisions of the Civil Code governing the supply contract are supplemented by those of the sale if, depending on the object of the contract, the contract is qualified as a contract of sale. The legal basis is Article 1766 (3) of the Civil Code "*If by the same contract both the sale of goods and the supply of goods or services are agreed upon, then the contract will be qualified according to the characteristic and ancillary obligation. "*.

Also the **repurchase agreement** has, in its content, a contract of sale and resale, as defined by Article 1772 (1) of the Civil Code according to which "*the repurchase agreement is the one by which bonds and securities are purchased with immediate payment, circulating in trade and undertaking the obligation of reselling bonds and securities of the same nature to the initial seller at a certain due date, in exchange for a certain amount*". Therefore, the content of the legal text shows the speculative nature of the sales contract; and, at the same time, it is observed that the sale and resale both have as a subject bonds and securities circulating in trade. These legal transactions demonstrate the commercial nature of the contract of sale.

Another contract that highlights the commercial nature of the sale is the **consignment contract** whose definition is provided in Article 2054 (1) of the Civil Code as "*a variety of the commission contract which has as its object the sale of movable property which the consignor has handed over to the consignee for this purpose*".

One of the modern contracts that contain in its structure sales operations is the **leasing contract**[13], regulated by GO no. 51/1997 on leasing operations and leasing

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[12] S. Angheni, *Commercial Law. Treatise, op. cit.,* pp. 97-100; G. Ripert, R. Roblot, *Traite de droit commercial,* vol. I, 15th Edition, L.G.D.J., Paris, 1993, pp. 467-468; Y. Guyon, *Droit des affaires,* vol. 1, Economica Publishing House, Paris, 1988, p. 688.

[13] For more details, see I. Macovei, *International trade law,* Ed. Junimea, Iași, 1980, p. 304 et seq.; T.R. Popescu, *International trade law,* Didactică și Pedagogică Publishing House, Bucharest, 1976, p. 363-376; R. Munteanu, *Modern crediting Techniques. The Lending Contract – Leasing,* in *"Instituții de drept comercial internațional",* vol. II, Academiei Publishing House, Bucharest, 1982, p. 46 et seq.; M.L. Belu Magdo, *Commercial Contracts, Traditional and Modern,* Tribuna Economică Publishing House, Bucharest, 1996, pp. 182-194.

companies, republished[14]. Thus, leasing is a complex operation, a modern lending technique that consists of a purchase for the purpose of renting goods, industrial equipment, rent followed by a sale.

However, these special contracts are, undeniably, acts of trade, both from the perspective of the contracting parties who are usually professional traders and from the perspective of the object of the contract, reasons which lead us to classify the contract of sale as an act of trade.

One of the problems that generated different doctrinal opinions[15] it is the one related to the operations on the real estate, concretely if these can be qualified acts of commerce.

Among the real estate transactions, an important place is occupied by the sales contract, in which the seller or the buyer is a professional-trader.

In this situation, the contract of sale is an act of trade only if the real estate sold or purchased is necessary for the normal activity of the professional, i.e. in its exercise or in the operation of an undertaking, within the meaning of Article 3 of the Civil Code. At the same time, in the relations between the professional traders, often **the question of the legal nature of the sale or purchase of a real estate**, respectively if it is a civil act or act of trade in case of **controversy** related to its inclusion in goodwill and, more recently, in the patrimony of affectation.

Considering the current legal provisions that define goodwill, respectively GEO no. 88/2018 amending Law no. 85/2014 on insolvency prevention and insolvency procedures, "*goodwill represents the set of movable and immovable property, tangible and intangible – trademarks, firms, emblems, patents, commercial assets – used by an economic operator in order to carry out its activity".*

The conclusion that emerges, at least at *primo facia*, is that transactions in real estate in goodwill, including the contract of sale, are acts of commerce.

With regard to the condition imposed by the legislator that these goods be used by the trader in his activity, in practice, the following categories of real estate by their nature may be assigned to a trade activity (*lato sensu*): real estate in which the goodwill is operated in its entirety, respectively, warehouses, factories, factories, etc. and over which the trader has a right of ownership; real estate rented by the trader to be used for the purpose of carrying out his activity; the real estate in which the trader's registered office is declared, real estate over which the trader has the right of ownership, usufruct or use; real estate brought into the company as a contribution to the share capital; real estate brought within a joint venture.

Those properties intended to meet the personal needs of the individual trader or of the trader's associates or employees may not be included in the goodwill – for example, holiday homes – because it is clear that they do not meet the condition imposed by the legislator, namely to be used in the activity of the trader.

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[14] Published in the Official Gazette of Romania no. 9 of January 12, 2000.

[15] I. Turcu, *Business Law,* Fundația "Chemarea" Publishing House, Iași, 1992, p. 16; St.D. Cărpenaru, *Romanian Commercial Law,* All Publishing House, Bucharest, 1995, p. 2; S. Angheni, *Some Aspects Regarding the Consequences of Including Real Estate In Goodwill,* in the "Curierul Judiciar", no. 5/2002, p. 2 et seq.; S. Angheni, *Acts (Deeds) of Trade Under the Conditions of Unification of Private Law. The Need for Legislative Reconfiguration of Trade Acts (Deeds),* in "Revista română de drept comercial", Universul Juridic Publishing House, no. 1/2020, pp. 109-111.

4 Determining the price in the sales contract – as an act of commerce

Another peculiarity of the contract of sale, as an act of trade, also regarding the object of the contract is the determination of the price, a price which, like the good sold, must meet the conditions of validity provided by law, mainly by the Civil Code.

The fundamental principle of pricing is the principle of freedom of will of the parties, which is fundamental to the formation of the contract. According to this principle, the price is determined by the parties at the time of concluding the contract.

The price is also determined if the contract stipulates that it will be possible to pay the market price for the respective category of products, a price that will exist at the time of the payment of the price.

Thus, according to Article 1661 of the Civil Code, the sale made at an indefinite price in the contract is valid if the parties have agreed on a method to determine it later, but not later than the date of payment and which does not require a new agreement of will of the parties. This provision is in line with the provisions of Article 1233 of the Civil Code, **text in which the legislator provides for the determination of the price between professionals**. Thus, "*if a contract concluded between professionals does not set the price or indicate a way to determine it, it is presumed that the parties have taken into account the price normally charged in that field for the same services performed under comparable conditions or, in the absence of such a price, a reasonable price*".

The reference by the legislator to the reasonableness of the price is uncertain and remains at the discretion of the court that will resolve any disputes between the contracting parties. However, in our opinion, in determining the reasonable price, the court will use the knowledge of a expert in the field. Moreover, that legal text must be corroborated by the provisions laid down in Article 1664 (1) of the Civil Code, in which the legislator provides, as a principle: "*The sale price is sufficiently determined if it can be determined according to the circumstances*".

If the object of the contract is goods which the seller normally sells, it is presumed by the legislature that the parties have taken into account the price normally charged by the seller; and if goods are sold whose price is fixed on organized markets, it is assumed that the average price, charged on the market closest to the place of conclusion of the contract on the day of the conclusion of the contract, is accepted. The price may also be determined according to the weight of the item, according to Article 1663 of the Civil Code, without taking into account the weight of the packaging.

The price may also be determined by a third party, indicated in the contract or subsequently nominated[16)]. If the parties do not agree on the designated person, or if the third party does not determine the price within 6 months from the conclusion of the contract, its nomination will be made by the court, by appointing an expert.

[16] See M.B. Cantacuzino, *Elements of Civil Law,* Cartea Românească Publishing House, Bucharest, 1921, p. 636.

5 Clauses for maintaining the value of the contract, in the sales contract – as an act of commerce

The contract of sale, as an act of trade, is also particularized with regard to the clauses for *maintaining the value of the contract*, mainly *regarding the price*.

In the contract, the parties may provide for clauses to maintain the value of the benefits, including the price. Such a clause is the *price indexation* clause. The contracting parties have the possibility to provide in the contract a clause specifying that the price to be paid will depend on a certain index agreed upon by the parties, called "the currency of the contract[17)]". The amount of money the buyer will pay depends on the value of the index agreed by the parties, which will determine a variation of the price, either increasing or decreasing it.

In Article 1234 of the Civil Code, the legislator provides for the report to a reference factor, if the parties determine the price by reporting to a reference factor, providing that, if this factor does not exist, it has ceased to exist or is no longer accessible, it will be replaced, unless otherwise agreed, by the nearest reference factor.

Another clause to maintain the value of the contract which is often used in practice is the price review clause. The parties have the possibility to provide a price review clause, especially since according to the legal provisions analyzed, it is possible to subsequently establish the price according to the price charged on the market, in stock exchanges, etc.

Under the price review clause, the parties set a specific price at the time of the conclusion of the contract which may be revised at a later date. If the parties can later determine the price due by the buyer, they may *a fortiori* change the price initially set in the contract, if there is a contractual clause to that effect.

To the extent that there is no contractual price review clause, the seller cannot request its recalculation, stating that after the conclusion of the contract, re-evaluating the goods, the seller found that, in fact, the buyer still owes him[18)].

The price revision appears in the contract, in particular, in the form of the *price variation clause*, depending on the evolution of the exchange rate. Such a clause is perfectly valid, given that between the time of the agreement of the parties and the time of execution of the obligation to pay the price there is a longer period of time, in which there may be a fluctuation in the price of the same product depending on the evolution of the exchange rate[19)].

The price change according to the review or variation clause *cannot be made unilaterally by the seller*, especially since, as a rule, the price is increased.

In one of the settled cases, the Supreme Court found that, although the parties provided for the possibility of renegotiating the price within the contract, it did not

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[17] I. Turcu, L. Pop, *Commercial Contracts. Form and Enforcement, vol. I,* Lumina Lex Publishing House, Bucharest, 1997, pp. 75-76.

[18] The Supreme Court of Justice, The Commercial Chamber, decision no. 1085/1996, in the Legislative Economic Bulletin no. 1-2/1999, p. 99.

[19] The Brașov Court of Appeal, Civil Chamber, decision no. 35/1996, în "Culegere de practică judiciară" 1996, p. 130.

occur that, without the agreement of the beneficiary, the supplier could not request the increased price, but only the price initially provided in the contract.[20)].

However, **the price variation based on the inflation index of the payment currency** operates independently of the existence of a contractual clause, if the buyer has not fulfilled his obligation to pay the price within the term or terms stipulated in the contract. In this case, being a contractual liability, it is obvious that the debtor must cover the damage caused to the seller in its entirety; however, by devaluing the payment currency, obviously a damage is brought to the seller's patrimony[21)].

6 Other clauses regarding the price used in the sale contracts – as an act of commerce

6.1. The retention of title clauses (*pactum reservati dominii*)[22] consists of the fact that that the seller will transfer ownership of the item sold at the time of payment of the last installment of the price due by the buyer.

The validity of this clause is currently indisputable, as long as there may be sales of other people's goods or work. In all these cases, the transfer of ownership is made after the completion of the agreement of will.

With respect to the *legal effects of the retention of title clause*, from the moment of the realization of the agreement of will the buyer acquires only the right of use over the purchased good, becoming a precarious holder until the moment of the full payment of the price, when the property title will be transferred. In case of non-payment of installments, the seller has the right to choose between the personal action regarding the payment of the price, the action arising from the contract, and the action for the recovery of possession of the item held by the buyer.

The risk of accidental loss of the goods sold belongs to the seller, according to the *res perit domino* rule, unless otherwise provided in the contract..

In case of damages caused by the work purchased to a third party, the buyer who has possession and use of the item will be liable.

The sale is opposable to third parties as any legal fact, it is known that a convention is opposable to third parties as a legal fact and not as a legal act.

6.2. Sale with payment of the price in installments.[23] The sale with the payment of the price in installments can be qualified as a *sale on credit*, the price being divided and payable at different time intervals. At the end of the contract, an advance (part of the price) is paid, after which the rates are evaluated in progressive, equal or regressive installments. The credit can be granted by the seller or by a third party.

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[20] The Supreme Court of Justice, The Commercial Chamber, decision no. 356/1998, in "RDC" no. 3/1999, p. 133.

[21] The Supreme Court of Justice, The Commercial Chamber, decision no. 445/1996, in "RDC" no. 3/1999, p. 83; The Supreme Court of Justice, The Commercial Chamber, decision no. 87/1997, in RDC" no. 7-8/1998, p. 196.

[22] See, S. Angheni, *Commercial Law. Treatise, op. cit.,* p. 490.

[23] *Idem*, p. 491; St.D Cărpenaru, *Romanian Commercial Law Treatise,* Universul Juridic Publishing House, 2019, p. 480.

It is important to note that *the interest and ancillary costs of the sale are added to the agreed price.*

The right of ownership and the risk of fortuitous loss are transferred from the seller to the buyer at the time of signing the contract of sale.

In cases where there are *legal prices* for certain categories of products, the contracting parties must comply with the legal provisions. If another price is set in the contract, the clause will be void and replaced by the legal one regarding the price of the respective products. If the contract lacks the price clause, it will be struck by absolute nullity.

7 Conclusions

In relations between professional-traders or between a professional-trader and a consumer, the contract of sale may be qualified as an act of trade, a legal operation which has specific features of the trade activity. These features result, both from the content of the applicable legal provisions in the matter, and from the will of the parties.

Determining the legal nature of the contract of sale, whether it is an act of trade or a civil act, is important not only in terms of the legal regime which, in certain situations, is derogating from common law, but also in relation to the court competent to settle any disputes, either specialized panels or specialized courts to settle disputes between professional traders or civil courts which settle common law disputes, according to Article 226, 227, 228 of Law no. 71/2011 for the implementation of Law no. 287/2009 regarding the Civil Code.

What is of interest in determining the classification of a contract of sale as an act of trade is not only the professional status of both contracting parties or only one of them, but also the object and purpose of the contract.

The commercial nature of the contract of sale is the expression and result of the purpose of the trade, expressing its specificities, such as: the speed of operations, the credit, the good faith between the subjects participating in the legal relations, security of the information acquired during the negotiation of the contract but also later on, during the execution of the contractual obligations[24].

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Some procedural difficulties relating to the scope and method of solving the eviction procedure out of the real estate being used without having the right to

University Professor PHD Răducan G.

Faculty of Law, "Titu Maiorescu" University, Bucharest (ROMANIA)
E-mail: gabriela.raducan@rlga.ro; gabriela.raducan@prof.utm.ro

Abstract

The present study aims, mainly, to analyse some problems of interpretation of the scope of the special procedure of eviction procedure out of the real estate being illegally used, arguing the incidence of the exception to the inadmissibility (ineligibility) of the action/ claim (as a procedural exception), in the event that the action/claim exceeds the restrictive scope provided by law or in which the rule electa una via is breached, or, as the case may be, the incidence of a dismissal solution. In particular, we analysed the situation of the joint venture agreement and the case in which the defendant could oppose the *usucapio* (prescription) of the real estate from where eviction is requested, but also the hypothesis in which the plaintiff uses the special eviction procedure, although an eviction claim of general jurisdiction is pending. The study also states that the special eviction procedure can only be used if the plaintiff can outline a clear legal situation.

Keywords: eviction, real estate being illegally used, real estate/property, possession, precarious detention, exception to the ineligibility of the action, joint venture, *usucapio* (prescriprion)

1 Introduction

In the matter of the special procedures regulated by Book VI of the Code of Civil Procedure, within Title XI (articles 1034-1049) we find the special procedure of *eviction from the buildings being illegally used or, as the case may be, occupied*. At the same time, although it does not aim at the eviction out of a building, but considering the

rights and obligations risen from the lease contract, within the same title, in the chapter entitled "Special provisions" (articles 1046-1049 Code of Civil Procedure), several hypotheses are regulated in which the law allows urgent measures to be taken by way of presidential ordinance.

Lato sensu, the special eviction procedure constitutes a *procedural application* of the substantial provisions regarding the protection of the right to property, being one of the alternatives that the injured/aggrieved persons have at their disposal, especially when they want to resort to an urgent, judicial procedure, quickly carried out.

The norm provided for in the article 1034 paragraph (1) Code of Civil Procedure sets the scope of the eviction procedure, establishing that, in this way, the disputes regarding the eviction from the buildings illegally being used or occupied by the *former tenants* or *other persons* can be solved.

Although the article 1034 paragraph (2) Code of Civil Procedure, explains the terms *lease, tenant, lessor, real estate, occupant and owner*, the legislator shows no preoccupation about the term "*illegally occupied*", and the fact that it is set in relation to the notions of "*former tenants*" and "*other persons*" often prove to be insufficient in the judicial practice.

Therefore, in this paper, we will insist on issues related to the strict scope of this procedure, as well as the incidence of the solution of *inadmissibility* of the application, given that the factual and legal situation of the case brought before the court exceeds the scope of this legal application.

At the same time, we shall address other particularities of this special procedure, related to the mandatory prior notification procedure and the sanction of its non-fulfilment, related to the procedural documents, the manner of conducting the decision, the effects of the eviction ruling, the remedy at law, the levy of execution and the suspension of the execution.

2 The scope of the special eviction procedure

The norm provided for in the article 1034 Code of Civil Procedure delineates the *scope* of the procedure, so that it becomes incident in two hypotheses, namely: w*hen the buildings are illegally used* (namely, when there was a lease between the parties, but it ceased to produce its effects) or *when the building is illegally occupied* (namely, when there is no contract concluded between the parties, concerning the use of the property, and one of the parties actually occupies *de facto* the building, without having the permission of the owner or, as the case may be, of the tenant).

At the same time, we can argue that the scope of the special eviction procedure is delineated in terms of particularities related to the *general conditions for exercising the civil action*, but, outside these general conditions, for the admissibility of the eviction claim by the way of this special procedure, it is necessary that a *special condition* is also met, namely the *prior notification* of the former tenant or, as the case may be, of the one who occupies *de facto* the building.

The provisions of article 1034 of the Code of Civil Procedure also detail the *active and passive procedural quality* within the special eviction procedure. Thus, as we stated

on another occasion[1], *the active procedural capacity* belongs *to the owner* (the holder of the property right over the building), *the holder of a dismemberment of the property* thus offering the defendant the right to request the hand-over of the property or, as the case may be, *to the lessor* [respectively: *the main lessor*, *the sub-lessor*, *the assignee and the acquirer of the building*, according to the article 1034 paragraph (2) letter c) Code of Civil Procedure], as well as *to the lessee*, insofar as, in defence of his right to use, he promotes an action in eviction against a third party who illegally occupies the building that is the object of the lease; as for the *passive procedural quality*, it belongs to the *former tenant* [in the sense given by the article 1034 paragraph (2) letter b) Code of Civil Procedure – that of *main tenant*, *tenant* or *lessee*, *sublease* or a *transferee of the lessee*] or, as the case may be, to the *occupant of the building*, who, under the article 1034 paragraph (2) letter e) Code of Civil Procedure, *is any person, other than the owner or tenant, who de facto occupies the building with or without the permission or acceptance of the owner or tenant*.

Legitimately, the doctrine[2] has shown that the term of *occupant of the property* means not only the person who used the property de facto – with or without the permission of the owner or, as the case may be, the owner of another real right, which involves the use of the property – but *also any other person who has the obligation to hand-over a building that is included in the content of a legal relationship*, other than that of lease or rental.

Thus, the plaintiff can resort to eviction by way of court action both in the event that the defendant has a contractual basis based on which he currently occupies or did occupy the building in the past (for example, a lease contract[3], renting agreement or land leasing agreement) and in the case in which the defendant does not have a contractual basis, but nevertheless occupies the building de facto. Thus, a feature of this special procedure lies in the possibility of exercising it, *even in the absence of a contractual basis for the obligation to hand-over*. The doctrine[4] specified that the claim for eviction formulated under the article 1034 et seq. of the Code of Civil Procedure directly sanctions the violation of a real right for the hypothesis in which the defendant does not show any title over the real estate[5].

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[1] G. Răducan, *Civil procedural law. Remedies. Non-contentious judicial procedure. Special procedures*, Hamangiu Publishing House 2017, p. 494.

[2] See G. Boroi, M. Stancu, *Civil procedural law*, 5th edition, Hamangiu Publishing House 2020, p. 1060, where it is shown that the *active procedural quality* is owned by the person who had a title for the use of the building, another than a lease or rental agreement, and the effects of this title have ceased. Specifically, the eviction action can be exercised as well in the case of the borrower who used the property according to the loan agreement, if it was concluded without termination point, of the seller who continues to occupy the property, thus refusing to fulfill his obligation to hand-over, of the usufructuary, of the holder of the right to use or to occupy, who does fulfill his obligation to hand over at the end of the usufruct, etc.

[3] In the provisions of the article 1034 paragraph (2) letter a) Code of Civil Procedure, the term "lease" is defined as any written or verbal lease, including sublease (n.n.).

[4] G.-L. Zidaru, *Special procedures: eviction from buildings being illegally used or occupied*, in the Conferences on the New Code of Civil Procedure, http://www.inm-lex.ro/NCPC/doc/Brosura%20NCPC.pdf, p. 126.

[5] In any case, even in the situation where both litigants hold property titles over the building whose use is disputed through the eviction action, it is not possible to compare the titles, in such a situation the eviction action becoming ineligible – C.A. Craiova, s. com., Dec. no. 79/2009, published in

On the other hand, it was also rightly stated[6] that such a special procedure "*does not involve the examination of the right of ownership or of another real right* in the conditions of the action for the recovery of possession or the confessory pleading (actio confessoria), so that, if the defendant shows a title which confers him a real right on the disputed property, although the eviction will not be ordered, we consider that the decision given in the special procedure *will not have the authority of res judicata in a possible subsequent real action*", especially in the restrictive conditions provided for in the article 1042 paragraph (2) Code of Civil Procedure, according to which the eviction claim is judged with *summary debates*.

The object of the special procedure regulated by the provisions of the article 1034 et seq. Code of Civil Procedure is represented by the *eviction out of a building*. Also, from the perspective of the scope, the provisions of the article 1034 paragraph (2) letter d) Code of Civil Procedure stipulates that *building* means the construction, the land with or without buildings, together with their accessories[7], which leads to the conclusion that this special procedure is not limited to residential buildings, targeting other categories of buildings and/or land.

With regard to the requirement of *the interest*, as we have previously stated[8], in the exercise of the special eviction procedure, by hypothesis it is understand that it exists whenever the defendant refuses to release the building voluntarily and the *plaintiff does not have a writ of execution* under which he could force the defendant to evacuate the property, and this is like that because – regardless of the procedural action chosen, the special action or of general jurisdiction- the plaintiff's action would be dismissed as *lacking of interest*, if the plaintiff would possess a writ of execution against the defendant.

By establishing the special procedure provided for in the article1034 et seq. Code of Civil Procedure, it was implicitly created the *possibility for the plaintiff to choose* between this procedure and the eviction action of general jurisdiction, *so that both have optional feature*. However, *when the factual and legal situation of the case does not fall within the scope of the special eviction procedure*, the plaintiff no longer has that right of option, but he must resort to the exercise of eviction action of general jurisdiction in order to seek the assertion of his subjective alleged right.

3 The inadmissibility of the special eviction procedure

First of all, we would like to mention that we consider the *procedural exception* (substantive, absolute, peremptory) *of ineligibility*, and not an inadmissibility in the material sense (defence on the merits of the law), although often, erroneously, in jurisprudence, confusion is made between the two categories of ineligibilities. *In concreto*, the *exception to the ineligibility of the action*, as a procedural exception, can

Indaco Lege 4.4 *apud* C.C. Dinu, *Special procedures in the new Code of Civil Procedure*, Universul Juridic Publishing House, 2013, p. 238.

[6] G. Boroi, M. Stancu, *op. cit.,* p. 1061.

[7] According to the provisions of the article 546 paragraph (1) of the Civil Code, the accessory goods are those that have been destined, in a stable and exclusive way, for the economic use of another good, as long as they satisfy this use (n.n.).

[8] G. Răducan, *op. cit.*, p. 495. In the same respect, G. Boroi, M. Stancu, *op. cit.*, p. 1062.

be claimed not only in cases where any rule of law expressly regulates it, but also when the law does not recognize the path open to a certain action or recognizes it under certain conditions.

For greater clarity, the following theoretical clarifications are required.

3.1 *General theoretical clarifications regarding the exception to the ineligibility*

The legal institution of the *exception to the ineligibility (in material sense) of the action* can be claimed only for the *non-fulfilment of some conditions of material law, provided cumulatively,* specific to certain actions, such as *the derivative action, the actio pauliana, the action for the restitution of the undue payment* (grounded on undue payment), *actio de in rem verso* (based on enrichment without just cause), the tort liability action, etc. Of course, this *exception to the ineligibility of the action (in the material sense)* is a defence on the merits of the law, which should not be confused with the *exception to the inadmissibility (in the procedural sense)*.

Distinctly, within the substantive procedural exceptions there is also *the procedural exception of inadmissibility*, however, *as a species* (within the substantive exceptions), and not as a genre. The exception of inadmissibility is therefore a *substantive, peremptory, absolute* or, as the case may be, *relative exception* (depending on the nature of the infringed norms).

The definition we previously proposed in the doctrine, confirmed by the case-law and the literature[9] is as follows: *the* (procedural) *exception of inadmissibility* represent the procedural means through which an irregularity is claimed in terms of the fact that *the law does not acknowledge as open a certain action, a certain procedure or a certain way in court, or that the law acknowledges it only if certain procedural conditions are met (*(usually, cumulative), *or that the law does not allow it due to the fact that the right is not recognized by the law*[10].

By way of example, *the exception of inadmissibility* may be claimed (and the solution, if this exception is allowed, will be *to reject the application as inadmissible*) in the following cases: when a petition for a declaratory action is formulated, although the party has the option to pursue an injunction under the provisions of the article 35, Thesis II of the Civil Procedure Code, *the exception of the inadmissibility of the petition for the declaratory action* being an *absolute, peremptory* exception *on the merits* (which is also called the *exception of the subsidiarity of the declaratory action compared to the injunction*); when the mandatory preliminary procedure has not been performed, *the exception of inadmissibility* for the non-fulfilment of the *mandatory preliminary procedure* has *absolute* character when the norm being breached is of public order [for example, the lack of the mandatory preliminary administrative procedure provided for in the article 7 of Law no. 554/2004 of the administrative contentious; the case specified

[9] G. Răducan, *op. cit.*, p. 410.

[10] "The inadmissibility of an application can occur only when the right is not recognized by law or if the conditions of admissibility of the procedural path exercised are not met in relation to the legal regulation" – C.A. Bucharest, 3rd civ. s., Dec. no. 2478/2001, Civil judicial practice for the years 2001-2002, p. 393.

in the article 193 paragraph (3) Code of Civil Procedure etc.] or *relative* character, when the norm being breached is of private order [for example, in the case of the payment injunction procedure – the article 1017 paragraph (2), Thesis II, Code of Civil Procedure]; *the exception of inadmissibility of the appeal* [when the law does not provide for the remedy of the appeal, the court ruling being final on the date when the appeal judgment was pronounced; when, except for the situation provided for in the article 459 paragraph (2) Thesis II and Code of Civil Procedure, the appeal is exercised *omisso medio* (against a judging rendered by a court of first instance that has not been appealed), in which case the appealed ruling becomes final at the expiration of the appeal term; in the case of a genuine "*appeal to recourse*", etc.] or the *exception of inadmissibility of an extraordinary way of appeal for withdrawal*, as long as the appeal or recourse way is open, including when *omissio medio* the reformation remedy at law has been skipped, whose deadline has expired without being exercised; *the exception of inadmissibility of the presiding judge's order*, on the ground that all three conditions of admissibility in the procedural sense are not met. We recall that, in addition to the general conditions of any legal action, in order to be *admissible*, the presiding judge's order must meet three special *conditions* of admissibility which are provided *cumulatively* and which result from the provisions of the article 997 paragraph (1) Code of Civil Procedure (respectively: urgency, provisional/temporary nature of the measure and non-prejudice of the merits), which means that *the non-fulfilment of a single condition is sufficient to attract the dismissal of the application for presiding judge's order as inadmissible*. As we have stated on other occasions[11], we insist on this solution, of *dismissal as inadmissible*[12] of the request for a presiding judge's order if at least one of the three special conditions of admissibility is not met, because the case-law show that there have been judgments of rejection "*as not grounded*".

It should therefore be noted that these are *conditions of admissibility in the procedural sense* [and not in the material sense (substantive)], in the sense that the law does not acknowledge as open the path of this procedure unless special admissibility requirements are met, which is capitalized by claiming and admitting the *inadmissibility* (*by way of procedural, absolute and peremptory exception on the merits*).

On the other hand, the solution of rejecting an application as *unfounded* is delivered when, following the trial, analysing the merits of the application, it is found that the *subjective right subject to the trial does not exist*[13], even if we speak of the appearance of that right, and not when, *failing one of the conditions of admissibility provided by law, there is an impediment to the substantive analysis of the claim* (practically, the analysis of the merits becomes useless, the claim not being able to be accepted by this way); *the exception of inadmissibility of an action for which the law provides for another specific way* [for example, of the request for a presiding judge's order requiring the temporary suspension of the forced execution, because the law provides for the specific procedure in article 719 paragraph (7) Code of Civil Procedure, when the provisions of the article 450 paragraph (5) Code of Civil Procedure are not incident, provisions that are applicable to ruling with provisional execution; requesting

[11] As example, G. Răducan, *op. cit.*, pp. 410-411
[12] Similar, please also see G. Boroi, M. Stancu, *op. cit.*, p. 1,000.
[13] V.M. Ciobanu, G. Boroi, T. Briciu, *Civil procedural law. Selective course*, 2011, C.H. Beck Publishing House, p. 3; G. Boroi, M. Stancu, *op. cit.*, p. 42.

precautionary measures (distrain [upon property], precautionary execution seizure), by means of a presiding judge's order, although the law directly regulates the path of these special procedures] etc.

Returning to the special procedure of eviction grounded on the provisions of the article 1034 et seq. Code of Civil Procedure, considering its limited scope of application, we claim that the procedural exception of inadmissibility has incidence whenever it is found that the *de facto and de jure situation mentioned in the claim or in the defences*, as the case may be, *does not fall within the scope* of this procedure, meaning that the court must rule it as a true *procedural exception* and expressly rule on its admission into the enactment terms of the sentence, and if it is justified to be followed by the ruling of dismissal of the claim for eviction as inadmissible.

Thus, in the current study, we focus on three hypotheses (only as examples and not limitative) that we intend to present, which determine *the inadmissibility of the claim for eviction* grounded on the provisions of the article 1034 and subsequent article(s) of the Code of Civil Procedure.

3.2 *Inadmissibility of the claim for eviction grounded on the provisions of the article 1034 and subsequent article(s), when the defendant uses the building under a joint venture agreement*

Ab initio, we specify that the special procedure of eviction applies either to the tenants/former tenants (those who owned the building under their own title), *or to the de facto occupants, who exercise exclusively the prerogative of use, and not to the co-owners and/or associates of joint venture.*

Regarding *joint ventures contracts*, there may be a simple situation in which one partner brings together a property (usually land and construction), and the other partner only uses the property brought in the association for its purpose, but there may be the particular situation in which, during the development of the contract, with the consent of the associate who is the owner of the real right on the building, the other partner builds on the land of the former or expands, makes additional works to the construction of the former. In this case, the question arises whether or not at the time of expiration of the term for which the joint venture agreement was concluded, the partner who is the holder of the real right over the building brought to the joint venture has or hasn't at his availability the special procedure of evicting the other partner.

In the event that only the associate who brought the property estate within the joint venture is the owner of the property right or of another real right over the building, the claim for the eviction grounded on the provisions of the article 1034 and following Code of Civil Procedure is *inadmissible* as long as the *liquidation of the association* and the *distribution of profit and assets* have not yet been made, in *conjunction with the compensation of losses* – the other partner having an active *right of retention* and *use* over all assets of the association, including over the property estate brought by the other partner, even if the contract has reached its term.

Assuming that the partner who at the time of concluding the joint venture agreement was not the holder of any real right over the building, acquires, during the

performance of the contract, such a right in respect of a part of the building (usually by adding new constructions, new extensions of existing construction, etc.), all the more so the *claim for eviction is inadmissible*, because in addition to the reasons set out above (related to the liquidation of the association, distribution of profit and assets, correlated with compensation for losses), such a partner cannot be characterized as a simple *precarious holder* (within the meaning of the article 918 Civil Code), which has only *ius utendi* and *ius fruendi*, but he is a *co-owner* (and proves this right, under the law).

Usually, the managing partner is not the one who brings the building in association, but the other one, who participates with the management and development of a certain business in association. Also as a rule, joint venture agreements contain specific clauses governing the manner in which the liquidation of the association is carried out, after a meeting of the commission, after the liquidation balance has been carried out; in addition, the liquidation operations imply, necessarily, the identification of the goods with whose use contribution has been made to the association, stating their condition in order to determine the extent of wear, identification of the objects of inventory and of fixed assets, which are not embedded in the construction and can be taken over without destructive effect on the constructions; the identification of the constructions, arrangements and modifications with definitive character, in a state of fixation, as well as the establishment of the circumstance if they were, in whole or in part, amortized or included in the association's expenses, and otherwise, the establishment of their circulation value etc.

In addition, it must be borne in mind that *there is no joint venture without contributions*, the contribution which may be in kind, in cash or in industry (ie the partner undertakes to put in the service of the association his activity, work, credibility, professionalism he has in the respective activity etc.), so that, on the occasion of the liquidation, these participations will be taken into account for the associate who did not bring the building in the association, but such contributions. As the purpose of the association in such contracts is to bring a contribution *in exchange for participation in benefits*, it is considered that the *right to participate in benefits is essential*, and the benefits may consist in the payment of sums of money as a result of business, but also in movable or immovable property, as a result of the activity carried out, while the distribution of benefits is made in proportion to the contribution at the time of concluding the contract.

The liquidation can be performed by the *managing partner,* whose management mandate is extended at this stage, even if the duration of the association contract has expired, and in case of conflict, the liquidator is appointed by the court or, as the case may be, the parties may request a liquidator from the Trade Register Office.

With regard to the distribution of the asset, if there have been no losses or, should they have existed, they have been distributed or paid, the parties have the right to a refund of the contribution and *the corresponding part of the registered asset as a result of the joint activity;* the contribution will be reimbursed to the extent possible, such as movable or immovable property.

In the situation of the restitution in nature of property estate, where improvements or investments have been made on them, is the difference (plus or minus) that will be taken into account in determining the benefits and losses of the association, as the property has been used in the interest of the association.

As decided in the jurisprudence[14], "*first the settlement had to be done* in the first association (...) and *then the plaintiff could find out what property rights he acquired depending on the participation.* However, keeping in mind that these rights are only claims until settlement, his claim that his *property rights have been defrauded* is not substantiated."

In these circumstances, it is clear that until the liquidation of the association and the distribution of the assets of the association are completed, any request for eviction is *inadmissible.*[15]

3.3 *Inadmissibility of the request for eviction grounded article 1034 et seq., when the plaintiff it claims* usucapio *(prescription)*

The doctrine[16] stated that "the law includes in the notion of *de facto occupant of a building* not only the person who entered the *use of* the property in fact, with or without permission of the owner or holder of another real right (in rem) involving *the prerogative of the use of* the property, but also any other person who has the *obligation* to hand-over a property falling within the content of a legal relationship, other than that of lease or rental" (ie, under another contract stipulating the obligation to hand-over, which results *ex re* – our underlining).

In other words, the special eviction procedure applies either to the tenants/former tenants (those who owned the building under their own title) *or to the de facto occupants, who exercise exclusively the prerogative of the use,* and *not the useful possession* over the building in question. We cannot confuse the simple *use* (and the quality of "*occupant*" without having the right to do so) of a good with *the possession,* which implies the existence of rights recognized by law.

Therefore, in those cases where the defendant *is not a mere precarious holder*[17] *(within the meaning of article 918 Civil Code),* which has only *ius utendi* and *ius fruendi,* but is a true *POSSESSOR* (*ius possidendi),* within the meaning of article 916 Civil Code[18], we appreciate that the special eviction procedure is *inadmissible.*

We recall that *possession* means the *actual mastery of a thing, which, from the point of view of the possessor, appears as an exteriorization of the attributes of a main real right,* involving the two both constituent elements of possession: the material element *(corpus)* and the psychological or intentional element *(animus possidendi* or

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[14] HCCJ, Commercial Section, decision no. 4872 of October 19, 2005, in L. Săulean, *Joint* Venture, Bucharest, Hamangiu Publishing House, 2009, pp. 46-47.

[15] For example, Ilfov County Court, civil section, civil judgment no. 391/19.05.2016, file no. 485/93/2016, remained final and Ilfov County Court, civil section, Judgment no. 2705/F/08.10.2018, to complete the *civil sentence no. 2098/27.07.2017,* file no. 940/93/2017 (remaining final) etc. (*unpublished*).

[16] G. Boroi, M. Stancu, *op. cit.,* p. 1061.

[17] I.R. Urs, P.E. Ispas, *Civil law. Theory of rights in rem,* 2nd edition, Hamangiu Publishing House, Bucharest, 2015, pp. 370-373.

[18] Art. 916 of the Civil Code: "*(1) Possession is the exercise in fact of the prerogatives of the property right over a good by the person who owns it and who behaves like an owner. (2) The provisions of this Title shall apply mutatis mutandis to the possessor who acts as a holder of another real right, with the exception of the real security rights"* (n.n.)

animus rem sibi habendi). The psychological element is characterized by the will of the one who masters the thing to behave regarding it *as an owner* or *as a holder of another main real right.* Moreover, according to article 919 paragraph (1) of the Civil Code "*Until proven otherwise, the one who owns the property is presumed to be the owner"* and according to article 922 paragraph (2) of the Civil Code *a presumption of useful possession* is established.

In these conditions, we consider that in the special procedure of the eviction, the defendant – who has not the right to formulate a counterclaim, according to article 1043 paragraph (1) of the Code for Civil procedure, but can still claim "*substantive defences regarding the merits of the reasons in fact and in law of the request, including the lack of the title of the plaintiff"*, according to article 1043 paragraph (2) C.proc.civ – can be defended by invoking the prescription *(usucapio) by way of substantial exception* (defence on the merits of the law). As it is generally acknowledged that the invocation of usucapio paralyzes the very exercise of the action for the recovery of possession[19], all the more so, it will paralyze an eviction request.

Of course, the purpose of claiming the usucapio by way of substantive defence (exception) is only to obtain the rejection of the plaintiff's action, and not to establish the very property right acquired by the defendant through this original way of acquiring the property.

In this context, finding that the defendant's defence is well-founded, some courts may opt for a dismissal solution *of the petition for the eviction,* while others may directly embrace the solution of the *inadmissibility* of such a request, given that the useful owner's situation does not fall within the scope of application of article 1034 et seq. of the Code of Civile Procedure.

However, we appreciate that this special evacuation procedure can only be used if the applicant can outline a *clear* (*unequivocal) legal situation*. Thus, whenever it is concluded that this summary procedure cannot clarify the actual legal relationship between the parties, the *request for eviction must be rejected* (usually as *inadmissible,* sometimes as *unfounded*), as there is nothing to prevent the applicant from addressing an *application for eviction of general jurisdiction,* where even the defendant may file a counterclaim and use any means of proof, without there being a serious prejudicial risk of a possible miscarriage of justice caused by an enforceable judgment of eviction, which would subsequently prove erroneous. Rhetorically, we ask ourselves: what is the use of today's *defendant,* who became tomorrow's *creditor,* initiating a case for the return of enforcement, which can take several years, if he has already been evicted, harmed also materially, and if the usucapio was invoked by way of exception, – in the case of an eviction decision – would a forced surrender of the property unjustly interrupt the *possession*?

[19] E.P. Ispas, *Typology of real estate usucapio and elements of civil procedure,* article published in the volume of the annual international conference *on Law, European Studies and International Relations,* 4th Edition, *Perspectives of the European Union. Romania on the review after a decade since the accession,* organized by Titu Maiorescu University, Faculty of Law on May 18-19, 2017, ISBN 978-606-27-0879-5, pp. 204-211.

3.4 *Inadmissibility of the petition for the eviction based on article 1034 et seq. Code of Civil Procedure, when the plaintiff had previously notified the court with a claim for eviction of general jurisdiction*

Under another aspect, there is *another* procedural exception of inadmissibility, more precisely, the request for eviction based on article 1034 Code of Civil Procedure is also inadmissible when it is *exercised simultaneously with the existence of a petition for eviction of general jurisdiction pending before the courts,* because it violates the principle of law *electa una via non datur recursus ad alteram.* Thus, after one procedural path was chosen, it is not allowed to use another one to achieve the same right as long as the first was not rejected completely. The expression is a Latin phrase used to state the principle according to which, in the cases provided by law, a person is granted the *possibility to opt for referral to a court with one of the applications through which the same right can be* exercised, and not the right to address both of them (to obtain the same right in two different paths in front of the court)[20].

In the doctrine[21], in an opinion, it was considered that the plaintiff could not simultaneously promote both a petition for eviction under the general jurisdiction and a request through the special procedure, being incident, where appropriate, the exception of lis pendens or the exception of the res judicata. Thus, it was shown that "one cannot equate civil cause of action (*causa petendi*) and the cause of law (*causa debendi*), which constitutes the cause of the application of summons, the two concepts being different and not subject to confusion[22]. The cause of the summons means the basis of the legal relationship brought in front of the court, the legal basis of the claim[23]. In other words, the cause of the summons is the basis of the claim brought before the court or the factual situation legally qualified, but with the emphasis on the factual situation. The cause of the summons does not change depending on the chosen procedural path, nor by indicating any additional legal grounds. Consequently, the *cause of the civil eviction*

[20] The rationale for this principle was, on the one hand, to avoid unnecessary crowding of courts and, on the other hand, to prevent contradictory judgments. The Strasbourg Court as well recognizes the applicability of this principle of law, stressing that its application does not violate the right of access to justice (for instance, ECHR, Section III, decision Iorgulescu versus Romania, January 13, 2005, 59654/00). The High Court Cassation and Justice as well (Decision no. 3151 of October 9, 2013 pronounced in appeal by the Second Civil Section of the High Court of Cassation and Justice; https://www.juridice.ro/300165/iccj-incalcarea-principiului-electa-una-via-non-datur-recursus-ad-alteram.html) ruled that *if the law provides for two different procedural paths*, *with the same goal*, the option of the parties involved in the process for the first possibility, prevents access to the second procedural path, to clarify the same issue of fact. The High Court of Cassation and Justice stated that the reason for the exclusive nature of the option for one of the two procedural paths is precisely to prevent the pronouncement of contradictory solutions in one and the same problem referred to the court (n.n.).

[21] A.B. Arghir, *The procedure of the eviction from buildings used or occupied without having the right to do so. Comments and jurisprudence according to the new Code of Civil Procedure,* Hamangiu Publishing House, Bucharest, 2015, pp. 7-9.

[22] V.M. Ciobanu, T.C. Briciu, C.C. Dinu, *Civil procedural law,* Naţional Publishing House, Bucharest, 2013, p. 121.

[23] M. Tăbârcă, *Civil procedural law,* vol. II, Universul Juridic Publishing House, Bucharest, 2013, p. 592.

action is the *use or the occupation without right of a building by the former tenant or by the occupant and the will to make that use or occupation to cease, establishing a state corresponding to the right being claimed,* and the cause of the summons may be the lease contract or the sale-purchase contract (or another title that confers the right of use on the real estate). In such circumstances, *it is irrelevant the procedural path being chosen,* namely the general jurisdiction action or the special procedure since the case of the application of summons may be the same. (...) Therefore, the objection of *lis pendens* can be raised successfully by parties or by the court ex officio, if the conditions provided for in article 138 paragraph (1) and (2) Code of Civil Procedure are met.

However, as far as we are concerned, we share the view expressed[24] in the literature as well, in the sense that such a solution is not the appropriate one, by reference to the consequences of claiming and admitting the exception of *lis pendens*, consisting in sending the file by the court subsequently invested, before which the exception of lis pendens was claimed and admitted, to the first instance being notified, but we consider that the second petition for evacuation must be dismissed as *inadmissible,* for breaching the principle *electa una via non datur recursus ad alteram.*

It is true that the plaintiff has a right of option, acknowledged by the legislator through the article 1035 paragraph (1) Code of Civil Procedure, between the judicial capitalization of his right of real estate use, *either through the special eviction procedure, or through the general jurisdiction,* but, once this right of option is exercised, the principle *electa una via non datur recursus ad alteram* stands against the formulation of a new action having the same cause (*causa petendi*) and the same object (*causa debendi*).

Thus, *if the plaintiff formulates an action for eviction by way of general jurisdiction, and subsequently, he requests the eviction by means of the special procedure provided for in article 1034 et seq. Code of Civil Procedure* (our case) the second action, chronologically speaking, will be dismissed as *inadmissible* for having breached the principle electa una via ..., given that, *since the legislator provides two different procedural paths, with the same purpose, the option of the parties* involved in the process for the first possibility is likely to prevent access to the second procedural path[25].

[24] A. Carali, *The relationship between the special procedure of eviction from the buildings occupied or used without having the right to do so right and the eviction in terms of general jurisdiction. Does the rule become an exception?,* The Magazine Themis of the National Institute of Magistracy, 2016, http://www.inm-lex.ro/fisiere/d_1196/Revista%20Themis%20nr.%201-2016.pdf

[25] See also Timiş County Court, 1st Civil section, Dec. no. 1038/19.11.2014 (final, unpublished), *apud* A.B. Arghir, *op. cit.,* pp. 7-9 et seq.

Flexibility of working time, between the organizational prerogative of the employer and the social protection of employees

Volonciu M.

"Titu Maiorescu" University, Law Faculty (ROMANIA)
E-mail: magdavolonciu@volonciu.ro

Abstract

Flexibility in labour relations is a perceived need especially in times of crisis. Flexibility correlates with social protection. The concept of flexibility and the appropriate adaptation of working time. Early granting of paid days off and reduction of the weekly work schedule, advantages and disadvantages effective implementation in practice.

Keywords: work time; work program; compensation; flexibility; technical unemployment; contract suspension;

1 Introductory considerations

Flexibility in employment relationships has always been a goal, indeed, usually for employers. Otherwise, such a conception is fully understandable, as long as the management activity is specific to the employer. The later does not have only the organizational prerogative materialized by the right to own organization recognized by art. 40 paragraph (1) of the Labor Code, but, equally, even if not defined as such, has an obligation to organize work. For this organization to be as efficient as possible, it needs flexible working tools. On the other hand, the employee is interested in job stability[1], in

[1] In fact, job stability has always been, in the opinion of many Labour law specialists, a fundamental principle of this branch of law. Based on this principle, the principle of legality also works in case of termination of the individual employment contract (employment relationships can only end in cases expressly and exhaustively provided by law and only under the conditions imposed by law. Therefore, an abusive dismissal, e.g., cannot intervene stricto sensu, but only an illegal dismissal). It is not less true, however, that such an approach further stiffens this field, and compared to other legislations shows some anachronism).

the existence of clear and fixed limits, this also because the excessive formalism is considered to protect him somewhat from any abuse of the employer.

Probably this placement on diametrically opposite positions of the main actors of labor relations is also explainable by the fact that unlike traditional relations under common law, labor law is concerned with the labor process, the diligence with which the employee pursues the result, while in the case of civil relations what matters is exactly the result. However, the flexibility of work automatically leads to a greater liberalization of the positions of each participant in labor relations.

This is the reason why, especially after 2000, at European level, the concept of flexicurity at work was questioned, as an attempt to happily combine labor flexibility with the need for social protection of the employee.

The problem of flexibility becomes even more pressing in crisis situations that also affect the field of work. And in the crisis caused by the pandemic with COVID 19, the work-related aspects were of maximum interest and posed many challenges for the legislature, not all successful at least in terms of the legal technicality that would have been required to be taken into account by the Romanian legislator.

In the same context, an essential element to be considered is working time and how it must be adapted to existing realities. Thus, there were entire industries that, during the state of emergency declared by Decree no. 195/2020 and extended by Decree no. 240/2020, were forced to a temporary closure of activity. We can consider that in this hypothesis, there were no adaptation solutions, and the state, through GEO no. 30/2020, amended by GEO no. 32/2020 provided protection measures for both employees and capital, in the sense that it took over the costs of the allowance granted during the period of technical unemployment, when the individual employment contracts of the affected employees were suspended. Moreover, the granting of the technical unemployment indemnity by the state, from the unemployment insurance budget, represented a solution used by any employer who, during the state of emergency, resorted to the suspension of individual employment contracts pursuant to art. 52 paragraph (1) letter c) of the Labor Code, reported to the provisions of art. XI et seq. from GEO no. 30/2020 as amended by GEO no. 32/2020.

However, the problem becomes more difficult for those employers who, during the state of emergency and especially after its lifting, want to continue the activity, but cannot ensure full coverage of the normal work schedule. As a consequence, the issue of ways was made available to the employer, in order to reduce the working hours, obviously with the appropriate payment of the employees in such a case. Several options have been identified.

2 Granting paid days off to be recovered later

In common language, such a solution is also known as "notebook paid days off". Basically, there is an anticipated compensation of an additional subsequent work. Thus, the employer, in the event that he is affected by a reduction of activity that imposes on him, accordingly a temporary reduction of the labor force requirement, may grant days off for the respective employees, following that the additional hours that will be provided in the future, in a period of 12 months to be compensated from these hours thus granted. (see art. 122 paragraph (3) of the Labor Code). It should be noted that this

regulation can be found in the Section of "Additional Work"[2]. As a general rule, considering the provisions of art. 120 et seq. of the Labor Code, overtime must be rewarded in a certain unit of time (60 days) with correspondingly paid free time, and to the extent that this compensation in kind is not possible, overtime is compensated with an increase whose value may not be less than 75% of the basic salary. But, the work actually performed must actually be paid for. It follows that if an employee had paid time off during the employer's restricted period of time due to the state of emergency and subsequently, for example, had to work overtime until the end of the calendar year, the employee would have been paid in full for the additional work performed, but it is true that without increase. This is the solution because the basis of compensation for overtime work, according to the regulations of the Labor Code, is the principle of an additional reward that the employee must benefit as long as his work is used above normal working hours (overtime can not be remunerated with the same compensation which the employee benefits from for work performed in the normal work schedule). Therefore, the employer who has gone through a restriction of activity during the emergency period, which correspondingly determines a reduction of income, will be obliged that when the activity will resume and there will be the option of activities that involve and additional work to bear a double cost for the employee who did not perform the activity during the state of emergency, but carries out additional activity when the activity is revived[3]. In addition, as is clear from both the provisions of art. 122 paragraph (3) of the Labor Code, as well as a systemic interpretation of this text, in the future, when necessary, but within a limited period of 12 months, the employee will recover the early remuneration with free time paid by performing additional work. But, according to Romanian law, overtime is subject to a specific legal regime, being directly subordinated to the principle of freedom of labor and the prohibition of forced labor. Under these conditions, additional work can only be performed with the employee's consent. We consider that this special regime is fully functional and related to the hypothesis regulated by art. 122 paragraph (3) of the Labor Code. Consequently, the employee's consent is required at the time when he will be required to perform additional work in the future[4].

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[2] Section 2 of Chapter I – Working time in Title III Working time and rest time – Labour Code.

[3] See also the corresponding comments on this text – M

[4] It should be noted that in the specialized doctrine there is the opposite opinion, according to which, along with additional work in force majeure, or for urgent works designed to prevent accidents or remove the consequences of an accident and the situation of compensating free time in advance in case of restriction activity, under the conditions of art. 122 para. (3) of the Labour Code, would be an exceptional situation, in the sense that additional work may be imposed on the employee, without the need for his express consent in this regard – to be seen I.T. Stefanescu; M. Ezer; M. Gheorghe; I. Sorica; B. Teleoaca-Vartolomei; A.G. Uluitu; V. Voinescu, *comments Labour Code,* Universul Juridic publishing house, 2017. We consider this solution rational, but we do not believe that there are sufficient arguments to support it. Thus, it cannot be appreciated, automatically, that the employee would have given an advance agreement for the performance of additional work in the future, as long as he benefits from free time that will be "covered" in the future by performing additional work. It should be noted that the provisions of art. 122 paragraph (3) of the Labour Code allow the employer to force the employee not to perform work because he, the employer does not have enough activity to ensure full employment of his workforce (temporary reduction of activity). However, if this corresponding early leave is not granted by the consent of the parties, as the employee is practically required to receive such a benefit, it would not be acceptable for the employee who is not called to give his consent for the benefit of early leave to be given, however,

This solution is also debatable in the event that subsequently, within a period of 12 months, the employer is not required to provide additional work by employees who have received early compensation. Thus, the employer could end up in the situation where he paid the salary without his employee having provided the appropriate consideration.

We believe that this text, at least in the way it is worded, could suffer some amendments. It can be used when the impossibility of providing the necessary work for the workforce occurs for very short periods and there is no spectrum of prolonging a crisis situation. But, for the hypothesis analysed here and for the period that we are going through and we will go through during 2020, we do not think that it would have represented an opportune solution for the employer. It is the reason why, the solution of using the provisions of art. 122 paragraph (3) of the Labor Code was not really embraced in practice during the state of emergency.

3 Reducing the work schedule during the working week

Much more successfully was embraced in social practice the solution offered by the provisions of art. 52 paragraph (3) of the Labor Code, provisions governing the hypothesis of reducing the working week from 5 days to 4 days, with the corresponding payment for the activity actually performed. Unfortunately, this text also created problems in terms of its effective application.

Thus, the regulation is found in the article of the law that regulates the causes of suspension of the individual employment contract at the initiative of the employer. A first finding that results from this takes into account the fact that even if the employer orders the reduction of the weekly working time from 5 days to 4 days with the corresponding payment of the salary, the day when the employee does not work is a period of suspension of the employment contract, in which, unless otherwise provided, the contract does not produce any legal effects[5].

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tacit consent to perform additional work in the future. Moreover, the work performed by the employee over the normal working hours requires the consent of the employee, the exceptional situations in which the express consent of the employee is not required being clearly and limitingly provided by law. However, there is no express provision either in the texts of principle of the Labour Code or in the section on overtime according to which the employee is obliged to work at any time for the benefit of the free time he enjoyed in advance. However, it is true that in this way it would be possible for the employee to permanently refuse for a period of 12 months, the recovery of the paid days off from which he benefited in advance. However, given the essence of Labour law, we believe that any legal rule in Labour law, when it involves an ambiguous interpretation, is interpreted in favor of the employee. However, it is equally true that the wording of the text of art. 122 paragraph (3) of the Labour Code, may give rise, from this point of view, to an abusive attitude of the employee, who thus benefited from an undue right. However, the Romanian legislation includes means at the disposal of the employer, when he paid undue rights to his employee. Thus, the employer granted paid time off for future work, but it was not performed. In such a situation, pursuant to the provisions of art. 256 of the Labour Code, the employer can act against his employee for the recovery of undue amounts (payment of salary rights granted during the period when the employee did not perform the work).

[5] In the social practice of the last period, this aspect raised problems in terms of the records that must be made by the employer in the general register of employees (REVISAL). Thus, in accordance with the provisions of GD no. 905/2017, in REVISAL is registered any measure of

The hypothesis in which the employer may order the suspension of the individual employment contract based on the provisions of art. 52 paragraph (3) of the Labor Code is clearly expressed by the legislator: "in case of temporary reduction of activity, for economic, technological, structural or similar reasons for a period exceeding 30 working days". The hypothesis thus defined, is similar to the one considered in case of suspension of the individual employment contract for technical unemployment, as it is regulated by art. 52 paragraph (1) letter c) of the Labor Code. This similarity from the point of view of drafting the texts of law could lead, in the first phase, to the idea that it cannot order the reduction of the weekly working time from 5 days to 4 days with the corresponding payment of the salary, unless, at the level of that employer and for those employees, the measure was first taken to suspend the individual employment contract for technical unemployment, and this, for a period of at least 30 working days. However, from a practical point of view, such a solution is nonsense. What could be those reasons that would cause an employer to first resort to an interruption of activity with the payment of an indemnity (of a social nature and not as a consideration for work) of at least 75% of the basic salary and subsequently, after a period of 30 working days (minimum) to be able to really resort to a cost optimization, corresponding to the actual activity it has to carry out, in the sense of reducing the working time from 5 working days per week to only 4 working days, only these will actually be remunerated? And, how could such regulation have been used in social practice during the state of emergency? There were many employers whose activity did not involve the actual interruption of activities, but they were no longer carried out at normal parameters, but much reduced. For this reason, the vast majority of employers who maintained the activity, but it was reduced, resorted to reducing the weekly working time under the conditions of art. 52 paragraph (3) of the Labor Code. Since the state of emergency was established on 15 March 2020 (by decree no. 195/2020) and extended to 15 April 2020 (by decree 240/2020), it would have been required that by the beginning of May, those employers to have ordered technical unemployment and the suspension of individual employment contracts for these reasons, and only after the expiration of the 30 working days (ie approx. 45 calendar days) to be possible the measure of reducing the working week under the conditions of art. 52 paragraph (3) of the Labor Code, which would be completely irrational. Eventually, however, given the

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suspension of the individual employment contract, except for the legal suspension, determined by temporary incapacity for work (medical leave).
It would therefore result that, in such a situation, it is necessary to register the suspension of the individual employment contract on the fifth day of the working week, when it is necessary to reduce the work schedule, pursuant to art. 52 paragraph (3) of the Labour Code. However, such a reduction of working time in social practice does not occur only exceptionally, once, but, most often, for a longer period of time. Or, applying the registration requirements imposed by GD no. 905/2017, within each reduced working week, it is necessary to register the day on which one does not work as a cause of independent suspension. From a formal point of view, the current law does not impose certain formal conditions for the decision based on which the employer orders the suspension of the individual employment contract of the employee affected by the provisions of art. 52 paragraph (3) of the Labour Code. It is obvious, however, that the employer should issue a decision in this regard. However, we consider it too excessive for the employer to issue a new decision for each employee for each situation of suspension – reduction of the working week – all the more so if from the beginning the employer establishes the reduced work schedule for a longer period of time or the procedure by which the employee will be informed about his work schedule.

text in question, which in its current form is quite clear, there really must be a justification for the employer to resort to the measure of reducing weekly working time.

Basically, there should be a real and serious cause to justify the fact that, although by the individual employment contract the parties have agreed to certain benefits and consideration in an exceptional way and for clearly individualized motive, on a temporary basis, these benefits change. Therefore, we consider that, at least in relation to the current provisions of the law, the measure of temporary reduction of the working week must be justified by economic, structural, technological or similar reasons, and these reasons must be at least 30 working days.[6]

Finally, it should be noted that the reduction of the working hours is not only a cause for the suspension of the individual employment contract but also a cause for its modification. Thus, by reducing the working week from 5 days to 4 days, the employee's salary is also changed accordingly, being reduced for the work actually performed. Last but not least, if the employer orders the reduction of the working hours, he cannot demand that his employee perform the same work in a short unit of time as he did during the normal working hours.

In other words, the reduction of the weekly working time leads, as a consequence, to a corresponding change in the working hours, which will be reduced. All these changes imply the corresponding modification of the individual employment contract. Given the fact that the employer is the one who can unilaterally order the suspension of the individual employment contract, it follows that the same provision also imposes, in practice, the unilateral change of the salary, working time and working hours of the employee. It is the reason for which, we could consider that the measure of

[6] We believe that the 30 working day period referred to by the legislator must also be viewed in a flexible way, precisely so that such a text can be effectively used in practice. Thus, what matters is that the economic, technological, structural or other similar reasons are functional for a period of 30 working days and not necessarily that they have intervened 30 working days prior to the employer's decision to reduce the weekly working time. It should be noted, in this regard, that the text of the law is worded as follows: "In case of temporary reduction of activity, for economic, technological, structural or similar reasons, for periods exceeding 30 working days, the employer will have the opportunity to reduce the program work from 5 days to 4 days a week .... ". Therefore, the employer may anticipate that his work will be reduced for more than 30 working days for the reasons stated in the text. In the specific state of emergency caused by the COVID 19 pandemic, it was obvious to many employers that they had to reduce their activity at least during the state of emergency (60 calendar days, so more than 30 working days), with all the prerequisites as subsequently, in a possible state of alert or even under normal conditions, the economic measures to impose the reduction of the activity. Or, in these conditions, the fact that from the beginning they adopted the measure of suspension for one day, within the working week of the individual employment contracts, in order to reduce the weekly working time under the conditions of art. 52 paragraph (3) of the Labor Code must be considered perfectly legal. If the legislator had imposed the existence of real and serious causes (for example, economic reasons that led to the reduction of activity) at least 30 working days before the decision to reduce the weekly working time, then the text of the law should have been in this meaning, respectively: "In case of temporary reduction of the activity, for economic, technological, structural or similar reasons, for periods exceeding 30 working days, subsequently the employer will have the possibility to reduce the working hours from 5 days to 4 days per week. ... ". However, the express reference to the subsequent nature of the intervention of the decision to reduce the working week does not appear in the current text. And then, why should we make an interpretation that respects neither the spirit of the law nor, in the end, the letter of the law, especially since, as we have shown above, it is, from the point of view of social practice and inopportune and even non-functional?

reducing the work schedule, under the conditions of art. 52 paragraph (3) of the Labor Code, would also find its place in the economy of the Labor Code and in the section on amending the individual employment contract, however, although the law does not expressly provide for it, it should be noted that the hypothesis analysed here is equally a cause of unilateral modification of the individual employment contract, along with the other causes regulated in art. 42 et seq. of the Labor Code.

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[2] Law no. 53/2003, Labour Code, republished
[3] Decree No. 195/2020 regarding the establishment of the state of emergency for the territory of Romania
[4] Decree no. 240 for prolonging with 30 days the state of emergency applied through Decree no. 195 of 16 March 2020
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Animus – Manifest Intention of the Patrimonial Expansion or Penalty for the Non-diligent owner?

Prof. univ. dr. Băieșu A., Russo M.

Abstract

The research of the evolution of the instinctual element of acquiring property over a good transcends the economic interest, positioning itself as a pure biological nature. From the need for food, tools and up to the construction of homes and households, property is found to be closely linked to a series of individual abilities assimilated to force, social imposition, instinct and self or group interest.

The deep knowledge of this component construct of the possession – animus, notices an increased practical importance, given that its analysis will generate a correct perception on the elements that govern the possession in the complex landscape of the notion of property.

Animus, in particular, must be seen from the perspective of the conduct of the possessor in good faith, but also of that belonging to the passive subject, as long as the intellectual attitude of the active subject often oscillates between sincere erroneous perception and subjective manifestation of patrimonial expansion.

This article tends to methodically demonstrate the connection between natural possession and the right to consolidate the character of the acquisition, the good keeping for himself and the economic capitalization of the possession.

Keywords: Animus, evolution, grabbing instinct, possession, property.

1 Introduction

The instinct of monopolization, among the first and the most primordial of human instincts, pushes the individual to acquire the goods on which his material existence depends. Beyond any moral outrage, sometimes the stolen property is appropriated and publicly perceived under this regime, beyond the reprehensible act of the thief, a state that gives a deep meaning to the popular conclusion that justice is not identical with the truth.

Thus the primitive remains in the human structure and, speaking of property, expresses its topicality by instinctively perpetuating the human desire to appropriate certain things without giving anything in return, a social reality that generates discussions about the morality of the institution of the adverse possession in the contemporary era.

The phase of the individual property is inextricably linked to the evolution of the human society and its economic and legal development, regardless of the nations, but dependent on civilization, a civilization that has significantly reduced the non-economic access to goods of citizens.

Historically, but without going into details, the doctrine regarding possession and its protection is based on the principles of Roman law and derives from it.

Private property is the expression of the free man and progress, an absolute argument from Aristotle, Jean Jacques Rousseau [1], John Stuard Mill [2] and to Dimitrie Alexandresco [3] or Antonie Iorgovan [4].

Aristotle considered that "a society free from evil is given by property, workmanship, temperance and philosophy", thus arguing that private property is nothing but a true foundation of human life and social balance.

From ancient times the acquisition of property has been possible through a means considered immoral by some, and by others as expressing equity – adverse possession, an institution of civil law found in the vast majority of legal systems, based on the fact of possession and seen as a civil sanction directed against the non-diligent owner.

But the reason on which the adverse possession is based must be treated through the prism of the component element of possession – animus, an element that, theoretically and practically, influences the characters of possession and generates effects closely related to the acquisition of the right of private property over a good.

Without the meeting of the animus element in the person of the possessor, it is clear that we could no longer talk about the acquisitive prescription, since it appears that the psychic factor in the construction of possession is decisive.

The psychic factor influences the behavior of the individual, constituting in the matter of the possession, alongside with the material component (the corpus element), the beginning moment from which the time period of possession starts. It also has the ability to generate hypostases or subsequent events that may interfere with and influence both the active period and the quality of possession, being known in this regard the various causes of suspension or termination before the deadline set by the legislator for the constitution of a real right in the heritage of the possessor. The psychic factor, together with the material one, absolutely governs both the beginning of the course of the acquisitive prescription and its temporal stability under the conditions dictated by the rule of law.

Against this background, the retroactivity of the adverse possession's effects is monopolized from the moment of appearance of the animus and corpus element of possession, only from this unique hypostasis the interval of the acquisitive course can be fixed and the acts undertaken by the possessor during all this time validated [5].

2 *Animus* – manifestation of will of the adverse possessor and constitutive feature of the civil penalty borne by the holder of the property right

In the human essence there is instinctively the desire to be master of a thing and to use it in one's own interest, group or general, and this aspect allows us to characterize animus as that intentional element that consists in a person's state of possessing a good

and in relation to which it presents a specific behavior to the true owner or to the holder of another property right. But, beyond the legal formalism, animus presents itself as a dynamic psychological attitude of the person to satisfy, by grabbing, a material need or to restore his social or mental balance, a state that often comes in response to certain externally driven stimuli. From the feeling of a certain deficiency to the satisfaction of a subjective desire and need, the possessor demands a pertinent and conscious self-interest.

Starting from this observation we can try to state that the legal legitimation of possession is only the transformation of a factual reality into a state of law, a general idea in convergence with Jestaz's profound valued judgment "Possession is a fact, but one of those deeds before which the right bows with much good will, and this by the way of the prescription, which allows, one by one, the acquisition and loss of rights. Prescription and possession are basically instruments for measuring the strength and longevity of rights, especially those considered perpetual." [6].

The way in which the theory of possession defends the rights of the possessor acquires meanings in terms of the required features so that the exercise of material acts can be called possession, and starting from this landmark we are required to deal with the subject of the possessor's will, the implications and the aspects regarding the genesis of the state of fact, but also the character of the fund that generated at the same time or later the act of mastery exercised by him of by another for himself. Possession simultaneously designates the generating fact and the right generated by it, closely related to each other, the law being created with the fact, but also extinguishing with it [7].

From this point we are led to the subtlety and nature of the gesture, rhetorically asking ourselves "to what extent are we talking about the desire to increase the heritage or to penalize the true holder of the right?".

This question must be approached in the light of the existence or not of the good faith.

In Otto Klineberg's conception, among the behaviors resulting from different individual needs, one finds with native origin the desire to monopolize (which can also be influenced by the interest of self-actualization – the feeling of self-fulfillment through abundance), from which results the intention to behave as a true owner expressed by the possessor and transposed as proof of the psychological element animus, can sometimes be clearly incompatible with good faith, but this fact does not exclude its existence, obviously influenced by a flawed contextual state.

Starting from these elements it results that animus has its primarily origin in the person's desire to have that good, in other words in his determined inner intention, being followed by the action and activator factor that is just called will, a will able to produce material, external, public and implicitly legal consequences.

Thus we speak of a legal will of the possessor as long as he freely, knowingly, undertakes certain acts or facts that generate external effects, he practically in the transposition of his psychological will has the representation of the pursued results. The motivation that determines making an decision has legal significance because it produces the external manifestation, it being represented by the previous instinctual factors highlighted

Speaking of possession and possessor we can say that there is a relational link subordinated to the behavior of the person and her will, given that the will and actions

of a person is a consolidated unit as long as each action involves the presence of will. Without the will being externalized by actions, it would mean at most a simple desire, hope or dream.

In doctrine [8] we find this spirit transposed in a statement of substance where resembling the corpus element with the envelope of possession and the animus element as the animating essence it is sustained that the corpus is everything that animus expresses, and the latter in turn, excludes any relationship from other persons regarding the good.

We notice that possession represents a volitional physical control over a thing, an indissoluble relationship between corpus and animus that allows, in the event of losing the material connection with the thing, the restoration of the lost relationship.

But physical possession wouldn't be sufficient to justify a useful possession – ad usucapionem, as required by the legislature for the acquisitive prescription to be effective, motivated by the fact that it could be considered at most as a precarious detention, the possession needs to be doubled by the will to control and the behavior of a true holder of a property right.

This will to control is required to have a well-defined, perpetual, absolute character and without referring to the hypothesis of restitution the property to a certain person, a value in which a possible recognition of the property right in the person of a third party and the correlative refunding obligation is excluded.

Thus we are talking about a particular intention that excludes the situation of the usurper or the thief, considering that he cannot have the real representation that he is the owner of the good, even if he manifests his will towards it – *animus domini.*

The lack of specific intention in exercising de facto power over the good leads to the exclusion of the precarious holders from the possession sphere – they do not have animus dominus, but also those who in the exercise of the corpus benefit from the tolerance of the owner or the holder of a property right. This lusion also applies to those material acts of possession that are based on acts of transfer of use of the property (lease, lease, etc.).

We notice that in the situation of the lessee, tenant, depositors, etc., the material acts of possession are not doubled by the intention and will to behave like a true owner, so there is no intention and will of the owner to assert his right of ownership over the good (or another property right susceptible to acquisition by adverse possession) [9]. This specificity distinguishes possession from precarious detention, where the precarious holder owns for another.

The modern doctrine treats separately the role of the element animus and dominus in the concept of possession, but the most significant and influential theories, but also divergent, belong to Savigny and Ihering. We are talking about Savigny's influence for the consecration of his theory in the French Civil Code [10], the Romanian Civil Code of 1864 [11], the New Romanian Civil Code [12], the Civil Code of the Republic of Moldova [13], etc. His possession focuses mainly on the subjective element *animus* demanding that the will and intention of the possessor to be externalized through a similar behavior as the owner in his desire to approach this completely, without recognizing another authority over it, and Ihering's revolves around the corpus element, claiming only the holder's simple will to control.

According to the latter, the distinction between possession and ownership is not determined by the character of the holder's will, but only by the material possession of the good and the determination of the objective right. Ihering's theory is found in legal systems marked by German doctrine, [14] treating the de facto owner of a thing as the owner. This regime does not exclude the need for these two elements, but distinguishes their rooting in the character of a true possession, the approach losing the aspects related to the manifestation of the holder's personality and knowledge of his real will in working relationship – causa possessis. On the other hand, Ihering treated possession as a right that must be found among property rights, a reasoning that arose from the generative nature of the right that is given by the state of possession.

This objective theory focuses on a single element of ownership – the actual possession of a thing regardless of the owner's intention can be found in most modern laws that consider possession exclusively as a fact, regardless of the will to own a thing. We find this approach in German law, in the text of Article 854 of the Civil Code, which regulates that the property right is acquired by de facto authority over a thing, but also the Dutch Civil Code where, conceptually, it defines the property right as a fact state which indicates the ownership for itself of the holder over a good.

If we briefly treat these two theories, we notice that the point of divergence between Savigny and Irehing is the dilemma between the need for the cumulative existence of the will and the owner's intention to behave as a true owner and the simple claim of the will to exercise the corpus element by the precarious holder.

At the same time, Savigny's subjective theory could be concentrated in the supremacy of animus over corpus, corpus without animus being only a detention and not a possession.

Thus we can observe that, unanimously, the structure of the animus element is seen as having two distinct components: will and intention. Thus the will to possess must be one's own in the person of the possessor, as opposed to the character of the corpus element that tends to be exercised through the intermediary. Intention signifies the interest of the possessor to assert his authority over the good as the owner or holder of another real right susceptible to adverse possession.

Can the cause for which the possessor tends to assert this authority be an answer to the question of the substance of the animus element – the patrimonial expansion, the penalty directed against the careless owner or both?

The cause of intent will emerge from the very appreciation in abstracto of the intentional element required in the matter of the possession, the cause of intent being common with the cause of detention, aspect of finesse and real difficulty in contemporary judicial practice, especially in conditions where animus is located at the interior – mental of the person, and its external expression is achieved through the material acts of dominion – corpus. But being an eminently psychological, volitional factor, the Romanian legislator, like the French one, appreciating the practical difficulty and the risk of jurisdictional arbitrariness, understood the necessity to establish a relative legal presumption [15], correlating animus's proof of its existential interdependence and the appearance of the corpus element, against which the contrary proof is admitted (one capable of overturning the presumption and stating the position of the possessor as a precarious holder in relation to the controlled good).

The acquisition of possession takes place when, in the person of the possessor, the elements animus and corpus are reunited, personally and directly or through an intermediary, the concretization of this merger being represented by the seizure of the good (regardless of its owner).

Through the materiality of the act of taking possession of the good, of approaching it, we are in the presence of the intentional element animus, the mastery referring in the abstract to the positioning of the possessor at the stage of social relations in which he can directly dispose of the good, act on it and perform material or legal acts which are specific for the owner or the holder of a property right subjected to the purchasing functions.

The unilateral act of possession of the good is considered possession if the good on which the material force or the volitional authority is exercised can be used according to its economic destination by the possessor or by another for him or for himself. Practically, the presence of the intentional element can result from the operations such as fencing, demarcation, exploitation, cultivation, etc., depending on the nature of the good, this being in the person of the owner himself and not of a third party.

The intentional element ensures the preservation of possession and the consistency of its existence can exclude the discontinuity or its interruption as long as we are not talking about the voluntary resignation of it or determined by the violent intervention of a third party.

Although possession is legally legitimized by the appearance of law that forms it, its basis seems to be given by the subjective attitude of the person exercising it, behavior that simulates or expresses the conduct of a true owner.

However, the motivation breaks the "secret" of the public attitude, which can be intrinsic or extrinsic, respectively it can start from internal desires or from imposed/influenced external needs.

3 Conclusions

Animus, by studying its complexity, we discover it as a facet of motivation, closely related to the social behavior of the individual, his aspirations and needs – often economic. The existence and the personal performance depend on the level of motivation and the perception of life is closely linked to private ownership of goods, but also to the instinct to monopolize and preserve values.

The mostly egocentric human conduct intensifies the interest and actions aimed at patrimonial expansion, stability and individual progress, so the relative presumption found in various legal systems regarding the fact that the possessor is presumed to possess for himself is fully justified and anchored in the contemporary society.

The concept of motivation has its origin in the latin *motum* (motivus) and means the ability to move/cause of movement, where we can conclude that animus derives from the primary instinct of grabbing and conserving as a priority of self-interest often in contempt of reaction/opinion to those to whom he opposes a certain conduct or commits acts intended to possess a thing.

In order to explain a conduct it is necessary to specify the relationship that exists between the reason and the conduct. If we admit that the source of conduct is in the very fact of living, then it can be explained that an action or conduct is based on several

reasons, reasons which in the situation of possession can be personally patrimonial, but also external – sanctioning (when we refer at the possession of bad faith, which, under strict conditions, has rights-generating effects), neither of which excludes the other.

Starting from the definition of motivation given by the erudite psychologist Alexandru Roșca, it could be argued that it represents "the totality of the internal motives of behavior, whether they are born or acquired, conscious or unconscious, simple physiological needs or abstract ideals" [16]. If we force the subject of the proof of the intentional element we could say that the main proof is the existence of motivation based on the psychological, social and economic needs of a man related to the appropriation of a good beyond the morality or immorality of his gesture, the existence of a legitimate justification or not.

The psychological needs can prevail over others as long as the man's desire for submission and domination are manifestations that underlie the development of motivation and achievement in contemporary society, a competitive and capital-oriented society.

At the level of animus configuration – the support and the psychological content are full of significance, given that it signifies the good or bad faith that is grafted on it giving legitimacy to the effects of possession in the person of the active holder.

Given the insert ability of intention and will in the genesis of possession, attaching good faith to it excludes the planning of immorality and illegitimacy, ensuring a synchronization between intention, desire, will and persuasion of material acts exercised under their influence, even if good faith is not always synonymous with morality or objective truth. The importance of the possessor's good faith, from the perspective of the animus element is a preamble in relation to other institutions attracted in the acquisitive effect of possession, the intellectual attitude of the possessor towards the good portrays the factual reality in the terms approved by the legislator.

Bad faith does not exclude the existence of the animus element, for example in the situation of possession of an asset on the basis of the passivity of the title holder, in relation to which it adopts the unequivocal position of contesting its title by adopting public conduct of its owner, to the detriment of the real owner.

The legal field of the subjective element is framed in the literature under the corollary that it "does not express the concordance between the state of affairs and a certain real right, but the subjective representation of the possessor who behaves as if he were the right holder, regardless of the subjective representation that others have. From this perspective, the thief is the owner, although both he and the owner have a clear representation that he is not the owner of the property right "[17].

Reportedly, these elements provide an image of the force of possession – as a state of affairs positioned beyond the barriers of law, which through its aptitude and legal consequences crosses the border constituting property rights by exercising its acquisitive function and thus entering in the womb of the law.

Bringing together the animus and corpus element from the perspective of psychological perception, possession could be justified as the owner's conduct to fulfill the obligations, measures and acts that a diligent owner would have wanted to accomplish, a realm on which we could state in the sense that beyond the desire of patrimonial expansion, the owner of the good through a faithful conduct to the true owner, in the situation of the good faith possession, opens the way to a true penalty of

involuntary principle directed in relation to the careless owner of the property right or another real right.

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The insolvency law for individuals. Success or failure?[1]

Pălăcean C.

PhD Associate Professor, "Titu Maiorescu" University, Faculty of Law (ROMANIA)
E-mail: carmenpalacean@yahoo.com

Abstract

Romania finally has a law that regulates the insolvency of individuals.

Although the stated purpose of the law is to support debtors in good faith, over-indebted and overburdened with debt, the procedure, hampered by bureaucracy, along with the shortcomings and inaccuracies of the law, have led to an unusual situation, given the low number of cases registered with the territorial insolvency commissions and courts.

As the law is largely non-functional, the need to amend the text of the law is indisputable, in order to achieve the purpose for which it was created.

In addition to the fact that the law must be of interest to debtors, it must also be of trust and credibility, both for debtors and creditors, in order to become a real social protection law.

The economic situation in Romania, excessive and reckless crediting, has generated an alarming number of cases of over-indebtedness, in which individuals have acquired the status of debtors, being in foreclosure for several years, in endless and costly enforcement cases, including for the creditors.

In its current form, Law no. 151/2015[1], even if it can be considered a "*step forward*" made by the Romanian legislative system, is not a solution for over-indebted individuals in Romania.

In the near future it is necessary to amend the law or adopt another law, a law that would be a viable solution and available to debtors natural persons, in good faith.

Keywords: insolvency, debtor, natural person, insolvency proceedings based on debt repayment plan, insolvency proceedings by liquidation of assets, simplified insolvency proceedings.

[1] The paper was written within the Internal Research Project of Titu Maiorescu University of Bucharest, First Edition (2018-2020), code PR04 INSOL-PERS.

1 Law no. 151/2015, a normative act that could no longer be lacking from the national legislation

Law no. 151/2015 on the insolvency procedure of natural persons focuses on the natural person who does not carry out commercial activities, a simple, private, over-indebted consumer, but in good faith.

The law is not only a normative act of novelty in national legislation, but also a normative act that could not be missing given the European legislative context and insolvency regulations.

Although it is a law long awaited by consumers, with a history of decades in other European countries, and not only, it is nonetheless obvious that the law in its current form does not show interest and trust for over-indebted Romanian consumers.

A pertinent question in this context would be:

What can be done? What is the solution? Amending the law or adopting another normative act that gives debtors trust and hope? And let's not just rely on trust and hope, because the debtors need solutions!

Although I did not intend to criticize only, because the adoption of the law is still a big step forward by the Romanian legislative system, being the first law governing the insolvency of individuals, I would like to present some regulations that can create confusion and misinterpretation.

According to the provisions of Law no. 151/2015, the three forms of the procedure apply to the debtor, a natural person in good faith, who, in certain situations strictly regulated by law, may benefit from the release from residual debts.

The law regulates the following forms of procedure:

1) *The insolvency procedure based on debt repayment plan*, which has as its stated purpose the financial recovery of the debtor. This procedure is similar[2] with the judicial reorganization procedure, regulated by Law no. 85/2014[3].

2) *The judicial insolvency procedure by liquidation of assets*, whereby all the debtor's assets and/or traceable income are liquidated to cover the liability. And this procedure has a correspondent in Law no. 85/2014, respectively in the bankruptcy procedure.

In addition to these two forms, which we can consider as the main ones of the insolvency procedure, Law no. 151/2015 also regulates the third form:

3) *The simplified insolvency procedure*, which apply to certain categories of debtors, which meet the following conditions: the total amount of the debtor's obligations must be no more than 10 minimum wages per economy, the debtor must not have seizable assets or income, the debtor must be above the standard retirement age, or have lost all or at least half of their work capacity.

So, we have a legal framework, which should have been a generator of solutions for individual debtors, both for those who would like to benefit from a repayment plan, as well as for those who have an irreparably compromised financial situation, or for those who qualify for the third form of procedure, but the number of cases registered as pending with the insolvency commissions and courts is extremely low, given the time elapsed since the entry into force of the law.

Apart from the fact that not many cases were registered, which indicates a limited trust in the law, most of these requests were rejected. Is it only due to the individual aspects of the file, or is the legal regulation not the regulation that was expected?

On a simple analysis of the text of the law, it can be seen that the procedure is cumbersome and confusing, so that, from the first articles of the law, there are questions and perplexities.

2 The purpose of Law no. 151/2015, regulated by the provisions of Article 1

The provisions of Article 1 govern the purpose of the law, which is the establishment of a collective procedure for the recovery of the financial situation of the natural person debtor, of good faith, in order to cover as much of the liability as possible and in order to eliminate residual debts, under certain conditions established by law.

The legislator felt the need to emphasize the importance he attaches to "good faith" throughout the text of the law, so that, throughout the proceedings, and even after its closure, up until the court decision of release from residual debts, or up until the closure of the simplified insolvency proceedings, the debtor must prove his good faith.

But what is good faith? The definitions in Article 3 do not include good faith. Given the lack of a provision in Law no. 151/2015, we refer to the provisions of Article 14 of the Civil Code, which state that:

"(1) Any natural or legal person must exercise his rights and perform his civil obligations in good faith, in accordance with public order and morals. (2) Good faith is presumed until proven otherwise".

In Romanian civil law, good faith has the value of principle, this being presumed. As a result, the presumption can be overturned by identifying aspects that prove the bad faith of the debtor.

Thus, even if Law no. 151/2015 does not define the phrase debtor in good faith, it lists in Article 4 (4) some of the facts that lead to the presumption of bad faith.

By reference to the provisions of Article 4 (1), which establish that the law applies to the debtor, a natural person whose obligations do not result from the operation of an enterprise within the meaning of Article 3 of the Civil Code, we ascertain that professional natural persons cannot make use of the provisions of Law no. 151/2015.

According to the Romanian legislation in force, the liberal professions cannot benefit from the effects of an insolvency procedure, considering also the fact that the provisions of Article 3 (1) expressly exclude this category from the application of Law no. 85/2014.

As a result, those who practice a liberal profession cannot benefit from the procedures provided by the two laws governing insolvency, stating that, for obligations arising from the quality of consumer, and not from the pursuit of professional activity, debtors can apply to open the procedure as regulated by Law no. 151/2015.

3 The scope of the law

According to the provisions of Article 4 (1) a), the debtor, natural person, may request the opening of insolvency proceedings only if he has his domicile, residence, or habitual residence in Romania for at least 6 months prior to the submission of the application in the country. Paragraph (2) expressly mentions that the debtor has his habitual residence in Romania also when he resides permanently in Romania, even if he has not completed the legal registration formalities and if he has assets and/or earns income in Romania. The two requirements, that of permanent housing, and that related to goods and/or income, are cumulative.

The condition of a "*domicile*" or of a "*residence in Romania*" must be fulfilled by the natural persons of Romanian citizenship, and the condition of a "*habitual residence in Romania*", applies to the natural persons of foreign citizenship or stateless persons.

The period of 6 months regulated by law, complies with the provisions of Article 3 (1) of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast)[4].

The second condition established by law is governed by the provisions of Article 4 (1) b), according to which, in order to open a procedure provided by Law no. 151/2015, the debtor must be in a state of insolvency, within the meaning of Article 3 thesis 12, and there must be no reasonable probability of becoming able to perform his obligations again, while maintaining a reasonable standard of living, both for himself, as well as for the people he has in his care.

The first legal definition of the term insolvency in Romanian law was given by Law no. 64/1995 on the procedure of judicial reorganization and bankruptcy, republished[5], amended by GO no. 38/2002[6], which established that: *"Insolvency means that state of the debtor's patrimony, characterized by the obvious inability to pay the debts due with the amount of money available".* Prior to this regulation, the notion of "cessation of payments" was used[7].

The insolvency law of natural persons defines insolvency in Article 3 point 12 as that state of the debtor's patrimony, which is characterized by the insufficiency of liquit assets available for the payment of debts, as they become due. The insolvency of the consumer individual debtor is presumed when, after a period of 90 days from the due date, he has not paid his debt to one or more creditors. Insufficient funds relate to the debtor's obligations as contracted, the income earned and the expenses necessary to maintain a reasonable standard of living.

The law on the insolvency of natural persons does not provide, among the conditions of admissibility, also that of insolvability, the application of one of the three procedures being conditioned by the state of insolvency.

The definition of insolvency in the Civil Code is different from the definition given by the Fiscal Procedure Code. Thus, the state of insolvency, viewed through the prism of the civil norm, results from the inferiority of the patrimonial asset that can be subjected to enforcement proceedings, in relation to the total value of the outstanding debts. The fiscal procedural norm establishes that the debtor whose income or seizable assets have a lower value than the fiscal obligations of payment or the one who does not own seizable assets or incomes is insolvent.

Although insolvency is not mentioned as a condition for the application of the provisions regarding the procedures regulated by Law no. 151/2015, from the verification of the provisions of Article 4, corroborated with those of Article 13, 46 and 65, we can observe that only the natural person debtor, in a state of insolvency, but also insolvent can be subject to the procedures provided by law.

Insolvency is also defined by Law no. 85/2014[8], as that state of the debtor's assets which is characterized by the insufficiency of liquid assets available for the payment of certain, liquid and due debts, thus:

a) the debtor's insolvency is presumed when, after 60 days from the due date, he has not paid his debt to the creditor; the presumption is relative;

b) the insolvency is imminent when it is proved that the debtor will not be able to pay the due debts committed, at maturity, with the funds available at the maturity date.

In the doctrine, opinions were expressed according to which the definition of consumer insolvency should have been taken from the content of Law no. 85/2014[9].

The second thesis from Article 4 b) regulates the elements to which the debtor relates in order to make a forecast for the next period, of maximum one year, regarding the possibility of financial recovery, in the light of the evolution of obligations, income and traceable assets.

Thus, according to the legal provisions, the reasonable probability is assessed by considering the total amount of obligations related to the income realized or forecasted compared to the level of professional training and expertise of the debtor, as well as to the seizable assets owned by him. Thus, in the case of a debtor, in the case in which an inheritance is to be debated, or the debtor is to be promoted to a position with a higherpay, the initiation of a procedure would not be justified, if there is a possibility that in a short term they will pay their debts or they will decrease significantly.

From the way in which the legislator defines the reasonable probability, we find that, within the meaning of the law, in order to analyze the debtor's solvency and implicitly the admissibility of the application for opening one of the three procedures, on the one hand, the income realized or forecast to be realized in relation to the professional training of the debtor and the traceable assets held by him are relevant, and on the other hand, the total amount of obligations assumed, ie the debtor's assets and liabilities.

Thus, under the conditions of the insolvency law of the natural person, elements of patrimonial assets will be: current incomes, incomes forecast to be realized in a period of maximum 12 months, in relation to the professional training and expertise of the debtor, as well as traceable assets; while the debtor's liabilities will consist of all his obligations, other than those resulting from the operation of an undertaking, within the meaning of Article 3 of the Civil Code.

It can be seen that what is of interest from the point of view of the insolvency of the natural person is his state of insolvency, respectively the lack of liquidity necessary for the payment of debts, but also his financial evolution, that is, the objective impossibility of achieving those incomes that are necessary for him, in order to become able to execute his assumed obligations without having his private life, but also of the persons he has in maintenance, suffer.

At the same time, it is important that the assets are lower than the liabilities, so the debtor must be insolvent, and not have the prospect of recovery within a maximum

interval of 12 months. It would not be justified to obtain the benefit of the release of residual debts, if the natural person has the possibility to pay his debts within a reasonable time. Obtaining such a benefit is recognized only to over-indebted and insolvent individuals who are in this situation for reasons not attributable to them and for which future financial developments do not have positive forecasts.

We can observe that the insolvency of the natural person is essentially different from the insolvency of the professionals, where the insolvency of the debtor does not present legal relevance for determining his insolvency, being possible that a solvent debtor is insolvent, subject to the procedures provided by law. On the other hand, for the natural person debtor, who owns traceable assets and has incomes whose value exceeds the patrimonial liabilities, the legislator did not allow the application of insolvency proceedings, as it is considered that there is a possibility to cover debts, following the capitalization of the assets.

And, regarding the way in which the living standard is determined, there are a series of criteria established both by the provisions of Law no. 151/2015, as well as through those of the methodological norms in force[10].

In accordance with the provisions laid down in Article 45 (1) (d) of the Methodological Rules, the general criteria for determining the reasonable standard of living shall be issued by the insolvency commission at central level.

The general criteria for establishing the reasonable standard of living, in the insolvency procedure based on the repayment plan, and in the judicial insolvency procedure by liquidation of assets are published annually, in the Official Gazette and on the website of the NACP.

And in the provisions of Article 2 (2) of the same rules, the benchmarks to which the Commission will refer at central level for establishing the criteria are mentioned: the value of the Minimum Expenditure Basket, the minimum value of professional and/or school expenses, the price of utilities, food and basic products, the composition and structure of the debtor's family, the existence of special health situations, minimum expenses related to the operation and maintenance of a vehicle, the minimum costs of raising, caring for and educating a child, and the minimum requirements of a suitable home.

The way of establishing the Minimum Expenditure Basket gave rise to numerous discussions and controversies, which in the end were settled by the appearance of a normative act, namely Decision no. 7/2018 regarding the approval of the General Criteria for establishing the reasonable standard of living[11].

According to Article 2 of the Decision, the value of the Minimum Expenditure Basket represents the minimum threshold below which the expenses for ensuring a reasonable standard of living and the amount of money necessary to cover the expenses necessary to ensure daily living cannot be set. The decision refers not only to the debtor, but also to his family. As a result, the amount that cannot be retained from the debtor in order to pay the debts must ensure the daily living, both for the debtor and for his family[12].

The value of the minimum expenditure basket is established differently, for each of the three forms of procedure, but also taking into account the particular needs of each debtor and of the family members, whose satisfaction is imperative. As a result, the legal regulation creates the possibility to establish an amount necessary to ensure a

reasonable standard of living in relation to the particular cases and exceptional situations.

The provisions of Article 6 of the Decision set the amount of the minimum monthly expenditure basket, which is different for the debtor living in urban areas and his family members, compared to the debtor living in rural areas[13],whether in the insolvency proceedings on the basis of a debt repayment plan or in the simplified insolvency proceedings[14].

For example, the value of the minimum monthly expenditure basket for an adult in an urban area is set at 797 lei, and for an adult in a rural area it is set at 644 lei. I consider that this amount cannot ensure a reasonable standard of living for an adult, neither in urban nor in rural areas, even if we take into account the fact that in rural areas the costs of daily maintenance can be lower, and that insolvency in itself means lack of funds, availability, etc.

With regard to insolvency proceedings by liquidation of assets, the provisions of Article 7 (1) stipulate that the value of the minimum monthly expenditure basket is equal, whether the debtor lives in urban or rural areas, to the value of the minimum gross wage per economy. And as regards the members of his family, the corresponding values mentioned in Article 6 (1) and (2) of Decision no. 7/2018.

The third condition established by the provisions of Article 4 (1) for a natural person debtor to be able to benefit from the provisions of Law no. 151/2015 concerns the amount of outstanding obligations, which must be at least equal to the threshold value.

According to Article 3 point 24 of Law no. 151/2015, the debtor will not be able to request the opening of the insolvency procedure based on a repayment plan or the judicial insolvency procedure by liquidation of assets, if the total amount of his due obligations is below the threshold value of 15 minimum wages per economy.

Unlike the provisions of Article 5 point 72 of Law no. 85/2014, which establish that the threshold value is 40,000 lei, both for creditors and debtors, within the provisions of Article 3 point 24 of Law no. 151/2015, the legislator does not establish a fixed amount from which the insolvency procedure can be requested. As a result, the threshold value is determinable, not determined[15].

It should also be noted that in the simplified insolvency procedure there is a maximum threshold of receivables, which is 10 minimum wages per economy.

In view of all these aspects, we consider it necessary to amend the provisions of Article 3 point 24, in order to specify that the threshold value is 15 minimum gross wages per economy.

151/2015 does not define the phrase *debtor in good faith,* The provisions of Article 4 (3), exclude from the application of the law the category of debtors who have been the subject of one of the three procedures regulated by law, and which concluded with the release from residual debts, less than 5 years prior to when new application was made.

As a result, in order for a natural person debtor to request the opening of a new procedure, in case he has been the subject of a procedure provided by Law no. 151/2015 and benefited from the "bonus" brought by law, the release of residual debts, he will have to formulate the application after a period of 5 years.

The law prohibits this category of debtors from benefiting from the legal provisions, precisely in order to avoid a repeated discharge of debts and to obtain patrimonial advantages to the detriment of creditors..

According to the provisions of Article 91 (2) and (3) of the law, the debtor will be deleted from the Insolvency Proceedings Bulletin 5 years after the date of the court decision on concluding this procedure, by conclusion of the director of the Insolvency Proceedings Bulletin.

From the date of publication in the Insolvency Proceedings Bulletin of the Director's conclusion, access to all published documents and information concerning a debtor, including through related online services, will be provided only to the debtor, insolvency commissions, courts, prosecution and criminal investigation bodies, public authorities and institutions.

In view of these provisions, does the 5-year period start to run from the issuance of the court decision to close the procedure, or is it calculated from the date on which the court ordered the release of the residual debts and the decision became final? Obviously, even in the first situation we refer to a final decision to close the procedure.

As a result, several hypotheses are possible:

- In the case of a debtor who has been discharged from the residual debts, the 5-year period shall begin to elapse from the date on which the decision to release the residual debts becomes final.
- If the debtor does not benefit from the release of residual debts, the provisions of Article 76 stipulate that he is required to cover the claims contained in the table of claims, in full, including interest and penalties that would have been incurred if he had not suspended the flow of interest, penalties, late fees, and other accessories, from which the amounts paid are subtracted.

The insolvency court will reject the claim for debt if:

- the debtor has breached his obligations during the insolvency proceedings, the obligations imposed by law or through the repayment plan;
- the debtor has not complied with the obligations and prohibitions corresponding to the post-insolvency supervision period;
- if during the proceedings any of the situations referred to in Article 4 have occurred or are ascertained.

In these three cases which are stipulated in the provisions of Article 75 (1) a), b) and c), and have the character of a sanction, in the event that the debtor makes a new request to initiate the procedure, it would be rejected, according to Article 4 (4) (a).

Apart from the cases mentioned, letter d) of Article 75 (1) sets out a fourth ground for rejecting the claim for debt, namely if the claim is made prematurely and the debtor will be able to make a new claim at the end of the period. In this case, the term of 5 years will be calculated from the date of the final sentence by which the request for release from residual debts was admitted[16].

In conclusion, the 5-year period will start to elapse from the final date of the debt relief sentence, which can be pronounced at the earliest within 60 days from the

issuance of the decision to close the insolvency procedure on the basis of a repayment plan, or the simplified insolvency proceedings[17].

In the case of insolvency proceedings by liquidation of assets, the term of 5 years will start to elapse from the date of finality of the sentence of relief of debts; which can be pronounced at the earliest, after one year from the date of concluding the procedure, if the debtor has covered a share of at least 50% of the total value of the claims, or at the latest, after a period of 5 years from the concluding of the procedure[18].

In addition to the prohibitions mentioned in paragraph (3), in Article (4) the debtors of "bad faith", those who cannot benefit from the provisions of the law are listed.

Thus, the procedures provided by law are not applicable to the debtor:

• If one of the three procedures listed by law was closed less than 5 years prior to the formulation of a new request to open insolvency proceedings, for reasons attributable to it.

Such a sanctioning provision is also included in the provisions of Article 132 (4) of Law no. 85/2014, regulation which establishes that the debtor who, within 5 year span prior to the formulation of the introductory requests, has been the subject of the procedure before, cannot propose a reorganization plan.

• If he has been formally convicted of tax evasion, forgery or intentional offense against property by disregarding trust.

Offenses against property by disregarding trust are regulated in the Criminal Code, Title II *Offenses against property*, Chapter III, Article 238 – Article 248[19].

Some of these offenses, namely simple bankruptcy, fraudulent bankruptcy and fraudulent management have been regulated in the past by Law no. 85/2006, which was repealed on the date of entry into force of Law no. 85/2014.

From the wording of the legislator it could be understood that a conviction for one of the offenses provided for in Article 4 (4) b) would completely exclude the convicted debtor from the benefit of the law, without the possibility of judicial rehabilitation, based on which the debtor would benefit from these legal provisions.

If the convicted person has been rehabilitated, the lack of capacities and prohibitions are removed.

The provisions of Article 4 (4) (b) determine exactly which offenses prevent the debtor from benefiting from the effects of the law, so that a debtor who is convicted of one or more of the offenses provided for in the Criminal Code or in special laws can be subject to the law of insolvency of the natural person, and may be considered a debtor in good faith.

• Who has been fired in the last 2 years for reasons attributable to him.

We consider that it would be welcome to waive this provision, which limits the access to proceedings of some debtors, who have had the misfortune to lose their jobs, for reasons that are not always and entirely attributable to them.

• Who, although fit for work and without a job or other source of income, has not taken the reasonable diligence necessary to find a job or who has unjustifiably refused a proposed job or another income-generating activity.

By the above provisions, the legislator has limited access to this procedure for individual debtors who have not made any effort to find a job, in the situation where they have debts.

The law does not determine what this "*reasonable diligence*" means, leaving it to the discretion of the insolvency commission or the court to assess whether or not the debtor has made a reasonable diligence to find a job.

Thus, at the time of submitting the application to initiate the procedure, the debtor has the following possibilities at hand:

– to prove that he is unfit for work, or;
– that he held a job, or;
– that he has taken steps to take up employment, including that he is registered in the records of the employment agency in which he resides without being offered a job

• Who accumulated new debts, through voluptuous expenses, while he knew or should have known that he was in a state of insolvency.

• Which determined or facilitated the arrival in a state of insolvency, intentionally or through serious fault. *The following are presumed to have had this effect*:

– Contracting, in the last 6 months prior to the formulation of the request for opening the insolvency procedure, some debts that represent at least 25% of the total value of the obligations, with the exception of the excluded obligations[20].
– Assuming, in the last 3 years prior to the application, excessive obligations in relation to the person's financial status, to the advantages obtained from the contract or to all the circumstances that significantly contributed to the debtor's inability to pay debts, other than those owed by him to the persons with whom he thus contracted.
– Making, in the last 3 years prior to the application, preferential payments, which have significantly contributed to the reduction of the amount available for payment of other debts.
– The text of the law can be confusing given that any payment made by the debtor has the effect of reducing the amount available for the payment of other debts.
– The transfer, in the last 3 years prior to the application, of goods or values from his patrimony to the patrimony of another natural or legal person while he knew or should have known that through these transfers he will reach a state of insolvency.
– Termination of an employment contract by agreement of the parties or by resignation in the last 6 months prior to the formulation of the request to initiate the procedure.
– This, at the date of the request for the opening of insolvency proceedings, has already opened another insolvency procedure.

These assumptions are relative.

As a result, the insolvency proceedings regulated by Law no. 151/2015 are not accessible to any good-faith debtor in financial difficulty, for debts that do not arise from the operation of an undertaking, within the meaning of Article 3 of the Civil Code. The provisions of Article 4 limit the debtor's access to one of the three procedures, so that in the end the law is difficult to access. The law excludes bad faith debtors from the application, accepting only those in good faith, although the conditions for access to insolvency proceedings are so fragmented in the body of the law; that it is necessary to reconstruct the criteria which the insolvency commission and the court are required to apply in resolving applications to initiate proceedings. The bad faith of the debtors excludes them from the benefit of the law. Practically, however, neither the insolvency commission nor the court have the necessary means to assess bad faith, so that after checking the debtors, consumers can also go through this filter even if the behavior prior to the application can not be considered in good faith. Although the stated objectives of the law include the motivation of the debtor to make efforts to carry out income-generating activities, facilitating social re-emergence and its contribution to the economic life of the community, these objectives are also achievable by consumers of bad faith, who under certain special conditions could have received access to the procedure. Moreover, in certain special cases of insolvency by liquidation of assets, the law regulates the institution of annulment of fraudulent acts, thus contradicting its own provision, which excludes the debtor in bad faithfrom the application of the procedure.

4 Conclusion

*In conclusion***,** the adoption of legislation regulating the insolvency of natural persons was not only necessary but also mandatory, given that the provisions of Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings[21] require Member States to extend insolvency proceedings to natural persons as well.

Even if it has given rise to a whole series of criticisms and it is obvious that certain changes are required, the insolvency law of individuals is an important step towards a reform of the legislative system on recovery options available to the debtor, a natural person of good faith.

Let's not forget that in the case of the legislation that regulates the insolvency of professionals, it was necessary for a long period of time to pass, and for several other laws to be adopted, so that in the end, the law was able to reach its current form.

Judicial practice is the main promoter of changes in legislation, and at the same time, the one that will concretely establish the legal provisions that need to be amended, supplemented or adopted, and which could help to transform the insolvency law of natural persons into a functional, useful law, a true law of social protection.

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[7] According to Article 695 of the Commercial Code of 1887 "*The trader who has stopped paying for his debts is in bankruptcy*". The Commercial Code, promulgated by decree on May 10, 1887, entered into force on September 1, 1887 and was repealed on the date of entry into force of the New Civil Code.

[8] Article 5 pt. 29 of Law no. 85/2014.

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[15] Marcela Comșa, *Legea privind procedura insolvenței persoanelor fizice no. 151/2015,* Relevant legislation and comments, Second edition revised and added, Universul Juridic Publishing House, Bucharest, 2016, pp. 59.
[16] According to the provisions of Article 75(1) of Law no. 151/2015: "*The insolvency court may reject the request for release of debts if: a) the debtor has violated, during the insolvency proceedings, the obligations imposed by this law or by the repayment plan, including negligent or disinterested behavior regarding the execution of obligations they are required under this law; b) the debtor has not complied with the obligations and prohibitions corresponding to the post-insolvency supervision period; c) during the insolvency proceedings any of the situations referred to in Article 4 (4) has occurred or is established; c) it is introduced prematurely, in which case the debtor may make a new claim at the end of the term*".
[17] According to the provisions of Article 71(1) of Law no. 151/2015: "*In the case of a debtor who has been subject to an insolvency procedure on the basis of a debt repayment plan or a simplified insolvency procedure, within 60 days of the issuance, pursuant to Article 42, of the decision to close the procedure, the debtor may formulate a request for release of residual debts*".
[18] According to the provisions of Article 72 of Law no. 151/2015: "*(1) Following the closure of the insolvency proceedings by liquidation of assets, opened in accordance with Article 46 a) or b), the debtor shall continue to make payments to creditors for the periods provided for in (2) or, as the case may be, (3); in proportion to the seizable income determined by the court or, as the case may be, by the insolvency commission, and will be subject to the limitations and prohibitions set out in (6) and (7). (2) If, one year after the closing of the proceedings, the debtor has covered a share of at least 50% of the total amount of the claims, the court shall, at the request of the debtor, attach the decision of the insolvency commission provided for in Article 73 verifying that the obligations laid down in (6) and the prohibitions laid down in (7) have been complied with, and order the release from debts.(3) If, after 3 years from the date on which the proceedings are concluded, the debtor has covered at least 40% of the amount of the claims, the court to which the decision of the insolvency commission provided for in Article 73 shall be annexed, verifying that the obligations laid down in (6) and the*

prohibitions laid down in (7) have been complied with, may order the release of debts.(4) If, despite all his diligence, the debtor failed to cover at least the share of the amount of receivables provided for in (3) first sentence, the court, at the request of the debtor, verifying whether the obligations provided for in (6) and the prohibitions provided for in (7) have been complied with, may order the release of debts only after a period of 5 years from the closure of the procedure".

[19] Offenses against property by disregard of trust are regulated in the Criminal Code, Title II *Offenses against property*, Chapter III, Article 238 – Article 248: breach of trust, breach of trust by fraudulent creditors, simple bankruptcy, fraudulent bankruptcy, fraudulent management, misappropriation of found property or misused by the perpetrator, fraud, insurance fraud, misappropriation of public auctions and exploitation of a vulnerable person.

[20] According to Article 3 14)of Law no. 151/2015, *the excluded obligations* are the obligations of the debtor that cannot be subjected to measures of rescheduling, reduction or deletion: legal or conventional maintenance obligations, the latter not exceeding a threshold of 5 average salaries per year. and obligations resulting from criminal and tort liability.

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Procedural aspects in the liability action of the administrator of the company regulated by Law no. 31/1990

Lecturer Todică C.

"Titu Maiorescu" University (ROMANIA)
E-mail: carmentodica_utm@yahoo.com

Abstract

Taking a distinct French law between social action (the action is brought against the company manager guilty) and *ut singuli* social action (the action is brought by share-holders on behalf inactive company for damage suffered by it), art. 155 of company law governing social action and art. 155^1 governing *ut singuli* social action. Essentially, the paper is a reflection on the controversial doctrine opinions, "doubled" by the solutions offered by the legal instances, which are as recent as possible, also offering the solution we have considered adequate.

Keywords: the administrator liability action, approval of general meeting, action in damages, arbitration clause.

1 The legal framework of the liability action of the administrators

According to Law no. 31/1990, the liability action of the administrators belongs to the company and not to the associates. In this sense, art. 155 para. 1 "the liability action against... the directors, the directors, respectively the members of the board of directors and of the supervisory board, ... for damages caused to the company by them by violation of their duties towards the company, belongs to the general meeting which will decide by the majority art. 122". Naturally, the text establishes the rule according to which the action in liability belongs to the general assembly of the associates, because through the acts and operations of the administrator, the one harmed is the company. This is also the reason why the doctrine supported the societal character of the action. Therefore, such an action cannot be promoted by the partners. The introduction of the action in liability is, moreover, provided by law and as an obligation in the task of the

general assembly. Thus, in the limited liability company, art. 194 para. 1 lit. c) of the law provides "the general assembly of the associates has the following main obligations: … c) to decide the pursuit of the administrators… for the damages caused to the company, designating also the person in charge to exercise it". In the same sense, in the joint stock company art. 111 para. 2 stipulates "…the ordinary general meeting is obliged… d) to decide on the management of the board of directors, respectively of the directorate".

As an exception to this rule, the law also allows the introduction of an action for damages at the initiative of minority shareholders. According to art. 1551 paragraph 1, if "the general meeting does not bring the action into liability nor does it give effect to the proposal of one or more shareholders to initiate such an action, any of the shareholders representing, individually or together 5% of the share capital, have the right to bring an action for damages, in his own name, but on behalf of the company". Unlike the liability action regulated by art. 155 of the law, as a social action, the analyzed text regulates an action in liability at the initiative of minority shareholders. Although the action is brought in their personal name by them and not as representatives of the company, nevertheless the effects of the decision, in the hypothesis of admitting the action, occur on the company. Thus, the compensations granted will revert to the company, the legal text expressly providing for the introduction of the action "on behalf of the company". Therefore, we can state that in both cases, the beneficiary of the liability action is the company and not its associates.

Articles 155 and 1551 contain incidental regulations on joint stock companies. In these circumstances, the question arises whether, in the absence of specific rules in respect of other types of companies (collective name, limited partnership, limited partnership or limited liability company), the said texts are applied by analogy. The literature has consistently held that those provisions apply to other types of companies, with the exception of those concerning the legal termination of the term of office of persons against whom such actions are brought. Thus, in the other companies, it is necessary for the general meeting to decide to revoke the mandate of the director expressly, distinct from the decision to bring the action against him.

2 Procedural quality in liability action

During the operation of the company, the active procedural quality in initiating the liability action is the company through its representative – the person in charge of the general meeting with the exercise of the action, but also the supervisory board insofar as the liability action is exercised against the board members. regulated by art. 155 para. 7 of the law.

Passive procedural capacity has, as the case may be, the administrator, the director, respectively the member of the directorate or of the supervisory board against whom the decision to engage the responsibility was adopted.

However, in the doctrine[1] it has been stated that it has the procedural capacity to promote the action in liability against the administrative bodies, the general assembly through the person in charge of it to exercise the action in court. In our opinion, since the interest belongs to him, the quality in initiating such an action has only the company, the general assembly having the competence to adopt the decision of

commitment, based on which the action will be introduced and to designate the person to exercise in justice. Likewise, in the case of the supervisory board which, in the event of the liability of the members of the board of directors, adopts the decision on the basis of which the liability action may be promoted, at the same time exercising the action in court. Such a solution is all the more necessary since, even art. 220 para. (1) of the Civil Code, as a general norm, expressly stipulates that "the action in liability against the administrators, … for damages caused to the legal person …, belongs, in the name of the legal person … the competent management body, which will decide .... ".

If the decision was taken to promote the action in liability, according to art. 155 paragraph 2, the general assembly will appoint, by the same decision to engage the responsibility and with the same majority, also the person in charge to exercise the action in court. This appointment is necessary because, as we will show, the mandate of the persons empowered to represent the company ceases by right on the date of adoption of the decision. Because the law does not distinguish, in this case, the legal representative of the company can be both a shareholder and a person outside the company.

Exceptionally, if the meeting decides to act responsibly only for a part of the directors, it was appreciated that the appointed person could be even one of the remaining directors[2].

The mandate of the appointee will be a special one, given for a single legal operation, namely, the exercise of the legal action. Therefore, regardless of the person so appointed, he has the capacity of legal representative of the company before the courts. The proof of this quality is made with the decision of the general assembly adopted in this respect, and the request for summons will have to be signed by the appointed representative. However, if the liability action is brought against directors who do not hold the capacity of legal representatives of the company, the action is brought by the company, through its legal representative from that date, according to the general rules on the representation of the company in court[3].

To the extent that the general meeting does not introduce the liability action provided in art. 155 nor does it follow the proposal of one or more shareholders to initiate such an action, a procedural quality active in initiating such an action is held by the shareholders who, individually or together, represent at least 5% of the share capital pursuant to art. 155^1. In this case, the persons exercising the right to bring an action for damages must have already had the quality of shareholder at the date when the issue of bringing the action for liability was debated in the general meeting, according to art. 155^1 para. 2. The legal provision is equivalent to a qualification of the right to the action in liability as a strictly personal right, since it cannot be transmitted by assignment, together with the actions.

Both if the share in the responsibility of the management bodies is brought by the company, based on the decision of the general meeting, and if the share is brought by the shareholders who hold individually or together at least 5% of the share capital, the share has a character aiming to recover the damage caused to the company and not to the damage caused directly to the shareholders[4].

3 The effect of promoting liability action

As a result of the approval of the liability action, the mandate of the directors, respectively of the members of the board of directors and of the supervisory board ceases by right, so that the decision of the general assembly operates as a legal cause for termination of the mandate report. It should be noted, however, that if the termination of the term of office of the directors and members of the board of directors operates without any conditions, in the case of the members of the supervisory board the term of office ends if the general meeting decides to initiate their action with the majority provided by art. 115 para. 1 (by derogation from the rule imposed by art. 155 paragraph 1, which refers regarding the majority to art. 112). Thus, art. 155 para. 4 stipulates "if the general meeting decides to take liability action against the administrators, respectively the members of the board of directors, their mandate terminates by right from the date of adoption of the decision and the general assembly, respectively the supervisory board, will proceed to replace them"[5].

Instead, para. 6 of the same article specifies that "if the general assembly decides to initiate liability action against the members of the supervisory board with the majority provided in art. 115 para. 1, the mandate of the respective members of the supervisory board ceases by right. The general assembly will proceed to replace them ". Therefore, for the term of office of the members of the Board of Supervisors to cease by right, it is necessary that the decision be adopted by the majority and quorum required for extraordinary general meetings (by way of derogation from the quorum and majority rules provided for in paragraph 1 of Article 155, specific to the ordinary meeting). Per a contrario, in the situation in which it is decided to promote the action in liability against the members of the supervisory board, under the conditions provided by paragraph 1 of art. 155, their mandate does not end.

Unlike the mandate of the administrators who cease by right, regarding the directors, the approval of the action in liability entails their suspension from office until the final decision of the court. According to art. 155 para. 5 of the law, "if the action is initiated against the directors, they are suspended by right from office until the decision becomes final". In a more complex provision, art. 220 para. (5) The Civil Code provides "if the action is brought against the directors employed under a contract other than the individual employment contract, they are suspended from office until the final decision of the court", without regulating and the possibility of replacing them.

If in the case of liability action decided by the general meeting, the term of office of the directors, members of the board of directors, and under certain conditions and the term of office of the members of the supervisory board ceases by right, from the date of the decision the case of the liability action of the minority shareholders. On the contrary, such a decision is left to the discretion of the general meeting of shareholders, respectively of the supervisory board. In addition, the social action *ut singuli* cannot even have the effect of terminating the mandate of these persons, in the absence of an express legal provision, and the law expressly stipulates exactly the opposite. According to art. 155^1 paragraph 4, "only after the decision of the court admitting the action remains final, the general meeting of shareholders, respectively the supervisory board may decide to terminate the term of office of the directors, directors and members of the supervisory board, respectively of the board members, and replace them".

4 Object of the action for liability

The object of the action for liability concerns only the reparation of the damage, all the situations that aim at the termination of the mandate producing their effects either by law or by decision of the general assembly. Thus, in the case of the liability action formulated pursuant to art. 155 by the general meeting against the administrators, respectively of the members of the board of directors or of the supervisory board, their mandate terminates by right from the date of adoption of the decision. And in case of liability action against the directors, they are suspended from office until the decision remains irrevocable. Instead, in the case of social action *ut singuli*, formulated under art. 1551 by the shareholders who represent, together or individually, at least 5% of the share capital, the termination of the mandate does not occur by law, but the general meeting will be able to decide the termination of the mandate of the persons whose liability has been established by the court definitively. However, a distinction must be made regarding the object, between the social action regulated by art. 155 (liability action) and the social action *ut singuli*, provided by art. 1551 through which the aim is to obtain compensations (action in compensations). As expressly provided in art. 1551 paragraph 1, the shareholders representing together or individually at least 5% of the share capital have the right to bring an action for damages. From this point of view, the object of the social action *ut singuli* is more restricted than of the social action, regulated by art. 155. As regards the latter, being an action for damages, a claim for damages is possible both in kind and by equivalent. Moreover, the reparation of the damage in kind differs according to the nature of the obligation not fulfilled or improperly fulfilled by the administration body, and may even be obligations to do, such as the existence and keeping of registers or the fulfillment of some decisions of the general assembly. On the other hand, regardless of whether it is a liability action promoted by the company or in compensation of the minority shareholders, both can have both contractual and tort grounds.

A distinction is also required. Both liability actions can have both contractual and tort grounds[6][1]. At the same time, the administrators, directors, members of the board of directors and of the supervisory board may be held liable for the non-fulfillment or improper fulfillment of any obligation incumbent on them according to the law and the constitutive acts.

5 Competence to settle the liability action

For all aspects related to the procedure for resolving the liability action of the administrators, the general norms included in the Code of Civil Procedure and in the special norms of art. 155 and 1551 of Law no. 31/1990. However, related to the arbitrability of the dispute[7], as a general rule, art. 63 of the law establishes "the requests and remedies provided by this law, by the competence of the courts, shall be

[1] In the previous regulation, the social action ut singuli could not be brought for damages brought to the society by illicit deeds. causing damage to the administrator, but was limited to the damage caused by a legal act, because the law expressly restricted the scope of the action to the case "where the director or directors conclude legal acts that harm the company."

resolved by the court of the place where the company has its main headquarters". The norm being of public order, so that the parties cannot derogate, it was considered as a legal basis for the exclusion of arbitration in corporate matters. Therefore, the action in liability, in both variants, is an action of exclusive competence of the courts, and a possible arbitration clause would be ineffective. The situation appears as an exceptional case, in which a patrimonial and tradable dispute, in principle, is excluded from the incidence of arbitration.

However, starting from the object of the action which is patrimonial and tradable[8], we believe that there is no impediment in resolving the arbitration action. In addition, there is a mandate relationship between the company and the directors, which can be materialized in a management contract itself, in which the parties are free to include an arbitration clause (arbitration)[9]. This is all the more so as the special norms provided by Law no. 31/1990 in art. 155 and art. 155^1 concerning the liability action of the administrative bodies, do not contain provisions incompatible with the settlement of the dispute by an arbitral court. At the same time, in doctrine were included in the sphere of arbitrability, the patrimonial litigations belonging to some fields subject to the special legislation, which are limited to indicating generically the competence of the courts (we believe, moreover, that this is the role of art. 63 of Law no. 31/1990, the intention of the legislator being, moreover, to establish the territorial competence) or, in other cases, only the "jurisdiction", without other additional specifications. It is argued that these general wording encompasses arbitration as a form of possible jurisdiction. According to the same opinion, are excluded from this field, strictly the patrimonial litigations in matters that benefit from imperative norms of establishing the non-arbitral jurisdiction or those that, concretely, if subjected to arbitration, would violate the public order or the imperative dispositions of the law.

Against these arguments, we consider that the competence of the common law court in the matter of the liability action of the company's administrator should not be absolutized, and to admit the plan, the idea of non-arbitrariness of this action, would correspond to a rigid and formalistic interpretation of the law. 63 of Law no. 31/1990).

We also believe that the problem of the arbitrability of the liability action of the company's administrator should find an express normative solution. *De lege ferenda*, a provision is required in the body of the Company Law, either in the sense of expressly excluding the arbitral competence to settle the liability action, or in the sense of allowing it (possibly, according to the model offered by Law no. 66/1993 of the contract management, currently repealed)[10].

6 Prescription of the material right of liability action

A final aspect needs to be analyzed, namely the prescriptibility of the action. The action in liability is subject to the prescription of the material right to action provided by art. 2528 of the Civil Code ("the prescription of the right to action in reparation of a damage that was caused by an illicit deed begins to run from the date when the injured party knew or should have known both the damage and the person responsible for it"). Therefore, the prescription begins to run from the date on which the injured party knew or should have known both the damage and the person responsible for it. In the case of liability action, the injured party is the company, because the liability action has a social

character, being decided by the body representing the social will, or the shareholders representing individually or together 5% of the share capital, in case of damages regulated by art. 155[1]. The text also provides for an objective moment of the beginning of the prescription course, respectively the moment from which it should have known the damage, as is the case of the analysis of the respective operations on the occasion of the approval of the annual financial statements. According to art. 186 of the law, "the approval of the annual financial statements by the general assembly does not prevent the exercise of the liability action, in accordance with the provisions of art. 155". Considering the regulation of the action in individual liability in compensations, in an independent article, through the provisions of art. 155[1] of the law, we consider that the reference contained in the analyzed text must be interpreted in the sense that it refers both to art. 155 expressly stipulated as well as in art. 155[1].

The legal norm is justified, because it cannot be argued that the approval of the financial statements has ratified all the operations of the directors and that the company would have lost the right to liability, insofar as after the approval it would be found that the directors worked with negligence to the detriment of society or malicious acts may be imputed to them[11]. Thus, the liability action can be exercised after the approval of the financial statements, even if the general meeting has analyzed an operation likely to hold the directors, directors, board members and the supervisory board liable, because the law does not distinguish. However, if the assembly, following the analysis carried out, has decided not to assume their responsibility, a possible decision to the contrary may be adopted only on the basis of new elements, which were not taken into account when adopting the first decision[12].

Thus, the liability action can be exercised after the approval of the financial statements, even if the general meeting has analyzed an operation likely to hold the directors, directors, board members and the supervisory board liable, because the law does not distinguish. However, if the assembly, following the analysis carried out, decided not to assume their responsibility, a possible decision to the contrary may be adopted only on the basis of new elements, which were not taken into account when adopting the first decision[13].

7 Conclusions

Liability action is not the only means of sanctioning the administrator, because Law no. 31/1990 also regulates the possibility of *ad nutum* revocation of the administrators, members of the board of directors and of the supervisory board, as well as of the dismissal of the directors. However, insofar as the company has been harmed, the general meeting is obliged to discuss not the revocation or dismissal, but the commitment of those responsible for the damage. Thus, the action for liability is not limited to having a simple punitive character but also a reparative one, for full recovery of the damage. From this perspective, liability action can be seen not only as a right, but especially as an obligation of the general meeting of shareholders.

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[4] Even today, the doctrine maintains the isolated opinion according to which the action in liability of the administrators promoted by the minority shareholders is a kind of oblique action, in which the debtor's passivity allows the creditor to act directly in court in defense of the debtor's direct interests (C. Leaua, *op cit.,* pp. 312)..
[5] The legal provision is in perfect agreement with the general norm contained in art. 220 para. (4) of the Civil Code, according to which "if it has been decided to bring an action for liability against the administrators, their mandate shall cease by right and the competent management body shall proceed to replace them".
[6] In the previous regulation, the social action *ut singuli* could not be brought for damages brought to the society by illicit deeds. causing damage to the administrator, but was limited to the damage caused by a legal act, because the law expressly restricted the scope of the action to the case "where the director or directors conclude legal acts that harm the company."
[7] For a contrary opinion according to which the litigation is of exclusive competence of the courts, see G. Florescu, Z. Bramberger, M. Sabău, *Commercial Arbitration in Romania,* Publishing House of the "Romania of Tomorrow" Foundation, Bucharest, 2002, p. 38; C. Gheorghe, *Limits of arbitration in corporate matters,* in Judicial Courier no. 8/2010, p. 436. However, the last author accepts the arbitration for the liability action filed by the administrator against the company, in case of non-fulfillment by the administrator of the contractual bonuses of the administrator. Such a solution leads to a differentiated legal regime and to a non-unitary settlement of disputes.
[8] The two coordinates, which give the dimensions of the arbitrability of the dispute, are: the patrimonial nature of the dispute and the tradable character. It therefore exceeds the scope of arbitrability, non-patrimonial disputes (regarding the state and civil capacity of the person) and non-tradable patrimonial ones..
[9] The Court of Arbitration shall have jurisdiction to settle disputes concerning companies if the parties have concluded a written (arbitration) arbitration agreement to that effect. The arbitration agreement may be concluded either in the form of a clause in the main contract, called the arbitration clause, or in the form of an independent agreement, called a compromise. In this regard, see D.A. Sitaru, *International Trade Law.*

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Organic contractual freedom and slowing down insolvency

Tăbăraş M.

"Titu Maiorescu" University, Laws Faculty (ROMANIA)
E-mail: manuela.tabaras@yahoo.com

Abstract

Law no. 151/2015 concerning the insolvency of natural persons with its further amendments is limiting the freedom to contract provided by art. 12 of the Civil Code in respect of the natural person debtor in insolvency only when this one is choosing or is forced to choose the notarial path, but, although the legal technic could be appreciated as a bad choice, we must admit that it shows a constant concern of the law maker to provide a monitoring of contractual reports of the debtor in insolvency procedure, a stability of the civil circuit, representing only one of the legal diligence acts of the law maker to replace insolvent debtor's simulated deeds in order to fraud creditors' interests and even to incriminate these deeds, which proves an increase of the phenomena and an orientation of the penal policy towards the total eradication of such a behavior of the debtor.

Keywords: contractual freedom, notarial contracts, insolvency, simulation, debts recovery

1 *Captatio benevolentiae*

Civil Code – organic law – is regulating in the introductive chapter called "*Civil law interpretation and effects"* in article 12 par. 1 that "*Anyone can freely dispose of his/her assets, if the law does not expressly state otherwise"* – base principle constantly recognized in the nowadays jurisprudence, too.

The same true is the fact that this right is not an absolute one, but only one with general applicability, so that in paragraph 2 of the same article, the law maker is tailoring stating that "*No one can freely dispose of it, if insolvable"* and we couldn't criticize this vision coming to protect a serial of other institutions, rights and persons: the right of a third party creditor, stability of the civil circuit, morality of civil and commercial business, plenty of other rations grounding the same principle. However, this norm correctly assumed by the doctrine and jurisprudence can be amended by the law maker through a special law of natural persons insolvency Law no. 151/2015

regarding the insolvency of natural persons[1] with changes[2] and further amendments. The new law didn't surprise (except for, maybe, its form in which it remained to produce legal effects….) because if for legal persons they found ways to redress or steps required for debts liquidation have been regulated, slowing down individual actions of creditors for forced execution, as regards natural persons debtors there were no similar provisions, therefore creating inequities and more disadvantageous situations for natural persons versus legal persons debtors.

If we make a summary in the history of debts recovery, we will reach the conclusion that this debt recovery problem is as old as the world itself and civilizations put their mark over the settling of such debt incidents in a fundamental way.

2 Short time overview

If originally secular law of the Talion targeted *punishment of the person* and *not repair of the damage,* further on the evolution of the social conscience has focused the tasks on *debt recovery* and solutions were from the most different ones: in India the creditor was sitting at the door of the debtor in order to embarrass him and oblige him to pay the debt, in the antic Egypt, they used guarantees in order to assure the payment of a debt (mortgaging the body of a beloved dead person), during the Babylonian Empire, Hammurabi Code was regulating the sale of the debtor, his wife and kids to creditors for a period of 3 years in order to exploit their work, during the *Roman Empire* originally the creditor had the right *to retain the debtor in order to sell him as slave* or even the right of *life or death over him/her,* further on, *during the praetorian law,* the debtor being able to escape of his debt (and prison) *by abandonment of his/her goods* on behalf of the creditors and in the end of the *Republic status,* forced execution to be regulated by the *"manu militari"* state, *which was selling the goods* from the debtor's patrimony. During the *Middle Ages* commerce was blooming, developing "*mission in possessionem"* and *"vendito bonorum",* making the difference between the good faith debtor and bad faith one. Legal institutions such as -*arrangement* through which the correct debtor could manage his activities, creditors approving the decrease of the debts and *moratorium,* that allowed *the suspension of any pursuit of the debtor* for a while - appeared. Caragea Code speaks us about the debtor as "*mofluz*", imposing handing over of the debtor's fortune to lenders, and Civil Code and Cuza's Code are regulating "*deconfitura"* in respect of solvability – making the difference between merchants and non-merchants.

Even in canonical law they talked about pardoning debts: in the Old Testament Moses introduced saint year who among others, was marking "*forgiving of all debts",* theologians appreciating that through "*Pater noster" pray* the pardoning idea appears again, not only for ethical and moral sins, but also for debts, the forgiveness being deep and full.

At international level, two main models of insolvency of natural persons are recognized: **1)** English-American model called "*fresh start"* where good or bad faith in the cause do not have a major importance, because mainly any natural person debtor can take advantage of this procedure and liquidation is regulated in a simple procedure and **2)** European version, known as "*deserved fresh start"* adopted by the Romanian law maker as well, where only the natural person in **good faith** can take advantage of this

procedure, who reached in the impossibility to pay his/her current debts because of hardship, independently of his will.

3 Geo-political context

European Council has expressly imposed through Regulation no. 1346/2000 to member states, the extension of insolvency procedures to natural persons[3], too and the Romanian law make had to make a choice because part of the European states have a common legislation in respect of bankruptcy of natural and legal persons, while other states, as Romania did, too, chose **to separately treat and make difference between natural and legal persons' bankruptcy.**

The first country introducing such a law was Denmark, in 1984 – after which France (1989), Germany (1999), Austria, Belgium, Great Britain, Holland, Italy and Spain and others including Romania since 01.01.2018, followed.

4 National historical context

New Civil Code entered into force in 2011 has brought a re-drafting of legal obligations reports, traditional principles and concepts, highlighting a modern and enhanced legal regime over *sources of obligations*[4], has enlarged legal possibilities frame made available to creditor in order to *remedy consequences of failure to execute due obligations*[5], targeting at the same time a voluntary execution of the obligation detrimental to immediate start of legal procedures, in addition to the new items brought to legal regime of guarantees, finally providing a *superior protection of subjects outnumbered from economic point of view.* These changes in law have been followed **in 2014 by** entering into force of **the New Civil Procedure Code** *and its further* ***changes*** generated by procedural needs of the debtors' forced execution, of ***Law no. 85/2014 regarding prevention of insolvency and insolvency*** that focused the law maker on insolvency procedures[6] [arrangement (*concordato preventivo*) and ad-hoc mandate being included in the new normative act] and not in the least *entering into force also during* ***2014 of the New penal Code*** that incriminated some legal fraud deeds of the debtor through provisions of ***art. 239 Penal Code for punishment of breach of trust through defraud of creditors.***

These legal norms that fully regulated in detail the debtor's behavior, his rights and obligations correspondent to creditor's rights and obligations couldn't reach the legal target without the existence of **a set of substantial law norms and procedural measures** ***applicable to the good faith debtor*** **in a transitory temporary insolvency situation**[7], so that to offer both the debtor and the creditor non discriminatory legal protection required for legitime rights in the advantage of both parties, norms included in the *Law concerning insolvency procedure of natural persons.*

The purpose of law was establishment of *a collective procedure*[8] *(essential difference as compared to forced execution or offering as payment which are individual procedures following to satisfy only one creditor) through 3 different mechanisms:* ***a)*** *insolvency procedure based upon a debts reimbursement plan;* ***b)*** *legal insolvency procedure through assets liquidation;* ***c)*** *simplified insolvency procedure*[9].

With respect to the impact of this normative act, the *Law concerning insolvency procedure of natural persons* has been regarded with enough reluctancy[10], but also with criticism in terms of technics, legal coherence and from normative point of view, but from *contractual freedom point of view, the law should be regarded not only as a path (happy or less happy) to amend provisions of art. 12 par. 2 of the Civil Code,* but rather as *a continuation of law maker's diligence to replace simulated deeds* carried out by the debtor in order to fraud creditors' interests, the law maker's task being that one to hijack the debtor from his desperate attempts (some of them less legal) to protect his fortune by sale legal documents, that were increasing costs as well as debt recovery and which were opening the way for complaints and court actions, including criminal ones from creditors.

5 Magnitude

While in Czech Republic they filed 5000 claims at a population of 10 million inhabitants in 2008 when law has been implemented, then in 2014 they increased to 35000 claims, in our country at the present there are 21 natural persons debtors in the BPI subject to insolvency procedure and 59 procedural acts registered for them in the BPI, although an estimation of the number of files to be re-open during 2018 is of 10,000 files, by reporting to a volume of about 25% non-performant credits from about 1 250 000 credits awarded to population on the analyses date.

We have to mention that these procedures open for a reduced number of debtors are reported to a 1,181 administrators of the procedure and liquidators from the ANPC's records (out of which 25 public notaries at the level of the whole country)[11] and we could draw the conclusion that banks trials and negotiations had on the special law no. 77/2016 regarding offering as payment of real estate in order to cancel obligations assumed by credits have solved the hardship situation and payment incidents from credit contracts concluded on the law's enforcement (with less effort and costs), so only time will be able to judge the legal value of this normative act.

Norms governing the subject[12]

- Law no. 151/2015 regarding insolvency procedure of natural persons[13] with its further changes[14] and amendments[15],
- Decision no. 419/2017 for the approval of Methodological norms for the application of Law no. 151/2015 regarding insolvency procedure of natural persons[16],
- Decision no. 11/2016 regarding establishment of insolvency commissions at central and territorial level stated by Law no. 151/2015 regarding insolvency procedure for natural persons[17].

New rules

The law offers to contractual matters new *express* norms *that regulates instrumentation* of legal acts (attention! only on notarial way) in order to collective satisfaction of debts limiting once again the contractual freedom stated by art. 12 par. 1 of the Civil Code much more severe than par. 2 of the same article.

According to art. 91 (1) from the Law – The public notary is checking in the Insolvency Procedures Bulletin[18] **if party is debtor in the insolvency procedure** and, if the case, he/she requires the debtor to submit proving documents of the **approvals provided by the law for natural persons' insolvency,** *when he is drafting the notarial document regarding* **conclusion *of a contract.***

We have to notice the generous and inexplicable wording of the law maker that imposes to check in the BPI **all the parties of a contract** although the interest of the law would be that verifications to regard the case when the debtor is transmitting a right, encumbrance etc and at the most the case when it receives an asset with liens and not at all all the involved parties in conclusion of any contract.

We cannot resist to amend the unhappy technics that suggests to check the mentions within the BPI during the deeds before or after a contract because the law maker states that the interrogation is achieved *when drafted a notarial document regarding a contract,* when the natural wording is *at the conclusion of a contract.* There is no legal interest to check the debtor quality of contractual parties when we draft a Power of attorney, a statement of rest of price, documents that can be concluded in relation to a contract.

Therefore if Civil Code – **organic law – states,** as omnipresent rule of all legal relationships that *anyone can freely dispose of his/her assets,* showing that however, *you cannot dispose without consideration, that is free of charge, if you are insolvent,* **special law** of natural persons insolvency is controlling contractual freedom both of the debtor and any party he entered in contract with when they decided to conclude a legal document… regarding a contract, assumption in which not only the debtor – onerous decisions maker – is checked with respect to his fiscal solvency, but his/her contractual partner, too (maybe even the creditor) because in the assumption of this law, legal operation to be subject to validation by the insolvency practitioner.

Another important aspect to me mentioned is that one that this contractual freedom is limited, controlled, monitored **only for conclusion of legal documents in front of a notary.**

We are assisting either at a subtle legal technics of public education towards pure agreement that is bypassing the fund control of the notary (which personally it's hard to believe) or to a law maker's ignorance that didn't catch the present economic-social reality where this law appeared, because, in front of the notary, they do not find any longer the conclusion of transactions with respect to big values of the present society (as it has often happened during the totalitarian regime, when the real estate was the most important value). This is because at the present, there are transactions for cars with double, triple or even much more expensive than a real estate based upon an invoice and a payment order only, also aeronautical industry items, airplanes, ships, boats and other means of transport, as well as accessories, jewelries etc that can have much higher values than a real estate property (where the notary's competence is indeed imperative, substantive rights being required to be traded in authentic form under the absolute nullity of the contract sanction if the imperative rules are not observed) and which in their turn are traded the same through a simple invoice followed by the payment execution – cases that are not under this law and implicitly under this limit because the law maker envisaged only the notarial legal documents.

Thus, each time when insolvent debtor will conclude an onerous agreement other than in authentic form, he/she will be free to trade, but if he/she will choose (n.n. opting but not absolutely necessary) or it will be required (depending on the nature of the asset) to choose notarial variant to conclude the contract – his/her contractual freedom will suffer big changes by imposing verifications with their related time costs in order to check if all contractual parties are insolvent debtor or not and, if the case, the necessary approvals on the insolvency law for natural persons will be requested and the natural person debtor shall be obliged to present them.

6 Instead of conclusions

We are therefore assisting to a different treatment (is it fair? Constitutional?) of the freedom to conclude a contract by an insolvent natural person debtor (treatment that we do not find in the case of an insolvent legal person debtor) that will be compulsory checked if he is a natural person debtor public recognized by being included in the BPI only when he/she chooses or is obliged to choose notarial way to conclude a contract and he/she will be obliged to submit proves regarding approvals to contract as stated by the insolvency law of natural persons. These limits are absolutely vanishing when natural person debtor understands to contract in simplified form agreement or even through legal documents concluded in written form under private signature (regardless the certified notarial formula or with certified signature form) concluded with a law practitioner other than the public notary.

We are only noticing the law maker's excess to treat so different the contractual freedom of the debtor, which is only representing an unhappy concern to follow contractual relationships of the insolvent debtor, to monitor the stability of civil circuit, given the fact that we must remind that the insolvency law for natural persons has been enacted in a historical-legal frame focused on law maker's efforts to replace simulated deeds of the debtor in order to fraud creditors, its task being to distract the debtor from his desperate attempts (some of them less legal) to protect his fortune by sale agreements, documents that were increasing costs and chances for execution and debts recovery, prove of this being art. 88 from the Law[19] *and provisions of art. 239 from the NPC*[20]. *These articles are sanctioning attempts or deeds of debtors to evade execution, sale or liquidation of goods or values through legal documents not according to the truth and which are targeting fraud of creditors and which by repeating part of the general provision of the penal code into the special norm of the insolvency law prove the law maker's concern to incriminate these deeds but also it shows us an increase of the phenomena and criminal policy orientation towards removal of such a behavior of the debtor.*

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[19] The debtor's deed to *alienate, hide,* damage or destroy, in part or in whole, his *values or patrimony assets* or to *invoke deeds or fictive debts* or to fake documents in order to fraud creditors represent a crime stated by art. 239 from the Penal Code;

[20] **(1)** The debtor's deed to *alienate,* hide, damage or destroy, in full or in part, values or goods from his patrimony or to *invoke documents or fictive debts in order to fraud creditors* is punished with jail from 6 months to 3 years or with fine. **(2)** The same punishment is applied to the person who, *aware that he/she is not be able to pay, is buying goods or services producing therefore a damage to the creditor.*

Authentic Form – The *Quo vadis* regarding the tenants' option to buy houses, based upon Law no. 10/2001

Tăbăraș M.

"Titu Maiorescu" University, Laws Faculty (ROMANIA)
E-mail: manuela.tabaras@yahoo.com

Abstract

Since although traditionally, sale documents of real estate owned by the Romanian state, territorial administrative units towards tenants were achieved in written form under private signature according to changes brought to Houses Law no. 114/1996 through Law no. 170/2010 for the amendment of art. 45 of the Land Register and Real estate advertising Law no. 7/1996 and for amending art. 101 from the Houses Law no. 114/1996 (art. 101), ad validitatem authentic form of transfer documents for real estates has been unitary set up (by strengthening provisions of art. 24 par.(3) of the updated and republished Land Register and real estate advertising Law no. 7 of 13 March, 1996 already existing), reason for which, as a consequence of recognition of the tenants' right to opt for purchase of their rented houses through Decision (appeal in the interest of law called hereinafter as "RIL") no. 81/2017 of the High Court of Cassation and Justice, based upon art. 42 par.(3) from Law no. 10/2001 for the purchase of their rented houses, a new legitime concern raises with regards to the form of the sale document: shall we use traditional form of the document under private signature based upon Law no. 112/1995 or authentic *ad validitatem* form of sale documents of real estate provided by Law no. 114/1996 as amended during 2010 according to provisions of art. 24 par.(3) of Law no. 7 dated the 13th of March, 1996?

Keywords: sale agreement, tenant, authentic form, ad validitatem, document under private signature.

1 *Captatio benevolentiae*

Tenants who according to the law had the right to opt for the purchase of their houses whose tenants were – is a compulsory provision according to art. 521 par. (3) of the Civil Procedure Code, decided by RIL no. 81/2017, pronounced by the High Court

of Cassation and Justice in the public hearing (DCD/C court components) of the 6th of November, 2017 in file case no. 1914/1/2017 (published in the Official Journal of Romania Part 1 no. 49/18.01.2018) in the interpretation and application of art. 42 par. (3) from Law no. 10/2001 regarding legal regime of properties abusively taken by the state during the 6th of March 1945 – the 22nd of December, 1989, republished with its further changes and amendments provisions.

The methodological norm for unitary application of Law no. 10/2001 regarding legal regime of some properties abusively taken during the 6th of March 1945- the 2nd of December, 1989 dated 07.03.2007 did not bring clarifications regarding the form of the sale document to be concluded with the tenant who opted for the purchase of his/her house abusively taken by the state.

We are assisting to a real schism that has clarified the law maker's vision regarding the form of the properties' sale documents (not only for lands, but also for constructions) through which they unitary regulated (through strengthen of provisions of art. 24 par. (3) of the republished and updated already existing Law no. 7 of 13th of March, 1996 of the Land Register and real estate publicity) the *ad validitatem* form of the sale documents for real estate as the authentic one: "*Houses and individual units can be sold and obtained through legal documents between alive persons concluded in authentic notarial form, under the absolute nullity sanction",* through changes brought to Houses Law no. 114/1996 through Law no. 170/2010 for the amendment of art. 45 from Land Register and real estate publicity Law no. 7/1996 and for the change of art. 101 from the Houses Law no. 114/1996 (art. 101)[1].

Thus, given the previous documents and their history, a legitime question arises: Will the sale documents for purchase of houses be concluded in an authentic form as an *ad validitatem* form, under the sanction of nullity of this imperative requirement or not in case the tenant has opted, according to art. 42 par. (3) from Law no. 10/2001 regarding legal regime of properties abusively taken by the state during 6 March 1945-22 December, 1989, republished and further amended?

2 Assessment of legal norms

The solution for form conditions in valid conclusion of legal documents can only be a legal one and for this we have to systematic assess norms that generate a grounded legal response[1].

The law maker is stating as a principle, through art. 1244 of the Civil Code[2], that legal documents through which parties agree to move or establish substantial rights following to be registered in the Land Book must be concluded in ***ad validitatem*** **authentic form**, failure in respecting this imperative requirement taking to absolute nullity of the document in breach of this form requirement[2]. Thus this wording

[1] Art. 10 was initially introduced through Emergency Ordinance no. 210/2008 for amending Houses Law no. 114/1996 (in force since 11 December, 2008) and further on it has been changed by Law no. 170/2010 for amending art. 45 from Legal Register and real estate publicity no. 7/1996 and for changing art. 101 from Houses Law no. 114/1996.

[2] Art. 1244 Civil Code – "Except for other cases stated by law, agreements that move or establish substantial rights following to be registered in the Land Book have to be concluded through authentic document, under absolute nullity sanction".

represents the rule in the matter of transferring or establishing substantial rights and apparently we would appreciate as obvious the fact that also in respect of sale contracts concluded with the tenant according to art. 42 par. (3) from Law no. 10/2001, this requirement will is applicable to the contract. However, the law maker is adding another key to this word construction form, deepening our search in the legal norms maze, using the syntagma "except for other cases stated by the law".

Continuing our itinerary, we stop at provisions of art. 1179 par. (2) of the New Civil Code[3] that take us to a new general norm, but broader as application (incident to all legal documents), through which ***obligation to respect form of agreements*** is imperatively implemented when *law is providing for a certain form in which they must be concluded.*

Form requirements represent not only a concern of the law maker in order to assure recognition and stability of the legal documents in the civil circuit at an end, finding them also in the **CE Regulation 593/2008** (Rome I) regarding applicable law to contractual obligations namely provisions of **art. 4** par. (1) letter c) according to *which "**contract** for a substantial right of a property or with regards to a rental right over a house is regulated by **the law of the country where the real estate is located in",*** which establish how the applicable law is chosen (attention if parties did not already made a choice, depending on the contract)[3].

Contract regarding real estate rights (sale, exchange, donation, usufruct, use, superficia, mortgage) and property rental are subject to the laws of the country where the property is located, provision that is directly applied in Romania as in any other EU state without being necessary to have an internal domestic document to transpose the European norm, art. 4 of the Regulation sending directly to the norms regarding form conditions from the domestic law[4].

Parties cannot derogate through agreement from these norms because **art. 2639 par. (3)** is imperative when it provides that the applicable law to the form conditions of the legal document is that one from the country where the property is located (Romanian law absolutely states for the tenant's right to opt if the buildings are located in Romania), law that imposes, under nullity sanction, a certain solemn form for the transmission of substantial rights through *inter vivos* documents, so that no other law can remove this obligation and corelative sanctions for its infringement.[4]

We have to mention that ***no details regarding the form of the sale document*** following to be concluded with the tenant of a real estate abusively taken by the totalitarian regime who exercised his legal benefit of social protection for the purchase of the house based upon art. 42 par. (3) from Law no. 10/2001 ***have been brought*** through **Methodological norms** since 07.03.2007 for unitary application of Law no. 10/2001 regarding the legal regime of some properties abusively taken by the state during 6 March 1945- 22 December, 1989 period.

Search must continue because the sanction due to infringement of form conditions asked by the law for valid conclusion of legal documents is the toughest in the private

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[3] Art. 1179 par. (2) New Civil Code "*As far as the law states for a certain form of the contract, this one has to be respected, under the sanction stated by applicable legal provisions."*

[4] Art. 2639 par. (3) NCC "*In case the law applicable to fund conditions of the legal document* imposes, under nullity sanction, a certain solemn form, no other law from the mentioned ones in par. (2) cannot remove this requirement, regardless the place of the document's set up".

law system and it is that one of absolute nullity[5] of the document concluded without observance of imperative form requirements imposed by the law maker[5].

Since we have finished to review the norms applicable to common law (civil code), we are now reviewing related special regulations starting from the idea that by concluding sale agreement for the house owned by the tenant, a substantial right over the house is transmitted – house registered in the Land Book as well as other substantial rights based upon notarial authentic document as provided at the level of year 2013- art. 79 from the Public notaries and notarial activity Law no. 36/1995[6].

Solution is taken from provisions of art. 24 par. (3) from the updated and republished Law no. 7 dated the 13th of March, 1996 of the Land Book and real estate publicity[7] that, repeating provisions of Law no. 36/1995, is stating that registration in the Land Book (land registration, temporary registration of land) of the ownership right and other substantial rights over a real estate will be achieved based upon an **authentic notary document** or upon the Certificate of inheritance, concluded by a public notary in Romania, definite final Court decision **or based upon a document issued by administrative authorities[6],** ***when law states for, through which they have validly been transmitted.***

We must remark the message of the Land Book Register and Real Estate Publicity Law no. 7/1996, republished and amended, much more generous than the Law of public notaries and notary activities and that represents with no doubt the special norm in respect of real estate publicity, **will be applied with priority,** proving the **possibility to register the substantial ownership right over a real estate** (therefore theoretically also the ownership right of our tenant who became owner) not only based upon authentic notary document[7], but also based upon the document issued by administrative authorities.

Is it also incident, too, this way of document under private signature (supporting in its turn, once again, social protection measures offered to the tenant since the beginning), *social protection going on by reducing the papers costs given the fact that*

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[5] Art. 1242 par.(1) of the New Civil Code according to which: " *The contract concluded without the form requested by law for a valid conclusion is without doubt hit by absolute nullity."*

[6] Art. 79 from the Public notaries and their notarial activity no. 36/1995, republished 2013 according to which: "*(1) Registrations in the Land Book are: registration in the land book, temporary registration and notation (written down)… (3)* ***Ownership right and other substantial rights over a house shall be registered in the land book based upon an authentic notary document."***

[7] Art. 24 par. (3) from updated and republished Law no. 7 of 13th of March, 1996 of the land book and real estate publicity "*(1) registrations in the land book are:* ***land registration, temporary registration and noting down.*** *(2) Cases, conditions and legal regime of these written documents are established by the Civil Code and the registration procedure in the land book by the present law and regulation approved by normative Order of the general director of the National Agency. (3)* ***Ownership right and other substantial rights over a real estate will be written down in the land book based upon an authentic notary document*** *or upon an Inheritance Certificate, concluded by* ***a public notary in Romania,*** *Court final and irrevocable decision or upon a document issued by administrative authorities, when laws provide for, through which they have validly established or transmitted such rights. (4) Real estate rights and commitment to conclude an agreement with ownership right as its object or other related right, registered based upon legal documents where parties provided for cancellation based upon commissoria lex, are deleted if they file: a) parties' authentic statements; b) closures for certification of deeds, where public notary notices the fulfilment of the commissoria lex, at the request of the interested party; c) court decisions*

they are concluded with administrative authorities or *is it the authentic form the only legal form allowed for a real estate sale document??*

3 Instead of conclusions

Here you are the law maker's response that is hidden also in the special law, namely in provisions of art. 45 (2^1) of Law no. 10/2001 regarding legal regime of some properties abusively taken during the 6th of March 1945 – 22nd of December, 1989, according to which "***Sale-purchase contracts concluded as documents under private signature based upon Law no. 112/1995, as further amended, being ownership title opposable erga omnes since their conclusion are considered as authentic documents"***[8].

Therefore, although starting with the changes brought to Houses Law no. 114/1996, the law maker's vision regarding the form of sales' documents for real estate (*not only lands but buildings as well)* has become unitary, that is they can be aliened, respectively obtained under absolute nullity sanction through legal documents between alive persons concluded ***only in authentic form,*** the ***tenant's*** right ***to opt for purchase of houses within art. 42 par.(3) conditions from Law no. 10/2001*** regarding the legal regime of real estate abusively taken during the 6th of March, 1945 – 22nd of December, 1989, republished, as further amended, ***is a right grounded on provisions of art. 9 par. (1) from Law no. 112/1995***[9] for the legal status regulation of some nationalized houses, with further amendments[8].

Consequently, ***the tenant's right*** born based upon art. 42 par. (3) from Law no. 10/2001 regarding legal status of some properties abusively taken during the 6th of March, 1945 – the 22nd of December, 1989, republished, with further amendments ***is exercised by reporting to provisions of Law 112/1995*** that represent common law and which offer at the same time the whole sale methodology[9] for these properties, as well as price criteria, right to buy offered to the tenant corelated to the express sale obligation

[8] Art. 9 from Law no. 112/1995:
Titleholders tenants of rented apartments that are not given back in nature to their former owners or their heirs can opt, after the expiration of the period stated in art. 14, for *purchase of these apartments with full payment or instalments of the price.*
Tenants who are occupying houses obtained through the extension of the initially built space will take advantage of the provisions stated by the previous paragraph.
In case of apartments sale with payment in installments, *they will pay an advance* of minimum 30% of the full price *at the conclusion of the agreement.* Monthly instalments for the apartment price *shall be in steps* on maximum 15 years, with an interest rate representing half of the reference interest rate annually established by the National Bank of Romania.
Young married persons up to 30 years old as well as persons over 60 shall pay a 10% advance, and instalments shared on maximum 20 years.
Due commission of specialized units that are evaluating and selling apartments is 1% of their value.
Exception to provisions of art. 1, titleholders tenants or members of their families – husband, wife, minor kids – that have obtained or have sold a personal owned house after the 1st of January 1990 in the domicile location.
Tenants that do not have material possibilities to buy their house apartment can remain in that space paying the established rent fee according to the law.

[9] Methodological norm since 17.01.1996 regarding Law no. 112/1995 for the regulation of legal status of nationalized houses, republished in the Official Journal, Part I no. 27 of the 18th of February, 1997.

not only through RIL provisions, but also through competences established through functioning Regulation of local councils and through above quoted Methodological Norms for the enforcement of Law 112/1995[10].

The conclusion becomes extremely clear and systematically grounded on the law's wording of art. 45(2^1) from Law no. 10/2001 regarding legal status of some properties abusively taken during the 6th of March, 1945 – the 22nd of December, 1989 period according to which "*sale-purchase agreements concluded under private signature* ***are qualified as authentic documents*** *according to Law no. 112/1995, as further amended, constituting erga omnes opposable ownership title on their conclusion date* ***".*** Thus, in the succession of notary's norms previously introduced, the **sale document achieved at the request of the tenant** who has opted for his house purchase **shall be a document under private signature,** without being *ad validitatem* necessary to conclude an authentic agreement, this form being enough in order to register the obtained substantial right in the Land Book[11] because according to *art. 24* from Law no. 7/1996, **the registration** of the *ownership right over a real estate shall be done in the Land Book* ***based upon a document issued by administrative authorities***[12] *when* the law provides for such a registration (art. 9 from Law no. 112/1995), through which it has been validly established or transmitted.

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content, their signature and date of the document. (2) Any other document issued by a public authority and to which the law offers such a quality is also an authentic document."

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[12] We have to mention that according to art. 269 New Code of Civil Procedure: *"(1) Authentic document is the set up document or, after case, received and authenticated by a public authority, by the public notary or by another person appointed by the state as a public authority, in the form and conditions established by the law. (2) Any other document issued by a public authority and to which the law offers such a quality is also an authentic document".*

Theoretical and practical aspects regarding the forced surrender of immovable property as a form of direct enforcement proceedings

PhD Associate Professor Dinu M.

Faculty of Law, "Titu Maiorescu" University, Bucharest (ROMANIA)
E-mail: madalinaconstantin10@yahoo.com

Abstract

Enforcement of the enforceable title, whether it is a court decision, an arbitral award or another document in which the law recognizes its enforceability, can be achieved through two methods, namely, direct enforcement and indirect enforcement.

Through *direct* enforcement, the creditor seeks the fulfillment by the debtor, in kind, of the obligation stipulated in the enforcement title, respectively, the forced surrender of the movable assets (Article 893-895 of the Civil Procedure Code), the forced handover of immovable assets (Article 896-902 of the Civil Procedure Code), as well as the enforcement of other obligations to do and not to do, including the enforcement of judgments concerning minors (Article 903-914 of the Civil Procedure Code).

Enforcement is *indirect* when the creditor, who has to make a money claim recognized by the enforcement title, seeks to satisfy the claim from the amounts obtained by capitalizing the debtor's assets or by seizing the amounts he has to receive from third parties[1], thus garnishment being a form of indirect enforcement (regulated in the content of Article 781-794 of the Civil Procedure Code), seizure of unharvested fruits and root crops (Article 795-799 of the Civil Procedure Code), seizure of the general income of real estate (Article 800-812 of the Civil Procedure Code), legal seizure of movable assets (Article 727-780 of the Civil Procedure Code), legal seizure of immovable assets (Article 813-863 of the Civil Procedure Code).

Keywords: forced surrender of assets, creditor, bailiff, debtor, enforceable title.

1 General aspects and the term for performing direct enforcement proceedings consisting in forced surrender of immobile assets

Direct enforcement is one of the two ways in which enforcement is performed, along with indirect enforcement, but, unlike the latter, is characterized by the *fulfillment in kind of the obligation stipulated* in the writ of execution.

In this sense, we mention the fact that enforcement in kind of the obligations presupposes *the fulfillment of the service to which the debtor was obliged*, and not the payment of a monetary equivalent[2], as, if the object of the obligation could be "converted", we would no longer be in the presence of the rules applicable to direct enforcement, but to indirect enforcement. However, if enforcement in kind is no longer possible, it must be converted into indirect enforcement[3].

Also, the forced enforcement is not always done directly by the debtor's participation, being numerous the situations in which he does not actually participate in the enforcement, although we are in the presence of a direct enforcement. We mention in this sense, by way of example, the situation in which the creditor, with the authorization of the court, procures goods of the same kind as those owed to him by the debtor, at his expense. Therefore, in the direct enforcement proceedings, the participation of the debtor does not really pose any interest, but the fact that the enforcement of the obligation from the enforcement title takes place in kind, by fulfilling the service that forms the object of the obligation[4].

The Code of Civil Procedure provides as *forms of direct enforcement*:

- the forced surrender of movable assets (Article 893-895 of the Civil Procedure Code);
- the forced surrender of immovable assets (Article 896-902 of the Civil Procedure Code);
- enforcement of obligations to do or obligations not to do (Article 903-909 of the Civil Procedure Code);
- enforcement of court decisions regarding minors (Article 910-914 of the Civil Procedure Code).

With regard to the general rules applicable to direct enforcement, we note that the provisions of Article 888-892 of the Civil Procedure Code provide for the general provisions on the rules applicable to direct enforcement, regardless of its form. Thus, Article 888 of the Civil Procedure Code enshrines the *principle of voluntary enforcement* of the obligation established by the writ of execution and provides that, only to the extent that the debtor does not comply with this obligation, will it proceed to enforcement. In other words, the creditor will request enforcement, and may, in relation to the circumstances of the case and the nature of the obligation being enforced, refer the matter to the enforcement court, in order to apply a penalty, when the debtor's obligation under the writ of execution is not performed voluntarily within the term provided in the summons, which consists in:

- abandoning possession of a good;
- surrendering a good or its use; we mention that, if a court decision is obtained in this respect, the creditor is no longer obliged to obtain, by promoting another action, the eviction of those who occupy it, taking into account

Article 888 (2) of the Civil Procedure Code, which enshrines the fact that "the attribution by court decision of a building or the obligation to hand it over, to leave it in possession or in use, as the case may be, also includes the obligation to evacuate the building, unless the law expressly provides otherwise";
- eviction of the debtor from a home or other premises;
- demolition of a building, plantation or other construction;
- performing any other activity established for the realization of the creditor's rights.

As regards the forced surrender of immovable assets[5], this is the second form of direct enforcement, governed by the Code of Civil Procedure in Article 896 902, as a result of the admission of an eviction action, in the claim[6], owners, as well as in the case of any decision ordering the restitution or delivery of real estate[7].

2 The deadline for the enforcement regarding the forced surrender of immobile assets

With regard to the time limit for enforcement, the provisions of Article 896 (1) of the Civil Procedure Code establishes a derogation from the common law on enforcement, so that "no eviction from residential buildings may be made from 1 December to 1 March of the following year, unless the creditor proves that, within the meaning of the provisions of the housing legislation, he and his family do not have a suitable dwelling or that the debtor and his family have another suitable dwelling in which they could move immediately", provisions which *do not apply*, however, to the eviction of persons who abusively occupy, de facto, without any title, a dwelling or to those who have been evicted because they endanger cohabitation relations or seriously disturb public order[8].

Therefore, evictions from residential buildings cannot be carried out between 1 December and 1 March of the following year, unless the following *conditions* are cumulatively met:

a) the creditor proves that he and his family do not have another suitable dwelling in which to live or that the debtor and his family have another dwelling in which he could move immediately; it can be seen that fulfilling one of the two conditions is an alternative, so it is up to the creditor to prove that he or his family does not have a suitable home in which to move, which means that if one of the family members his owns real estate corresponding to a dwelling, the condition is no longer met; alternatively, if this condition is not met, the creditor may still obtain the eviction of the debtor if he demonstrates that he and his family have another suitable dwelling in which they could move immediately;

b) regardless of whether or not the debtor has another home or the creditor and his family have/do not have another home in which he could move immediately, the eviction of the debtor can be done if he occupies the building from which eviction is abusively requested*, de facto*, without any title or because it endangers cohabitation relations or seriously disturbs public peace; In such a situation, the lack of housing title or the danger resulting from the cohabitation relations, as well as the disturbance of the public peace are circumstances that must be demonstrated by the creditor in order to

obtain the eviction of the debtor between December 1 and March 1 of the following year. Therefore, as has been correctly established in judicial practice[9], "given that, according to Article 896 (1) of the Civil Procedure Code, no eviction from residential buildings may be made from on December 1 and until March 1 of the following year (...), however, these provisions do not apply in the case of eviction of persons who abusively occupy, in fact, without any title, a dwelling according to paragraph (2), so it follows that, given that the text of the law refers only to eviction from residential buildings and expressly mentions in paragraph (2) when the provisions of paragraph (1) do not apply, the only situation in which the eviction will not be possible between December 1 and March 1 is when the person actually occupying the building opposes a valid title deed"

With regard to the *debtor's notification*, we fully appreciate the provisions of Article 667 (1) of the Civil Procedure Code, which is the common law in the matter, and the bailiff will communicate to the debtor the decision approving the enforcement, a certified copy by the bailiff for conformity with the original writ of execution and a summons. From the date of communication of the decision approving the enforcement proceedings, the debtor together with his family have at their disposal a period of *8 days* in which they must evacuate or surrender the dwelling, otherwise the eviction or handover will be done by enforcement.

3 Carrying out the enforcement proceedings

The manner of carrying out the enforcement consisting in the delivery of the real estate is regulated in the content of Article 898 Of the Civil Procedure Code. Thus, in accordance with the provisions of Article 898 (1)-(2) of the Civil Procedure Code, "*the bailiff will travel to the required place; will formally order the debtor to leave the property immediately, and in case of opposition, will evacuate the debtor from that property together with all persons occupying the property de facto or without any title opposable to the creditor, with or without the help of law enforcement, as appropriate, restoring the rights to the creditor. In situations where the debtor is absent or refuses to open the doors, the bailiff will be accompanied by law enforcement officers or gendarmerie representatives, as appropriate".*

From the analysis of the legal text, it results that, forced surrender of immovable assets goes through several stages[10], respectively:

a. the formulation of the application regarding forced surrender of immovable assets by the creditor;

b. registration of the application at the Office of the bailiff;

c. approval of enforcement;

d. notifying the debtor;

e. conducting the enforcement.

The *conducting of the enforcement* stage goes, in turn, through several stages:

a) the bailiff will travel to the required place. In order to fulfill the obligation under the enforceable title (if the debtor has not fulfilled it voluntarily within 8 days from the date of communication of the approval), the provisions of Article 898 of the Civil Procedure Code become applicable, in the sense that the bailiff will travel to the site,

formally ordering the debtor in this regard so that the building may be vacated immediately;

b) performing the enforcement depending on the position/presence/absence of the debtor in the building:

- if the debtor opposes the enforcement, the bailiff will evacuate him from the respective building together with all the persons who *de facto* occupy it, or without any title opposable to the creditor, with or without the help of the public authorities, as the case may be, restoring the creditor in his rights.;
- when the debtor is absent or refuses to open the doors, the bailiff will be accompanied by law enforcement officers or gendarmerie representatives, as appropriate;
- after the opening of the doors of the building, the presence of the agents of the public force or of the representatives of the gendarmerie will be able to be supplemented by means of two assistant witnesses.

In this sense, it was correctly assessed in the practice of the courts that "*During the enforcement proceedings, the incident legal provisions were observed, proceeding to the eviction of the debtors, in the presence of the police, in accordance with the provisions of Article 897 (2) of the Civil Procedure Code according to which when the debtor is absent the executor will be accompanied by law enforcement officers or gendarmerie representatives. It is also noted that two assistant witnesses were present. The appellant's claims that three families lived in the building and that the eviction certificate was not presented for all family members are not able to affect the legality of the minutes, considering that according to the provisions of Article 897 (1) of the Civil Procedure Code the eviction is made with regard to the debtor as well as to all the persons who actually occupy the respective building. As for the goods existing in the building at the date of eviction, they were mentioned in the minutes, and in the case the appellant did not prove the existence of other goods*[11]".

c) the continuation of enforcement proceedings. If the enforcement proceedings could not be completed due to an opposition to enforcement by the debtor or of another person or in the case in which the operations to be performed in order to complete the enforcement could not be performed by 20.00, enforcement may continue on the day of its commencement even after 20.00, as well as in the following days, including during non-working days.

Most of the times, when the debtor does not evacuate or does not voluntarily surrender the real estate, therefore incurring the necessary intervention of the bailiff, in the real estate to be surrendered to the creditor there are movable assets that the debtor will not pick up alone. At the same time, there is the possibility that the movable goods may be seized in another pursuit. In such situations, the bailiff will entrust these assets *in the custody of a seizure administrator*, who may also be the creditor, at the expense of the debtor, the creditor being notified of this measure for the benefit of which the assets were seized.

With regard to the assets left by the debtor and which are not the subject of another seizure, the bailiff will establish through the minutes of forced delivery *the term in which the debtor must pick them up*, which may not exceed of one month.

Such a solution is natural given that, "*the precise enforcement of the obligation established by the enforcement title presupposed not only the abandonment of the*

building by its occupants, but also its making available to the creditors by emptying it of their property or of other persons (including legal) placed in the building with the appellant's permission (in any case, on the basis of a title not enforceable against creditors) and by surrendering the keys. That this is so is apparent from the corroborated interpretation of the procedural provisions contained in Article 897 et seq. of the Civil Procedure Code (...). Also, in support of the argument that the eviction of the building involves its release of movable property are also the provisions of Article 899 et seq. of the Civil Procedure Code which regulates the procedure to be followed in the situation of identifying such goods in the building, respectively their storage and sale in the event of non-collection by the debtor[12]."

The bailiff will draw up a report on the execution of the enforcement. According to Article 900 of the Civil Procedure Code, If the debtor refuses to receive it, is absent or, as the case may be, left the building after the beginning of the enforcement proceedings, and his domicile is in that building, the bailiff, if the debtor has not communicated a chosen address, the bailiff will proceed to display the forced delivery report on the door of the building or in any other part of the building where it is visible.

4 The procedure for selling the assets of the debtor which were left in storage

The procedure for the sale of the debtor's assets left in the deposit is different in relation to the patrimonial value they hold. Thus, in the event that the debtor *does not retrieve the assets* within the term established by the bailiff and they have a market value, according to Article 901 of the Civil Procedure Code, they will be put up for sale, including those that are imperceptible by their nature, according to the rules on the sale of seizable movable assets. If their sale is successful, from the price resulting from the sale, first of all the execution expenses will be retained, including those made from the sale of the goods, and the remuneration of the seizure administrator. If there is a balance after deducting these expenses, it will be recorded in the name of the debtor, who will be notified according to the provisions regarding the communication and delivery of summons.

As for *goods that have no market value*, as well as, at the request of the creditor, in the case of assets which, although of value, have not been claimed by the debtor or by another person who would prove the quality of owner within 4 months from the date of concluding the report of forced delivery, they will be declared *abandoned property*. And in this situation, the debtor will be notified, as well as the local financial body to take over the abandoned goods.

5 The reoccupation of the property by the debtor or by another person who does not hold a title to it

The provisions of Article 902 of the Civil Procedure Code legislate the hypothesis in which, after the enforcement proceedings and the conclusion of the forced surrender report, the debtor or any other person enters or resettles in the building, without first

obtaining a court decision in this regard or the express consent of the right holder; in this case, at the request of the creditor or of another interested person, it will be possible to conduct a new enforcement procedure based on the same enforcement title, without summons and without any other prior formalities.

In other words, in the above situation, the creditor or any other interested person may request the bailiff to carry out a new enforcement, without requiring the fulfillment of any other formality. Therefore, from the moment the application being submitted to the bailiff requesting the repetition of the eviction of the debtor/person occupying the surrendered dwelling, the bailiff may go to the property in question and perform a new eviction of the debtor, without requiring the approval of enforcement, summons of the debtor or fulfillment of any other formality provided by law. Therefore, the enforcement proceedings can take place whenever the debtor, or any other person who does not justify a residential title, illegally occupies the building, based on the same enforcement title and in the absence of any other formality, this being conducted in a separate file, to which the file in which the first enforcement was ordered will be attached[13].

According to Article 902 (3) of the Civil Procedure Code, in such situations, on the basis of the report made available to the criminal investigation body, in certified copy, by the bailiff, the criminal investigation will be initiated.

5.1 *It is or is not necessary to open a new enforcement file in case of the hypothesis in the contents Article 902????*

The question often raised in practice is whether, in the application of the provisions of Article 902 of the Civil Procedure Code, a new enforcement file should be opened. The answer should differ in relation to the situation of the enforcement file in which the initial forced surrender was made. In our opinion[14], if, until the reoccupation, the previous enforcement file had already been closed, by issuing the conclusion provided for in Article 703 of the Civil Procedure Code, it is mandatory to open a new file, without the need to obtain a separate approval, even if the creditor of the obligation to surrender the real estate is different, compared to the express provisions of Article 902 (1) final sentence of the Civil Procedure Code. The provisions of Article 705 of the Civil Procedure Code, which refer to the reopening of the enforcement file only after ascertaining the cessation of enforcement for the reason of the impossibility to continue the enforcement for lack of traceable assets, would not be applicable. If the enforcement file had not been previously closed, it is obvious that there is a possibility to continue the enforcement proceedings within the same file. Obviously, a new conclusion of expenses will be issued, this time for the subsequent forced surrender operation of the building, which will benefit from enforceability under Article 666 (4) of the Civil Procedure Code. In our opinion, the conclusion establishing the new expenses will also benefit from the same effect, which was also given in the situation of opening a separate file because this new file also has a legal existence by virtue of the initial conclusion approving the enforcement proceedings on the basis of which the first eviction was carried out. At the same time, all these enforcement expenses will be borne by the initial debtor, who caused, through the non-compliance with the obligations established in the

title, the entire *de facto* situation, fault that is retained even if the reoccupation of the property is done by persons apparently unknown to him.

6 Conclusions

Certainly this article only partially answers the problems that have arisen in practice, but its purpose has been to bring some clarifications to the forced surrender of real estate as a form of direct enforcement. Thus, we tried to clarify the problems regarding the goods that can be subject to the forced surrender of immovable assets, the term in which the enforcement proceedings can be conducted, the stages of the enforcement, the hypothesis of the movable goods abandoned by the debtor, the procedure for selling the debtor's assets abandoned in the warehouse in relation to the patrimonial value they hold, the reoccupation of the real estate by the debtor or by another person who does not hold a title over the real estate, the need to open a new enforcement file in the case of reoccupation of the building after the enforcement proceedings.

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Divorce procedures in other EU Member States Italy. Cyprus. Finland

PhD Associate Professor Dinu M.[1], Ioana M.-C.[2]

[1]Faculty of Law, "Titu Maiorescu" University, Bucharest (ROMANIA)
[2]MA student, Faculty of Law (Drept civil si procesual civil aprofundat), "Titu Maiorescu" University (ROMANIA)
E-mails: Madalinaconstantin10@yahoo.com; IoanaChristian@yahoo.com

Abstract

Over time, the institution of divorce has been perceived differently by society, being either accepted as a common practice or rejected as not being moral or against local laws. But what is certain is that *divorce has been recognized, in various forms, since ancient times, but there have been periods or states in which it has not been accepted or in which the exercise of this right has been more or less restricted*[1]. These restrictions were not perceived as *discrimination*[2] at the time they came into force, on the contrary, they meant something natural to that society.

Divorce is a result of social realities, a result that should, indisputably, be regulated and recognized by law, we do not believe that the law is able to require the individual to continue life tied to another individual, because *individual freedom is above the law*[3]. If the law unilaterally required people to be bound forever to those they married, then this situation could be likened to the situation of slaves who were dependent on their masters.

We consider that the theme is a topical one, often encountered in the new contemporary social and legal life. The social-legal life to which we refer is in a continuous change and transformation, with great valences of uniformity and globalization. Today, there is a trend towards rapid harmonization and modernization, with divorce becoming trivial in the vast majority of the world's states, being likened to a simple change of job. The Romanian patriarchal society, although considered one of the last *European strongholds*[4], does not differ from the others in Europe, also being on the verge of extinction, people nowadays having other desiderata, and when they find that these desiderata are difficult or even stagnant due to their life partner, they turn to the legal institution of divorce. Thus, divorce becomes a remedy that provides the necessary instruments to the person who turned to it in order to follow the path they wanted from the beginning.

Keywords: dissolution of marriage, de facto separation, legal separation, grounds for divorce

1 General issues relating to divorce procedure under national law

The dissolution of the marriage by divorce is the legal means by which the existence of the marriage is terminated, either by court, or by administrative [5] or notarial means. Thus, the legislator regulated the legal institution of divorce in a complete manner, adapting it to the existing social reality in Romania.

The dissolution of the marriage by administrative or notarial means is conditioned by the agreement of the spouses in the dissolution of the marriage, and in the case of the administrative procedure an additional condition is that the spouses do not have minor children.

With regard to the dissolution of the marriage in court, it may be presented, on the one hand, in the form of a "remedial divorce" which may take place with the consent of the spouses or for health reasons; on the other hand, the "divorce by the fault of the spouses" by which the spouse requests the dissolution of the marriage from the common fault or the exclusive fault of the other spouse and the divorce for long de facto separation (the spouses have been separated *de facto* for at least 2 years).

Regarding the regulation, the substantive conditions of the divorce, as well as its effects are regulated by the Civil Code, in Chapter VII, "Dissolution of marriage", of Title II, entitled "Marriage", from Book II, "On the family (Article 373-404), whereas the Code of Civil Procedure regulates the judicial procedure for divorce in Title I of Book VI; Article 915-935.

2 The divorce procedure in Italy

2.1 *General provisions*

First of all, Italy has been, is and probably will be for a long time a conservative state in terms of family relations, including divorce. The Italian state has this perception due to the strong influences of the Catholic Church and the *proximity of the Vatican [6]* to the Italian capital, Rome.

Secondly, divorce is a relatively new institution in the law of this state. It was first regulated only in the second half of the twentieth century, more precisely in 1970, but the law was strongly criticized by the anti-divorce society. These dissensions, between those who supported the law governing divorce and those who were against it, led to the organization of a consultation of the people, in the form of a referendum, which resulted in keeping the law in the form adopted by Parliament.

The core of the legislation for the divorce procedure in Italy is represented by Law no. 898 of December 1, 1970. It underwent two subsequent amendments made by Law no. 436 of August 1, 1978, respectively by Law no. 74 of March 6, 1987, to which a last amendment is added in 2015, which only shortened the time required for the *de facto* separation to be recognized to allow the courts to rule on the divorce between spouses.

A specificity of divorce in the Italian state is the fact that the participation of the prosecutor is mandatory. Also, another fundamental difference is that divorce cannot be

pronounced exclusively by the consent of the spouses, in addition to their consent it is necessary to have well-founded reasons to support the divorce application.

Good reasons, within the meaning of Italian law, are:

a) The other spouse is sentenced by final judgment for a *particularly serious crime*[7] (with the exception of political offences),
b) The couple have been *legally separated[8]*, either by mutual consent or on the application of one of the parties, for an uninterrupted period of at least 3 years;
c) The marriage has not been consummated;
d) One of the spouses has officially changed sex;
e) The other spouse, being a foreign national, has obtained the annulment or dissolution of the marriage abroad or has entered into a new marriage abroad;

The legal effects of divorce in Italy are relevant on several levels. Thus, divorce influences the personal non-patrimonial relations between the spouses, the patrimonial relations between them, the custody over the minor child (if they exist) and the maintenance pension of the other spouse (if applicable).

- The category of non-patrimonial effects between spouses includes those personal relationships, such as, for example:
- The last name that the two ex-spouses are to bear.

In Italy, the wife takes the surname of the husband, and after the divorce is pronounced, she will return to the name she originally had. By way of exception, she may keep her name upon request, the court having the option of allowing the wife to keep her name if it proves to be in her or the child's best interest.

- The status of the two spouses changes, they return to celibacy and become free to remarry.
- If one of the spouses was a foreign national and, through marriage, acquired Italian citizenship, this will not be lost.

An exception to this effect is the situation in which the marriage has been vitiated from the beginning, its purpose being to obtain Italian citizenship.

- Divorce does not break the ties of affinity, and in particular it does not set aside the impediment to marriage constituted by affinity in the direct line.
- By the category of patrimonial relations we mean the division of the joint estate owned by the spouses. More specifically, we refer to the abolition of common property established by Italian law (*comunione legale*[9]).

It should be noted that divorce has no effect on common property governed by other agreements, such as property acquired by the two spouses together, but before they marry. These assets will continue to be jointly owned.

- The exercise of custody is established only when the marriage resulted in children who are minors at the time of divorce.

Under Italian law, custody will usually be exercised by both parents. By way of exception to this rule, custody may be exercised only by one parent, exclusively. This situation is encountered when the two ex-spouses no longer co-habitate. In addition to establishing custody, the court must also determine the contribution of the parent who does not live with the minor, but who has the obligation to participate in the maintenance of the minor child.

- In connection with the payment of the maintenance of the other spouse, it will be granted only at the request of one of the parties, the decision being at the discretion of the court.

The pension is a sum of money, paid regularly, to the ex-spouse who does not have sufficient means of maintenance or who is unable to procure the necessary means. It is also necessary that this impossibility be caused by objective reasons beyond the control of the person concerned.

The obligation to pay the maintenance[10] is extinguished at the remarriage of the beneficiary or, by agreement of the parties, by a single transaction that transfers the right of ownership over a property in the patrimony of the person in need from the patrimony of the other ex-spouse.

In case of non-payment of maintenance, the offense of *non-fulfillment of the obligation to support the family*[11] will be ascertained. It should be noted that this offense will be ascertained even if the spouse obliged to pay the maintenance has died but the obligation has been transmitted to the heirs (by establishing a survivor's maintenance pension) and the latter do not pay it.

2.2 *About legal separation*

The Romanian state does not regulate this institution of legal separation, but for Italians it is the fastest and most efficient solution for two spouses who no longer understand each other. Given that the reasons for divorce are very restrictive and many couples do not fall within a reason provided by Italian law, the spouses choose to use the institution of legal separation, following that, after the deadline provided by law (which, by the last amendment in 2015, became 3 years) they will be able to divorce.

In a simplistic definition, legal separation is represented by the situation in which the law no longer requires spouses to live together. This situation can arise either by a court decision or by *mutual agreement of the two spouses*[12]. The mere *de facto* separation has no legal effect. Therefore, in interpreting the provisions relating to divorce and legal separation, the latter does not annul the marriage relationship, but weakens it, ultimately leading to divorce.

The conditions for legal separation differ depending on how it is to be carried out. Thus we have the following two situations:

- If the spouses choose to have their separation in court, that is, to have a court decision, it is necessary to state that the spouses can no longer live cohabitate. It should be noted that the consent of both spouses is not required for such a judgment. It is sufficient for one of the spouses to refer the matter to the court, and if it is considered that the spouses are unable to live together, then the court will *rule in favor of legal separation*[13]. Also, in this procedure, the court may find the exclusive fault of one of the spouses. In such a situation, the spouse whose fault is found *will no longer have the right to inherit the estate of the other spouse*[14].
- In the second situation, where there is a mutual agreement between the spouses, the involvement of the court *is more formal*[15], in that the court must ascertain whether or not the consent of the spouses infringes the best interests of the child. In the event that the court considers that the interest of

the minor child is being violated, for example in the light of the maintenance pension, then it will bring the situation to the attention of the parties and ask them to make the necessary changes. If the spouses do not comply, the request for legal separation by the consent of the spouses may be rejected by the court. If the marriage did not result in children, then its role is a purely formal one, to take note of the separation between the two, pronouncing a decision in this regard.

The effects of legal separation are both personal and non-patrimonial, as well as patrimonial. Given the fact that the spouses will no longer live together, although they remain married, there will be changes in the legal relations between them.

The first category, of the non-patrimonial effects, includes the following effects:

a) the wife *does not lose her husband's surname*[16] if she added it to her own name;
b) the custody is established;
c) the obligations of mutual assistance, associated with living together, are extinguished.

From the second category, of the patrimonial effects, we can enumerate the following:

a) the property right over the joint estate of the spouses is extinguished;
b) a maintenance pension for the minor child is established, which will be paid to the parent living with the child;
c) the obligation to pay financial support to the spouse who does not have sufficient means of subsistence arises;
d) the right of the spouse guilty of legal separation to inherit the estate of the other spouse is extinguished.

2.3 *Other aspects of divorce and legal separation in Italy*

We consider it important to note that there are no rules in Italy regarding alternative methods of resolving disputes concerning divorce or legal separation. However, spouses have the opportunity to call on a mediator specializing in family mediation to facilitate their agreement on the custody of the minor.

The court competent from a material point of view to judge cases of divorce, or *in connection with them*[17], is the tribunal. From a territorial point of view, the competent court is that of the place of the *last joint residence of the spouses*[18].

Also, at the first trial, the reconciliation of the spouses will be tried. Only if this conciliation procedure fails and it is found that the spouses persist in the lawsuit will enter into the merits of the case.

It is also noteworthy that the actual divorce is regulated by its own law, Law no. 898 of 1970, while legal separation is governed by the Italian Code of Procedure, more precisely by Articles 706-711.

3 The divorce procedure in Cyprus

As we have seen in the case of Italy, that the history of this country and its proximity to the Vatican have influenced the perception of the divorce procedure, this is also true in the case of Cyprus. Moreover, given that *the history of Cyprus*[19] it was much more tumultuous than in Italy, religion came to have an even greater influence than we saw in the previous case. The influence I mentioned is still present today, and we intend to highlight it through the prism of *divorce reasons strictly related to the religious field*[20].

There is no actual civil marriage in Cyprus. Two people who want to get married must first conduct the religious marriage, and this is to be registered in the civil registers. The seat of the matter is represented by Law 104 of 2003 which has undergone a single amendment by Law 66 of 2009.

Given this fact, there is a preliminary procedure that must be completed before filing for divorce. This consists in notifying the bishop of the region in which the applicant's domicile or residence is located. Also, the mere announcement of the bishop is not enough, the plaintiff must wait a period of three months from this notification before filing the application. By way of exception, the applicant is not required to go through this preliminary procedure if his reason for divorce is either the disappearance of the defendant's spouse or a mental illness which the latter suffers.

The reasons for divorce in Cyprus are relatively numerous, as follows:

a) Adultery;
b) Immoral, disgraceful or any other repeated unforgivable behavior;
c) Attempted murder or physical abuse of the spouse or the children;
d) Mental illness for three years that makes co-habitation intolerable
e) Final sentencing to a term of imprisonment (regardless of the offence*) longer than seven years*[21];
f) The disappearance of the spouse;
g) Sexual incapacity present at the time of marriage and which continues for at least six months. The calculation of this period the time can be done including the time from when the action is brought;
h) Change of religion or denomination, or exercise of moral violence or *attempt to proselytize the spouse into joining a sect*[22];
i) *Persistent refusal*[23] to have a child despite the other spouse's desire to do so;
j) The de facto separation of at least five years.

Having enumerated the reasons for divorce, we can see that some reasons relate exclusively to the behavior of the spouses with regard to their religion, which is self-evident, given that the officiating of marriage is an eminently religious one; and others are part of the *field of morality, and not of law*[24].

Regarding the effects of divorce, we will point out only those specific differences that appear in the Cypriot legal system. We will focus only on them because what we want to emphasize through this chapter, in general, and through this section, in particular, is the specificity of the norms from other countries and their differences from the Romanian legal system.

A first difference, found among the personal non-patrimonial effects is that, despite the fact that divorce leads to the dissolution of the marriage, this fact does not lead to the legal change of the surname of the ex-spouses. The change of name remains at the discretion of the parties who, if they wish to return to the original name, have the option of giving a sworn statement to this effect.

The second difference, this time in the category of patrimonial effects between spouses, is represented by the fact that, in the case of divorce, the division of common property between spouses is excluded. Cypriot law considers divorce and the division of property between spouses to be two completely different institutions, so that any property dispute must be settled by a different application from that of divorce.

The third difference is that the custody of the spouses over the minor children will not be decided in the divorce process. The rule is that this requires a separate action. Exceptionally, if the reason for divorce is based on the physical abuse of the minor child or even the attempt on the life of the minor, then the same court decision will decide on the custody.

The last difference we want to mention is that divorce does not directly involve the payment of maintenance to either the other spouse or the minor child. These rights may be claimed at a later stage by a different action. The independent nature of divorce is thus significant in relation to all other legal actions, no matter how similar they may be.

At the end of this section we would like to highlight a few aspects that we considered specific to the divorce procedure in Cyprus. Thus, we have the following:

i. The only way to divorce is before the court.
ii. There is no other alternative out-of-court method for resolving matters related to divorce, the only solution is to bring an action before the Cypriot courts.
iii. In Cyprus, there are specialized courts in the field of family law that judge divorce proceedings.

4 Divorce procedure in Finland

Finland is the last country we have *chosen to present*[25] in the present paper because it, unlike the other states we have reviewed so far, is part of the *Nordic countries*[26] and has a different perception of divorce than Italy and Cyprus in particular, and most *other states*[27], in general.

This state has simplified the procedure for choosing the law applicable to a divorce with an element of foreignness; so that any action relating to divorce, registered in a court of Finland, whether the spouses are not domiciled in Finnish territory or whether they have different nationalities, will be subject to Finnish law.

What is specific to the divorce procedure is that, whether the divorce application is filed by one or both spouses, it is not necessary to state any reason for the divorce. The Finnish legislator considers that it is not for the courts to examine the personal relations between the spouses, as a result of which they cannot rule on any possible reasons which led to the registration of the action.

However, given that it is not for the courts to examine the grounds for divorce, the Finnish legislature offered the possibility of reconciliation between spouses. Thus, the first trial term of the trial will be set from the registration of the application, but it will be six months from the filing of the application. That period is called the *cooling-off*

period[28]. There is an exception to this rule. If the spouses were *de facto* separated, prior to the filing of the divorce application, for a period of at least two years, then it is no longer necessary to respect this cooling-off period.

As for the effects of divorce on the relationship between the spouses, they are similar to the effects of divorce in Italy.

We therefore have personal effects between spouses, such as, for example, the surnames of the spouses. With divorce, the rule is that spouses keep the family name they acquired after marriage. By way of exception to this rule, if at least one of the spouses so requests, the surname may be changed. Custody over minor children can be determined, upon request, by the court hearing the divorce application, but the application must be in a file attached to the divorce application.

Regarding the patrimonial effects, the division of the estate can be carried out during the cooling-off period. In this case, the general rule is that the spouses share the property equally. However, this rule is only a relative presumption that can be overturned by proof to the contrary. However, the division of assets is not carried out by the court, the spouses can either carry out the division of assets in a conventional way or ask the court to appoint an executor. It is true that maintenance can also be claimed, but Finnish case law has shown that this is quite rare.

One last peculiarity, which I noticed during the documentation on the divorce procedure in Finland, is that Finnish law does not regulate the institution of marriage annulment. I only found two *pseudo-cases*[29] in which the prosecutor may file a divorce application on behalf of the spouses, requesting urgent ruling if;

- The spouses are close relatives;
- one of the spouses was already legally married at the time of entering into the marriage

Finally, the only way to divorce in the Republic of Finland is before a court. In this state, similar to the Cyprus procedure, only the court has the competence to pronounce a divorce.

5 Conclusions

The main objective of our research was to make a comparison between the divorce procedure in Romania and other *European countries*[30], to better emphasize the legal consequences that family relationships have on society and how they are felt, from the point of view of the social to legal reality. An analysis of the European Union's divorce policies cannot be carried out because, according to the principle of conferral[31], this area is part of competences to support, coordinate and supplement. The European Union addresses family issues in the context of the manifestation of the free movement of persons, especially for the purpose of settling[32]. A brief history of how the institution of divorce has evolved and how it has been perceived by religious beliefs has also been made. History is important, from our point of view, because it helps us understand the complexity of this phenomenon and its gradual evolution, while the analysis of sacred visions was imposed as a result of the extremely close connection that the state and the Church had in the European space. The close ties between the two institutions are still maintained today, but most states of the world have become secular in terms of governance, the role of religion decreasing, but even so, it is not negligible.

Although, in appearance, marriage and divorce are related to the private and personal life of each individual, these changes influence society as a whole, continuously shaping it. The family is the smallest form of interpersonal organization, so society is chiseled by the way individuals relate to it, implicitly to the institutions of marriage and divorce, representing moments that change, sometimes irreversibly, the future of a family. If we imagined society as a whole as a living organism, then the family would represent every cell that constitutes it and gives it life. And just like an organism that needs healthy cells to function at its optimum capacity, so society needs healthy families to help the development and smooth running of society. But when a cell becomes ill, it must either be treated or removed, making a parallel here, when relationships in a family become fragile, that family must either find good reasons to continue together, or it must "be removed" by divorce.

The analysis I presented in this paper focused on presenting the procedure in which a divorce can be pronounced in different societies. Thus, I noticed that, as a rule, the legislator gave a reasonable time to the spouses to reconsider their divorce application. Also, the notion of *reasonableness* differs from one state to another, in Italian law a legal separation of at least 3 years is required, in Finnish law the first trial period is granted 6 months from the date of filing the appeal, and, in Romanian law, the legislator gives a term *of 30 days*[33] in which the spouses think about the step to be taken and whether or not they want to insist on their divorce application. It is clear that the state wants to protect and ensure that the family plays its part in the development of society, which is why it gives spouses a break in which to reconsider all available options to save their family life.

In our view, divorce is a reality that must be understood and interpreted in the current context in terms of the development of communications, technology and all other determinants that influence us in our daily lives. We must accept that we are constantly evolving, that patriarchal society is in the realm of the ideal, and that all these changes change the positive right to provide a regulation as close as possible to the objective reality existing at a given time. At the same time, divorce does not have to be exclusively likened to an end, it can also represent a possible new beginning for other future families.

These changes were also understood by the Romanian legislator, which regulated three divorce proceedings, namely the administrative procedure, the notarial procedure and the judicial procedure. New forms of divorce have also been introduced before the court, such as, for example, divorce on health grounds, which did not exist until the entry into force of new legislation in this area. This fact proves that, at least in the matter of divorce, the Romanian legislation is a modern one that aims to offer spouses the most efficient methods that can be molded on their specific case, easily adapting to as many practical and possible cases as encountered in concrete reality. We thus appreciate that the Romanian legislator has a balanced, mature and realistic vision regarding the divorce procedure as a whole, ensuring, within it, the respect of the fundamental rights of the persons and the protection of the general interests of the society.

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[1] See Cristina Codruța HAGEANU, *Dreptul familiei și actele de stare civilă.* 2nd Edition, revizuită și adăugită, Hamangiu Publishing House, Bucharest, 2017, p. 164.
[2] For example, in most societies before the 19th and 20th centuries, the right to divorce belonged exclusively to the husband.
[3] See Emese FLORIAN, *Dreptul familiei. Căsătoria. Regimuri matrimoniale. Filiația.* 5th Edition, C.H. Beck Publishing House, Bucharest, 2016, p. 283.
[4] See Irina COSTACHE, *Despre condiția de femeie iubită într-o societate patriarhală*, in the «Dilema veche» Newspaper, no. 616, December 3-9, 2015.
[5] See Gabriel Boroi, Mirela Stancu*, Drept procesual civil,* 5th Edition, Hamangiu Publishing House, Bucharest 2020.
[6] The Vatican is actually an enclave state, located in central Italy, being very close to Rome. It has autonomy and independent leadership, being led by the Pope.
[7] By a particularly serious crime, what is understood is: incest, sexual offences, murder or attempted murder of a child or spouse, serious bodily injury, failure to fulfill family maintenance obligations and the like. With the specification that a divorce cannot be requested if one of the spouses is the perpetrator of one of these crimes and the other has the quality of accomplice.
[8] The institution of legal separation is not regulated by Romanian legislation. This ensures a relaxation of family relations under judicial control in states with stricter divorce law, as is the case in Italy. It should be noted that the simple *de facto* separation is in fact not sufficient, as it has no legal effect.
[9] This term defines all the goods acquired by the spouses, both jointly and separately, during the marriage. However, the personal property of each spouse is an exception to this rule.
[10] At European level, a regulation has been adopted that regulates several issues related to maintenance obligations between ex-spouses. For additional details, see Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.
[11] In the Romanian legislation, the correspondent of this crime is the abandonment of the family, regulated by Article 378 of the Criminal Code regarding the abandonment of the family, enshrined in Law no. 286/2009 on the Criminal Code published in the Official Gazette of Romania, Part I, no. 510 of July 24, 2009 with subsequent amendments and completions.
[12] The agreement between the spouses must be an express one, it is not enough for the agreement to be tacit (for example, for one spouse to propose legal separation to the other, and the latter to be passive).
[13] We would like to reiterate that in Italy the prosecutor has an important role to play in the divorce proceedings. In addition to the fact that his

presence is mandatory in the actual divorce process, his presence is also necessary for the pronouncement of a decision of legal separation of the two spouses. If a legal separation decision is issued without the presence of the prosecutor, then that decision will be null and void and a new application must be filed by at least one of the spouses.

[14] In terms of Romanian law, this situation is paradoxical. The two remain married, but one of them, the guilty one, does not inherit from the other. We can say that the present situation is somewhat similar to the institution of debarment from succession, regulated by Article 958-961 of the Civil Code, but this statement would not be entirely true. The Romanian Civil Code considers a completely different hypothesis, referring to any person, being a norm with general applicability, unlike the fault of the spouse in the institution of legal separation, regulated by the Italian Civil Code, see D. Florescu, *Drept succesoral, 6th Edition, revised*, Universul Juridic Publishing House, Bucharest, 2016, p. 35-41.

[15] However, whether there are minor children or not, it is necessary for the court to rule, even if the spouses have agreed on their legal separation. The formalism in the field of family law in Italy is therefore noticed, compared to family law in Romania.

[16] By way of exception, at the request of the spouse, the court may prohibit the spouse from using it, if its use may cause serious harm to the spouse.

[17] For example, such as: legal separation, marriage annulment.

[18] If one of the spouses resides abroad, then the court of the petitioner's domicile or residence will be competent. If both spouses reside abroad, then any court in the country is competent to resolve the case.

[19] Cyprus, being an island state, had few resources to oppose the great powers around it. Thus, it belonged, in order, to the Byzantine Empire, the Ottoman Empire, the British Empire, and finally in 1960 it became independent. However, independence did not bring the desired stability to the state, but, on the contrary, the dissensions between Orthodox and Muslims led to an even greater division of the state that resulted in an armed intervention by modern Turkey, around 1970. These events are still controversial, as the political situation is still not very clear; these facts are also found in state law, including the divorce procedure. For more information on the prodigious history of Cyprus, see Katia Hadjidemetriou, *Istoria Ciprului,* 2nd Edition, Meronia Publishing House, Bucharest, 2011.

[20] As we will see below, the change of religion or denomination is a well-founded reason for divorce. Another well-founded reason for divorce is the attempt by one of the spouses to convert the other to a sect.

[21] The text must be interpreted restrictively, so that a sentence of at least seven years and one day is required in order for a divorce action to be brought forth.

[22] In this case, the attempt of joining such a sect must be a concrete, the simple oral statement being insufficient.

[23] The refusal to have a child must be serious and repeated. The defendant spouse must have refused at least twice.
[24] See the reasons provided for in h), second thesis, letter b, respectively letter a.
[25] Regarding the divorce proceedings.
[26] In addition to Finland, the so-called "Nordic countries" also include Denmark, Norway and Sweden. Of these, only Denmark and Sweden are Member States of the European Union.
[27] Here, we refer to the other states in the European Union because our analysis focused on its member states.
[28] It is considered that, through such a term, the spouses may reconsider their options and give up the process completely.
[29] I used the notion of "pseudo-cases" because, in the event of their existence, the prosecutor, *ex officio*, is also competent to file the divorce application. They cannot file an application for annulment of the marriage because there is no such notion in the Finnish legal system, but they can apply for a divorce, given that it remains the only way to correct the situation provided for and prohibited by law.
[30] In this case, Italy, Cyprus and Finland.
[31] Gabriel Liviu Ispas, Daniela Panc, *Drept instituțional al Uniunii Europene,* Hamangiu Publishing House, Bucharest, 2019, pp. 104-110
[32] Gabriel Liviu Ispas, *Uniunea europeană. Evoluție, instituții, mecanisme,* Universul Juridic Publishing House, Bucharest, 2011, p. 159
[33] The term is granted in the administrative and notarial procedure. In court proceedings, the judge is obliged to take note of the consent of the spouses at any time during the trial, if it intervenes, in accordance with Article 925 of the Code of Civil Procedure.

Exoneration from civil liability. Force majeure and the fortuitous event

Ispas P.-E.

"Titu Maiorescu" University (ROMANIA), Faculty of Law
E-mail: ispas_petrutaelena@yahoo.com; petruta.ispas@prof.utm.ro

Abstract

The provisions of the current Civil Code regulated as cases of exoneration from civil liability the force majeure, the fortuitous event, the deed of the victim and the deed of the third party. These cases are common to tort liability and contractual civil liability, so we will analyze, in a unitary manner, the legal provisions adopted in this matter. In the current context of the COVID-19 pandemic, the question has been raised, especially in contractual matters, of the possibility of invoking force majeure as an exonerating cause of contractual civil liability, so that the question arises of analyzing the conditions under which force majeure may be invoked with a view to exoneration from civil liability.

Keywords: force majeure; the fortuitous event; civil liability; exonerating cases.

1 Introductory considerations

In the literature corresponding to the current Civil Code, the cases of exoneration from liability have been viewed differently, but the doctrine is unanimous regarding the conditions in which these cases operate, and on the effects which occur in the event of the incidence of force majeure, fortuitous event or the deed of the victim or a third party.

Thus, there are authors who treat these circumstances as cases that remove the causal relationship between the wrongful act and the damage[1], just as there are authors who treat the same circumstances as cases that remove guilt[2].

Whichever of those opinions is considered valid on the merits, it is important that once these cases have occurred, the contractual debtor or the perpetrator of the wrongful act is exonerated from liability. In the following, we will briefly analyze the causes that remove civil liability, emphasizing the specifics of each form of liability, when there are differences in the legal regime between tort liability and contractual liability as regards

the effects which occur as a result of the incidence of a case of force majeure or a fortuitous event.

2 Force majeure

According to the legal provisions incident in the analyzed matter, force majeure represents any external event, unpredictable, absolutely invincible and inevitable. As appreciated in the literature[3] the legal text depicts a series of epithets attached to a foreign case that must be analyzed to turn it into a force majeure with exonerating effect. It is true that not every case which is foreign to human volition can be considered a case of force majeure, but it is imperative that the foreign, external event cumulates the conditions required by law in order to talk about the incidence of these cases that exonerate one from civil liability.

Thus, the first condition required by law refers to the existence of an external event, foreign to the activity of the person who would be liable to civil liability. Extraordinary natural phenomena such as severe earthquakes, floods, tornadoes, etc. were considered to be causes of force majeure, but also extraordinary social events such as wars, revolutions, etc.[4]. In the current context of the COVID-19 pandemic, can the parties to a contract invoke the contractual provisions and provisions of the Civil Code in matters of force majeure in order to exonerate themselves from liability? Analyzing the conditions that the doctrine has developed in this matter, we can say that the first condition for invoking force majeure is met because we must keep in mind that this virus appeared and spread beyond the will of a particular person, and the virus cannot be generated or controlled by humans. Under these conditions, the current pandemic fulfills the first condition required by law, for force majeure to be incidental to lead to exoneration from civil liability.

Secondly, in order to be able to be in the presence of a case of force majeure, it is necessary to consider the unpredictability of the external circumstance which has occurred and which may constitute a case for exonerating liability. With regard to unpredictability, it concerns both the circumstance which constitutes force majeure and its results. The unpredictability is absolute, in the sense that it is appreciated *in abstracto*, in relation to the prudence and diligence of a person who puts all the care he is capable of in his activity. Thus, a circumstance only relatively unpredictable (subjective unpredictability), being determined exclusively by the personal power of knowledge of the one held liable, does not constitute force majeure and implicitly does not lead to the exoneration of civil liability for this reason[5]. Given the legal provisions, and the de facto state of the declared global pandemic, can the COVID-19 virus be considered to be an unpredictable circumstance? In our opinion, the answer to this question is different depending on when the obligation arises. Thus, in the event that the parties conclude a contract and set the maturity of the obligation at a date when the pandemic would have arisen, then the issue of the incidence of force majeure may arise; on the other hand, if the parties conclude a contract after the occurrence of the pandemic, force majeure can no longer be invoked because the event was known to both contracting parties who had the possibility of foreshadowing the effects produced by this circumstance; In this example, the condition of unpredictability can no longer be imposed because in the second situation the event had already arisen at the time of

concluding the contract, being known to both contracting parties. Equally, the effects of force majeure must be analyzed in order to see, in the first example above, the extent to which the performance of the obligations assumed can no longer be offered because the intervening circumstance may not be a case of force majeure, but a temporary impossibility of execution[1] which will take effect under the conditions regulated by law. Another situation that could be incidental in the execution of a contract is the theory of unpredictability[6], situation in which we are in the presence of an exception to the *pacta sunt servanda* principle, a principle that governs civil contracts.

Thus, the same situation can be framed, depending on the circumstances under analysis, in three different cases. In order for an event to be considered a case of force majeure accordingly, the condition of unpredictability must also be met, so that the reference must be made with respect to an average person[3].

It is true that unpredictability must be analyzed on a case-by-case basis, depending on the circumstances of each situation, but not only unpredictability defines force majeure, but the cumulative fulfillment of all the conditions required by law. In the literature it has been appreciated, regarding the condition of unpredictability, that although the fall on Earth of an asteroid is predictable, invincible and inevitable it can be considered that this event is not a case of force majeure because there is a possibility that this event will occur? The quoted author considers that predictability, although it must be taken into account, cannot alone be a criterion of force majeure[3]; We fully share this view because, as we have pointed out above, the conditions of force majeure must be analyzed with reference to each case, and in all cases in relation to the concrete situation, without attributing to a single condition the full merit to exonerate a person from civil liability as an effect of force majeure.

Another condition that must be considered for the establishment of force majeure as an exonerating cause of civil liability is the absolutely invincible and inevitable character. Invincibility and inevitability must relate, as the legal provisions say, not to a particular person, but to all subjects who could not withstand such a circumstance. Therefore, it is not necessary to be able to prevent the occurrence of the event or to avoid harmful effects. Invincibility must therefore have an absolute character, i.e. be applicable to any person; if the invincibility is only of a relative character, applicable only to the person liable, the external circumstance does not constitute force majeure and will not have the exonerating effect of civil liability.

As a conclusion on the conditions under which the event that occurs and which may constitute force majeure, it is necessary to emphasize that not every reason that apparently could constitute an case of exoneration of civil liability will produce these effects because, as we have shown, every condition must analyzed according to the specifics of the situation in which it is invoked. In this regard, the courts have established that "*Regarding the justification given by the defendant to his decision to revoke the force majeure certificate, it is found that the Romanian legislation does not provide a definition of force majeure, but the doctrine and judicial practice are unanimous in defining this concept as an objective impossibility to execute an obligation, impossibility determined, in the absence of any fault of the debtor, by an unpredictable and inalienable de facto circumstance. In order to be qualified as force*

[1] In this regard, see Article 1557 Civil Code.

majeure, a certain circumstance must determine the impossibility of fulfilling the obligation for any person who would have been in an identical situation, and not only for the one who invokes the state of force majeure. The court considers that the situation of force majeure must be represented by an event, a factual circumstance determined and precisely identifiable. A general socio-economic context, such as that determined by the onset of an economic crisis, cannot be qualified as a force majeure circumstance; in the conditions in which such a context can affect the participants to the economic life differently, be they also from the same field of activity, due to the diligence, the prudence that they show in carrying out their own activity"[2].

Also regarding the conditions in which force majeure may be incidental, another court[3] appreciated that "… *of all the cases relied on by the appellant I.M., the economic crisis that caused the decrease of his revenues by 25% can be considered a cause of force majeure, both by reference to the definition given by the doctrine and by reference to the definition agreed by the parties in one of the two credit agreements. Therefore, during the period in which the Government intervened in the amount of the applicant's income, a force majeure can be considered to have existed, consisting of an external, unpredictable and invincible action, with the possibility of diminishing the payment power of the contractual obligations by 25%, during the period in which he was affected".*

In another case settled by the court[4] the following were held "…*as regards the arguments in the defense, that the non-performance of the debtor's own obligations was due to the force majeure represented by the global economic crisis, the court considers that the economic crisis cannot be considered as force majeure..(...) Any case of force majeure must be officially certified by state institutions that issue special certificates to this effect, in Romania, force majeure cases being certified exclusively by the Romanian Chamber of Commerce and Industry, which in turn has the obligation to obtain prior approvals from public administration authorities or other state bodies, as appropriate. However, the economic and financial crisis is not an "absolutely unpredictable and absolutely invincible" circumstance, not being certified according to the aforementioned".*[5]

We consider that the last solution taken above should be applied as a legal reasoning in the current context of the COVID-19 pandemic. Regarding the financial difficulties that may be encountered in the execution of a contract, the Chamber of Commerce and Industry of Romania and the County Chambers may, under the law of operation[6], certify, on the basis of documentation, upon request, for Romanian companies, the existence of cases of force majeure and their effects on the execution of international trade obligations. Therefore, with regard to Romanian companies, the

[2] In this regard, see the civil sentence 1138/2011, pronounced by the Iași Court (available at https://sintact.ro/#/jurisprudence/532340196/1/sentinta-civila-nr-1138-2011-din-17-ian-2011-judecatoria-iasi-anulare-act-civil?keyword=forta%20majora&cm=SREST)

[3] Decision no. 1185/29.04.2015, pronounced by the Bucharest Tribunal (www.rolii.ro)

[4] Civil sentence 10256/2012, pronounced by the Cluj-Napoca Court (www.rolii.ro)

[5] On the need to prove the impossibility of funding as a justification for force majeure see M. Tăbăraș *Daune-interese. Dobânzi. Penalităţi. Răspunderea contractuală,* C.H. Beck Publishing House, Bucharest, 2009, pp. 23-24.

[6] Law no. 335/2007 on the Romanian Chambers of Commerce, with subsequent amendments and completions.

invocation of force majeure takes place after the issuance of a certificate on the existence of force majeure. As a result of obtaining this certificate, the possibility of the party being exempted from the contractual obligation is accepted, with the agreement of the other party[7]. In connection with this effect held by the authorities, we are somewhat reluctant, as the agreement of the other contracting party does not seem appropriate to us in the conditions in which, as we have shown, force majeure exceeds the will of the contracting parties and becomes incidental as an external, unpredictable, absolutely invincible and inevitable circumstance. In this context, our opinion is that the agreement of the contracting party cannot be taken into account because force majeure occurs under the law and its effects also occur *ex lege* and not as an effect of the agreement of the parties.

Regarding the effects that the force majeure produces, in order to support our thesis above, we consider that in the conditions in which the event meets the characteristics required by law, the force majeure exonerates from contractual and tort liability[1], without the need for the consent of the contractor or, as the case may be, of the victim of the damage. This hypothesis of removal of civil liability is valid only if the event qualified as force majeure was the only phenomenon that led to the damage; if force majeure occurs at the same time as another cause of injury, the effects of the competing cause are to be determined alongside whether civil liability remains or is removed.

As can be seen from the interpretation of the legal provisions in relation to the opinions expressed in the literature and in the practice of the courts, not every external event is a force majeure. It is true that if we look at the effects that force majeure produces, we must also analyze the obligation and possibility of the debtor to execute it. Thus, in the event that we are in the presence of a contract that cannot be performed during the period of force majeure; we consider that the exonerating effect of this circumstance, which would normally lead to the exoneration of civil liability, is not required, but rather what should be applied is the extension of the effects of the contract, an exception from the principle of *pacta sunt servanda*[4].

Particular attention must be paid to this case of exoneration of civil liability in respect of objective tort liability because the legal provisions in force[8] establish that in terms of liability for damage caused by animals, things, through the ruin of the building and in the case of liability of the occupant of a building, liability is removed only if the damage is caused exclusively by the act of the victim or a third party or is the result of a case of force majeure. Thus, with regard to these indirect forms of tort liability, liability will not be waived unless the conditions of force majeure are met, given that the provisions of Article 1352 of the Civil Code cannot be overlooked, according to which "*the act of the victim himself and the act of the third party remove the liability even if they do not have the characteristics of force majeure but only those of the fortuitous event, but only in cases where, according to the law or convention of the parties, the fortuitous event can exonerate them from liability"*. Having regard to the provisions of Article 1380 of the Civil Code in conjunction with the provisions of Article 1352 of the Civil Code, we conclude that with regard to the forms of indirect civil liability listed by

[7] In this regard, see the information available at https://ccir.ro/2020/03/25/precizari-privind-avizarea-existentei-cazurilor-de-forta-majora-si-influenta-acestora-asupra-executarii-obligatiilor-comerciantilor-atributie-legala-ccir-si-camerelor-judetene/

[8] Article 1380 of Law 287/2009 on the Civil Code.

law, only force majeure can exonerate from liability and in respect of the act of the victim or a third party, these cases will exonerate from tort liability only if they meet the requirements of force majeure.

3 The fortuitous event

Unlike the force majeure whose requirements we have previously analyzed, the fortuitous event is an internal or external circumstance, relatively unpredictable and relatively insurmountable, which has its origin in the field of activity of the person being held liable[2]. It has rightly been held that this exonerating cause of liability must be regarded as a diminished version of force majeure, since it lacks the absolutism of the latter, and its exonerating force is confined only to subjective liability[3].

In order to be qualified as a fortuitous event, the circumstance that occurs and may lead to the exoneration of civil liability must meet the following conditions, which we will analyze below.

First of all, the situation that intervenes can be internal, having its origin in the field of activity of the one being held liable, or external, but which does not have an extraordinary nature and can be foreseen and avoided with the diligence and prudence of a capable man. This condition, as well as all the conditions required by law regarding the fortuitous event, must be analyzed in comparison with force majeure because only in this way can the distinction between the two cases of exoneration from liability be made accordingly. Thus, unlike force majeure, which, as mentioned above, presupposes in all cases the existence of an external event, in the case of a fortuitous event the event may have an internal existence, but it can also have an external nature, but one which is not extraordinary, exceptional. Therefore, there is a fortuitous event in the situation where the circumstances are internal, having the cause in the field of activity of the one held liable, being intrinsic to his assets and animals: hidden defects, manufacturing defects, etc. but in equal measure, there will also be a fortuitous event in the event of external circumstances, not attributable to the person being held liable and which are not of an extraordinary nature: the explosion of a tire, the breaking of a machine part, frequent landslides, torrential rains in summer, frost in winter, earthquakes commonly occurring in certain geographical areas.

Secondly, the condition of the relativity of the fortuitous event as opposed to the absolute nature of force majeure must be analyzed. Relativity is closely related to the first condition analyzed above and is closely related to the person being held liable or to his usual object of activity. This is the reason why, as a result of a fortuitous event, we cannot have an objective civil liability exemption, for the reasons shown in the analysis of the incidence of force majeure.

The courts support these differences that we have pointed out and are reluctant to admit force majeure as an exonerating cause of liability, but by comparing the conditions of the two exonerating cases of liability, the incidence of the fortuitous event is admitted. It is noted in a sentence given by a court that "… *thus distinguishing between the absolutely unpredictable nature of the event, specific to force majeure, and that which is only reasonably unpredictable which characterizes the fortuitous event. Unpredictable is that event for which the responsible person is not guilty for being unable to predict it. In order to assess the relatively predictable nature of the event, it is*

necessary to analyze all the circumstances in which it occurred (time, place, economic, social and political nature) in order to determine whether the debtor had the necessary means to avoid its occurrence. Thus, some natural phenomena (snowfall, rain, hail, storm, etc.) are not exceptional in relation to local climatic conditions, there being the possibility that, based on information provided by the meteorological services, the debtor may anticipate them and avoid the occurrence of damages. To the extent that, in practice, he could not anticipate them, these events could be regarded as fortuitous circumstances such as to remove his liability[9].

In another court decision, it was held, regarding the incidence of the fortuitous event, that *" In the event of frequent landslides, which are therefore likely to be foreseeable, their detrimental consequences can be prevented and avoided. Thus, if the strong probability of such a landslide is seen, the unpredictability of the phenomenon is removed, situation in which it could not be invoked as a basis for a defense against liability"*[10].

If we want to emphasize once again the differences between force majeure and fortuitous event, we can appreciate that between these two cases of exoneration from civil liability the regulatory differences are, as we have shown, of a qualitative nature but also of a quantitative nature. At the same time, beyond these differentiations, the scope of application of force majeure as an exonerating cause of liability is greater than the scope of application of the fortuitous event. As we have shown above, with regard to strict liability, the Civil Code has established that only the intervention of a case of force majeure can exempt from tort liability. The same is the solution regarding the contractual liability, where the legislator chose as a solution the exemption from liability only for the incidence of force majeure. With regard to contractual liability, we recall the provisions of Article 2004 of the Civil Code applicable to liability for the person of the passenger in the contract of transport of persons[11] and the provisions of Article 2130 of the Civil Code applicable to the hotel storage contract[12] according to which it is established that only force majeure is an exonerating cause of contractual civil liability.

Similarly, in the case of civil liability for defective products, the exemption from liability occurs only if a case of force majeure is incidental, for the same reasons that we have analyzed in the case of other forms of objective tort liability.

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[9] Civil sentence 3368/10.10.2013, pronounced by the Tulcea Court (www.rolii.ro)

[10] Supreme Court, civil sentence, decision no. 1096/1978, in R.R.D. no. 1/1979, pp. 55.

[11] Liability for the passenger. (1) The carrier is responsible for the death or injury of the bodily integrity or health of the passenger. (2) He is also liable for direct and immediate damages resulting from the non-execution of the transport, from its execution in conditions other than those established or from the delay of its execution. (3) If, due to the circumstances, the delay in the execution of the transport occurs and the contract is no longer of interest to the passenger, he may terminate said contract, requesting a refund of the price. (4) The carrier is not liable if it proves that the damage was caused by the passenger, intentionally or through gross negligence. The carrier shall also not be liable where it is proved that the damage was caused by the health of the passenger, the act of a third party for whom he is not liable, or force majeure. However, the carrier remains liable for damage caused by the means of transportation used or by his state of health or that of his employees.

[12] The hotelier is not responsible when damage, destruction or theft of the customer's property is caused: a) by the customer, by the person accompanying them or under their supervision or by their visitors; b) by a case of force majeure; c) by the nature of the good.

With regard to the effects which the fortuitous event produces, as in the case of force majeure, the liability is, as a rule, removed.

Without being close to exhaustive regarding the issue of exoneration from civil, contractual or tort liability, we consider that in respect of these cases expressly regulated by the provisions of Article 1351 of the Civil Code, things should be reset, and given the relatively small scope of the fortuitous event, we believe that the system of exonerating civil liability cases could be rethought.

It has even been argued in the literature that the two notions should be unified, so that there remains only one case that can lead to exoneration from liability. The quoted author appreciates that "*Most likely, this delimitation remained grounded in our law, as a result of the legal literature prior to the New Civil Code, quasi-consistent in "identifying" two categories of unforeseen events, followed, of course, by the case law of national courts, which also invariably distinguished between the two concepts; and this was no doubt due to the fact that the old Civil Code (the Romanian Civil Code of 1864) distinguished between the two notions, under the obvious influence of the French Civil Cod.*"[13].

We support the proposal made by the quoted author because, as specified in the course of this paper, the differences between the two cases of exoneration from liability are, in certain situations, quite sensitive, so that, in view of the rather small scope of application of the fortuitous event, the legislator could waive the legislation on this exonerating cause of civil liability.

In equal measure, although not discussed in this paper, the impact and regulation of force majeure in international law[7],[8] and European Union law should not be neglected[14].

In a future article, we will attempt to draw a parallel between the provisions adopted at national level, and international and European Union regulations, in order to support the proposal to review exoneration cases and remove the fortuitous event from cases that remove civil liability.

4 Conclusions

As we have shown above, the issue of force majeure and fortuitous events as cases of exoneration from civil liability can be extensively developed and commented on in areas tangential to the general theory of civil obligations, regarding the risks of general insolvency and their insurance through credit insurance and guarantees[9], given that at some point there may be confusion between these two causes in terms of the effects produced. Nor should the opinions expressed under the rule of the previous Civil Code be ignored, according to which *"Between fortuitous event and the case of force majeure no distinction should be made, as the result is the same for the tenant or renter (...)"*[10].

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[13] G. Tița-Nicolescu, *Propunere* de lege ferenda *pentru unificarea de caz fortuit și forță majoră într-un singur concept,* in the "UJ" Review, no. 10, October 2016

[14] By way of example, we mention Directive (EU) 2015/2302, applicable from 1 July 2018, a directive which the countries of the European Union are required to transpose into national law by 1 January 2018

As we have shown, although the effects that occur are the same, the conditions under which the two cases of exoneration from liability intervene are nevertheless dissimilar, and the scope is also different. We further support the need for the intervention of the legislator in order to rethink the cases of exoneration from civil liability for the aforementioned reasons.

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Real rights over the property of another in Roman law

Axente A.-M.

PhD, Assistant Professor, "Titu Maiorescu" University of Bucharest, Faculty of Law (ROMANIA)
E-mail: alinasng@yahoo.com

Abstract

Iura in re aliena or real rights over the property of another are recognized in the modern doctrine as the product of the dismemberment of attributes that fall within the scope of the legal content of the right of ownership. As a result, the real rights resulting from the separation of the attributes of the right to ownership are now known as dismemberments of the right to ownership. In a restricted sense, these dismemberments are: the right of servitude, the right of superficies, the right of usufruct, the right of use and the right of habitation.

In Roman law, under the name of *Iura in re aliena* those rights which were constituted over a foreign asset were consecrated, by which on the one hand certain benefits were conferred to the rightful person and on the other hand limitations to the property right were imposed. The fact that the name of dismemberments was not known to the Romans, with it being a creation of modern law, did not entail, however, that they were foreign to the concept of establishing real rights over the property of another. On the contrary, the way in which they elaborated the institutions of superficies, emphyteusis and servitude rights (among which usufruct, use, and habitation were included), which have lasted for so many centuries, reflect their exceptional spirit of creating laws. The purpose of the present paper is precisely to highlight the fact that the jurisprudence in Roman law is a cornerstone in the construction of current legal institutions such as the dismemberment of rights of ownership.

With the natural differences generated by the historical evolution of the society, the dispositions created by the Romans both regarding the concepts, the conditions of exercise, the types, the ways of acquisition or extinguishment; but also the legal sanction of these real rights were, to a large degree, transposed by the legislator and adapted to the requirements of the time.

Keywords: real rights; *superficies; servitude; iura in re aliena;*

1 Introductory aspects

The right of property is the "king" of real rights, as it incorporates in its content all three attributes: *the usus, fructus* and the *abusus*. Of course, the right to property cannot be defined exclusively from the point of view of the three attributes that constitute it, thus, also materializing through elements concerning its essence, namely the fact that it expresses a relationship of appropriation of certain property (be they tangible or intangible), as well as the fact that the owner exercises the three attributes by his own power and in his own interest[1].

Iura in re aliena or real rights over the property of another are recognized in the modern doctrine as the product of the dismemberment of attributes that fall within the scope of the legal content of the right of ownership[2]. As a result, the real rights resulting from the separation of the attributes of the right to ownership are now known as dismemberments of the right to ownership[3]. In a restricted sense, these dismemberments are: the right of servitude, the right of superficies, the right of usufruct, the right of use and the right of habitation.

In Roman law, under the name of *Iura in re aliena* those rights which were constituted over a foreign asset were consecrated, by which on the one hand certain benefits were conferred to the rightful person and on the other hand limitations to the property right were imposed[4]. The fact that the name of dismemberments was not known to the Romans, with it being a creation of modern law, did not entail, however, that they were foreign to the concept of establishing real rights over the property of another. On the contrary, the way in which they elaborated the institutions of superficies, emphyteusis and servitude rights (among which usufruct, use, and habitation were included), which have lasted for so many centuries, reflect their exceptional spirit of creating laws. The purpose of the present paper is precisely to highlight the fact that the jurisprudence in Roman law is a cornerstone in the construction of current legal institutions such as the dismemberment of rights of ownership.

2 Servitude rights

If at present the usufruct, use and habitation are distinguished as dismemberments independent of the right of servitude, in Roman times, they were included in the category of servitudes.

Those obligations which encumbered the property of another but which at the same time signified real rights of the person for whose benefit they were constituted were called servitudes. On this criterion, the Romans distinguished between *predial* servitudes (*servitutes prediorum*, constituted for the benefit of any person who had the quality of owner of a certain immovable asset) and *personal* servitudes (*servitutes personarum*, constituted for the benefit of a determined person)[5]. The last category of servitudes included usufruct, use, habitation but also *operae* (servitude whose existence ceased with the fall of the Roman Empire).

2.1 *Predial servitudes*

Provisions created for the benefit of any owner of immovable assets (the quality of owner of the respective building being the only one that legitimizes him as beneficiary of these rights), the predial servitudes presupposed the fulfillment of some conditions also consecrated in the Romanian positive law[6]: the existence of two neighboring tenements owned by different owners, out of which one bears the name of *dominant tenement (praedium dominans)*, and the other *servient tenement (praedium serviens),* the servitude is useful to the dominant tenement (in the sense that the dominant tenement retains or even increases its economic purpose) and *causa perpetua*, that is, the servitude corresponds to a continuous need of the dominant tenement, in order to fulfill its economic purpose[7].

In the Roman jurisprudence a subclassification of the predial servitudes was configured in predial servitudes on tenements (*servitutes praediorum urbanorum*) and predial servitudes on land (*servitutes praediorum rusticorum*). Predial servitudes on tenements were those established on an estate, regardless of its place, and predial servitudes on land were established over land, regardless of whether it was situated inside or outside of a city[8].

The most known predial servitudes were: *aquaeductus* (the servitude that allowed the owner of the dominant tenement to supply his property with water through pipes that passed through the servient tenement) *jus pascendi* (the right of the owner of the dominant tenement to graze his cattle on the servient tenement), *actus* (the right of the tenement owner to cross the servient tenement with his herd, to a foreign place where they can drink), *pecoris ad aquam adpulsus* (the right of the owner of the dominant tenement to take his waters to drink on the servient tenement), *iter* (consisting of the right of way of the owner of the dominant tenement, either on land or on horse, through the servient), *via* (the right of the owner of the dominant tenement to pass, with the cart through the servient tenement), *aquae haustus* (servitude by which the owner of the dominant tenement can take water from a well or spring located on the servient tenement), *cloacae immittendae* (the right of the owner of the dominant tenement to allow the discharge of its own domestic water through a sewer located under the servient tenement), *non altius tollendi and ne prospectui officiatur* (servitudes with a prohibitive character, which created some negative burdens on the owner of the servient tenement; by which they were prohibited from building property of over a certain limit, either so as to not deprive the owner of the dominant tenement of natural light, or in order to not obstruct his viewpoint), *servitus oneris sustinendi and tigni immitendi* (servitudes by which the owner of the dominant tenement was allowed to lean a weight on the neighbor's wall, respectively to incorporate a beam in the wall on the neighbor's side in order to strengthen his own wall)[9].

2.2 *Personal servitudes*

Personal servitudes were those by which the burden on another's property did not bring benefits to the owner of a neighboring building, but to a certain person. These servitudes had at most a lifelong character and a non-transmissible nature. Both arose

from the fact that personal servitudes were inextricably linked to the person for whose benefit they were constituted. Therefore, they could neither be continued after the death of their holder nor alienated by *inter vivos* acts. However, it was exceptionally accepted that *operae* should be transmissible *mortis causa.* At the same time, the ban on the alienation of the right of servitude did not include the temporary cession of its exercise. Thus, the usufructuary had the ability to lease the estate over which he had a right of usufruct, for a period that could not exceed the duration of the usufruct[3].

As announced in the introduction, the personal servitudes provided for in Roman law were: *the usufruct, usus, habitatio* and *operae*.

2.2.1 The usufruct

By *usus fructus est jus alienis rebus utendi fruendi salva rerum substantia* the Romans defined the usufruct as the right of the usufructuary to use the property of the bare owner and to harvest its advantages, without altering or modifying its substance[10]. We can see how even today, Article 703 of the Civil Code defines the usufruct identically (the usufruct is the right to use another person's property and to benefit from its advantages, just like the owner, but with the duty to preserve its substance).

If initially they only admitted the usufruct in a *private capacity* (constituted exclusively with respect to tangible goods that were not consumed by a single use), the evolution of legal relations determined the Romans to extend the scope of usufruct to other property, thus appearing *universal usufruct* or *under a universal title* (the usufructuary not taking over the patrimonial liability), *quasi-usufructus* and *usufructus nominus* (constituted on receivables, which although they were *res incorporales*, were benefit-bearing – interest).

Quasi-usufruct, as nowadays, (Article 712 of the Civil Code) applied to consumable or expendable property. The provisions of the positive law governing the quasi-usufruct are situated in a relationship of total identity with the provisions of Roman law. As the usufruct's prerogatives over consumable goods cannot be exercised without depleting the substance, the quasi-usufruct also allows the usufructuary to acquire *abusus* (the right to dispose of them as an owner would). Of course, it is symmetrically incumbent upon him to return to the owner, at the end of the quasi-usufruct, other goods of the same quantity and quality, or their monetary equivalent[11].

Regarding the obligations of the usufructuary, we mention that until the intervention of the praetors in the matter, they did not exist. Indeed, the old Roman civil law did not provide for obligations between the subjects of a usufruct, since it was considered that the usufructuary and the bare owner are not in a legal position of interdependence, being holders of distinct real rights.

To meet the requirements of practice, Praetorian law imposes several obligations on the usufructuary. The main obligation of the usufructuary was to solemnly promise that he would take care of that property, as a good owner would, and that he would return to the bare owner all that was to be returned at the end of the usufruct. This promise, called *cautio usufructuaris,* it was consolidated by guarantors, who would be liable in the event that the bare owner would be unable to obtain compensation from the usufructuary for breach of obligations [9]. The promise made by the usufructuary before the good was made available to him did not presuppose from the beginning that he

should submit the diligences of a good owner in the obligation to maintain the good, but only the normal diligences, in accordance with the good morals (*usurum se boni viri arbitratu*). However, in time, by praetorian edicts it was ruled that the obligation of care that fell on the usufructuary had to be similar to that undertaken by the best head of the household (*ac si optimus pater familias uteretur)*[12].

In concreto, the solemn promise obliges the usufructuary to keep the substance of the good unaltered from the moment of its taking over and to respect the destination of the property received in the usufruct (being forbidden from changing the economic purpose established by the bare owner prior to the establishment of the usufruct). In order to keep the substance unaltered, a first step taken by the usufructuary and the bare owner was to draw up an inventory. As a result, if the object of the usufruct was a building, the usufructuary had, under the sanction of compensating the bare owner, the obligation to make all current repairs, to pay taxes, to prevent the degradation of the property, to prevent a possible fire or even an attempt by a third party from acquiring ownership of the property by *usucapio*[10]. Compensation operated even in the event of culpable damages. Symmetrically, the usufructuary had the obligation to replace the dry trees on the usufruct tenement, as well as the obligation to replenish the herd, in the event of the loss of part of it[10].

The bare owner had a negative obligation to refrain from any action by which the exercise of the servitude by the usufructuary was disturbed or prevented.

An analysis of Articles 720-736 of the Civil Code shows that, in general, with the changes imposed by the many centuries that separate the two regulations, the obligations of the usufructuary have also been transposed in the current law.

2.2.2 Usus, Habitatio and Operae

The *usus* and *habitatio* servitudes are now known as the use and habitation dismemberments. We will find below that their regulation has remained almost identical in current civil law. But before that, it is necessary to specify the reason why *operae* servitude was not transposed in our legislation. Known as *operae servorum sive animalium*, this designates the right (usually conferred by testament) to the beneficiary to use the services of slaves or another person's animals. It is therefore easy to understand why *operae* did not survive the Roman Empire.

Use is currently defined by Article 749 of the Civil Code as the right of a person to use the property of another and to harvest natural and industrial advantages only for the needs of himself and his family. The Romans also reached this definition by jurisprudence. We say this because in the first phase, through *usus* they understood only the right of use exercised over someone else's property, but without the possibility of harvesting its advantages (*uti potest, frui non potest*)[10]. Over time, however, the interpretation of the ban on benefiting from the advantage of the good has acquired more permissive nuances, the usuario acquiring the right to pick advantage, but only to the extent of his need (and the need of his family).

Moreover, the same obligations specific to the usufructuary were applicable to *the usuario*, as he had to make exactly the same promise of maintenance and restitution of the property, this time called *cautio usuaria*[3]. Likewise, the similarities between the

obligations of the user and the obligations of the usufructuary are also recorded in Article 753 of the Civil Code.

Withal, *habitatio* marked the right of a person to live in someone else's house without paying rent and without the possibility of the renting the property to someone else[13]. Originally, the right to habitation was established for a period of 1 year.

2.3 *The acquisition, extinguishment and sanctioning of servitudes*

Other notable similarities in the field of servitudes concern the acquisition, the extinguishment and the defense of these rights. Thus, even in Roman law, they could be constituted by legal acts but also by usucapio. Known as *longi temporis praescriptio,* the usucapio of a servitude presupposed its exercise by maintaining an untainted possession (which had not been obtained from the other party clandestinely, by violence, or precariously – *nec clam, nec vi, nec precario*) for a period of 10 years between those present and 20 years respectively in absentia. At the same time, the acquisition of servitudes by usucapio was made to the extent to which possession was exercised[4].

Among the methods of extinguishment of servitudes consecrated by the Romans, but which are also recognized by the legislation in force, we enumerate: renunciation, consolidation, the perishing of the good – respectively the definitive impossibility to exercise, and in the case of personal servitudes, the death of the right holder and lack of use (which also operated in the case of positive servitudes on land). Regarding the extinguishment of servitudes by lack of use, the terms provided in classical Roman law were initially one or two years, depending on whether the encumbered property was movable or immovable. In the postclassic era, Emperor Justinian raised these terms to 3 years for movable property, respectively to 10 or 20 years for immovable property [14].

In the field of the sanction of these real rights, the Roman law made available to their holders the confessory pleading of servitude encumbrances (through which the holder of the right of servitude defends his right), action for a negative declaration (for the bare owner) but also action for the interdiction of possession (the equivalent of applications for the protection of possessions). We see, therefore, that the holder of the right of servitude and the bare owner could capitalize on their rights in the same ways recognized by the Romanian legislation in force.

3 Superficies, emphyteusis and *conductio agri vectigalis*

By superficies one person's right to build and use a building on another's land was understood. Emphyteusis was the right to exploit an area of land in exchange for a royalty, and *agri vectigales* were those state-owned lands that could be leased for a long time in exchange for a sum of money (*vectigal*).

The analysis of these institutions is made within the same section because they have in common the fact that they were acquired in close connection with the capitalization of the public property of the state. This feature of theirs is a very interesting one, given that, at present, the dismemberments are incompatible with the right of public

property[2]. Their acquisition was due to the inalienable nature of state property *(ager publicus*). Since the state lands could not be the object of a private property, the only legal means by which they could be capitalized with the help of individuals were those through which their use was transmitted. This justifies the fact that leases and emphyteusis were created in agricultural matters, and the superficies, in urban matters. Over the centuries, Roman cities have been hit by disasters such as earthquakes and fires. Under these conditions, the reconstruction of cities had become a huge economic burden for the state. Creating the superficies proved to be a more than an ingenious and bilaterally advantageous solution, Roman citizens being satisfied that the construction of a house in the city became much more accessible to them, while the state was exempted from paying exorbitant expenses that the reconstruction of the cities would have entailed.

The advantages of renting land were quickly received by individuals and, shortly, landowners began to conclude contracts for the transfer of the use of their tenements in favor of the superficies, a phenomenon that led to the generalization of the superficies. Although the superficies resembled the lease because it involved paying a regular sum of money (named *solarium*), the rights of the *superficarius* were clearly superior to those of a tenant, having the ability to dispose of his surface as he wished: by sale, donation, testament, mortgage or even the acquisition of servitude. In addition, the superficarius enjoys all the means of legal protection specific to an owner (useful actions and a special interdiction to prevent the disturbance of the exercise of the right of superficies, which could be opposed including to the owner of the land)[10].

Emphyteusis and conductio agri vectigalis although they were not received as dismemberments, they form the basis of the institutions of the concession, respectively of the lease. Emphyteusis represented the osmosis of the usufruct and the lease. This real right arose from the action of Emperor Justinian to merge two distinct legal institutions: *the emphyteusis* agreement (from the Orient) and *ius in agro vectigali* (from the Occident). The *emphyteusis agreement*, gave the emperor the possibility of constituting, in favor of an individual, a perpetual lease on imperial tenements, in exchange for an annual payment. Considering that the classical era was marked by a decline in the agrarian economy, both the state and the large landowners came to be unable to make any profit from the vast uncultivated lands[15]. That is why the right to emphyteusis was widespread at that time.

We mentioned that emphyteusis was the product of merging the lease with the usufruct. However, there were sufficient boundaries between the three institutions. For example, unlike lease, emphyteusis had a perpetual character, not subject to a term. In opposition to usufruct, Emphyteusis was an alienable right (both by *inter vivos* deeds as well as *mortis causa*). Moreover, the *emphyteuta* had far more rights than the usufructuary. For example, he was not a mere holder of the property, but a true civil owner, which gave him the aforementioned legal advantages over the superficarius.

The bare owner had the right to collect the fee (royalty) as well as a right of preemption on the tenement. Thus, if the emphyteuta neglected the obligation to pay (either for a period agreed by the parties or for a legal period of 3 years) or brought damage to the tenement, the bare owner had the freedom to relinquish, by termination, the right to emphyteusis[16].

4 Conclusion

The foray into real rights over the property of another in Roman law once again captured the fundamental role that Roman law played in consolidating contemporary law. With the natural differences generated by the historical evolution of the society, the dispositions created by the Romans both regarding the concepts, the conditions of exercise, the types, the ways of acquisition or extinguishment but also legal sanctioning of these real rights were, to a significant extent, transposed and adapted by the legislator to the requirements of the time.

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Coronavirus and Force Majeure – Impact on International Trade Contracts

Niță M.C.

PhD, "Titu Maiorescu" University, Faculty of Law, Bucharest (ROMANIA)
E-mail: av.carolina.nita@gmail.com

Abstract

The SARS-CoV-2 pandemic and the measures taken by the governments in all the countries of the world for limiting the COVID-19 virus effect on the human health have continued to have a significant impact also on the international trade. A number of states, including Romania, have adopted a series of regulations and mandatory measures designed to prevent the spread of the virus. From a legal perspective, these measures give rise to many problems and controversies. The legal implications of the pandemic and the measures applied to control the virus inevitably depend on the competent jurisdiction, on the applicable law, but also on the way in which the parties themselves understood to regulate or to adapt their contractual relations, in the given context. At this time it is important that counterparties carefully assess and analyze the agreements concluded, in order to identify their rights, obligations and liability, and therefore, to adopt the best partnership behavior. In particular, the parties should be aware of any type of communication obligations and they should ensure that these obligations are fulfilled, especially those relating to the "force majeure" clauses.

Keywords: SARS-CoV-2 pandemic, force majeure, force majeure clause, applicable law, exemption from liability, notification, suspension, cancellation, termination of contract, renegotiation.

1 General framework

If on 30 January 2020, the World Health Organization ("WHO") declares the SARS-CoV-2 coronavirus epidemic from China an international public health emergency, within only two months later (11 March 2020) the WHO will define this virus as being a worldwide spread pandemic ("the Pandemic"). The emergency situation created worldwide is quickly followed by drastic social, economic and political measures, starting with limiting/restricting the movement of people, physical distancing,

but also other measures with significant direct effects, including upon international economic relations. Undoubtedly, perhaps for the first time in the recent history of humanity, the spread of the COVID-19 virus epidemic is creating a major shock to the European and global economy. The whole complex of measures, imposed largely by government acts adopted at the level of each state, severely affects companies in key areas of their activity such as production, distribution, logistics, personnel management, etc. The economic impact of the pandemic varies from one sector of activity to another and from one enterprise to another, depending on a number of factors, such as the exposure to a foreign state as a source of intermediate entries, the possibility of using alternative suppliers, the existence of stocks or the dependence on "just-in-time" production processes. In all this context, many companies are facing now the risk that the obligations assumed by signing commercial contracts with external partners might no longer be fulfilled or could be executed only with great difficulties.

A universal analysis of the nature and effects of the pandemic, respectively a qualification generally valid for all international commercial contractual legal relations, is not possible, considering that both the nature and the effects of the same phenomenon occur in a different manner depending on the specific features of each legal situation. That is why, in this article, I will limit myself to a brief analysis of the concept of force majeure and how it could be invoked.

2 The Regulation of the Force Majeure at international level

At international level, cases of force majeure are considered to be those circumstances which are beyond the control of the obligated party, if they cause an impediment that the party was not reasonably obliged or could not foresee it at the time the contract was concluded and was not able to avoid it, nor to remove its consequences. They are considered cases of force majeure, either those created by natural causes, such as disasters resulted from fires, earthquakes, floods, hurricanes, etc., or the particularly severe human events, such as wars, terrorist acts, riots, strikes, government orders, etc..

Establishing the concept of force majeure and the consequences of this event within international contractual relations depend both on how the implied parties have agreed to regulate the cases of force majeure through their contractual clauses, as well as on the content of national or international legal rules designated as applicable to the legal relations between the implied parties.

Considering the law applicable to international trade contracts, we emphasize that, in general, the parties are free to agree, freely and without restrictions, on the application of the legal system of a particular state or even of certain internationally regulated rules that are best serving their interests (*lex voluntatis*). In the absence of such a choice, the law governing the contract is designated by applying the rules of the Private International Law. For example, in the European area, the law applicable to international trade contracts is governed by Regulation (EC) no. 593/2008 on the law applicable to contractual obligations (Rome I)[1]. The regulation enshrines in article 3, the full freedom of the parties will in determining the law applicable to the contract, a choice that must be clearly expressed or it must result, with a reasonable degree of certainty, from the contractual clauses or from the circumstances of the case. At any time, the parties may agree that all the contract, or a part of it, shall be governed by

another law different from that previously agreed upon. In the absence of a choice made by the parties, the contract will be subject to one of the laws designated by the regulation, according to the rules established in Article 4 et seq. of this. The Regulation is without prejudice to the application of international conventions in which one or more Member States are involved as parties at the time of the adoption of the Regulation and which govern the conflict of laws in contractual obligations. However, between Member States, the Regulation prevails over the conventions concluded exclusively between two or more Member States, as long as such conventions concern matters covered by the Regulation (art. 25).

Frequently, within international contractual relations, the parties make an express or tacit consent to subject their contract to a certain normative body that is uniformly adopted at international level or they use – for interpreting and applying the contractual clauses – specific international "codifications" of the general principles in the contract law. These may include the United Nations Convention on Contracts for the International Sale of Goods, concluded in Vienna on 11 April 1980 (Vienna Convention)[2] or the UNIDROIT Principles on International Trade Contracts[3].

The Vienna Convention was adopted in the context in which international commercial sales required uniform normative regulating procedures capable to ensure certainty and security in contractual relations. The purpose of the regulation was to ensure the overcoming of the difficulties and uncertainties that hindered international trade relations, a sine-qua-non condition for guaranteeing and developing international trade and economic progress.

With regard to applying the Vienna Convention, in the specialized legal literature in Romania[4], it is shown that – from the ratione personae point of view – it is made in front of the arbitration tribunals, either by reference to the conflicting norms of private international law [article 1 paragraph (1) letter b)], or by applying the Convention pursuant to article 1 paragraph (1) letter a). For example, in international trade relations established between a Romanian company and a foreign company, in which the law applicable under the contract is the Romanian law, reference is made to the Convention as being the Romanian law on sales[5]. In some cases, the Court of Arbitration issued the statements that the provisions of the Convention constitute the Romanian law on international sales, and in others, that the conventional norms constitute the lex mercatoria, and thus the arbitration tribunal retains the application of the convention, because it is the main regulation in this area.

As indicated above, the parties may choose to apply the rules of the Vienna Convention as lex mercatoria. As a general rule, in order for lex mercatoria to be taken into account by arbitrators in resolving the substance of a dispute, it is necessary for the parties to express their will in this regard. The choice of the parties can take place in two ways: (a) either the parties have expressly chosen lex mercatoria as the law governing the substance of the dispute, giving the arbitrator explicit permission to apply it during the proceedings, (b) or the parties have not expressed any desire regarding the law applicable to the dispute, tacitly and implicitly accepting the possibility for the arbitrator to choose the lex mercatoria for this purpose[6].

As well, within international trade contracts, the parties may choose to apply the general principles of international trade contracts codified in the UNIDROIT Principles. They were created with the intention of establishing a balanced body of rules, specifi-

cally designed for worldwide use by participants in trade, without being dependent on the legal traditions and economic or political conditions of the countries in which they are to be applied[7]. The UNIDROIT principles apply to the contract between the parties, when they have expressly agreed that the interpretation, application or completion of the contractual terms shall be based on these general principles or when they have agreed that the agreement between them shall be governed by "general principles of law", by "lex mercatoria" or other such principles. The UNIDROIT principles can also be used to interpret or supplement the uniform international legal instruments or to interpret or supplement domestic law.

In this general regulatory framework of international trade relations, it is observed that regarding the concept of "*force majeure*", there are significant differences between the legal systems of the states of the world, but also a specific approach at the level of international "codifications".

Thus, in a summary analysis, it is observed that in the common law legal systems, encountered in countries such as England, Northern Ireland, Canada, New Zealand, USA, the legal regime of force majeure was developed exclusively as a creation of the practice in contractual matters, inspired by the legal tradition of "civil law" systems, without knowing a regulation at institutional level. As a result, the invocation of force majeure is conditioned by the existence – in the contract concluded between the parties – of specific clauses, in which it is required to establish the events that can be considered impediments to the contract execution, as well as the allocation of risk between the parties involved in the contract, as a whole. Without the provision of such a clause, it is difficult to predict that the party – who is unable to enforce due to force majeure – could be granted, in such a legal system, the right to be released from contractual obligation or liability. Not infrequently, for example in English case law practice, it has been emphasized that compliance with contractual obligations takes precedence regardless of the circumstances invoked by the party who considers itself unable to continue performing the contract ("*agreements must be kept though the heavens fall*").

However, in the English legal system, in the absence of a force majeure clause applicable between the parties, the party unable to perform its obligation could invoke the common law concept known as "*frustration and impossibility of performance*", according to which a contract is "frustrated" only if its substance has become impossible or illegal, or if its commercial purpose has been completely annihilated[8]. In general, "*frustration*" is considered to be a limited concept that can rarely be invoked. In the Romanian legal literature, regarding "*frustration*", it is shown that "although the doctrine of frustration is similar to the doctrine of impossibility of execution since both of them have evolved from the commercial need to exempt from fulfilling obligations in case of extreme hardship, frustration is not a form of impossibility even in the modern definition of the term, which includes not only cases of physical impossibility, but also cases of extreme impracticability of execution. Execution remains possible, but the expected value of the performance of the contract for the party seeking to be released from obligations has been destroyed by an unforeseen event, which occurred in order to cause a current disregard, not a literal one"[9].

Unlike common law systems, in civil law systems such as Romanian, German, Italian, French, Spanish, etc., force majeure is regulated at institutional level, by law,

and in the same time the parties are given the possibility to agree on force majeure through their contractual clauses.

For example, in Romanian law the force majeure is regulated in art. 1351 of the Civil Code, where it is shown that the liability is removed when the damage is caused by force majeure, unless otherwise provided by law or if the parties do not agree otherwise. Force majeure is a case that removes contractual liability, defined as any external event, unpredictable, absolutely invincible and inevitable, which objectively and without guilt prevents a person from acting as he would have liked, in order to prevent the occurrance of damages. The effect of the case of force majeure is to remove all civil liability for damages caused by non-performance of the obligations due to the event of force majeure.

In French law, force majeure is defined in art. 1218 of the French Civil Code as that event which prevents the fulfillment of the debtor's obligations, which could not be foreseen at the time of concluding the contract (unpredictability factor) and whose effects could not be avoided by appropriate measures (mitigation factor). If the impossibility of performing the obligation is only temporary, only its suspension occurs, unless the delay would justify the termination of the contract. On the other hand, in cases where the impossibility is final, the contract is automatically terminated and the parties are exempted from performance their obligations, under the conditions set out in Articles 1351 and 1351-1 of the French Civil Code, and this happens mainly when the concerned party has not assumed the risk of the event or was not previously put in delay for fulfilling the obligation.

There is no explicit definition of force majeure in the Italian legal system. However, the term "*force majeure*" is mentioned in some provisions of the Italian Civil Code, such as article 1785, regarding the limits of the hotel landlord's liability in case of damage, destruction or theft of the goods or Article 1467 (entitled "*contract with corresponding benefits*"), which recognizes the debtor's right to request the termination of the contract when the benefit due by him has become excessively burdensome as a result of some extraordinary and unpredictable events which are not related to his scope of activity.

In Italian case law practice, in the field of international commercial contracts, the cases of force majeure are defined as those "*extraordinary and unpredictable*" events such as earthquakes, hurricanes, wars, riots, etc. For example, in a practical decision, it was stated that a force majeure situation is considered the event which hinders the contract execution and makes ineffective any action of the obliged person, while this one tries to remove the obstacle occured during its performance. Within this decision, it was shown that the event hindering the execution may not depend on the debtor’s direct or indirect actions or omissions[10].

According to Italian doctrine[11], we are facing a force majeure event only when, on the date of signing, the contract is impossible to be provided with normal diligence and average knowledge, otherwise, the event cannot be classified as force majeure. Therefore, for being considered a case of force majeure, the event must have two characteristics, namely: to be extraordinary and unpredictable. In this field, the Italian Court of Cassation intervened by providing a precise description of both terms, within Sentence no. 12235, Section III of 25 May 2007[12]. According to the Court, the extraordinary nature of the event must be an objective one, that is to say, it must be an

abnormal, measurable and quantifiable event based on factors such as its intensity and its size. Instead, the unpredictability of the event is considered to have a subjective character, which depends on the cognitive capacity and diligence of the contracting party, but its evaluation is to be performed based on objective criteria, taking as a standard the behavior of an ordinary person under the same circumstances. Both the extraordinary character and the unpredictability of an event are variable elements, which are to be analyzed in relation to the concrete circumstances of the case.

At the level of international codifications, the concept of force majeure, as we mentioned, has a specific regulation. For example, the Vienna Convention provides in article 79 that "*a party is not liable for the breach of any of its obligations if it proves that such non-performance is due to an obstacle beyond its will and that this obstacle could not reasonably be expected to be taken into account at the time when the contract was concluded, nor to be prevented or overcome, nor to prevent or overcome its consequences*".

The party that is unable to perform its obligation in a case of force majeure must notify the other party of the impediment and its effects upon its ability to perform it. If the notification does not reach its destination within a reasonable time calculated from the moment when the non-executing party knew or should have known about the obstacle, this party shall be liable for damages caused by non-receipt.

The UNIDROIT principles also provide in Article 7.1.7 for the force majeure case, which, as stated in the Official Comments on these principles, covers all situations known in the doctrine and practice of common law systems as being "*frustration and impossibility of performance*", and in civil law systems under the name of force majeure, Unmöglichkeit etc. However, it should be noted that the notion of force majeure regulated by Article 7.1.17 is not perfectly identifiable with any of these concepts, but it has an autonomous meaning.

Article 7.1.7 of the UNIDROIT Principles states that:

- the exemption from liability is provided only to the debtor who proves that his own non-performance was caused by an event which could not be controlled by him and could not reasonably be expected to be taken into account by him when the contract was concluded, and it could not be prevented or overcome, and its consequences could not be overcome as well;
- when the impediment is only temporary, the exemption from liability will operate for a reasonable period of time, taking into account the effect of the impediment on the performance of the contract.
- the above rules do not prevent any party from exercising the right to terminate contractual relations, to suspend the performance of its obligations or to require the payment of interest relating to the due amount;

In accordance with the UNIDROIT Principles, the exemption from liability operates only after a thorough analysis of both the conditions stated in article 7.1.7 and the contractual clauses agreed by the parties. In this respect, the Official Comments emphasize the need to adapt the provisions of this article according to the particular circumstances of each transaction.

For the situations in which the impediment fulfills the conditions of force majeure, but does not make impossible the execution of the contractual obligation, when it only delays its performance, the debtor has the right to receive an additional time interval for

fulfilling the obligation. In this respect, the Official Comments also show that the additional time period may be shorter or even longer than the period during which the obligation is impossible to be performed, because the crucial issue consists in measuring the effect of this interruption of performance on the contract economics.

3 Force majeure requirements in international trade contracts

In the matter of international commercial contractual relations, force majeure constitutes an impediment which exempts a party from fulfilling its obligations and relieves it of contractual liability only if it proves that the following requirements are met: it concerns an unpredictable and insurmountable event, the party invoking force majeure should not be blamed for the occurrence of the event and it is also relevant the moment when the event of force majeure occurs.

- **The unpredictability of the event**

The unpredictability of the event is an essential force majeure requirement imposed by both national regulations and internationally adopted rules. For example, the Vienna Convention as well as the UNIDROIT Principles provide that a party may be released from liability if it is able to prove that the non-performance of its obligation is due to an unforeseen event.

The requirement of unpredictability is imposed starting from the idea that if the parties have provided the possibility of unforeseen risk, it means that they have either assumed this consequence of the contract or they have provided a *hardship* clause for resolving the issue of subsequent imbalance of benefits between the parties.

The assessment of the degree of unpredictability of an event is made, on a case-by-case basis, exclusively under the factual circumstances of the situation, by applying the specific assessment standard of a *bonus pater familias*. Therefore, it is about an appreciation *in abstracto*, based on the behavior of the prudent and diligent man.

However, the analysis of the practice of national and arbitral courts shows that they generally prove to be extremely demanding and strict in assessing the condition of unpredictability, the majority tendency being to reject defenses based on force majeure, bringing the reason that the debtor (usually a professional) could or should have foreseen the event that generated the non-execution, even from the moment of concluding the contract. This possibility to foresee the occurrence of the event of force majeure, makes the party asume also the risk of the contract, so that it is no longer entitled to remedies[13].

- **The insurmountable character of the event**

Another essential requirement of force majeure in international trade contracts is that of the insurmountable nature of the event, which would make it impossible for one of the parties to fulfill the obligation. The burden of proof lies with the debtor who has the obligation to prove that the event invoked as a case of force majeure could not be avoided or overcome, being beyond his control.

And with regard to this requirement, national and arbitral courts have proved to be particularly strict in the objective analysis of the fulfillment of the condition, especially as regards to the possibility that the party may or may not have performed its contractual obligations.

The insurmountable character was considered as a protection measure, such as to guarantee the principle of the contract binding force, the exemption from liability being posible to operate only if the invoked impediment is really exceptional and there is no other possibility to fulfill the assumed contractual obligation.

- **Lack of fault of the debtor**

Starting from the principle of the binding force of the contract (*pacta sunt servanda*), according to which the parties are obliged to execute exactly all the services to which they were indebted by contract[14], in practice it was considered that the debtor who seeks exemption from liability for non-performance must prove that he is not himself guilty of non-execution. It should be noted that this requirement is a creation of the practice, especially the arbitral one, not expressly stated by any of the international instruments, although it could be implicitly deducted from the reason of the regulation[15].

According to the arbitration practice, in the specialized legal literature it is noted that "the event of force majeure – occurred on the date when the debtor was late with the execution of the obligation for which he undertook the foreign trade contract – does not defend him from liability in case he doesn't respect the agreed deadline"[16].

- **The importance of concluding the contract**

As in the case of the above requirement, the time of conclusion of the contract is not a condition expressly regulated in the international analyzed instruments either, this being established in the arbitration practice[17].

The moment of concluding the contract is a factual situation that can be easily proven. To the extent that the party invoking force majeure is proved to have been aware of the impediment or the possibility of its occurrence at the time when the contract was concluded, then this party is no longer entitled to benefit from this case of exemption from liability.

In this regard, recent comments on force majeure in international trade have shown that, however, it is not mandatory for the event to occur after the conclusion of the contract, and some of the arbitral courts also accepted the assumption that the impediment existed at the time of the conclusion of the contract, provided, however, that the parties were not aware of its existence[18]. On the same line, the Comments of the Secretariat about the Draft Vienna Convention, regarding article 65 paragraph 4 of the draft (currently article 79) state the following: "it is possible that the impediment existed at the time of concluding the contract. For example, the goods that were the subject of the contract and that were unique may have already perished at the time the contract was concluded. However, the seller will not be released from liability under this article if he could reasonably have considered the destruction of the goods at the time of the conclusion of the contract. Therefore, in order to be exempted from liability, the seller must not have known about their previous destruction and must not have reasonably foreseen their disappearance".

4 Invoking the SARS-CoV-2 pandemic as a case of force majeure in international trade contracts

The SARS-CoV-2 pandemic is a case of force majeure, considered both as a natural cause, due to the impact of the virus on health, and an indirect consequence of the measures taken by public authorities to reduce the risk of the virus, by imposing quarantines, restricting traffic, closing ports or air traffic, all with an inevitable impact on the correct and timely execution of contractual obligations.

Invoking the SARS-CoV-2 pandemic as a case of force majeure in international contractual relations depends essentially on how the parties have agreed to regulate their contractual relations, but also on the law declared applicable to the contract or the international instruments which they referred to. The relevant practice and doctrine show that the insertion of a force majeure clause in international trade contracts represents an indispensable tool both for foreshadowing and distributing risks between the parties during the execution of obligations, but also for preventing the disputes generated by the occurrence of such an event.

In addition to fulfilling the requirements discussed above, for estimating the SARS-CoV-2 pandemic as a case of force majeure, it is very important to determine whether or not the force majeure clause agreed by the parties includes such an event. This fact requires a careful analysis of the content of the force majeure clause.

In general, the parties adopt one of the following approaches in defining the type of event qualified as force majeure:

- Some contractual clauses contain a list with the events that constitute, according to the will of the parties, cases of force majeure. In such situations, this relevant enumeration of events may be either exhaustive or only exemplifying. When the enumeration is restrictive, the invocation of the SARS-CoV-2 pandemic could be considered as a case of force majeure only if the parties referred in the force majeure clause to epidemic or pandemic type events. On the contrary, the debtor cannot be exempted from fulfilling his obligation by invoking such an event, as he is presumed to have assumed the risk of the contract. On the other hand, if the enumeration is only exemplifying, the clause could also cover the SARS-CoV-2 pandemic, because it is difficult to prove that the parties agreed otherwise.

  If the parties have listed among the events of force majeure the governmental acts imposing certain restrictions, such as trade embargoes, quarantines, travel restrictions, the closure of buildings or borders, but without making any reference to epidemics or pandemics, this question inevitably appears: whether the SARS-CoV-2 pandemic could be invoked as a case of force majeure taking into account its indirect consequences, materialized in the adoption of government acts such as those mentioned by the parties. In this case, the SARS-CoV-2 pandemic does not, per se, lead to the existence of a case of force majeure, but, instead, the restrictive measures imposed by government acts – as a result of the spread of the epidemic, such as quarantine, border closures, flight suspensions, requisitions, etc. – may all represent the constituent elements of a force majeure.

- At other times, the parties use broader criteria to define force majeure, and contracts may refer, for example, to events or circumstances "beyond the reasonable control of the parties". In the presence of such a contractual clause, the inclusion of the SARS-CoV-2 pandemic in the criteria considered by the parties represents a matter of interpretation which depends essentially on the specific circumstances of the case. In some opinions expressed in the specialized writings, it is shown that in an unprecedented situation such as the current one, it could be appreciated that the courts will be more generous in interpreting this type of wording, when faced with parties who have encountered real difficulties in fulfilling their obligations [19]. However, it is undeniable that an important role will be played in this case by the debtor who invokes such an event and he will have the task of proving that the impossibility of temporary or permanent execution is due to some causes that are really out of his control, that could not be foreseen or prevented, and their consequences could not be overcome.
- Some force majeure clauses list a number of specific events, such as fires, floods, hurricanes, war, etc., along with a broader and more general wording, such as "or any other causes beyond the control of the parties". As a rule, for such clauses, the general wording receives a broader interpretation, such as not limiting the force majeure only to events similar to those specifically mentioned in the contract. Therefore, such a clause could also be invoked for the SARS-CoV-2 pandemic, even if an epidemic or pandemic event was not explicitly mentioned within the force majeure clause.
- Although rarely encountered, it is possible that the parties use only the term "force majeure" in their contract without other specific references. In legal systems where a standard definition of this concept is lacking[20], the meaning of the term is a matter of pure contractual interpretation. However, in the absence of any interpretation of this notion within the contract, there is a risk for the parties that the force majeure clause itself would be considered ineffective due to its uncertainty. However, if, from the way the clause is regulated, the phrase "force majeure" can receive an interpretation, it could be appreciated in relation to the circumstances of the case, that this phrase also includes events such as epidemics, pandemics or government acts imposing certain restrictions in order to avoid or reduce the risks associated with them. On the other hand, in the law systems regulating the force majeure at institutional level as in the case of the application of international instruments setting clear criteria for this concept, the inclusion of the above events in the force majeure clause referred to by the parties will be analyzed in the light of the legislative provisions or criteria which the international instruments refer to.

5 Communication of the case of force majeure

In the field of international contracts, in addition to the requirements that an event must meet in order to be considered a case of force majeure, there is also stated an obligation for the party concerned to invoke it, to immediately notify the other party of the case of force majeure, accompanied by proof of force majeure[21].

If the notification is not communicated within a reasonable time calculated from the moment when the non-executing party knew or should have known the force majeure event, it will be held liable for damages – interests caused by non-communication. For example, article 79 paragraph 4 of the Vienna Convention stipulates in this respect that "*the non-executing party must warn the other party about the obstacle and its effects on its capacity of execution. If the warning does not reach its destination within a reasonable time calculated from the moment when the non-executing party knew or should have known the obstacle, this party is liable for damages-interests caused by non-receipt*".

In the same way, article 7.1.7 paragraph (3) of the UNIDROIT Principles stipulates that the debtor must notify the creditor both of the occurrence and of the consequences of the event on his own capacity to execute the contract. If the notification does not reach its destination within a reasonable time, which starts from the moment when the debtor was aware or should have been aware of the occurrence of that event, the debtor is obliged to pay compensation for covering the damage caused by failure to reach the destination.

The Romanian Civil Code also stipulates the need to communicate the force majeure event. According to article 1634 of the Civil Code, it is the obligation of the debtor to notify the creditor – within a reasonable time from the date of the event occurance – about the impossibility of performing the contract. This obligation constitutes a practical implementation of the principle of good faith[22] and cooperation between the contracting parties[23], while the breach of the obligation is sanctioned with the payment of damages – interests of the resolution [article 1634 paragraph (5) of the Civil Code].

6 Consequences on the contract when invoking the case of force majeure

When invoking the force majeure, the effects on international trade contracts are as follows:

- **Suspension of the contract**

In international commercial contracts, where the interest in maintaining the legal relationship is a priority, the suspension of the contract is often an appropriate remedy, especially when the duration of the suspension is a short period of time. Of course, the suspension of the contract cannot be extended indefinitely, and that is why, in many contracts, the parties agree that after a certain period of time, the contract will be terminated or renegotiated. As in other legal systems, Romanian law provides that if the event generates a sufficiently significant non-performance, the creditor – who no longer sees an interest in having the obligation fulfilled by the other party – may obtain the termination of the contract, and thus the rules of the subject of the resolution are applied in this case [article 1557 paragraph (2) of the Civil Code].

- **Termination of the contract**

If the impossibility of execution is final and absolute, the termination of the contract is inevitable. In this case, the defaulting non-executing party can no longer claim the benefit from the other party and must return what it has already received. If the impossibility has affected only a part of the obligation, the co-contractor is entitled to a corresponding reduction of his own benefit.

Regarding the nature of the contract, if the force majeure clause does not imply a simple suspension or delay in the performance of the contractual obligations, but it leads to the termination of the contract itself, then another important issue for the parties to the contract is to be addressed, namely how the termination of the contract using the force majeure clause affects the services already provided. In such cases, the applicable rule states that the occurrence of the event of force majeure "freezes" the legal relationship between the parties at that moment. International courts have stipulated in this regard: "*when frustration occurs, the rights and obligations of the parties are those which have accrued at the time of such occurrence. As to the future, the loss lies where it falls*"[24].

- **Renegotiation of the contract**

The renegotiation of the contract, even in the event of force majeure, is a tool for rebalancing the contract by adaptation, in order to equitably distribute between the parties the losses and benefits resulting from changing circumstances. Renegotiation may take place in one of the following ways: a written agreement on the conditions of suspension and/or a simple rescheduling of the delivery dates or an agreed extension of the duration of the contract for a period equal to the period of suspension, while for more complicated cases, a rebalancing of the parties' services could be achieved, by adapting the contract to the circumstances and the will of the parties.

In the absence of a written agreement, the renegotiation of the contract may be carried out in accordance with the law chosen by the parties in the contract or, in the absence of such a choice, with the law applicable to the contract.

7 Conclusions

Based on the above considerations, in order to determine whether the SARS-CoV-2 pandemic or its indirect effects may constitute a force majeure event within international trade contracts, the following shall be established: whether or not the contract includes a force majeure clause and its content, in order to decide whether or not the event may be included among the cases of force majeure, the fulfillment of the requirements specific to the invoked force majeure event, as well as the effects that occur with respect to the fate of the contract. To this end, in the absence of an agreement of the parties on the applicable law, the essential role lies with the national common law courts or with the arbitral tribunals.

As so far there are no court or arbitration legal decisions issued with regard to this event, we can note that during and after the 2003 SARS epidemic, several arbitrators and courts in China acknowledged the existence of the case of force majeure in this epidemic period.

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[21] To this end, Chambers of Commerce and Industry in many countries issue certificates attesting to cases of force majeure. For example, according to Law no. 335/2007 of the Romanian Chambers of Commerce, the county chambers of commerce and industry and the Romanian Chamber of Commerce and Industry, approves, upon request, for Romanian companies, the existence of cases of force majeure and their effects on the execution of international trade obligations [Article 28 paragraph (2) letter i)]
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Interference of institutions of contract law with the procedure of insolvency of individuals, regulated by Law no. 151/2015[1]

Morariu I.

Lecturer PhD, "Titu Maiorescu" University (ROMANIA)
E-mail: morariu.ioan@gmail.com

Abstract

The purpose of establishing the insolvency procedure of the individual is subordinated, on the one hand, to the idea of remedying the financial situation of the debtor natural person, and, on the other hand, to the idea of recovering the outstanding debts held by said person's creditors. The legal relations that have been thus established and which are ongoing in the scope of insolvency of the individual are complex, and they include both "purely civil" relations between non-professional individuals, and the relations established between professionals and individual consumers. However, as the main source of the legal relations circumscribed to the outstanding debts subject to the procedure is the contract as a type of legal deed, an analysis of the intervention in the procedure is required.

Keywords: procedure, individual/natural person, debtor, law, legal act/deed, contract.

1. General aspects

1.1 *Background for adopting Law no. 151/2015*

At the beginning of 2018, the Law on the Insolvency of Individuals came into force, a long-awaited law [1] of which the enforcement was postponed several times.

This law was adopted in the context in which, until that specific moment, unlike most European countries, in Romania there was no specific legislative framework to

[1] The article was written as part of the Internal Research Project of Titu Maiorescu University of Bucharest, Issue I (2018-2020), code PR04 INSOL-PERS.

regulate the insolvency of individuals and to constitute a system of protection of individuals facing the risk of incapacity of payment.

More precisely, until Law no. 151/2015 on the procedure of insolvency of natural persons was adopted, the only normative framework circumscribed to insolvency was the general one regulated by Law no. 85/2014 on procedures of insolvency prevention and insolvency.

On this background and considering that Romania was, and continues to be, a member State of the European Union, the adoption of a law on the insolvency of natural persons was not only necessary, but also mandatory, since the Regulation of the European Union Council no. 1346/2000 of 29 May 2000 on insolvency procedures demanded Member States to create the legislative framework necessary to apply the insolvency proceedings to individuals as well.

On the impulse of internal and especially of external pressures, Law 151/2015 on the procedure of insolvency of individuals was adopted and published in the Official Journal on June 26, 2015, but the way to its enforcement, on January 1, 2018, was extremely difficult, as it acquired a certain infrastructure, without which the application of the law was impossible [2].

Although Law 151/2015 was originally supposed to enter into force 6 months after the date of its publication, therefore on December 26, 2015, this did not happen, because the application rules had not been adopted by that time; in their absence, the law could not be implemented. As such, by GEO no. 61/2015, the enforcement deadline of Law no. 151/2015 was extended to December 31, 2016.

Even though in the meantime the secondary normative framework regarding the establishment of central and territorial insolvency commissions was adopted[3], the Law on the insolvency of individuals did not enter into force on December 31, 2016 either, but, by GEO no. 98/2016, the application of the normative act was again postponed until August 1, 2017. As a consequence of this inconsistency, the law did not enter into force on this date either, and the decision has been made to extend once more its enforcement date; therefore, in the Official Journal no. 614 of July 28, 2017 was published G.O. no. 6/20177 to extend the enforcement date of Law 151/2015: the enforcement date was extended to January 1, 2018, when the law finally entered into force.

1.2 *The purpose for adopting Law no. 151/2015*

The purpose of establishing the insolvency procedure of individuals ultimately consists in finding a balance between remedying the financial situation of the debtor natural person and recovering the outstanding debts held by this person's creditors, by facilitating negotiations between creditor and debtor, as stated in its first provisions. However, the recovery of the debtor's financial situation by discharge implies the motivational side of the debtor, namely their honest wish to reorganize, to make an effort to benefit from that relief.

According to art. 1 of Law no. 151/2015, the purpose consists in "*establishing a collective procedure for the recovery of the financial situation of the debtor natural person, in good faith, covering as much as possible his liabilities and discharging him, under the conditions of this law*".

If we look at the synthetic formulation of the law with an analytical eye, we may contract a threefold perspective of the purpose of the law and implicitly of the establishment of the insolvency procedure of individuals, namely:

– remedy the financial situation of the debtor natural person;

– cover his liabilities to the greatest extent possible;

– discharge the debtor acting in good faith.

Comparing the insolvency procedure of the individual, established by Law no. 151/2015, with the general procedure established by Law no. 85/2014 on the procedures of insolvency prevention and insolvency, one may notice that, although both deal with the same phenomenon, namely the insolvency of a debtor, there is a significant difference between the purposes of the two procedures.

Specifically, "while the procedure of insolvency of professionals aims at covering the debtor's liabilities, giving him, when possible, the chance to recover his activity, *the insolvency procedure of the natural person aims at remedying the financial situation of the debtor natural person, in good faith, if his obligations do not result from the operation of an enterprise; aims at covering his liabilities to the greatest extent possible, and at discharging him of his outstanding debts"*[4].

2 Aspects of contract nature found in the procedure of insolvency of individuals

As the insolvency of individuals is essentially a collective way of recovering outstanding debts, and, given that the main source of legal relations circumscribed to the outstanding debts subject to the procedure is the contract as a type of legal deed, it is not surprising that a consistent number of contract law institutions interfere with the procedure of insolvency of individuals; the references to aspects of a contract nature are ubiquitous in Law no. 151/2015 on the procedure of insolvency of individuals.

Thus, in the very definition and delimitation of the scope of application of Law no. 151/2015 and implicitly of the insolvency procedure of individuals, the contract paradigm is used both positively, and negatively.

From a positive, inclusive point of view, Law no. 151/2015 refers to the institution of the civil contract in establishing the obligations that the debtor natural person, non-professional, is not able to carry out, and which thus enter the scope of the procedure of insolvency of individuals. More precisely, art. 4 para. 1 letter b), referring to the above-mentioned obligations, details them, specifying that they are "*obligations as contracted",* therefore their source consists in a contract[5].

From a negative, exclusive point of view, the contract as legal institution and source of legal relations is used as a reference element to delimit the scope of categories of debtors to whom the procedures provided by law are not applicable. Specifically, art. 4 para. 1 letter b) of the law excludes from the application of the insolvency procedure of individuals those debtors who have caused or facilitated their state of insolvency, intentionally or out of serious fault; for facilitating this exclusive scope, the following manifestations of will, of a contract nature, are presumed to absolutely fall into this category:

- contract, in the last 6 months prior to formulating the petition to initiate the insolvency procedure, certain debts that represent at least 25% of the total value of the obligations, except for the excluded obligations;
- undertake, in the last 3 years prior to formulating the petition, excessive obligations in relation to the debtor's estate, to the advantages that he would gain from the contract or to all the circumstances that contributed significantly to the debtor's inability to pay his debts, other than those due by him to the persons with whom he has thus contracted;
- terminate an employment contract by agreement of the parties or by resignation in the last 6 months prior to formulating the petition to initiate the procedure;

The importance of instituting the contract in carrying out the procedure is also revealed by the obligation established by art. 25 of the law on the insertion in the debt repayment plan of measures of contract nature or in connection with contract situations aimed at recovering the debtor's financial situation, with particular reference to:

- termination of contracts;
- undertaking by the debtor of certain obligations such as professional reorientation, re-employment or constitution of additional guarantees, in order to increase the income intended to cover the liabilities.

Along the same line of thought, as regards the family home, art. 26 of the law establishes, for cases when the repayment plan would establish that the real estate which is used as the family's residence is to be capitalized in order to cover the liability, there should be a preemption right *(preferably according to the law – n.n.)* in favor of the debtor on the signing of a lease contract for the place of residence or for part of it, for an amount of rent set according to the conditions of the market.

A point of utmost importance in the interference between the contract scope and the insolvency procedure of individuals is represented by the situation of the ongoing contracts, subject to art. 36 of the law. Regarding this aspect, para. 1 of the mentioned article sets the rule according to which the contracts which are ongoing on the date when the initiation of the procedure is admitted in principle are considered maintained, by derogation from the provisions of art. 1.417 of the Civil Code [6]. The sanction for failure to comply with this rule is the absolute nullity, which affects all the contract clauses stating the termination of the ongoing contracts, the deprivation of the benefit of the term or declaration of anticipated enforceability due to initiation of the procedure. In the same context, para. 2 of the same article sets the obligation that the debt repayment plan must be established for contracts that are ongoing during the procedure.

Given the already proven importance of the civil contract in the context of the insolvency procedure of individuals, it is natural that references to institutions of contract nature should also be found among the debtor's rights and obligations, and such a reference takes the form of a limitation of the debtor's right to contract new loans; such contracts may be made during the execution of the debt repayment plan only with the consent of the insolvency commission, notified by the trustee of the procedure (art. 37 of the law); also, during the procedure, only with the prior approval of the liquidator of the procedure and with the approval of the court (art. 57 of the law); and in both situations only with the purpose to settle a serious and urgent matter that endangers the debtor's life or health or the life and health of the persons that he supports.

As a natural consequence of the above, reflections of the contract paradigm are also found in the issue concerning the duties of various bodies and institutions involved in the insolvency procedure of individuals. Thus, among the duties of the insolvency commission during the execution of the repayment plan, is that of approving the contracting of new loans by the debtor (art. 38 para. 2 letter b of the law); and some of the main duties of the liquidator consist in selling the debtor's assets, under the conditions of the law, respectively in terminating certain contracts entered into by the debtor (art. 51 para. 1 letters m and p of the law). Likewise, some of the duties of the procedure trustee, that he must carry out during the execution of the reimbursement plan, include the following (art. 39 para. 1 of the law):

- monitor the sale of non-traceable assets;
- prior approval of the conclusion of deeds of disposal concerning certain traceable goods;
- prior approval of the conclusion of other contracts that may affect the debtor's financial situation and estate, except for loan agreements;
- approve, prior to notifying the insolvency commission, the contracting of new loans, according to this law.

The capitalization of the debtor's assets is another field of the procedure that involves aspects of a contract nature, an operation which is carried out through sales contracts entered into by the liquidator of the procedure, on behalf of the debtor (art. 58 para. 6 of the law). The sale of assets is made in accordance with the provisions of the Code of Civil Procedure on Foreclosure.

The issues of contract nature are also found in the context of the simplified insolvency procedure, even in the conditions of the schematic and accelerated character of this procedure. Thus, when the judgment ordering the opening of this procedure remains final, the debtor is forbidden to contract new loans. In this regard, within 15 days after the judgment ordering the opening of the simplified procedure of insolvency remains final, the insolvency commission notifies the debtor of the admission of his petition for the simplified insolvency procedure, and informs him that he has the obligation to not contract new loans for a period of 3 years after the notification (art. 69 para. 1 letter b of the law).

The same interdiction not to contract new loans also exists and continues throughout the specific terms set for the release of the debtor from his outstanding debts during the judicial insolvency procedure by liquidation of assets (art. 72 of the law):

- the term of one year after closing the procedure, applicable when the debtor covered a share of at least 50% of the total value of the outstanding debts, and the legal obligations and interdictions were complied with;
- the term of 3 years after closing the procedure, applicable when the debtor covered a share of at least 40% of the total value of the outstanding debts, and the legal obligations and interdictions were complied with;
- the term of 5 years after closing the procedure, applicable when the debtor, with all his diligences, failed to cover a share of at least 40% of the total value of the outstanding debts, but the other legal obligations and interdictions that he was subject to were complied with;

Throughout these specific terms, however, the new loans necessary to settle a serious and urgent matter that endangers the life or health of the debtor or of the persons

in his support are excepted from the aforementioned interdiction, but in this case, the insolvency commission must give its prior approval.

Finally, as at least part of the contracts carried out throughout or in the context of the insolvency procedure of individuals are of a solemn nature, the references to the contract legal operations are also found in relation to the involvement of the notary public in the procedure; therefore, on the drafting of the notarial deed related to the signing of a contract, the notary has the obligation to check in the Insolvency Procedure Report whether the parties have the capacity of debtor in the procedure of insolvency, and, if the case may be, the notary must ask the debtor to submit documents that would prove the approvals stipulated by the law (art. 72 of the law).

3 Conclusions

Analyzing the content of Law no. 151/2015 on the insolvency procedure of individuals, it may be acknowledged that the impact of the contract institutions is substantial, and references to aspects of a contract nature are found in almost every module of the procedure.

In these conditions and as any aspect that interferes with the estate of a natural person is also interesting in terms of its manner of development and in terms of effects, it is but natural to analyze the mechanism by which the new law approaches and integrates contracts as legal deeds *inter vivos*[6].

The main legal institutions of contract nature involved in the insolvency procedure of individuals, subject to Law no. 151/2015, concerns either aspects of general contract law, or special aspects regarding some civil contracts[7] as legal institutions per se.

From the latter perspective, the predominant references regard the sale contract and the lease contract, as legal deeds with distinct identity and particular relevance in the matter.

As regards the sale contract, its relevance to the insolvency procedure of individuals is limited to the characteristics of a synallagmatic contract, from its onerous and translational point of view. Thus, the synallagmatic character of a sale contract supposes the reciprocity and interdependence of the obligations and implies the possibility of intervention of the termination, which may have an impact on the certainty of the debtor's obligations. On the other hand, the onerous nature of the sale contract may affect the value and extent of the debtor's rights and obligations, and its translational nature may call into question the extent of his estate.

The lease contract, on the other hand, impacts by the character of a contract with successive execution, but also by its specificity of social security of the debtor, by insuring the living space, thus ensuring the satisfaction of a fundamental need.

We must not forget the employment contract either, an institution of labor law, through which the debtor usually insures his income and which he cannot terminate abruptly without suffering negative consequences, including the exclusion from the application of the insolvency procedure of individuals.

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[4] C. Pălăcean, *Quoted works*, in Phoenix Magazine no. 1/2018, p. 7.

[5] According to art. 4 para. 1 letter b) of Law no. 151/2015: "*(1) The procedures provided by this law will apply to the debtor natural person whose obligations do not result from the operation by him of an enterprise, according to art. 3 of the Civil Code, and which: ... b) is in a state of insolvency, according to art. 3 point 12, and there is no reasonable probability of becoming, within a maximum period of 12 months, able to fulfill his obligations as contracted, while maintaining a reasonable standard of living for himself and for the persons in his support; the reasonable probability is assessed by considering the total*

amount of the obligations in reference to the income earned or foreseen to be earned compared to the debtor's level of professional training and expertise, as well as to the traceable assets held by him;".

[6] According to art. 1.417 para. 1 of the Civil Code, *"The debtor is deprived of the benefit of the term if he is in a state of insolvency or, as the case may be, of insolvency declared under the law, as well as when, intentionally or out of his severe fault, reduces by his deed the guarantees constituted in favor of the creditor or does not constitute the promised guarantees".*

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The correlation between categories of shares and type of assemblies of the issuing company

Târșia A.C.

Law Faculty, University "Lucian Blaga", Sibiu (ROMANIA)
E-mail: andreea.tarsia@gmail.com

Summary

The profusion of the activities of joint stock companies in the economies of the Member States and their strategy to expand their business beyond the borders of their national territory, determines the formation of a certain level of the registered capital and, in order to protect the market, the law[1] imposes a minimum level of the capital, forcing trading companies, from their establishment, to embody in the constitutive act, the *number and nominal value of the shares*, leaving them the freedom to choose the *type and form* of the shares and to launch *issues* with various shares.

Moreover, the law recognizes the shares' quality of credit titles issued "in bulk", it groups them from the date of their issuance by *categories*, *types* and *species* and makes them subject to particular legal rules, from the time of their creation through the constitutive act, continuing with their entry into the legal trading and ending with their exit from this trading.

In relation to the types and categories of shares, the law regulates various legal relationships born both inside and outside the issuing company.

Thus, within the internal structure of the company, the holders of ordinary shares are reunited in the general assembly, which is placed in a position of supremacy, not only because of the subordination of the management and control bodies, but also due to its deliberative powers, for which shareholders do not answer and are not held accountable before anybody.

With regard to the deliberative powers of the general assemblies of the holders of ordinary shares, which grant their *owners equal rights*, the sole limitations concern the observance of the rights of the registered creditors, the protection of the rights of the shareholders against the will of the majority and the observance of the equal treatment of all shareholders.

[1] We are referring to the provisions of Law No. 31/1990 on trading companies both in its basic form, published in the Official Monitor no. 126-127/17 November 1990, as well as in the subsequent versions.

On the other hand, the legislator regulates the company's possibility to form categories of shares to which *different rights* are attached and, in relation to these shares, it organizes within the same company, other assemblies, consisting of the holders of the shares conferring different rights.

Given the foregoing conditions, the herein analysis aims to elucidate the reason for which the decision of the general assembly, having as object operations that affect rights of the shareholders belonging to different categories of shares, must be approved by the holders of each category of shares.

To this end, the study will focus on answering the following questions: what are the categories of shares issued by trading companies, what is the importance of their identification, what is the impact of the categories of shares on the organization of general assemblies in the issuing company and to what extent do the decisions made by the general assemblies of the shareholders of each category interfere?

Keywords: trading company, ordinary shares, special shares, ordinary general assemblies, special assemblies.

1 Categories of shares issued by trading companies

Following the provisions of Article 8 letter [f and f^1) and of Article 94 paragraph (1) and (2)] we can identify four reference premises in classifying shares, namely:

- through the constitutive act, the company forms shares, which are grouped in the category named by the legislator as "ordinary";
- regardless of the category they belong to, all shares issued by the trading company must be equal in value;
- the shares pertaining to the same category, grant equal rights to the holders of that category;
- the rights conferred by the shares grouped into one category, differ from those conferred by the shares that form another category.

Apart from these coordinates, we must consider the types of shares and different stages or hypostases in which they find themselves and are subject to particular rules of interest to our analysis.

Generically, shares can be classified into two basic categories, and the essential criterion that separates them is the different rights conferred to the holders.

Specifically, the law expressly distinguishes between *ordinary* or *common* shares and *preferred* or *special* shares, and in order to set apart these categories, it circumscribes the rights attached to the shares and, based on this criterion, it separates them from others whose content represents different rights and/or benefits than those granted by the first.

Thus, Article 95 of Law no. 31/1990 sets apart the ordinary shares from the preferred shares, as the latter lack the right to vote in the general assembly of the shareholders of ordinary shares[2].

[2] On grounds of Article 95 paragraph 1 of Law no. 31/1990: "*Preferred shares which benefit of priority dividends without the right to vote may be issued and confer to the holder: a) the right to a priority dividend out of the distributable profits obtained at the end of the given financial year, before*

From this point of view, any series of shares with identical and autonomous rights form a category, and in the absence of a specific right, the share or shares are excluded from the category of those with identical rights.

We must underline that, in order to group the shares into the two categories, it is irrelevant how one or another of the rights conferred by the shares is exercised, in which aspect, the "*freely transferable"* shares do not differ from those whose "*transmission is limited"* by the constitutive act or by law, they representing together a category. Following the same line, the "*cash shares"* do not constitute a separate category from the "*contribution shares"*, being different from each other only in *type* and not by the diversity of the rights attached to them.

1.1 *Ordinary/common shares*

The quasi-unanimity of provisions of Law no. 31/1990 are devoted to ordinary shares which, regardless of their *type* or the *legal status* in which they found themselves, "*grant equal rights to the possessors"* (Article 94 paragraph 1, 2nd thesis).

This wording expresses the rule of principle to which we will resort in examining the other categories or types of shares.

In a nutshell, it is ascertained that, depending on the benefits conferred, the *ordinary or common shares* are delimitated, in several respects, from the *special or preferred shares,* as we will reveal in the following lines.

A common share entitles to: the right to vote in the ordinary and extraordinary general assembly of the company; the shareholder's right to control and be informed on the management and the accounts of the company; the right of pre-emption to the subscription of new shares issued by the company in the case of the increase of the registered capital; the rights to dividends calculated as part of the profits annually distributed by the general assembly of shareholders; the right to reimbursement of the due quota in the case of the company's liquidation.

Therefore, regardless of their materialized or dematerialized form, of the registered type, of being or not listed on a capital market, the shares that grant the above-mentioned rights, are common shares.

The common shares confer *variable dividends*, as they are calculated based on the company's profit, recorded at the end of the financial-accounting year.

When the trading company has also issued preferred shares, the payment of the dividends due to common shares will be performed following the payment of the dividends related to preferred shares.

For this reason, *common shares are also called variable-income shares,* and, on the other hand, *preferred shares are also called fixed-income shares*.

Last but not least, the holders of this category of shares meet in the ordinary or extraordinary general assembly of the company, a deliberative body subject to the legal regime established by Law no. 31/1990.

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any other payments; the rights recognized to shareholders of ordinary shares, including the right to attend in the general assembly, except for the right to vote".

1.2 *Special/preferred shares*

According to Article 94 paragraph (2) of Law no. 31/1990 "*Certain categories of shares which confer **special rights** to their holders may still be issued…"* (s.n. A.C.T.).

Thus, in addition to the common shares, the company may issue various other categories of shares, endowed with all the rights attached to ordinary shares, to which is added, or excluded, one of the known rights or others, such as privileges or preferences granted to investors who are not interested in exercising administrative rights within the company.

From this point of view, the common shares represent the *legal genus,* and the special or preferred shares represent the *legal species.*

Indeed, the special shares are those which grant the shareholder the rights resulting from a common or ordinary share, to which certain special rights and specific prerogatives that sets them apart from the ordinary shares are added or excluded.

The "*preferred"* shares may give their holders, either priority over a fixed quota of dividends, without the right to participate in the life of the issuing company, or double or multiple voting rights in the general assembly of the company.

Depending on the rights they grant, special shares may be grouped into two classes in which the same legal rules apply, namely:

- special shares that grant their holders *priority patrimonial rights* but lack the most important non-patrimonial right, that is the right to vote in the assembly of the shareholders of common shares;
- special shares to which a *plural right to vote* is attached, in addition to the other rights granted by the common shares.

Therefore, through the constitutive act, categories of shares may be formed, granting privileges and/or advantages and, at the same time, limiting the exercise of other rights. The sole privilege that cannot be attributed by the preferred shares is the exemption from the obligation to make the due payments, in order not to issue and release shares which have no correspondence in the real registered capital, constituted based on contributions[3].

Depending on the privileges or advantages granted, the law refers to *legal types* or *subspecies* of special shares, namely: non-voting shares with priority dividends; multiple voting shares; restricted voting shares, etc.

For the sake of the analysis, we outline that only certain types or species of shares organize the holders in separate assemblies, while others do not have this potential, although they provide certain advantages to the holders (exempli gratia: shares with auxiliary benefits).

Different legal rules are established for each type of share, mainly describing the organizational framework for the exercise of rights by the holders.

1.2.1 Non-voting shares with priority dividend

The constitutive act or, depending on the case, the law, identifies groups of shares that grant certain privileges and, at the same time, limit the exercise of other rights.

[3] Also called fictious shares whose issuance and release are criminally punished.

Each of these groups of shares forms a category.

Thus, a first category is formed by the shares with *priority dividend* and without the *right to vote*[4]. These shares, also called "*gain shares*", may not exceed 1/4 of the registered capital and must have the same nominal value as the ordinary shares.

As the name suggests, this type of shares gives holders a *priority right* to the distribution of benefits in the form of dividends, in relation to other shares.

The priority right takes effect on the issuance date of the preferred shares, when the percentage to be taken from the net profit is established.

The amount of the *priority dividend* can be set in various ways (*for exampl*e: 4% up to 6% of the nominal value of each share), the established percentage will be collected with priority from the company's net profit, and then, another percentage of the common shares will be distributed from the residual part of the profit.

Furthermore, it is also possible to opt for the assignation of a percentage of 6% of all distributable profits, or a priority right to a fixed percentage of the net profit cumulated with the right to collect, in full or in another percentage, the dividends of ordinary shares and, moreover, the dividends that were not paid in the current year can even be carried over to the next year, and this gives rise to cumulative calculations.

It is worthy of mention that from nowhere does it result the manner in which should be treated the relationship between the provisions of Article 95 of Law no. 31/1990 regarding the priority dividend due to special shares and those of Article 32 on the right to a quota which cannot exceed 6% of the net profit, that may be granted to the founders of a company for a period no longer than 5 years from the date of the company's setting up.

Nevertheless, the silence of the law must not generate a conflict with the interests of the two categories of shareholders, especially since the final part of Article 95 paragraph (1) letter (a) sheds light on the matter, setting up that the priority dividend is due "*before any other payments*". This means that the founders of a company set by public subscription will be able to benefit from the quota of up to 6% of the net profit *remaining after the distribution of the priority dividend*.

Under the law, *only shares are preferential, shareholders are not.* Irrespective of whether they are created at the date of the company's setting up or afterwards, the non-voting shares with priority dividend are intended for subscription by any of the shareholders, and it is unconceivable for them to only be able to be subscribed by one of the shareholders, by breaching their equality of legal treatment. The only restriction provided by the legislator in acquiring non-voting shares with priority dividend concerns a certain category of persons working within the company, that is: *the administrators, managers, or respectively, the members of management and of the supervisory board, as well as the company's censors,* who *cannot be holders of non-voting shares with priority dividend* (Article 95 paragraph 3 of Law no. 31/1990).

The law establishes an incompatibility between the quality of holder of shares with priority dividend and the quality of representative, administrator or censor of the issuing

[4] On grounds of Article 95 paragraph 1 of Law no. 31/1990: "*Preferred shares which benefit of priority dividends without the right to vote may be issued and confer to the holder: a) the right to a priority dividend out of the distributable profits obtained at the end of the given financial year, before any other payments; the rights recognized to shareholders of ordinary shares, including the right to attend in the general assembly, except for the right to vote".*

trading company, the reason for the restriction being to prevent the persons who manage and administrate the company or who control the company's administration and registered patrimony, to cumulate these attributions with priority patrimonial rights and, in this way, to cause vulnerabilities, or even prejudicial states to the company and to the other shareholders.

The rule is also applicable in the event when, a legal person has been appointed or elected as social administrator, according to Article 153^{16} of Law No. 31/1990, understanding that, in such a situation, the restriction of acquiring the shares with priority dividend concerns both the legal person and the natural person designated as its representative.

Stepping forward to the following provision we find that, although the acquisition of special shares is prohibited "*intuitu personae*", as an exception, it is allowed to violate this prohibition, as the extraordinary general assembly may decide to *convert the gain or preferred shares* into ordinary shares and vice versa[5], so that, at least in one of the cases, the ordinary shares of the persons who administer and manage the company, become preferred shares.

Such a situation reflects the complexity of corporate relations, by virtue of which the rights and powers attached to shares bring the holders together in the general assembly where they are exercised individually, with an eye to take all measures related to the company, its subordinate internal bodies and to the conduct of its representative directors or censors.

1.2.2 Multiple voting shares

The type of special shares that entitle holders to a higher number of votes are multiple voting shares.

The issuing company may establish in its constitutive act the number of votes granted for a share held (e.g.: 2 votes), this faculty being recognized by Law no. 31/1990, according to which, unless otherwise provided in the constitutive act, each share paid for, entitles the holder to one vote in the general assembly" (Article 101 paragraph 1).

Furthermore, on grounds of Article 120 of the same law, "*the shareholders exercise their right to vote in the general assembly, proportionally to the number of shares they hold."*

Therefore, derogations may be made to the principle according to which each share fully paid for, entitles the holder to a single vote, and the number of votes is proportional to the number of shares hold, that is, a share paid in full may grant *a higher number of votes.*

It is worthy of mention that, a share may *confer the right to a multiple vote* only if the constitutive act provides such benefit or if, during the operation of the company, the extraordinary general assembly decided such a proportion.

In other words, taking advantage of this faculty, the company may establish a *right to a double vote* for each fully released share and/or may limit the exercise of this special right for certain persons.

[5] According to Article 95 paragraph (5) of Law no. 31/1990.

Usually, the granting of multiple voting is connected to the company's intention to reward a certain category of shareholders, reason for which, the multiple voting is in fact a *loyalty bonus* granted personally.

This right facilitates the establishment of a "blocking" minority in the company's deliberations, thus reducing the decision-making power of the shareholders who represent the majority in the registered capital. Having this characteristic, multiple voting shares[6] can be reserved for shareholders of the same nationality or granted to certain shareholders, in connection with certain corporate privatizations.

Last but not least, the granting of the right to a multiple vote (usually the right to a double vote), creates the possibility that, through a small number of shares, control may be exercised over the stable administration and management of the company's branches, which in fact, is the reason for their issuance. Being granted "*intuitu personae",* the right to a multiple vote will cease if the shares are transferred to another person that does not meet the requirements stipulated by the company by means of the constitutive act.

If the company issuing such shares is reorganized by merger or division, the shareholders will retain their rights to a multiple vote, provided that this hypothesis is also stipulated in the constitutive act.

1.2.3 Restrictive voting shares

The issuing company may, by means of its constitutive act, limit the number of votes belonging to shareholders who possess more than one share (Article 101 paragraph 2), and the law forbids the exercise of the right to vote associated to the shares for which due payments were not made.

The possibility of issuing restrictive voting shares is materialized in setting a reduced number of votes that may be exercised within the company's general assemblies (exempli gratia: for 5 shares, 3 votes).

This subspecies of special shares, as opposed to double or multiple voting shares, is created by the company for similar requirements, limiting the number of votes assigned to shareholders disinterested in the administration and management of the company, whose only concern is to collect dividends.

"De lege lata" no restriction is imposed in issuing restrictive voting shares, therefore, through its constitutive act, the company may recognize for this subspecies of preferred shares a right to priority dividends, as a compensation to their holders for the restriction of their right to vote.

As in the case of other special shares, the subscription or acquisition of restrictive voting shares will be done in compliance with the principle of equal treatment between shareholders, the aim being to avoid the "leonine pact".

Lastly, if the company issued multiple or restrictive voting shares, the deliberations of the general assembly must be taken in accordance with the number of votes allowed to the holders, otherwise the company's decisions being considered null.

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[6] These shares must be granted to all the shareholders that meet the conditions provided by the constitutive act and cannot be assigned only to some of the shareholders. Within the legislation of the EU Member States, "*double voting shares*" are regulated in order to preserve the interest of shareholders in relation to the company's nationality or that of the residents of a Member State.

2 The impact of categories of shares on the organization and decision-making process within the general assembly of shareholders

2.1 *The general assembly of shareholders of common shares*

The law imposes a certain interconnection of the rights granted to the holders of the shares forming different categories, and these categories influence the manner in which the internal structure of the issuing company is formed.

Indeed, as a rule, the operation of a company is ensured by the deliberative body, the registered patrimony management and company's administration body and the *control body in registered patrimony management.*

The deliberative and management body is the general assembly of shareholders, in its two forms, ordinary and extraordinary.

The ordinary general assembly is endowed by law with attributions that ensure the settlement of all current problems related to the management of the patrimony and the company's administration, being possible for some of the attributions of the general assembly to be passed over to the social administrators, except for those related to the conclusion, exercise and termination of the mandate contract of administrators, censors and auditors.

The extraordinary general assembly decides on matters that concern the essential elements of the company's constitutive act and even on its existence, the legality of its decisions being related to a higher deliberative quorum and of presence.

In all cases, the general assembly brings together the *shareholders of common shares, in order to decide, based on real grounds, on all issues related to the registered capital, ensuring the parity of treatment* of all shareholders and a consistency between the value of the registered capital, the value of the real capital and the number and value of shares.

Nevertheless, for the events when the company decides to issue, in addition to ordinary shares, other categories of shares, the legislator intervenes to organize the shareholders of special shares in special assemblies and to balance the relationships between the assembly of shareholders of ordinary shares and that of the shareholders of special shares.

The existence of this balance is verified both outside and inside the issuing trading company and is highlighted by the legal mechanism of interconnecting the decisions of the general assemblies of the holders of the shares belonging to different categories.

The way in which the special assembly of shareholders is organized and functions, is determined by the privilege or preference attached to the shares from the same category as we will show further on.

2.2 *The special assembly of shareholders of preferred shares*

According to the law, the category individualizes a group of owners of shares with identical rights, in which respect, Article 96 of Law no. 31/1990 gathers in assemblies "*shareholders of each category of shares"*, to which "*any holder of such share"* may attend. This legal provision is also incidental with regard to the other categories of shares, created by the company on grounds of Article 8 paragraph (1) letter (f), 2nd thesis of the law.

Therefore, the categories of shares that are endowed with particular rights, such as the right to *priority dividend*, *double or multiple voting, restrictive voting*, group their holders in just as many *atypical forms of special assemblies*, organized by law in order to ensure an effective protection to the rights attached to shares or conferred in compensation.

As the categories of shares face two or more groups of shareholders, gathered in general assemblies of the same company[7], the legislator regulates the interdependence between the decision-making power of the general assembly, consisting of holders of ordinary shares, and the decision-making power of the assembly of holders of *special shares*.

Thus, according to Article 116 paragraph (1) of Law no. 31/1990, "*The decision of a general assembly to amend the rights and obligations regarding a certain category of shares shall not produce effects unless it is approved by the special assembly of the shareholders belonging to the same category".*

On the other hand, the validity of the decisions of the general assembly of holders of special shares is subject to the approval of the general assembly of the holders of ordinary shares, based on Article 116 paragraph (3), according to which "*The decisions initiated by the special assemblies shall be subject to approval by the relevant general assemblies".*

It is implied that mutual approvals should be obtained from the two deliberative bodies of the company only if the decisions concern issues that can influence the rights attached to the shares held by one or another category of shareholders.

Nevertheless, the dissenting shareholder in the general assembly of holders of ordinary shares has procedural legitimacy to seek in court the annulment of the decision of the special general assembly, by means of which it was decided that the holders of shares with the right to priority dividends, have the possibility to collect with priority and cumulatively, dividends associated to the years in which they were not distributed, invoking the deprivation of his right to dividends caused by the risk of depletion of the profit, following priority and cumulative payment[8].

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[7] Although the law does not expressly provide, the special general assembly which groups the shareholders of preferred shares, is a body of the company, along with the general assembly of the shareholders of ordinary shares.

[8] Recently, the High Court of Cassation and Justice has decided in the interpretation and application of the provisions of Article 132 reported to Article 116 of Law No. 31/1990 that the decisions adopted by the special assembly of shareholders may be challenged in court, with an action for annulment (Decision no. 7/20.01.2020).

Coming back to the situation of incompatibility between the quality of owner of the shares with priority dividend and the quality of representative, administrator or censor of the issuing trading company, both the acquisition by the representative shareholder or proxy of preferred shares and the holding of special shares by one or more shareholders subsequently appointed by the decision of the general assembly in the position of representative or proxy of the company, will also be clarified by adopting the decisions of the two types of assemblies.

Based on the current provisions of the law, a series of measures can be taken to ensure the restoration of legality, compensation for those harmed and punishment of those guilty of violating the legal rule, where necessary.

In a first solution, we must resort to the provisions of Article 119 paragraph (1) of Law no. 31/1990 according to which the administrators are obliged to convene immediately the general assembly upon the request of the shareholders representing *even less than 5% of the registered capital,* regardless of whether the constitutive act sets a higher quota.

In the event when the administrators, having personal interests, refuse to convene the extraordinary general assembly, any of the shareholders can formulate a request before the court at the company's registered office, to designate the shareholder who will chair the assembly.

Apart from this, the administrators who *refuse to convene the general assembly, although the convocation is mandatory according to the law, commit the crime provided by Article 275 paragraph (1) letter b thesis I of Law no. 31/1990.*

These measures are justified, as the mandatory provisions of Article 95 paragraph (3) of Law no. 31/1990 prevail over the statutory clauses, and the non-observance of the legal interdiction regarding the acquisition of the preferred shares should lead to the absolute nullity of the subscription or of the acquisition of the shares with priority patrimonial right.

As the nullity of the subscription is not beneficial to the company, the ordinary general assembly of the holders of ordinary shares, may invoke the violation of the legal prohibition and decide to revoke the proxies and/or to promote the action for liability against these persons, for damages caused by exercising the rights conferred by the preferred shares or held against the law.

It is implied that, in the event when the action for liability is decided, the mandate of the administrators and that of the censors ceases "ope legis", the provisions of Article 155 paragraph (4) of Law no. 31/1990 being applied, in equal measure, with the amendment that, in what concerns the responsibility of the censors, the deliberation must be taken in the quorum conditions provided for the extraordinary general assembly, as expressly required by Article 166 paragraph (2).

If the representatives also hold ordinary shares, their right to vote in the general assembly in which it is decided to revoke and/or promote the action for liability is forbidden to them, as their personal interest is in an obvious conflict with that of the company.

In this situation, the law sets forth the obligation "not to do" or "to abstain" from voting, and its observance is ensured by *Article 275 paragraph (1) point 1 of Law no. 31/1990*, according to which *the administrator's act of voting, directly or indirectly,*

in the general assemblies having as scope a problem in which his personal interest is in conflict with that of the company[9], represents a crime.

Given the consequence that would affect the registered capital, we appreciate that only "*extreme ratio*" will the general assembly be able to decide *to cancel the shares* acquired by violating the legal prohibition by the shown persons.

However, we notice the imperfection of the regulation contained in Article 95 paragraph (3) of Law no. 31/1990, since the sanctions applied *post factum* do not quickly remove the inconveniences resulting from such a prohibited operation, concluded directly or indirectly by the shown persons.

We believe that, a future regulation, must establish these persons' obligation to alienate the preferred shares, and, in case of refusal, to establish the *company's obligation and not its faculty*, to *turn them into ordinary shares*, or, as the case may be, it must establish *the interdiction to transform* the ordinary shares held by the mentioned categories into preferred shares, during the entire period of time in which they hold the quality of representative, administrator or censor of the issuing trading company.

To this end, *de lege ferenda* it is also necessary to recognize the right of any owner of ordinary shares to request the court, in an urgent procedure, either to establish the nullity of the subscription of special shares by the incompatible persons, those by which the shares are removed from the patrimony of those persons, or *to directly turn* the preferred shares into ordinary shares, forcing those that violated the legal provision to compensation.

An apparently unusual situation of preferred shares issuance through the constitutive act is the one in which the company successively issues categories of special shares, and the conversion of ordinary shares into preferred shares and vice versa is a way of "issuance" by amending the constitutive act.

The effects of such a measure are the subject of the herein analysis.

2.3 The company's assemblies and the adoption of the decisions to convert special shares into common shares and vice versa

Normally, preferred shares ***may be converted*** into common or ordinary shares.

However, the endowment with a certain different right can also be decided in relation to ordinary shares. The hypothesis of the transformation/conversion of shares concerns the internal structure of the company that previously issued shares endowed with different rights, and the preference right attached to a group of shares formed the category of special shares, bringing together the shareholders of this category in the special general assembly, the general assembly of shareholders of common shares operating separately.

According to Article 113 paragraph (1) letter (j) of Law no. 31/1990, the decision on the conversion of shares from one category into another, belongs to the extraordinary

[9] We emphasize that the exercise of one's vote within the criminally sanctioned conflict of interests does not refer to the situation provided by Article 1443 of Law no. 31/1990 in which the deliberation has as object "*the offer of shares or bonds of the company for subscription to an administrator or to the persons mentioned in paragraph* (2)".

general assembly of shareholders, which must deliberate under the requirements of quorum and majority set by Article 115, unless the constitutive act provided a different quorum, even unanimity.

Since the decision to convert special shares into ordinary shares and ordinary shares into special shares might have the consequence of altering the rights[10] held by the holders of one of the two categories of shares, the law requires the approval of the operation by both the extraordinary general assembly of shareholders of ordinary shares and the extraordinary general assembly of shareholders of special shares.

Without the approval of both deliberative bodies, neither the decision of the general assembly of the holders of common shares nor the decision of the general assembly of the holders of preferred shares will produce legal effects.

3 Conclusions

The foregoing considerations show the rules or principles based on which we can identify the intrinsic correlation between the categories of shares, the types of general assemblies of shareholders, the ensuring of the equal treatment of shareholders and the protection to the rights of shareholders of different categories.

A first conclusion is that the special right attached to shares represents the criterion that qualifies the group of shares in the category.

Consequently, when the special right lacks in a group of shares, we are not in the presence of a category, whereas the group of shares endowed with the same right forms a category. Therefore, we can identify as many categories as there are groups of shares, and the shareholders belonging to a category of shares are gathered, by Law No. 31/1990, in an assembly, being possible to organize as many general assemblies as there are categories of shares.

Secondly, in the event when several categories of shares exist, the obligation to vote on each category of shares rests with the issuing company, if the decision of the general assembly concerns transactions affecting the rights of the shareholders of those categories.

The responsibility for convening ordinary and special general assemblies, for the compliance of the decisions with the constitutive act or with the law and for the existence of the majority or unanimity imposed by law, rests with the management body, but also with the control body of the issuing company.

Thirdly, if the company, through the decision of the general assembly, decides to create several new special shares, besides the existing ones, the previous relationships between the categories of shares must be put up for the debate of the general assemblies, the validity of the deliberation being recognized if the rights attached to the previously issued special shares remain unaffected.

Last but not least, in case of issuing several subspecies of preferred shares, which may give rise to conflicting situations between the assemblies of the holders of the categories of shares that claim the quality of "primus inter pares", the holders of the

[10] We do not refer to a damage in an absolute meaning, but in a relative one, in relation to the rights attributed by the shares subject to conversion (E.g.: when following the conversion, the percentage of priority dividends attached to the preferred shares would be reduced).

category of shares that meets the criteria expressly stipulated in the company's constitutive act, will enjoy priority and equal treatment.

Thus, the identification of the category to which the shares belong and of the rights conferred by each category of shares is of a paramount importance, highlighted by the connection between the different bodies of the same company.

Under all aspects, Law No. 31/1990 represents the common law applicable (directly or subsidiary) to the special, ordinary or extraordinary general assembly.

A brief overlook at the evolution of technical unemployment in pre- and post-December Romania

Lungu L.

Assist. Ph.D. Faculty of Law, "Titu Maiorescu" University of Bucharest (ROMANIA)
E-mail: luizamihai@volonciu.ro

Abstract

Technical unemployment, a form of suspension of the individual employment contract at the initiative of the employer is perhaps the most discussed, disputed and used measure taken during the pandemic with COVID -19, one that led to numerous legislative changes both in the field of labor law and on fiscal land.

In order to observe whether the way in which the legislator perceives technical unemployment today and its use are really legitimate, we must also analyse the historical evolution of the provisions of the institution of technical unemployment, how it was and is perceived by employers and authorities also determined by the current global crisis, in order to see what this notion is heading towards in the near future in the field of labor law.

The central idea of the paper aims to analyse this notion especially in terms of legislative changes during the state of emergency and the potential vice of unconstitutionality of current provisions, after reducing the negative effects of the Pandemic with COVID-19.

Keywords: technical unemployment, suspension, COVID-19, technical unemployment benefit

1 Technical unemployment. Notion and regulation

Technical unemployment, today – case of suspension of the individual employment contract at the initiative of the employer, did not attract the suspension of the contract in the old regulations of the Labor Code, but was another form of remuneration (ie, salary), but not for work, but for the obligation of remaining at the

disposal of the employer (state) during the period when the activity was interrupted for reasons not related to employees.

In this sense, art. 86 of the Labor Code of November 25, 1972 – Law no. 10/1972[1] provided that, "*in exceptional cases, when for technical or other reasons the activity was interrupted, employees will receive 75% of the individual basic salary negotiated, with the condition that the cessation of the work did not occur through their fault and if during all this time they remained at the disposal of the unit".*

Later, in post-December Romania, although the provision of the above-mentioned Labor Code remained unchanged, the texts negotiated in collective labor agreements at national level enriched the notion to be easier to put into practice, especially in the context of privatization and existence of many employers compared to the previous socialist period.

Thus, for example, according to art. 51 paragraph (3) of the Collective Labor Agreement at National level Registered at the Ministry of Labor and Social Protection under no. 53,225 of March 10, 1993 provided that: "*In exceptional cases, when for technical or other reasons, the activity was interrupted, the employees will receive 75% of the individual basic salary they had, provided that the cessation of work was not due to fault. and if during all this time they remained at the disposal of the unit. Negotiations at the level of the unit or institution will establish concretely the way of achieving the provision to remain at the disposal of the unit, present inside the unit waiting for the resumption of the activity or staying at home, where they can be summoned by the unit".* Furthermore, technical unemployment is not seen as a suspension by the authorities, but is included in the chapter on Payroll, with no direct reference to the suspension of employment relationship.

The provisions are maintained successively in the collective agreements at national level, until they cease to be applicable or, as the case may be, the provisions are repealed and of course included as a form of suspension of the individual employment contract in the current Labor Code, respectively Law no. 53/2003 – republished with subsequent amendments.

It is true that in the provisions of art. 52 of the current Labor Code states that technical unemployment is a cause for suspension of the individual employment contract, which is why the employee does not perform the work and, consequently, is not properly remunerated for that period. However, the employee receives an allowance of 75% of the basic salary corresponding to the job held (according to art. 53 of the Labor Code)[2] for the period during which he remains at the disposal of the employer.

Thus, this form of suspension is atypical, given that, although he does not perform activity, the employee receives an allowance from the employer's salary fund (*ie, and not from the state budget*), and the "*consideration*" for this allowance is represented the fact that during the reduction and/or temporary interruption of the activity, the employees are at the disposal of the employer, he having at any time the possibility to order the resumption of the activity and therefore the termination of the suspension. Therefore, even if there is no question of a "*salary"* received in the true sense of the word, in the absence of employment, the obligation to pay this allowance is born of the correlative "*remaining at the disposal of the employer*"[3] during the suspension of employment.

2 Technical unemployment in the context of the COVID Pandemic-19

For many years, employers resorted to the measure of technical unemployment when it was determined by technical reasons (for example, damage to a device on which several employees were working) which led to the temporary interruption of production and therefore the activity of the employer.

Recently, however, in the context of the COVID-19 pandemic, employers, having the activity affected by the measures imposed globally by the authorities in order to limit the spread of the virus, considered technical unemployment as a way to maintain employees' jobs and avoid layoffs. Thus, in the harsh conditions of affecting the economy but also to avoid "*mass*" layoffs or even disputed suspensions of employment without payment of any compensation, the Romanian state adopted solutions to maintain employment and offered the benefit of support from the state budget of technical unemployment benefits offered by the employer during the state of emergency.

Thus, OUG no. 30/2020 for the amendment and completion of some normative acts, as well as for the establishment of some measures in the field of social protection in the context of the epidemiological situation determined by the spread of SARS-CoV-2 coronavirus, as they were amended by OUG no. 32/2020[4], established a way for employers to benefit from the state's settlement of benefits granted during the suspension of the individual employment contract for reasons related to the COVID-19 Pandemic.

The text of the Ordinance has been amended several times since its publication in the Official Journal of Romania on 21.03.2020 and until now. As an idea of principle, by OUG no. 30/2020, a benefit was established for employers in this difficult period and from an economic point of view.

Although at first, in the first published form of the Ordinance, the way to obtain this "aid" from the state was complicated and sometimes confusing, given that employers were required to obtain such certificates to prove the impossibility of continuing the activity because of COVID-19 and also to fall into certain categories, such as a) to interrupt the activity totally or partially based on the decisions issued by the competent public authorities according to the law, during the state of emergency declared and to hold the certificate of situations emergency issued by the Ministry of Economy, Energy and Business Environment, provided in art. 12 of the annex no. 1 to the Decree no. 195/2020 regarding the establishment of the state of emergency on the Romanian territory; or b) reduce their activity as a result of the effects of the COVID-19 epidemic and not have the financial capacity to pay all their employees' salaries. In this version, the employers could benefit from the payment of the indemnity provided for at most 75% of the employees who have individual employment contracts active at the date of entry into force of the Ordinance.

The text was amended shortly by OUG no. 32/2020 and the essential condition according to which the employees of an employer can benefit from the special legal provisions is only that the employers reduce or temporarily interrupt the activity totally or partially as a result of the effects of the SARS-CoV-2 Coronavirus epidemic, during the declared emergency state, according to a statement on the employer's own responsibility.

Therefore, any employer who has decided at the level of his Company that it is necessary to interrupt/reduce the activity as a result of the pandemic with COVID-19 and as a consequence, has ordered the suspension of the individual employment contract pursuant to art. 52 para. (1) lit. c) of the Labor Code for the employees affected by the interruption/reduction of the activity, will benefit from the coverage of the technical unemployment indemnity from the unemployment insurance budget, based on a declaration. Thus, the cumbersome procedure of the amendments in the Romanian Parliament of the legal texts was abandoned, following that during the state of emergency these provisions of the Ordinance will be applied.

3 The benefit for technical unemployment

However, a problem, in addition to the procedural aspect previously seen, may be subject to interpretation in the application of law, respectively regarding the capped allowance received by the employee during the suspension of his employment contract to reduce/interrupt the employer's activity, based on art. 52 para. (1) lit. c) of the Labor Code.

In principle, following the general provisions of the Labor Code, during technical unemployment the employee benefits from an allowance paid from the salary fund by the employer and whose value cannot be, in principle, less than 75% of the employee's basic salary[5]. Thus, at a theoretical level, the employer who is obliged to introduce the unemployment measure must pay this indemnity, at the minimum level provided by law, according to art. 53 para. (1) of the Labor Code, but provided that the individual or collective labor contract at the level of the employer does not provide a higher value of the allowance, in which case the employer will have to pay the higher amount of the allowance.

However, OUG 30/2020, which in theory comes to provide social protection measures according to its preamble, regulates this "***specific***" situation of technical unemployment during the state of emergency and in the context of the COVID-19 Pandemic provides in art. XI paragraph (1) that "*during the state of emergency established by Decree no. 195/2020 regarding the establishment of the state of emergency on the Romanian territory, for the period of temporary suspension of the individual employment contract, at the initiative of the employer, according to art. 52 para. (1) lit. c) of Law no. 53/2003 – Labor Code, republished, with subsequent amendments and completions, as a result of the effects produced by the SARS-CoV-2 coronavirus, the allowances that benefit employees are set at 75% of the basic salary corresponding to the job held and are borne from the unemployment insurance budget, but not more than 75% of the average gross earnings provided by the Law on the state social insurance budget for 2020 no. 6/2020. "*.It is thus observed that the technical unemployment indemnity, granted in the light of the provisions of art. XI of GEO 30/2020 *is capped at 75% of the average gross earnings provided by the Law on the state social insurance budget for 2020 no. 6/2020, ie it relates to the value of 5429 lei provided by art. 15 of Law 6/2020 of the state social insurance budget for 2020.*

Therefore, the normative act does not mention that for the settlement from the State the employer must relate to the value of the individual employment contract or the collective labor contract, but in the same normative act, respectively to art. XI alin. (11)

provides that: "*In the situation where the employer's budget allows it, the allowance provided in par. (1)* ***may be*** *supplemented by the employer with amounts representing the difference of up to at least 75% of the basic salary corresponding to the job occupied, in accordance with the provisions of art. 53 para. (1) of Law no. 53/2003 republished, with subsequent amendments and completions".*

Consequently, even OUG no. 30/2020 refers to the right of social protection regulated by art. 53 para. (1) of the Labor Code, without explicitly modifying its content regarding the capping of the indemnity, moreover, we say, without even being able to interpret that OUG no. 30/2020 tacitly modifies art. 53 para. (1) of the Labor Code, respectively by establishing an exceptional norm, for the simple reason that, in a normal legislative technique, the special norms are of strict interpretation.

It is thus observed that, in view of the provisions of OUG no. 30/2020, as amended, the employer does not seem obliged to grant the difference in reporting to the basic salary from the employment contract, or to the value of the indemnity from the collective labor contract, but has the possibility, in the situation where the budget allows it, to cover the difference between the amount settled by the state and the amount due to the employee according to art. 53 paragraph (1) of the Labor Code, ie at least 75% of the basic salary of the respective employee.

Following the analysis of the text of the Labor Code, by reference to the provisions of OUG no. 30/2020, in the absence of an express amendment of the text of the law provided by art. 53 para. (1) of the Labor Code, taking into account that his right to pay the unemployment benefit has fundamental values, taking into account the principle of employee protection, the employee should benefit from the more favourable value, ie the value of the individual employment contract, or collective labor agreement and of course, by reference to his basic salary, without a cap. Thus, in the absence of clear amending rules, the settlement should, in principle, concern only the relationship between the employer and the Romanian state and should not impact the employee's right to social protection.

In other words, in this version, in which, although the solution of technical unemployment is based on the provisions of art. 52 para (1) lit. c) of the Labor Code, is not expressly derogated from the provisions of reference, respectively those regarding the value of the indemnity, as provided by art. 53 of the Labor Code. If the provisions on technical unemployment in the Labor Code had been fully complied with, it would have meant that the employer should have granted the employee the unemployment benefit at the level provided for in the collective or individual employment contract, or, at least the value provided by art. 53 of the Labor Code, but without any limitation.

In this sense, the settlement and limitation of the value provided by OUG no. 30/2020 would have concerned only the employer's relationship with the Romanian state, and not with the employee, who should have benefited from the more favourable value. As amended by OUG no. 30/2020 by OUG no. 32/2020, provides for the possibility that the employer, although benefiting from the settlement from the state, in a capped value, may cover, if the budget allows, a difference to reach, either the level of compensation negotiated in the individual employment contract, or collective bargaining agreement, or at the value of 75% of his basic salary corresponding to the employment contract, in accordance with the provisions of art. 53 of the Labor Code.

Moreover, the adoption of a text of law which establishes only a possibility of complying with an obligation already laid down by the law which that text of law is supposed to amend does not bring anything new in that matter, but may create possible interpretations in connection with the constitutionality of such a text of law.

By this limitation of the value of the settled indemnity and especially by the provisions of art. XI paragraph (1) of OUG no. 30/2020, which provide for the possibility for the employer to cover the difference from own funds with the amounts representing the difference of up to at least 75% of the basic salary corresponding to the job, a violation of the principle of protection social.

Also, another issue of the text of the law concerns the very way in which it seems that the Ordinance establishes a specific notion of technical unemployment, distinct from the one regulated by the Labor Code, but without derogating from the organic legal provisions, even based-on art. 52 para (1) lit. c) of the Labor Code.

Regarding a possible unconstitutionality of the above mentioned provisions, it could be interpreted in the sense that, following the provisions of art. 41 para. (2) and even (5) of the Constitution, the provisions of OUG no. 30/2020 practically aim at a restriction of the application of some social protection measures or of some rights gained through collective bargaining.

Since OUG no. 30/2020 caps the settlement of the indemnity and implicitly of the amount itself granted by the employer, leaving only at the disposal of the employer the possibility to grant the difference of money up to the value provided by art. 53 paragraph (1) of the Labor Code, it can be interpreted that OUG no. 30/2020 would not have aimed at amending art. 53 para. (1) of the Labor Code, the possibility being redundant in the conditions of the existence of the obligation in the absence of express or at least tacit modification.

Contrary to these arguments, the text of the law must be interpreted in the sense of its application, so this possibility to grant value to the indemnity provided by the Labor Code can also be seen, although inappropriate, as an amendment to the Labor Code – with only one mention – if the Romanian Government would have considered such an amendment, even tacit, when adopting the normative act. However, the economy of OUG no. 30/2020 does not show such a reason, moreover, the Ordinance comes to regulate social protection measures during the state of emergency declared and to avoid serious damages with long-term effects on employees and beneficiaries of assistance measures. social, according to its preamble (ie, not to suppress/cap these rights of employees, actually helping employers).

It should be noted, however, that a law amending the Labor Code was adopted by the Romanian Parliament and sent for promulgation, respectively Law no. 131/2020, which would modify the provisions of art. 53 of the Labor Code, for the specific situation of technical unemployment during the state of emergency.

Through this version, however, although an express text of the law is modified, and not implicitly, as in the detailed situation above, it creates more confusions and contains many problems of interpretation of the notion of technical unemployment, being able to attract additional problems in practice, mentioning in further a capping of the indemnity and a possibility for the employer to supplement the amounts received from the state with amounts from own funds in order to reach the value provided by art. 53 paragraph (1) of the Labor Code, but only during the state of emergency or siege.

As we mentioned, Law no. 131/2020 has not yet been promulgated, requesting the re-examination of the law amending the Labor Code, motivated by the fact that the amendment to the Labor Code should not target in isolation a state of emergency, but a measure that can be applied in general, thus having the potential to create a lack of clarity in the application of legal provisions.

Thus, even if a derogation from the provisions of the Labor Code in the field of technical unemployment would be obtained by normal legislative means, it is easy to understand that the respective regulation should address aspects of principle, generally applicable in the future, and not a specific applicable situation, only in the case of the COVID-19 Pandemic.

4 Conclusions

The measure of technical unemployment, perhaps not used in mass by employers until the time of the pandemic, is a measure that can indeed lead to adequate protection of the employment relationship, but provided that the employer complies with social protection measures and, why not, those negotiated with his social partner.

Also, perhaps a regulation would be required, by law, to clarify the way in which employees are to enter technical unemployment (eg, the need to adopt clear decisions and motivation of the employer's decision-making bodies) but also the rights of protection, including the negotiated ones, which employees must benefit from, including in exceptional situations such as the one we all live in today in the context of the COVID-19 pandemic.

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Humanization of state justice through institutionalized arbitration

Chifor D.C.

Lawyer, PhD student (ROMANIA)
E-mail: av.danielchifor@gmail.com

Motto:
"Perhaps no existing society fully attains the ideal that all humans are created equally so it is up to the state to assures that all members of the society stand on equal footing. Then, the state must ensure social equity".

Abstract

The role of the arbitration is to humanize the settling procedure for disputes over formalist and sometimes not fully understood state justice, or like the great Honore de Balzac once said "as soon as a man has fallen into the hands of justice, he is no more than a moral entity, a matter of law or of fact, just as to statitics he has become a zero.".

One must not misunderstand that arbitration should replace state justice as the state justice in the only one that can guarantee and ensure the observance of the correlative rights and obligations, public order, morals and imperative provisions of the lato-sensu law by applying the coercive force of the state, being the only one able to act in this way.

Thus, arbitration is an opportunity for the parties and not a risk of denial of justice.

Keywords: arbitration, equity, institutionalized arbitrage, risk, opportunity

1 Legal status and importance of arbitration

The provisions of article 541 par. 1 of the Code of Civil Procedure states that arbitration is an alternative jurisdiction with a private character. Although the legal provision provides a short definition of arbitration, the rule draws attention to the fact that the dispute will be settled through this procedure only if the litigants extract the dispute from the state jurisdiction by concluding the arbitration agreement. Thus, the arbitration procedure is private and therefore the disputes that will be submitted to

arbitration belong to the field of private law, not being possible to go through an arbitration proceeding within the scope of public law. Private law is the one that ensures and defends the particular rights of persons and public law defends and ensures the general interest. Arbitration has its origins in the shortcomings of state justice, in its cumbersome and lack of speed and it is considered that through arbitration "the mission of the public judge can be taken by a simple individual or a permanent arbitral institution that inspires the parties litigation the necessary confidence"[1].

The arbitration procedure has a conventional legal nature and it can take two forms: ad-hoc arbitration and institutionalized arbitration. Ad hoc arbitration is the procedure in which the parties have appointed as arbitrator for the settlement one or more persons who meet the conditions required by law. In this regard, they constitute the arbitral tribunal which will resolve the dispute according to the arbitration agreement and rules imposed by respect for the public order and the general good.

Institutionalized arbitration represents a form of arbitration chosen by the parties through the arbitration agreement and organized by an institution specializing in arbitration, which has its own rules and procedures to be followed in order to resolve the dispute.

In its essence, arbitration is an alternative method of resolving disputes as well as mediation, negotiation, conciliation, med-arb, adjudication commission. We consider that arbitration *"is configured as a more complex tool than mediation and conciliation, which are ways of resolving less important disputes"*[2]. While most alternative dispute resolution methods do not impose the parties a solution to facilitate the communication between them in order to reach a mutually agreed conclusion, the arbitration imposes on the parties the solution pronounced by the arbitral tribunal which is final and binding for the parties. In this case, arbitration has great importance due to the binding nature of the solution for the parties.

Regarding the regulations of the basic rules to be followed by the arbitration procedure, arbitration has a special derogating character from the common law, respectively the civil procedure, precisely due to the private character and the principle of autonomy of will that governs the procedure.

According to the definition provided by common law, the arbitration is an alternative jurisdiction characterized and governed by the principle of flexibility, confidentiality and speed, all under the principle of autonomy and will of the parties.

By following these principles, **arbitration offers the parties the advantages that they do not find in state justice**. The confidentiality of the procedure ensures a discreet settlement between the litigants which in most cases are traders who don't want the dispute between them to be made public and tarnish their market image in front of consumers and therefore lose the trust they enjoy from consumers.

The speed of the procedure, unlike the state justice, gives the parties a quick solution that will allow the parties to return to the situation prior to the dispute, in a much shorter time than that provided by the rigid and inflexible state procedure. However, the arbitration procedure may prove ineffective if the case before the settlement involves a large number of parties involved who do not wish to cooperate in resolving the situation. Thus, the arbitration procedure will be efficient and carried out quickly only when the parties to the disputed report seek only to resolve it and do not wish to delay the settlement by maintaining the status of the dispute.

The flexibility of the procedure makes it possible to avoid the classical and strict procedure by being the derogating element from the common law by which the parties relax the procedure and atmosphere and can reach a solution in a useful time without subjecting their dispute to a cumbersome and bureaucratic procedure.

Therefore, it is the will of the parties that makes arbitration a preferable institution to state justice. Another advantage of the arbitration over state justice is the low costs imposed by the procedure with the parties being able to bear all costs incurred in resolving the dispute equally or proportionately.

2 Guaranteeing the right to a fair trial and the notion of equity in the arbitration procedure.

The right of the parties to a fair trial is also fully applicable in the case of arbitration proceedings, emphasizing that the term "fair" does not refer, neither in civil nor arbitration proceedings, to the fair trial.

This term must be interpreted as following, the state court (in civil proceedings) and the arbitration tribunal (in arbitration proceedings) must ensure compliance with the fundamental principles and offer the parties enough, equal and adequate opportunities to exercise their rights and "to maintains its position on issues of law and fact and that neither party is in disadvantage to the other"[3]. We cannot consider that the right to be judged in a fair way is similar to the case trial in fairness because in the case of settlement within the arbitration procedure, according to art. 601 par. 2, C of the Civil Procedure, the parties must expressly request the arbitration tribunal to resolve the dispute fairly[4]. *"From a logical point of view, equity and equality are notions that are in a crossing relationship, in the sense that there may be situations of inequality that are fair or equitable, as may be encountered in cases where equity is not satisfied but the requirements of equality are not met (...) but, if we analyze thoroughly, we will find many situations and although equality from a formal point of view works, in reality there are many inequities or social injustices, as the rights and obligations are not distributed in a spirit of fairness"*[5].

The arbitration procedure, due to its confidentiality, the speed of arbitration and the possibility of a fair trial, together with the open atmosphere and lack of rigidity and formalism of the debates, bring arbitration closer to the spirit of commercial affairs and make it "more able to offer more appropriate solutions to disputes that may appear between the parties in the course of their business relations"[6].

Therefore, arbitration is a preferred method of settling a dispute within the participants of the business environment who understands the demands of trading while state justice remains in favor of litigants that are not a part of the action of trade.

We consider that speed and fairness are those that make possible the involvement in the arbitration procedure of the adage according to which "*a delayed decision is equivalent to the denial of justice"*, the parties having control over the time in which the dispute is resolved thanks to art. 567, C. From the Civil Procedure.

3 The Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, a representative institution of the Romanian institutionalized arbitrage for commercial matters

The Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, is one of the most important bodies providing institutionalized arbitration services in Romania. After the 1989 Revolution it was adopted the Decree Law no. 139 of 1990 regarding on the Chambers of Commerce and Industry, a normative act that marks the moment of the rebirth of the Chamber of Commerce System, after the communist "era".

From its official website presentation[7], we can notice the advantages of the arbitration procedure over the common law in the sense that the decisions adopted under the auspices of this court have wide international recognition, the arbitrators have a specialized competence, most of them being highly qualified specialists, the confidentiality of the procedure and of the meetings, the speed of solving the cases but also the low costs.

The Court also laid down in its own rules on the arbitration procedure like the principle of availability is indirectly emphasized, the rules showing that the dispute will be subject to arbitration by this court only if the parties have concluded an arbitration agreement to that effect in compliance with the rules of the court. A reflection of the principle of availability, as well as the principle of the flexibility of the procedure is also noted in the rule that the parties may choose to apply the procedure in the case of court rules or other rules provided that certain requirements are met. At the same time, the rules of the court govern the principle of the obligation of the arbitral award, specifying that the constituted tribunal is empowered to issue a final, enforceable and binding judgment for the parties and this is how the court rules absorbed a fundamental principle of the arbitration procedure. The Court also establishes the principle of continuity as a fundamental rule, recalling that the judgment of the dispute rests entirely with the arbitral tribunal invested, as it is the only one that can rule on the settlement of the case.

The International Court of Arbitration attached to the Chamber of Commerce and Industry of Romania establishes in its rules a fundamental norm, namely the principle of speed and fairness of the procedure but also the principle of independence and impartiality of the arbitration tribunal, the parties being guaranteed the right to a fast and fair trial. The Court also emphasizes the principle of the independence and impartiality of arbitrators, stating that arbitrators are not representatives of the parties, who have an obligation of independence and impartiality with the case and in the performance of their judicial duties. In support of the principle of the speed of the arbitration procedure, it was established that the term in which a dispute subject to arbitration must be resolved should not exceed a period of 6 months, establishing in case of non-compliance the sanction of expiration of arbitration.

The Court upheld exclusively the principle of non-discrimination and equality in the procedural rights of the parties, the principle of adversarial proceedings and the principle of the right of defense, ruling that if a judgment of an arbitration tribunal does not respect these principles, it will be null and void, thus eliminating the risk of an

arbitration award being annulled by an action for an annulment but also of maintaining the confidence the traders have in the arbitration procedure. The Court considered that the principle of confidentiality should be given a separate rule, confidentiality being the essence of the proceedings, thus regulating this principle in its own right, establishing that no person outside the dispute will have access to the proceedings and everything related to it if there will be no written agreement between the litigants. Moreover, in support of the principle of confidentiality, it is the obligation of the Court and its staff to ensure the confidentiality of arbitration and they have no right to disclose any information of which they are aware in the exercise of their powers. The Court has no right to publish judgments in a case unless the parties agree with that. The principle of good faith is expressly regulated with a deep character of novelty and particularity of the arbitration procedure, being at the same time both an obligation and a right of the parties.

Other important principles from the procedural rules of the Court are: the principle of the fulfillment of the imposed obligations, the parties being obliged to cooperate with the arbitral tribunal for the proper conduct of the dispute following its completion within the established time- in support of this principle, provision is made for the arbitral tribunal to seek clarification from the parties as to the facts, evidence and circumstances which may lead to a fair settlement of the case; the principle of trying to reconcile the parties, imposing an implicit obligation on the court to try to resolve the dispute in any state of the dispute on the basis of the agreement of the parties; the principle of specialization of the arbitral tribunal, establishing that the arbitrator is incompatible if he does not meet the qualification conditions imposed by the parties.

Another principle expressly regulated in the rules is the Kompetenz-Kompetenz principle, which emphasizes that the arbitral tribunal is the only one that verifies its own competence to resolve the dispute and decides in this regard by conclusion.

In addition to these main principles of the arbitration procedure, we also mention the fact that the Kompetenz-Kompetenz principle is specific to this procedure but also the possibility to judge the case in fairness, a situation prohibited in the case of the common law. In terms of the possibility of a fair trial of the arbitration tribunal, we point out that this judgment can be made only if there is the express agreement of the parties.

4 Conclusions

In conclusion, we recall that arbitration is a non-state procedure, used especially by persons engaged in economic activities in which the principle of autonomy of will of the parties governs the entire procedure and when the parties resort to arbitration they express their unequivocal intention to evade the jurisdiction of national courts to resolve the dispute.

Arbitration is a procedure characterized by confidentiality, speed, flexibility, specialization, with a consensual character and a contractual nature. Efficiency is the key element of arbitration. Often, the state judiciary is immobile and conservative and arbitration offers some help to fix the crisis of state justice that is agglomerated by a large volume of cases that are not commercially specific. According to Balzac: "as soon as a man has fallen into the hands of justice, he is no more than a moral entity, a matter

of law or of fact, just as to statitics he has become a zero."[8] and so the arbitration tries to humanize the settlement procedure as opposed to state justice. One must not misunderstand that arbitration should replace state justice as the state justice in the only one that can guarantee and ensure the observance of the correlative rights and obligations, public order, morals and imperative provisions of the *lato sensu* law by applying the coercive force of the state, being the only one able to act in this way.

"This Chamber – Arbitration – must have all the virtues that the law does not have. It must be expeditious where the law is slow, cheap where the law is expensive, simple where the law is technical, be a doer of peace and not a promoter of discord."[9].

In our opinion, the extraction of a commercial dispute from the state action area and its attribution for settlement to an arbitration tribunal does not present any risk regarding the correct, impartial and legal settlement of the dispute and the arbitral award offered by arbitration is superior to state justice given the specialization of arbitrators and the speed of the procedure. However, in the absence of a predominant legal culture and a practical sense among the masses, state justice is the only way to successfully resolve disputes.

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Considerations on the causality – condition relation of the tort civil liability

PhD candidate Tuduruţ L.

(ROMANIA)
E-mail: lauratudurut@gmail.com

Abstract

This study refers to theories on the causal relation, a condition of tort civil liability. The content of this material consists of opinions expressed in specialized literature on the theories underlying the identification of the causal relation in general, theories that have emerged during the evolution of society, especially due to its development in relation to the provisions of the new Civil Code. The various theories have determined the permanent change of the national case-law and not only, regarding the method for determining the causal relation between the wrongful act and the damage.

Keywords: causality, causal link, causal nexus, causal relation, civil liability

1 General considerations regarding the theories underlying the identification of the causal relation

1.1 *The concept of causality*

Causality was and remains a thorny issue in legal liability. Numerous papers have been written on the causality issue, which have dealt with the problem starting from causality in philosophy, in science and then proceeded to analyze causality in law. Even from the Latin Age, Publius Vergilius Maro said "Felix, qui potuit rerum cognoscere causas", Virgil[1] – "Happy is he who has been able to know the reasons of things".

The concept of causality is explained by the Explanatory Dictionary of the Romanian language [2] as follows: "objective, necessary relation between cause and effect. The principle (or law) of causality is the principle that any phenomenon has a cause – from French: Causalité". If we check the definition of the noun "cause, causes" we note that this is a "phenomenon, or series of phenomena that precedes and, under certain conditions, causes the occurrence of another phenomenon, called effect, which serves as a starting point; reason...."[3]; and for the word "Condition, conditions" the

explanation is "fact, circumstance which the occurrence of a phenomenon depends on, or which influences an action, being able to slow down or stimulate 2. (at pl.) the circumstances in which a phenomenon takes place..."[4].

The definition of causality was also registered in philosophy as follows: "causality, a philosophical category expressing the interaction between cause and effect and representing, as such, one of the main forms of the universal connection of phenomena. Together with the category of necessity and the recognition of objective laws is the basis of the deterministic conception, or determinism. Every phenomenon has a cause; there are no phenomena without any cause. Corresponding to the variety of matter movement forms, c. it represents a concrete, specific character in each field of objective reality. As a unit of coexistence and succession, the causal relationship is also a unit of continuity and discontinuity. The causal chains continuation is based on the principle of conservation of matter and motion, as interaction or change is not possible without material support, the causal relation is not possible without the transfer of matter and motion. The objective and universal character of the principle of causality is based on the idea of the infinity of matter and movement, on the thesis that they cannot be created and that they are indestructible. The principle of causality, a philosophical principle expressing that every phenomenon has a cause. Without the recognition of this principle, science is not possible."[5].

It is explained about "cause and effect" that they are "philosophical categories whose correlation designates one of the most general forms of the universal connection of phenomena. Within this correlation, an object or process is called a cause when it precedes and produces (causes, generates or determines) necessarily another object or process called an effect…. The typology of causal relations has a great variety. At the same time, there are many kinds of causes (main, secondary, necessary and accidental, internal and external, etc.)"[6].

In case of triggering tort civil liability, it is a mandatory, essential and necessary for the causal relation condition to be fulfilled; otherwise it will not be possible to give rise to legal liability. Civil liability is inextricably linked to the concept of causality. It was said about the causal relation that it is the essential condition of responsibility[7].

1.2 *The main theories regarding the causal link*

The definition of the causal relationship is not enshrined neither by the provisions of the Civil Code of 1864 nor by the provisions of the New Civil Code although the current Civil Code dedicates an entire chapter on civil liability, respectively chapter IV: "Civil Liability" (chapter contained in Title II, " Sources of obligations " from Book V, entitled "About obligations"). We identify in the provisions of the current Civil Code provisions (such as art. 1349 paragraph 2, art. 1357 paragraph 1, art. 1358-1359, 1372-1373, 1375-1376, 1378-1379) regarding the obligation of reparation that intervenes for "all damages caused" or for "the damage caused" by a wrongful act or "caused by an animal", "caused by a thing" or "caused by the ruin of the building" or in other situations, but the new provisions taking into account the doctrine and case-law established based on the provisions of the previous laws.

In the legal literature but also in the case-law of German origin, the following theories or systems were taken into consideration as follows: the theory or system of

equivalence of conditions and the theory or system of adequate causality. From the American and English area, the theory or system of the proximate cause was proposed. In the Romanian doctrine, the theory of the indivisible unity between cause and conditions was supported, the latter being validated by the solutions of the case-law as well.[8]

The French legal literature has raised the issue of the abundance of theories underlying the identification of the causal relation and their sources of inspiration, namely philosophical or scientific, considering that such sources are extrajudicially inspired[9] and could be artificial or insufficient; bearing in mind that the judge must not solve a causal issue from a philosophical or scientific point of view, but must judge acts.[10]

1.2.1 The theory of equivalence of conditions or sine qua non condition

Among the first theories that formed the basis of determining the causal relation is the theory of equivalence of conditions called the theory of the *sine qua non* condition, according to which, "in the event that the cause of the damage cannot be established precisely, equal causal value is assigned to all the facts and events that preceded that damage, or to each condition in the absence of which the damage would not have occurred"[11].

French literature states[12] that the theory of equivalence of conditions would be based on philosophy, originates in Mill's theory, being the highest point of all philosophical theories but at the same time the starting point of legal theories of causality, this statement being nuanced in the sense that if philosophers have developed many theories then Mill's theory will have to be adapted in order to be useful to the law. However, the German lawyer Von Buri does not distinguish between the philosophical foundations and those pertaining to the law of causation[13].

However, von Buri's theory was also interpreted in the spirit of idealist-subjectivist philosophy (Hume, J.St. Mill, Kant), causality being presented as a subjective habit, or as an a priori category (Fr. Liszt)[1]. Under the influence of J.St. Mill's ideas, von Buri's theory was further developed to justify the equivalence of conditions, a thesis that illustrated the authors' agnostic position. In essence, the theory of equivalence of conditions deems the conditions that preceded it as the cause of any result, if they were indeed so necessary to the effect that without them it would not have been achieved (sine qua non). All the conditions that meet the above requirements are causes, regardless of the actual contribution of each in producing the effect."[14].

"von Buri shows that if we want to determine the causal dependence of a concrete phenomenon, we must identify, in a certain order, all the forces that carried out an activity for the occurrence of that phenomenon. Each of these forces can be considered the cause of the phenomenon, if the existence of the result depends so much on them that excluding one removes the phenomenon itself[2]"[15].

To determine whether a condition was necessary for the result, the method of isolation in thought (hypothetical elimination) is used. Once the necessary condition is determined, the causal link is not interrupted, not even if the action of the forces of nature, of other people intervened between condition and result, or the result was due to the physical or mental peculiarities of the victim. It was objected in regard to this theory

that, giving the same importance to all the necessary conditions for a phenomenon (which are considered just as many causes) disregards the individuality of each, the different contribution, quantitative and qualitative, that the conditions has in producing the result."[16]

Subsequently, Von Liszt amends Von Buri's theory leading to a new definition of causal relation, a definition that is quite close to the current definition of the theory of equivalence of conditions as follows: the cause-effect relationship between the body movement and the consequence exists when this would not have taken place without the body movement[17].

The theory of equivalence of conditions has been criticized because it gives the same importance, with equal value, to all the conditions of a phenomenon; not making the distinction between cause, condition, occasion, all the latter being considered to produce the effect in its entirety.

In our legal literature it is shown that in reality the cause cannot be equivalent to the conditions because the cause is the principal element while the conditions are secondary situations that participate in the occurrence of the respective phenomenon.[18] Also, the cause cannot be assimilated to the occasion either: "The occasion is the event that occurs immediately before the effect, it is not the cause itself, but it gives impetus to its action. The occasion is therefore different from the cause, because the cause provokes, generates the respective phenomenon, while the occasion is only an event, a circumstance that can be used as a basis, as a pretext of some actions,[19] and the condition cannot be assimilated to the occasion. "The condition also differs from the occasion in that the latter directly precedes the action of the cause, which is not always the case for the conditions."[20]

The system of equivalence of conditions was supported by I. Rosetti-Bălănescu and Al. Baicoianu. The authors D. Alexandresco and N.D. Ghimpa argued that the causal relation should be left to the discretion of the judge.

Currently, the theory of conditions sine qua non is found in the "Principles of European law on civil liability" where in article 3:101 in Chapter 3 "Causal relation" section 1: The condition sine qua non and other restrictions'"; it defines it as follows: "Any activity or conduct (hereinafter referred to as "activity") in the absence of which the damage would not have occurred is considered to be the cause of the damage suffered by the victim."[21]; but the authors in the following articles bring important amendments and modifications to article 3:101.

I consider that the theory of equivalence of conditions or the sine qua non theory is significant by delimiting in a first phase the facts which affect the damage and the facts which do not have a meaning on the occurrence of the damage. The theory finds its utility only insofar as this technique of establishing the causal relationship leads to the objective delimitation of the facts related to the damage. If the situation were to be maintained equal values to all conditions without making a distinction between them, it would lead to the extension of the group of persons who will be held accountable even if their deeds were by chance with the damage caused, fact which cannot be accepted as long as a person's liability can be incurred only if the damage was caused by him, respectively to have a direct legal cause.

1.2.2 Proximate cause theory

Another theory that followed the sine qua non theory is the theory or system of the proximate cause, "which consists in retaining the last act from the facts that preceded the damage, that which is immediately preceding the effect, in the absence of which other antecedent conditions would not have had causal effectiveness, which means that the last cause – **the proximate cause** expresses and encompasses in itself the effectiveness of all previous causes;" [22]. The system of the proximate cause is the system that has been adopted by the Anglo-Saxon judicial practice. "This is due to the philosopher Fr. Bacon who established the rule "It would be an endless task for the law to judge the cause of causes and the action of some as compared to others. That is why it is satisfied with the immediate cause and judges the actions with its help, without going back to an earlier one.[142] It is the proximate cause theory»"[23].

In fact, the proximate cause theory represents a limitation of the equivalence of the conditions retaining only the last act immediately prior to the effect, meaning that the last act represents the totality of the previous causes. Our judicial practice has not embraced such a theory. The proximate cause does not offer a more satisfactory solution than the theory of equivalence of conditions regarding the causality issue; therefore some jurists have been inspired by science to build other theories.

This system cannot find its applicability being in contrast to the theory of equivalence of conditions in the sense that the theory of the proximate cause retains as a criterion for determining the causal relationship the proximate cause – the last cause, which leads to excessive and arbitrary, unjustified restriction of persons whose liability can be engaged while the theory of equivalence of conditions unjustifiably broadens the group of persons who can be held accountable by placing a sign of equality between all causes regardless of their type (direct/indirect, external/internal, etc.) and not distinguishing between cause, condition, occasion/ circumstance.

1.2.3 The effectiveness system

The effectiveness system "seeks the solution of the problem in the causal effectiveness of these conditions. The reason for this conception is the necessary condition that deserves this qualification because of the predominant effectiveness that must be recognized in the production of the damage or the socially dangerous result"[24]. The theory of effectiveness has not been adopted by jurists given that "…it is a system which, retaining only one cause, the predominant one, cannot give a satisfactory solution to the numerous cases[151] in which the cause is due to a multiplicity of causes. Indeed, if we retain several causal conditions, we should, in this system, determine what degree of effectiveness of the cause revenge begins from[152]." [25].

The theory of effectiveness, directly inspired by the scientific conception of causality, is not applicable in law unless several causal conditions could be retained, as we have shown above; this inadequacy explains the failure of this theory and the need to find other theories. Thus, some laid the foundations of theories of adequate causality.

The theory of effectiveness cannot be retained in determining the causal relationship as long as it keeps only one cause as a criterion in order to establish the causal link, respectively "the predominant one" because there are many cases in which

the occurrence of injury is determined by a complex of circumstances (causes and conditions), so there can be a plurality of causes for which to maintain a single cause in determining the causal relationship would be an unfair approach.

1.2.4 The theory of adequate causality

The theory of adequate causality is the theory that implies that "of the necessary conditions or sine qua non, only those previous facts or circumstances that normally, usually, according to human experience have the objective ability to produce a result like the one that has been produced are considered causes. Therefore, the necessary facts must be removed from the causal field which, only accidentally, cause or may cause such a result to occur"[26].

This theory has several versions, but regardless of its versions, "there is the question of the criterion according to which an act or circumstance can be qualified as appropriate in producing a certain result. This criterion is the idea of predictability, which is viewed differently"[27]. Concerning the type of predictability adopted by the majority, it is the objective one as a consequence, an act, a condition sine qua non, can be qualified as an adequate cause of the damage if, at the time when it occurred, it could normally, by reference to human knowledge in general and that provided by science, be likely to cause that result"[28].

The doctrine also analyzed the possibility of retaining a subjective predictability, namely the predictability of the damaging result by the author at the date of the illegal act, but it was shown that this possibility evades the objective predictability of causality[29] leading to confusion between causality and guilt.

Consequently, this theory cannot be retained because it is subject to questionable solutions, and cannot be retained as a reference theory because the theory ignores the fact that the causal link may exist in its atypical form, meaning that certain causes to produce other effects than those they normally produce.

1.2.5 The theory or system of the indivisible unity between cause and conditions

Our current legal doctrine states that in establishing the causal link it is necessary to apply the theory of indivisible unity between cause and conditions, a theory that was developed by Professor Mihail Eliescu, who, referring to the causality of the damage stated: "….We consider that such external conditions, which contributed predominantly in producing the detrimental effect, constitute, together with the causal circumstance, an indivisible unity."[30].

This system consists in the application in the first stage of the common theory – sine qua non – in the sense that all the elements that contributed to the creation of the damage are determined regardless of whether they are causes and/or conditions; subsequently, if required, the "capital of scientific knowledge" [31] may be used, respectively the "progress of science" [32] will be taken into account by the court (respectively the disposition of specialized expertise) establishing their typology, namely: internal/external, direct/indirect, main/secondary causes, identification of the conditions (if any) that ensured or facilitated the action of the causes, etc.; achieving a gradation of them. The

gradation thus established will be subject to a new control, namely, from the causal complex those events that "in the normal course of things, according to science and practice, in a certain society and at a certain historical moment of its development" could not have caused the damage will be eliminated[33]. Professor Mihail Eliescu calls this control "the objective criterion of the normal course of things" or "the criterion of normality"[34]. Professor Eliescu also takes into account the "special circumstances of a certain case" [35] showing that these must also be taken into account because the complexity of reality "involves exceptions"[36].

It has been shown in the doctrine that "the unity of these circumstances is given by the fact that they contribute, as a unitary whole, in producing the damage, thus it is necessary to recognize the causal efficiency of each of the elements of the causal complex"[37]. As well as the fact that this system "contains, moreover, also the plurality of causes, taking into account the participation of the causal chains in the occurrence of the damage"[38].

The Civil Code in Article 1369 provides for the instigators, accomplices, supporters, concealers to be held liable, liability that can be employed under this system.

The practice of the Romanian courts regarding the determination of the causal link in the common law of liability shows that this is done by applying the test of the condition *sine qua non* in the case of common law liability (civil and criminal), judges considering that there is a causal relationship if the damage had not occurred in the absence of the analyzed fact[39].

The Sorbonne Legal Research Institute offered the general public by publishing a research paper, an analysis of the causal link in civil liability, and a comparison of the reform of French law with the new provisions of the Romanian Civil Code. Thus, the analysis of the causality issue in the current Romanian Civil Code took into account the old provisions of the Civil Code and the theories and systems that lead to determining the causal relation found in our legal doctrine and exonerating causes. The conclusions of the Sorbonne Legal Research Institute regarding the new provisions of the Romanian Civil Code related to the causal link consist mainly in the fact that the new civil provisions do not enshrine an express provision of the causal relationship but it results from express provisions of the new Civil Code respectively article 1349, 1350,1357 in tort matters and in contractual matters from article 1547 which constantly uses the expression "caused damage" which obviously leads to the existence of a causal relationship. It is also shown that the theory adopted by the new Romanian Civil Code is that of the system of indivisible unity of cause and conditions, an idea resulting from the provisions of article 1369, 1370 and article 1371. [40]

Regarding the causal link in French law, the Sorbonne Legal Research Institute provides an analysis of the civil liability reform project of March 2017 in France which proposed the introduction of a subsection to regulate the causal relation. Thus, it was desired to enshrine express provisions regarding the requirement of causality that must exist between the wrongful act and the damage in order to engage civil liability. It has been pointed out that the French reform project does not answer the question of whether proof of a causal link can be possible despite the scientific uncertainty affecting that link[41]. It was also wanted to enshrine the method of proving its existence, respectively by any means.

Another clarification within the French project referred to the introduction of article 1240 which would contain provisions regarding a hypothesis in which the damage is caused by an unidentified person from a group of identified persons. [42] Articles 1239 and 1240. The difficulty related to the scientific uncertainty and then the one specific to the uncertainty regarding the identity of the author of the damage is presented in detail in the research paper, which takes into account the scientific uncertainty, hesitant case-law and the CJEU opinion of 21 June 2017. Regarding the issue of causality and the uncertainty of the responsible person, the so-called "alternative" causality is discussed, which is a means of combating a certain causal uncertainty, namely that of the identity of the damage perpetrator. [43]. The hypothesis taken into consideration is the one that the victim fails to identify the person who is responsible for the damage, but manages to establish that the damage they suffer is related to the activity of certain identified persons [44]. The reform project opts for this method of distribution based on the search for the most probable causality [45] but article 1240 of the project does not present clarity, thus giving rise to many questions.

A negative opinion is also expressed by the USM – French National Union of Magistrates [46], which during the hearings related to the civil liability reform project presented in March 2017 mentions that the draft does not indicate any definition of causality in fact; also regarding the possible provisions of article 1240 it is shown that they create a presumption of causality as well as a collective liability violating individual responsibility as well as the fact that the criteria proposed in the project are not clear and will subsequently lead to complex and significant disputes.

The provisions proposed in the civil liability reform of March 2017 on causal relation are not to be found in the current provisions of the French Civil Code, which preserves the rules of the French Civil Code of 1804 in the sense that the latter did not provide special provisions on the causal link, the latter being retained by national case-law as constantly necessary.

Regarding the theories adopted by the French judicial practice, we note that they maintain those mentioned by professor Eliescu and respectively the *sine qua non* theory and the theory of adequate causality [47] at the present time; French courts showing no interest in acquiring any of the theories [48].

The theory of the indivisible unity between cause and conditions we notice that it subjects to analysis a complex of interconnected actions and facts, complex specific to social life, thus leading to a distinction between the necessary causes, direct to the occurrence of the damage and the facts which represent only an occasion condition unlike the theory of equivalence of conditions which does not make this theoretical differentiation, for the latter system any occasion condition is a direct and necessary cause of the damage because it was given equal value.

2 Conclusions

Examining the theories that have appeared in the legal literature in relation to the criteria proposed by each of them to determine the causal relationship as well as in relation to the complexity of causes in social life, I evaluate that the system unity indivisible between cause and condition for establishing the most appropriate causal relationship should be embraced by the legislator.

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Mediation – an alternative method of resolving labour disputes

Hagiu I.

PhD student, Faculty of Law, "Titu Maiorescu" University, Bucharest, (ROMANIA)
E-mail: iulianhan@yahoo.com

Abstract

For the relief of the courts, for the speed of a court process, but also for saving the material and time resources of the parties involved, the alternative labour dispute resolution through mediation and not only, is currently the efficient and correct solution.

Legislation in Romania, as well as in other countries, in accordance with European Directives, recommends judges, lawyers, and parties to resort to mediation in court proceedings in order to find a better solution. It can also be a means of preventing conflicts. In countries where mediation is well developed, lawyers will suggest resorting to mediation before going to court.

Keywords: mediation, mediator, labour disputes, alternative resolution.

1 Mediation of individual labour disputes

1.1 *The current state of justice*

It is well known in contemporary society that the congestion of courts affects the entire judicial system, that seemingly trivial litigation is delayed due to slowness and cumbersome procedures, that court decisions come after repeated deadlines and hearings, in which the litigant loses money, time and nerves and the result is not always satisfactory.

The justice system in Romania faces financial and human resources problems, the decentralization of administrative-financial decisions and the rationalization of expenditures being a necessity.

Following my meetings with the courts in various situations, I found that the workload is overwhelming. There are judges who pronounce and motivate over a thousand decisions a year, which is inhuman. The large number of cases on each magistrate directly affects the quality of the act of justice.

The Superior Council of Magistracy (SCM) report from 2018 shows that there were 2,946,106 cases pending before the courts in 2018 [1].

The average file load is as follows:

- at the High Court of Cassation and Justice (HCCJ) – 1,152 cases per judge,
- in courts of appeal – 586 cases per judge,
- in court – 655 cases per judge,
- – in judicature – 1,129 cases per judge.

1.2 *The need for an alternative solution in the classical justice system*

An answer to this problem would be the relief of the courts, the observance by the administration of the jurisprudence of the courts, and, last but not least, the effective implementation of alternative means of resolving disputes, especially mediation, there are, moreover, express european recommendations in this regard [2].

Under these conditions, a number of alternative dispute resolution methods have developed over time, including practices, techniques and methods that represent an alternative to court proceedings.

In fact, there are two types of conflict resolution methods, namely the classical system and alternative methods (A.D.R. – ALTERNATIVE DISPUTE RESOLUTION).

The classical system is mainly represented by the courts and, in most cases, aims to punish those who have violated a rule.

The system includes courts, the prosecutor's office, the police, etc. The parties end up in this system when they fail to solve their problem on their own. In the classical system, the parties are not asked for an opinion or what would be the best solution for them, the magistrates make decisions for them, and then force them to respect them.

The classic resolution of conflicts, by entrusting them to the judiciary and resolving them by traditional methods such as the loser-winner, led to the conclusion that it is not the ideal solution to provide an adequate resolution of all social and economic difficulties, difficulties that have developed and aggravated in the absence of specific regulations for new types of conflicts.

Thus, new concepts have emerged that aim at amicably resolving conflicts known as A.D.R. – Alternative Dispute Resolution (Alternative Dispute Resolution – Facilitation, Negotiation, Conciliation, Mediation, and Arbitration or hybrid mediation-arbitration models). However, they do not restrict access to justice, if the resolution of the conflict is not possible in their way, the possibility of initiating or continuing legal actions remains open.

I will try in in this paper, a brief analysis of mediation as an alternative method of resolving labour disputes, taking into account that it is a relatively new concept in Romania, while showing the main advantages that the parties have if they understand to use a mediator.

The first question we should ask ourselves is: "Is it possible to resolve labour disputes through mediation?"

In order to answer the question, we need to look at the legislative framework governing this matter. Article 73(2) of Law 192/2006 on mediation and organization of the mediator profession, with subsequent amendments and completions, states that "the

provisions of this law also apply to the mediation of conflicts of rights that the parties may have in labour disputes." The interpretation shows that the law does not exclude labour disputes from the sphere of mediation, but refers to special laws, specific to labour relations.

1.3 *Mediation – notion, definition*

A definition of mediation, similar to those existing in the legislation in which this institution has already been established, would be that "*mediation is a way of resolving conflicts amicably, with the help of specialized third parties, as a mediator, under neutrality, impartiality and confidentiality conditions and with the free consent of the parties".* By developing this definition, we can conclude that mediation is primarily an alternative to justice that amicably resolves a conflict between the parties by a third party which is neutral, impartial and has no decision-making power: the mediator is the one who helps the parties to find together a solution that will resolve the differences between them [3]. Thus, the fundamental principles that govern this institution are, as I mentioned: neutrality, impartiality and confidentiality.

We find that over time hundreds of theories have been developed about mediation, more or less scientific, more or less legal, but all united by an essential common goal: extinguishing disputes, conflicts, differences, misunderstandings, etc [4].

1.3.1 The advantages of mediation

Among the advantages of mediation, we mention:

- the solution of the conflict is not imposed but is negotiated between the two parties. Each party to the dispute has procedural control over the final agreement;
- resolving in a confidential manner some issues that could affect the parties (the confidentiality of the mediator, but also of the other parties that appear for mediation is imposed by art. 32 of Law 192/2006);
- disputes of any kind can be resolved in a short time and with much lower costs compared to a lawsuit;
- in the event that no agreement is reached, the report concluded by the mediator demonstrates in court all the procedures for the amicable settlement of the conflict were carried out;
- if the mediation procedure is accessed after the start of a trial and an agreement is reached through mediation, the judicial stamp duty paid for the start of the trial is refunded (art. 63 paragraph 2 of Law 192/2006);
- avoidance of long and expensive lawsuits;
- mediation can prevent other conflicts.[5]

1.3.2 The need for mediation

Mediation is therefore an intermediate procedure between conciliation and arbitration, as it involves the intervention of a third party, which is not always the case

in conciliation, but the third party does not have, unlike the arbitrator, the power to settle the dispute.

Regarding individual labour disputes, the law stipulates that they can be resolved through mediation – a situation in which the provisions of art. 73 para. (2) of Law no. 192/2006 on mediation and the profession of a mediator, with subsequent amendments and completions, are applicable. This article stipulates that the provisions of the mediation law also apply to the mediation of conflicts of rights that the parties may have in labour disputes, so the parties may use a mediator chosen by mutual agreement to resolve the dispute they face, in neutrality, impartiality and confidentiality conditions.

We must also mention an important addition to the mediation law that is the introduction of art. 60, which at letter e) stipulates: "*it is necessary to prove the participation in a mediation information session for labour disputes arising from the conclusion, execution and termination of individual employment contracts*". In fact, the labour legislation (Law no. 168/1999, repealed by Law no. 62/2011 on social dialogue, but also Law 53/2003 – Labor Code) always provided mandatory for the judge to consider the parties in a labour dispute to seek an amicable settlement. Unfortunately, this provision was more declarative, perhaps even formal, because the court, due to a large number of cases in question, passed this approach quite easily.

If the mediation procedure in case of individual labour disputes cannot be finalized with an agreement, the parties have the possibility to address the competent courts to resolve their dispute.

Thus, Law no. 62/2011 of the social dialogue mentions in art. 208 that any individual labour dispute is resolved in the first instance by the court. We consider that this provision should not be interpreted in a restrictive sense, but must be corroborated with the provisions of Law no. 192/2006 on mediation and the profession of a mediator and of Law no. 202/2010 on some measures to speed up the settlement of cases, in the sense that it is in the interests of the parties to resort to the amicable settlement of their dispute before addressing the courts, and the courts have a special role to play in promoting the institution of mediation and encouraging the parties to resort to this dispute settlement procedure, which has advantages for both the parties themselves and the courts.

Therefore, the parties can resort to mediation both, before there is a case brought before the court, and in the conditions in which the dispute between them is already pending before the courts. If there is a case pending before the courts, and the parties agree to try to resolve the dispute through mediation, the court may suspend the case for a maximum period of three months. If the parties reach an agreement, the case is reinstated without paying the related stamp duty, and the court will take note of the mediation agreement, pronouncing, in this case, an expedited decision. If the parties do not reach a unanimously accepted solution in the mediation procedure, the dispute may be continued before the court.

2 The procedure for mediating collective labour disputes from the perspective of the law

The current Labour Code (Law 53/2003, with subsequent amendments and completions) regulates art. 231-236 labour disputes, defining them as those conflicts between employees and employers regarding the interests of economic, professional or social character or the rights resulting from the development of labour relations. It follows from these legal provisions that these labour disputes are divided into collective disputes and individual labour disputes. Also, conflicts of interest can only be collective, and conflicts of rights can be both individual and collective.

The doctrine defines the conflict of rights, in a general wording, "*that conflict submitted or likely to be submitted to domestic or international jurisdiction*" [6].

The judicial practice has often held that labour disputes (labour litigation) do not only mean disputes arising from the manner in which the employee performs the work and the employer pays appropriate remuneration or those related to working and rest time, but also all disputes related to the way in which the activity is carried out in the unit, including those related to the responsibility for illicit deeds committed in the work process or on its occasion. In this context, the disputes regarding the rights arising in connection with the obligation to pay by an employee guilty of a work accident resulting in the injury of another employee were qualified as labour disputes.[7]

The currently applicable Labour Code does not make any reference to the mediation procedure, specifying only briefly in art. 232 that the procedure for resolving labour disputes is established by a special law.

In this case, the text of the law refers to Law no. 62/2011 of the social dialogue, which includes provisions regarding collective labour disputes in Title VIII, chapters I-IV, art. 154-216.

Therefore, Law no. 62/2011 of the social dialogue currently constitutes the common law in the matter of resolving collective labour disputes. This normative act refers in Title VIII chap. II to the Collective Labour Conflicts, and in chap. IV of the same Title contains provisions regarding mediation and arbitration. It should be noted that in Law no. 62/2011 of the social dialogue no longer stipulates the role of mediator of the Economic and Social Council neither an advisory role for the Parliament and the Government of Romania, art. 82 – 119 being repealed by Law no. 248/2013. Regarding labour disputes, we note that the current regulation no longer retains the difference between "conflicts of interest" and "conflicts of rights" as it existed in Law no. 168/1999 on the settlement of labour disputes, being specified only the notion of "collective labour dispute". [8]

The first law reference to mediation is found in art. 27 which provides for the possibility for trade unions to use mediation in achieving the purpose for which they are established. The purpose for which the trade unions are established is shown in art. 28(1): "*Unions shall protect the rights of their members under labour law, civil servants' statutes, collective bargaining agreements and individual employment contracts, as well as agreements on the employment relationship of civil servants, before the courts, jurisdictional bodies, of other state institutions or authorities, through their own or elected defenders*".

The law stipulates that a collective labour dispute may take place for the defence of collective interests of an economic, professional or social nature, in accordance with the provisions of art. 156 of the law, which mentions the right of employees to initiate collective labour disputes in connection with the commencement, conduct and conclusion of collective bargaining agreements, in the following cases:

- the employer or organization refuses to start negotiating a collective labour contract;
- the employer or the organization does not accept the claims made by the employees;
- the parties do not reach an agreement on the conclusion of a collective labour agreement until the date established by mutual agreement for the completion of negotiations.
- the unit does not fulfil its obligations under the law to start the mandatory annual negotiations on salaries, working hours, working hours and working conditions.

Also, art. 157 of the law stipulates that employees' claims may not be the subject of collective labour disputes, the resolution of which requires the adoption of a law or other normative act, and at the same time, the law mentions the situations in which a collective labour dispute may be triggered, as well as the fact that during the validity of a collective labour agreement or contract, employees cannot trigger a collective labour dispute. The procedure for the amicable settlement of labour disputes between employers and employees is provided in Chapters III and IV of the law.

The normative act includes a differentiation in the case of resolving collective labour disputes compared to individual labour disputes so that all collective labour disputes are resolved according to the special procedure regulated by Law no. 62/2011 of the social dialogue and the individual labour conflicts are resolved according to the provisions of Law no. 192/2006 on mediation and the profession of a mediator. In the case of collective labour disputes, Law no. 62/2011 of the social dialogue stipulates that the conciliation procedure is mandatory, this being carried out by the Ministry of Labour and Social Protection – for units and sectorial collective labour disputes, respectively the Territorial Labour Inspectorate – in case collective labour disputes at the unit level.

In the event that an agreement is reached on the settlement of the claims made, the collective labour dispute is considered concluded. If the collective labour dispute has not been resolved by conciliation – so the conciliation procedure has failed – or the agreement concluded as a result of the conciliation is only partial, the parties – by consensus – can initiate the mediation procedure. Therefore, it is an option of the parties and not an obligation to resort to mediation in the case of collective labour disputes, unlike the conciliation procedure, which, in this case, is mandatory. Instead, mediation becomes mandatory if the parties to the conflict, by mutual agreement, have decided to do so before or during the strike.

It is important to emphasize that during the settlement of labour disputes that have been subject to mediation or arbitration, employees may not strike, and if the strike has nevertheless been called, it shall be suspended.

In order to quickly and amicably resolve the collective labour disputes, the Office of Mediation and Arbitration of Collective Labour Disputes of the Ministry of Labour

and Social Protection operates. Within the Office, the Body of Mediators and the Body of Arbitrators of Collective Labour Disputes are constituted. Arbitration is provided by law as a possibility for the parties – throughout the duration of a collective labour dispute – through which they may try to resolve the dispute they face. The arbitral decisions provided by the Office of Mediation and Arbitration are binding on the parties, complete the collective labour agreements and become enforceable from the moment they are pronounced.

3 Conclusions

The difference between mediating collective labour disputes and mediating individual labour disputes consists primarily in the fact that in the case of collective disputes mediation is done by mediators authorized by the Ministry of Labor and Social Protection, while mediation of individual labour disputes can be done by to any mediator authorized under the conditions of Law no. 192/2006.

We consider that it is absolutely necessary to resort to the mediation procedure in order to resolve both conflicts of rights and conflicts of interest, of course without violating the competences of the bodies expressly empowered for conflicts of interest in the phases imposed by the legislator.

Given the limited material and human resources of the justice system, the net benefits of using mediation – simple steps to follow, the extremely low waiting time for settlement, the limitation of expenses, the fact that you can take part in decisions that affect you – there is a need for a growing promotion among litigants from the magistrates themselves or from lawyers for the benefit of all parties involved.

To sum up, the answer to the question from the beginning of this paper at the beginning is: yes, mediation of labour disputes is possible, for conflicts of rights in their entirety and, in part, for conflicts of interest.

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The notice in case of dismissal for reasons not related to the person of the employee – Respecting the right to work and the principle of non-discrimination

Dobrinoiu A.

Phd. Student within the "Titu Maiorescu" University, Facultaty of Law (ROMANIA), IOSUD, Labour Law
E-mail: alicedobrinoiu@volonciu.ro

Abstract

The right to work, freedom to work, the right to dignity at work and the principle of non-discrimination are interdependent concepts and are enshrined in both international and domestic law. The Labor Code of 1972 provided for the possibility for the employer to terminate the employment contract of an employee without notifying it in advance and without respecting the notice period, but the employee has the right to receive, upon termination of employment, an allowance equal to the remuneration related to the non-complied term. Although this possibility was no longer maintained in the new Labor Code of 2003, the provisions of collective bargaining agreements concluded at national level maintained the possibility for the employer to terminate the employment contract of an employee without notice, provided he pays an allowance equal to the basic salary for one month, as per the date of termination of the employment contract. Currently, failure to give notice with a minimum duration of 20 working days, entails the absolute nullity of the dismissal measure and the dismissal decision. The employer has the possibility to grant paid time during the notice period, but in the situation where the decision targets only one or more of the notified employees, there may be premises for a situation of discrimination.

Keywords: Right to work, discrimination, liberty, restraint, paid time off, notice, dismissal etc.

1 The right to work and the freedom to work in the internal and European context

In Romania, the right to work benefits from recognition and protection. In the current system of domestic law, the general framework of the right to work is represented by the Constitution [1], the fundamental law mentioning it among the fundamental rights of the individual. According to art. 41 para. 1 of the Constitution, the right to work cannot be restricted, it's signifying the very right that a human being has to live, procuring the necessary resources for life through his work. The constitutional provisions enshrine the freedom to choose the profession, trade or occupation, the freedom to choose the job, social protection of labor, remuneration and equal treatment, the right to bargain and the binding nature of collective agreements concluded as a result of such negotiations. The right to work was recognized and protected even before 1990, but under the rule of law applicable at the time, the right to work corresponded to the correlative obligation to work. Thus, through the Constitution of the Socialist Republic of Romania, it was established that work is a duty of honor for every citizen of the country [2]. The doctrine stated that the principle of freedom of labor in Romania until 1990, was debatable, because the fundamental right to work has a positive and a negative connotation: everyone has the right to work and, respectively, no one can be forced to work, forced work being, in principle, prohibited. Or, when the Romanian Constitution prior to 1990 also referred to the "fundamental" obligation of citizens to work, the negative connotation was defeated. After 1990, however, the legislation establishing the correlative obligation to work was repealed and the principle of freedom of labor and the right to work were enshrined exclusively, absolutely and independently [3]. According to the new Labor Code, Law no. 53/2003, as republished in 2011 and with subsequent amendments, the right to work is enshrined in the provisions of art. 3 and cannot be fenced. Everyone is free to choose the job and profession, trade or activity he is to perform. [4] At the same time, no one can be forced to work or not work in a certain job or in a certain profession, whatever it may be [5]. The provisions of art. 3 para. 4 of the Labor Code provide for the express sanction of the absolute nullity of the employment contract concluded in violation of the provisions set forth above in this paragraph. However, in accordance with the provisions of art. 57 of the Labor Code which regulates the nullity in labor law, the nullity provided by art. 3 para. 4 of the Labor Code will have to be ascertained by agreement of the parties or pronounced by the court, although it appears as a nullity of law.

The current legal provisions have been aligned with international law enshrining the right to work, this right being considered an essential right of the human being. Thus, international law has regulated the concepts of "right to work" and "freedom of labor" since 1948, when it was adopted by the UN General Assembly, the Universal Declaration of Human Rights, which stipulates in art. 23 point 1 that "everyone has the right to work, to freely choose the employment, to just and favorable conditions of work". In 1966, the UN General Assembly adopted the International Covenant on Economic, Social and Cultural Rights (ratified by Romania by Decree no. 212/1974), of which Article 6 (1) stipulates that "States Parties recognize the right to work, which includes the right of every person to the right to earn a living by freely chosen or accepted employment". Last but not least, the European Social Charter

(adopted in 1996 and ratified by Romania by Law no. 74/1999) in point 1 stipulates that any person must have the opportunity to earn a living through work freely undertaken and in art. 1 regulates in detail the right to work. The right to work and its attributes have also been regulated in the I.L.O. no. 88/1948 regarding the organization of the activity of using the labor force, ratified by Romania by Decree no. 284/1973 (Official Gazette no. 81 of June 6, 1973) and no. 122/1964 on employment policy, ratified by Romania by Decree no. 284/1973 (Official Gazette no. 81 of 6 June 1973) [6].

Regarding the two concepts of "right to work" and "freedom of labor", the internal doctrine held that the right to work in a market economy does not mean guaranteeing a job, but the fact that such a right cannot be guaranteed, restricted, each citizen being free to work as much as he wants and as much as he can, being the sole master of his own labor force. The concept of freedom of labor is characterized as the freedom of the person to choose a profession and job, without any administrative constraints regarding the conclusion of one or more individual employment contracts [7].

2 respecting the right to work and the principle of non-discrimination during the notice period in case of dismissal based on the provisions of art. 65 of the labour code

The notice presupposes the prior notification of the other party about the termination of the employment relations that will take place, aiming to avoid the negative consequences, which would be produced by the unilateral and untimely termination of the employment contract. For the employee, in case of dismissal, the regulation of the notice constitutes a guarantee of the right to work and stability in work. The purpose of the notice of dismissal is for the employee to be able to look for and find another job, without being deprived of salary income [8]. If, during the notice period, the individual employment contract is suspended, the notice period will be suspended accordingly. Pursuant to the provisions of art. 38 of the Labor Code, the employee may not waive the right to notice neither before the communication of the notice of notice nor during the term of notice. Consequently, compliance with the dismissal procedure implies the granting of the notice and the observance of its legal minimum term. In practice, however, there may be a situation in which a fired employee is interested and even wants to give up the notice, for objective reasons (for example, he has found another job where he has to start work immediately), in which case it is debatable. the intervention of the provisions of art. 38 of the Labor Code. In this case, however, the employee, by manifesting his will, would determine the modification of the ground for termination of his employment contract, respectively could determine the incidence of the provisions of art. 55 letter b) of the Labor Code, if there is also the consent of the employer. It could be discussed, however, to what extent a possible refusal of the employer to agree to the employee's request for conventional termination of his employment contract would not be abusive or if it can be considered that the employee's prior notice was already a expression of will on the part of the employer regarding the termination of the employment contract and may be qualified as a valid

expression of will expressed and necessary to intervene in the case of termination of the employment contract by agreement of the parties.

It is also important to point out that the notice by which the employee is informed by the employer of the latter's intention to terminate the employment relationship between the parties, and which is a legal act preceding the dismissal decision, can not represent itself the object of censorship of the labor court, but only in the analysis of legality and validity of the decision to terminate employment and with it, because by itself, the notice does not produce the effects of termination of the individual employment contract [9].

2.1 *The duration of the notice period*

According to the provisions of the current Labor Code, employees dismissed due to physical and/or mental incapacity, due to professional misconduct and due to abolishing the position, have the right to a notice that can not be less than 20 working days (art. 75 of the Code labor). However, both by the Labor Code adopted in 2003 and by the previous legislation (art. 131 of the Labor Code 1972, republished in the Brochure on 12.11.1997 and in force until 01.03.2003), the notice period in case of dismissal was 15 days working. The dismissal cases for which this notice period applies prior to 2003 were listed in art. 130 para. 1 lit. a)-f) of the Labor Code of 1972, respectively when i) the unit reduces its staff by abolishing positions such as the one occupied by the person in question as a result of the reorganization; ii) the unit ceases its activity by cessation (dissolution – Labor Code republished in 1997); iii) the unit moves to another locality and the employed person does not agree to follow it; iv) the unit moves to another locality and has the possibility to provide locally the necessary staff; v) the person does not correspond, under professional report, to the position in which he/she was employed; vi) in the position occupied by the employed person is reinstated, based on the decision of the competent bodies, the one who previously held that position. At the same time, prior to the adoption of the Labor Code of 2003, the legislation expressly provided for the obligation of the employee to perform activity according to the work schedule during the notice period. As indicated above, the duration of at least 15 working days of the notice period was maintained in the Labor Code adopted in 2003, but these provisions were supplemented by the provisions of national collective bargaining agreements stipulating a notice period of 20 working days. Also through collective agreements at national level, the right of the employee during the notice to be absent 4 hours a day from the work schedule to look for another job was also provided. In this case, the employer could order the granting of these cumulative hours. Through the provisions of art. 75 of the Labor Code as amended and republished in 2011, it was stipulated that the duration of the notice period may not be less than 20 working days. Also, the obligation to effectively perform the activity during the notice period was no longer maintained in the new regulations. Taking into account the lack of a collective bargaining agreement at national level after 2011 as well as if there are no collective bargaining agreements with express provisions to this effect at unit level, at group level or at sector level, employees no longer benefit of the right to be absent 4 hours a day or to benefit from these free paid hours in cumulation, returning the possibility to the employer to grant or not to the employee on notice paid free time,

partially or fully. The situation may be different if, however, the parties have established in the individual employment contract clauses on the right to notice. Thus, compared to the previous legislation, starting with 2011, the notice period was resized, both in terms of scope and applicability.

2.2 *The possibility of the employer not to respect the notice period*

Prior to 1990, the Labor Code provided for the possibility of the employer to terminate the employment contract of an employee without prior knowledge and implicitly, without respecting the notice period, but the employee had the right to receive, upon termination of employment, an equivalent allowance in cash with no notice period. Although this possibility was no longer maintained in the provisions governing the notice in the new Labor Code adopted in 2003, by the provisions of art. 74 para. 4 of the Collective Labor Agreement concluded at national level for the year 2003 [10], the possibility for the employer to terminate the employment contract of an employee without notice, with the latter's right to benefit from an indemnity equal to the basic salary for one month, had on the date of termination of the employment contract. In practice, it was noted that, since the legislator did not provide an express sanction for non-compliance with the provisions of art. 74 lit. b) of the Labor Code (in force in the period 2003-2011), then the nullity of the dismissal decision for the omission to mention the duration of the notice can be ascertained only in the case where it proves the occurrence of an injury to the dismissed person. In jurisprudence [11], it was noted that the employee did not suffer actual damage by failing to mention the duration of the notice in the contested dismissal decision, since he received an allowance equal to the basic salary prior to dismissal, in accordance with art. 74 para. (4) of the National Collective Labor Agreement valid for the years 2005/2006, which provided that, if a person's employment contract is terminated without notice, the employer has the obligation to pay an indemnity equal to the basic salary for one month, had at the date of termination of the employment contract.

Over time, this possibility has not been included in the collective bargaining agreement concluded at national level, nor has there been any specific regulation in the legislation, which is why due to the non-unitary practice of the courts invested with resolving disputes related to object of finding the nullity of the dismissal decisions issued without observing or with partial observance of the notice period, was pronounced by the High Court of Cassation and Justice in full jurisdiction to judge the appeal in the interest of law, Decision no. 8/8.12.2014 [12]. By this decision, the court allowed the appeal in the interest of the law and clarified two legal issues raised, namely whether the employer's non-compliance with the right to notice constitutes a ground for annulment of the dismissal decision and the conditions under which the dismissal decision for omission occurs to indicate in its content the duration of the notice. Therefore, it was mandatory to state that: "*In the interpretation and application of the provisions of art. 78 of the Labor Code with reference to art. 75 para. (1) of the same code, the non-granting of the notice with minimum duration provided by art. 75 para. (1) of the Labor Code, republished, respectively with the duration included in the collective or individual labor contracts, if this is more favorable to the employee,*

attracts the absolute nullity of the dismissal measure and of the dismissal decision. In the interpretation and application of the provisions of art. 76 lit. b) of the Labor Code, reported to the provisions of art. 78 of the same code, the absence in the decision to dismiss the notice regarding the duration of notice given to the employee is not sanctioned by the nullity of the decision and the measure of dismissal when the employer proves that he gave the employee notice with the minimum duration provided by art. 75 para. (1) of the Labor Code or with the duration provided for in collective or individual employment contracts in the event that it is more favorable to the employee. "

The High Court of Cassation and Justice held that the right to notice is also an instrument to protect the employee against the negative effects of termination of his employment contract ordered by the employer, subsuming the "right to protection in case of dismissal", regulated by Labor Code. The employee's right to notice also represents a dimension of the employee's right to information, which is not limited only to the conclusion of the legal employment relationship, but continues during its development, provided by art. 39 para. (1) lit. h) The Labor Code, republished, and by the provisions of art. 2 para. (1) and para. (2) lit. g) of Directive no. 91/533/EEC[13]. According to the provisions of the Directive, the employer has the obligation to inform the worker of the essential elements of the contract or employment relationship. Among the minimum elements regarding which the worker must be informed, indicated in the content of art. 2 of the Directive, is also part of the duration of the notice, which must be observed by the employer in case of termination of the individual employment contract.

2.3 *Granting paid time during the notice period*

During the notice period, the employment contract produces the same effects: the employee has the obligation to carry out the activity under the same conditions and the employer has the obligation to pay him all the due salary rights. The rule, according to the current legislation, is that during the notice the employee performs activity. However, with regard to the employee's obligation to work during the notice of dismissal, there are cases in which the employer decides to give the employee paid leave during the notice period. The reasons why paid time off may occur range from the fact that there is no longer any activity to be actually performed by the employee and to the case where the employee's presence in the unit is no longer desired. Whatever the reason for the employer's decision, the granting of paid time off does not cause pecuniary damage to the employee, on the contrary, in this case the employer also offers the employee the opportunity to seek and obtain another job until which will intervene to the extent of dismissal, even if this legal or conventional obligation no longer exists. However, the cause of dismissal for reasons not related to the person who provided the basis for granting the notice becomes subjective if only one or only part of the notified employees have paid time off, but there is no justification for the decision of the employer (eg: although there is work to be done until the end of the notice period for all employees, the employer decides to keep only a part of those notified at work because they are more competent and can be assigned more tasks or because they are more cooperative). We could consider that in this case there may be incidents of restrictions on freedom of employment and discrimination, achieved by the employer offering a period of paid time off for some employees on notice and forcing the

performance of work for other employees on notice, even if their pecuniary interests are not prejudiced, all employees benefiting from the payment of the free time granted or the time worked during the notice period. Thus, if the employer grants paid time off during the notice period only for one or more of the employees dismissed during the same period, in the absence of objective justifications documenting the employer's decision, there may be grounds for discrimination.

A common situation in practice is that which in appearance represents a benefit for the employee, respectively the granting of paid free time but which in fact, represents a restriction of the right to work, as he is no longer allowed access to the unit with the communication of the notice notification (ex: once the notice is communicated, the employee is required to hand over all the goods necessary to perform the duties of work, he is no longer allowed access to the computer system or remote, he is obliged to hand over the access card, etc.). In this case, although the employee is in the notice period, the effects of the dismissal can be considered to occur prior to the communication of the dismissal decision, since from the moment of notice, the employee in question is unable to perform the employment contract, still effective until the communication of the dismissal decision. Therefore, even during the notice period, the employer may violate the employee's right to dignity at work. An eloquent example is given by the French jurisprudence, so the Conseil des Prud'hommes ordered the French company SKF to pay for each employee the amount of 30,000 francs, as non-pecuniary damage, because when the company decided to dismiss a certain number of employees, after announcing the dismissal by the director of human resources, he did not allow them to return to their jobs, forcing them to leave the company immediately in taxis specially ordered for the occasion, taxis already waiting for them at the gate of the company [14].

In the employment relationship, the employer has the right to establish the organization and operation of the unit, the appropriate duties for each employee, to make mandatory provisions for employees, to exercise control over the performance of duties and to find disciplinary offenses and apply the appropriate sanctions. On the other hand, the employee, in addition to the rights related to the employment relationship, has guaranteed by the Constitution the fundamental rights, specific to his quality of citizen-employee, respectively the right to dignity at work, the right to privacy, the right to freedom of expression, etc. Therefore, in exercising his prerogatives, the employer must also respect the fundamental rights of his employee. The Romanian Constitution as well as the New Civil Code regulate the right to dignity of the person and the Labor Code provides in art. 6 para. 1 that "*any employee who performs a work benefits from the respect of his dignity and conscience, without any discrimination", as well as in art. 39 para. 1 lit. e) the fact that "the employee has the right to dignity at work".*

According to the provisions of art. 8 paragraph 1 of the Labor Code, labor relations are based on the principle of good faith, which means that all actions of the employer must be limited to this principle. G.O. no. 137/2000 on the prevention and sanctioning of all forms of discrimination established by the provisions of art. 1 para. 1 the principle of respecting human dignity, the rights and freedoms of citizens, the free development of the human personality, these representing supreme values and guaranteed by law.

The doctrine and jurisprudence [15] have mostly ruled that, for the existence of discrimination, the following conditions must be met cumulatively: a) the existence of a differentiated treatment manifested by any difference, exclusion, restriction or

preference; b) the existence of a criterion of discrimination, such as those listed by way of example in the legal definition of discrimination (art. 2 paragraph 1 of G.O. no. 137/2000 for the prevention and sanctioning of all forms of discrimination, updated); c) the existence of a causal relationship between the discrimination criterion and differential treatment; d) the purpose or effect of the differentiated treatment is to restrict, remove the recognition, use or exercise, on equal terms, of human rights and fundamental freedoms or a right recognized by law; e) the persons or situations in which they find themselves in comparable positions; f) the differentiated treatment is not objectively justified by a legitimate aim, the achievement of which is done by appropriate and necessary methods. The causal relationship between differential treatment and the criterion of discrimination presupposes that the alleged victim was treated less favorably than other persons in a similar situation because he has a characteristic which falls within the concept of a 'protected criterion': race, nationality, ethnicity, language, religion, social category, beliefs, sex, etc., or any other criterion whose purpose or effect is that provided by legal provisions (restriction, removal of recognition, use or exercise, on equal terms, human rights and fundamental freedoms or the rights recognized by law, in the political, economic, social and cultural fields or in any other field of public life).

3 Conclusions

Legislative developments have led to the recognition of the employee's right to notice and to its execution in kind, maintaining the purpose for which the notice is given, namely ensuring the employee's ability to seek a new job and avoiding the situation in which the employee would be immediately deprived of any income, in the context of respect for the right to work and dignity at work. The clarifications brought by the supreme court ruled that the notice is part of the legal procedure of dismissal, representing the notification by which the employee is informed, the fact that at a later date it will be ordered to terminate his employment contract, thus being practicaly a guarantee of the employee's right to work. Last but not least, it was ruled that the right to notice is guaranteed and it is not left to the discretion of the employer to grant it, under the sanction of absolute nullity of the dismissal.

As regards the possibility for the employer to grant paid time off during the notice period to the notified employees, this option must be subject to the principle of good faith, must respect the fundamental right to work and freedom of work in all its connotations and, last but not least, must respect the principle of non-discrimination.

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Conventional representation during the state of emergency

Stupu A.-D.

PhD student at "Titu Maiorescu" University (ROMANIA)
E-mail: stupu.andreeadiana@gmail.com

Summary

The author presents in this study aspects regarding the conventional representation of both the natural person and the legal person, during the state of emergency established at national level, as well as innovative ways of implementing the institution of representation and the given context.

Considering the situation created globally by COVID-19 and the fact that in Romania a series of military ordinances were issued by the Ministry of Internal Affairs, which prohibits the movement of all persons outside their home/household, the institution of representation is severely affected, which in the end affects the daily activity of the persons, by the impossibility of concluding legal acts.

Therefore, we will make an analysis of the constitutionality of the restriction measures, as well as of the possibility of the conventional representation of both the natural person and the legal person, exposing innovative ways of representation, in accordance with the current technology.

Keywords: conventional representation of the natural person, conventional representation of the legal person, 2020 military ordinances, state of emergency at national level, COVID -19, constitutionality of restrictive measures, pandemic.

1 Introduction

The activity of both natural and legal persons is carried out through actions undertaken constantly, which are based on the conclusion of legal acts. Usually, individuals personally conclude legal acts, being present at their signing or execution, but there are situations in which the persons cannot be present, even more so in the current situation imposed by the state of emergency, cases in which there is a need for their representation by another person.

The institution of representation is nothing but a procedure of legal technique by which a person named representative, concludes legal acts with third parties in the name and on behalf of the representative.

The representation can be legal, conventional, or judicial. [1] In the case of conventional representation, one person (the represented) empowers another person (the representative) to conclude legal acts in his name and on his account. The trustee must have full capacity of exercise because in the documents he concludes on behalf of the principal must express a valid consent, lack of consent or defects of will being assessed not only in the person of the principal, but also that of the trustee. [2]

In the case of conventional representation, both the represented person and the representative must have the capacity to conclude the act for which the representation was given.[3] According to art. 83 par. (1) NCPC, the conventional representation of natural persons before the first instance, as well as on appeal, may be performed both by a lawyer or also by another agent.

The legal person is represented by the administrators with the right of representation or, in the absence of appointment, by any of the associates, if the right of representation has not been stipulated by the contract only for some of them. [4] To this respect, the legal person exercises its rights and fulfills its obligations through its administrative bodies, up to the date of their establishment. [5] In the absence of the administrative bodies, until the date of their establishment, the exercise of the rights and fulfillment of the obligations regarding the legal person is made by the founders or by the natural persons or legal persons designated for this purpose. [6]

The power of representation is demonstrated by a unilateral legal act, called the power of attorney, or a bilateral one, called a mandate contract.

The mandate contract can be concluded in written form, authentic or under private signature, or verbally. Acceptance of the mandate may also result from its execution by the agent. [7] The mandate given for concluding a subject legal act, according to the law, to a certain form must respect that form, under the sanction applicable to the act itself. The provision does not apply when the form is necessary only for the opposability of the act towards third parties, unless otherwise provided by law. [8]

2 The mandate contract during the state of emergency

Currently, a state of emergency is established in Romania. [9] On the background of the rapid spread of COVID-19, the World Health Organization has declared the outbreak, a public health emergency of international interest.' [10]

The Ministry of Internal Affairs has issued several military ordinances, [11] with measures to prevent the spread of COVID-19, which prohibits the movement of all persons outside their home/household, with some exceptions.[12] Also, the movement of persons who are the age of 65 or above, outside their home/household, is allowed only in a certain period of time, strictly for reasons expressly provided, [13] outside this time interval, their movement is allowed only if it is done for professional interest or for carrying out agricultural activities.[14]

We can see that it is an unprecedented situation in the 21st century, as there has not been this sort of general traffic restriction, this being established not only in Romania but also in some countries both in Europe and on other continents.

In such situations, more than ever, representation is imperiously necessary. Although the state of emergency is established for a short period of time, with the

possibility of extension, the commercial relations and not only, cannot be stopped, being necessary the conclusion of legal acts at every step.

The government tried to mitigate the negative consequences of banning the movement of persons, taking a series of measures such as extending the validity of certain documents, postponing payment obligations, extending the deadlines for submitting documents/statements/applications, but they do not cover all the needs of society.

The representation of the natural person is in this case a solution, both to comply as much as possible with traffic restrictions and to protect the population, especially people with higher risk of disease and other categories of vulnerable people, but it is indispensable in the case of the legal person.

The mandate contract can be validly concluded verbally, through a discussion between the principal and the agent even by telephone, through an unsigned communication, sent by fax, email, message, as well as any other form of communication equivalent to an oral statement from the principal destined to the agent, a situation that does not raise problems in the current context.

Also, the mandate contract can be validly concluded in written form under private signature.

For those persons who hold an electronic signature certificate, the contract under private signature does not raise any issue. In the current legislation, any person, natural or legal, located on the territory of Romania can benefit from certification services in order to use the electronic signature. [15] The provision of certification services is not subject to any prior authorization and is carried out in accordance with the principles of free and fair competition. [16] The electronic form, to which an extended electronic signature has been incorporated, attached or logically associated, based on a qualified certificate not suspended or not revoked at that moment and generated by means of a secure device for creating the electronic signature, is assimilated, in terms of its conditions and effects, with the document under private signature. [17] In Romania, the electronic signature is mainly used by legal entities in relation to institutions such as SEAP, CSSP, ANAF, ITM, CAS, ONRCANAF, or even with business partners. Documents signed in electronic format guarantee that they cannot be modified or altered in any way, intentionally or by mistake. Each signature is protected, so notifications appear when there is a change in the content of the document. In addition, one can consult the history of all changes made, which ensures increased safety. The electronic signature is also protected against counterfeiting, which means more security.

But, if a person does not have a certificate for electronic signature, one will be able to validly draw up a mandate contract, being able to write it by hand, to personally type it on a computer or to give someone approval to type it for the person in question, afterwards to sign and send it to the trustee or to the person with whom he is about to conclude the legal act. If, in order to fulfill the mandate, the original mandate contract is necessary, a disadvantage is the long time that the document travels to the recipient, the couriers being overworked during this period.

Depending on the object of the mandate, there are situations when in order to mandate or represent a person, it is necessary to authenticate the mandate contract. As such, the visit to a public notary's office or the notary's office at the principal's or agent's home is urgently necessary, or given the state of emergency, taking into account, on the one hand, the restrictions provided by military ordinances as well as contravention fines

and complementary contravention sanctions, concluding a mandate contract in authentic form is almost impossible. Military ordinances provide for the possibility of travel in professional interest, but if the agent is not a professional and does not act in the interest of its workplace or the object of the mandate is not among the activities allowed during the state of necessity, travel for representation is restricted.

3 Constitutionality of the restrictive measures

During this period, one of the most frequently asked questions is whether military ordinances can be issued in peacetime. According to art. 23, point 2 of the Government Emergency Ordinance no. 1/1999, during the state of emergency, military ordinances may be issued within the limits established by the decree establishing the exceptional measure, by the Minister of Administration and Interior or by its legal substitute, when the state of emergency was issued on the entire territory of the country, as well as by the officers empowered by the Minister of Administration and Interior or by their legal substitutes, when the state of emergency has been issued in certain administrative-territorial units.

We will analyze the constitutionality of the restriction measures in the following, from the perspective of the legality of the issuing body, as well as of the observance of the proportionality ratio between the means used and the intended purpose.

By the institution the state of emergency on the Romanian territory, by the Decree of the President [18] and the Decree on the prolongation of the state of emergency on Romanian territory, the President, body of the executive power, enacted norms of legislative competence of the Parliament, by which they were temporarily restricted, expressly but also implicitly, a series of rights: the right to free movement, the right to work, the right to education, free access to justice, the right to make a strike, the right to have an intimate, family and private life, freedom of assembly, right to free movement, economic freedom, etc., including the right to representation.

The President cannot legislate in the field for which the Fundamental Law requires the intervention of the primary legislator or of the delegated one by modifying some organic laws and by effectively restricting the exercise of human rights.

'The President of Romania, establishes, according to the law, the state of siege or emergency (...)', having in legislative matter only promulgation attributions. [19]

The Constitutional Court in its jurisprudence shows that the law, as a legal act of the Parliament, regulates general social relations, being by its essence and constitutional finality, an act with general applicability.

The law as a legal act of power has a unilateral character, giving expression exclusively to the legislator, whose content and form are determined by the need to regulate a certain field of social relations and its specificity. 'The law in its restricted sense, is the legal act of the Parliament, elaborated in accordance with the Constitution, according to a pre-established procedure and which regulates the most general and most important social relations'. [20] Thus, the law under which the constituent legislator determined that the President establishes the state of siege or the state of emergency (specifically the Government Emergency Ordinance no. 1/1999) must be "(...) in a

report in accordance with the Constitution, and to be harmonized with its letter and spirit ". [21]

According to the constitutional norms, the President has as a base function, the executive one, having recognized, in legislative matters, only attributions regarding the promulgation of the laws [22]; Notification to the Constitutional Court in connection with the unconstitutionality of the laws, or in connection with legal conflicts of a constitutional nature [23], without this being recognized the attribution of legislation.

Regarding the legislative power, the provisions of art. 61 para. (1) of the Constitution establishes that the 'Parliament is the supreme representative body of the Romanian people, the sole legislative authority of the country' and its power to legislate on a particular field can not be limited if the law thus adopted complies with the requirements of the Fundamental Law.

In addition to the legislative monopoly of the Parliament, the Constitution enshrines the legislative delegation, by virtue of which the Government can issue simple ordinances [24] or emergency ordinances [25]. Thus, the transfer of some legislative attributions to the executive authority is made by an act of will of the Parliament or, on a constitutionally accepted path, in extraordinary situations, and only under parliamentary control, but not even by exceptional legislative delegation, meaning by emergency ordinances, the Government is not allowed to adversely affect constitutional rights and freedoms.

In fact, the specialized literature emphasized the essential role of the Parliament during the state of emergency, the doctrine holding that "if the Parliament is not in ordinary session, it must function in extraordinary session during the whole state of siege or emergency conditions. It is a measure that constitutes a guarantee against any excesses or abuses that would be made by the executive and, at the same time, a continuity in the legislative plan of the Parliament as a legislative body of the country. It is possible that in such moments it will be necessary to take exceptional measures to restrict the exercise of certain rights or freedoms of the citizens, and this can only be done by law, according to art. 53 of the Constitution"[26]. This is the reason for obliging the Parliament, through the Constitution, to function throughout the declaration of the state of siege or the state of emergency, having the possibility to legislate in any field, including that of restricting the exercise of certain rights and freedoms[27].

Regarding the Government ordinances, they do not represent a law in the formal sense, but an administrative act in the field of law, assimilated to it by the effects it produces, respecting in this aspect the material criterion. Consequently, since a normative legal act, in general, is defined both by form and by content, the law in a broad sense, so including the assimilated acts, is the result of combining the formal criterion with the material one. As a result, the role of the legislature power cannot be diverted by the possibility offered to the President to establish a state of emergency or state of siege. By the decree establishing the state of emergency, the President may, at most, organize the execution or to execute, in concrete terms, the law, namely the Government Emergency Ordinance no. 1/1991, because the decree, in itself, cannot have the characteristics of a law, as an act issued by the Parliament.

As such, the Government Emergency Ordinance no. 1/1999 had to regulate the conditions and the procedure to be followed, respecting the constitutional framework that configures the attributions of the President of Romania in the field of establishing

the state of siege or state of emergency, as well as the principles of separation, balance and loyal cooperation between public authorities, principles that must respect by all authorities in the exercise of their attributions.

Moreover, through the provisions of art. 28 of the Government Emergency Ordinance no. 1/1999, with the subsequent modifications and completions, the Government did not provide any contravention deed that could be sanctioned, but regulated in a generic way, the fact that the non-observance of the provisions of art. 9 of the ordinance, constitutes a contravention. We must keep in mind that in the content of a military ordinance, no contravention deeds can be established, [28] or non-compliance with the measures imposed by military ordinances, provides that it attracts disciplinary, civil, contravention or criminal liability, in accordance with the provisions of art. 27 of the Government Emergency Ordinance no. 1/1999, with subsequent amendments and completions[29].

By the generic formulation used in art. 9 of the Government Emergency Ordinance no. 1/1999, the contravention deed is not configured by law, but by numerous other administrative acts of law enforcement, whose object of regulation concerns distinct domains. In order to establish the existing or non-existence of the contravention, it must be indicated in a legal norm or by reference to another normative act of the same rank with which the sanctioning text is closely related, in order to be easily identified. In this case, the legal norms are lacking predictability and clarity, which determines the impossibility of the person who would violate the provisions of art. 9 of the Government Emergency Ordinance no. 1/1999, to establish the conduct to be followed, in the absence of a rigorous description of a misdemeanor[30].

The Constitutional Court retained, in its jurisprudence, the principle of legality of contravention sanctions, the principle of establishing contravention sanctions compatible with the moral-legal conception of society, the principle of individualization (customization and proportionality) of contravention sanctions, the principle of customization of contravention sanctions and the principle of uniqueness.(ne bis in idem).

The principle of legality assumes the existence of sufficiently accessible and at the same time precise and predictable norms of domestic law in their application, as it appears from the constant jurisprudence of the European Court of Human Rights[31]. Therefore, the principle of legality implies the obligation of clear and precise texts. The clarity requirement of the law concerns the unequivocal character of the object of regulation, and the precision refers to the accuracy of the chosen legislative solution and of the language used, while the predictability of the law concerns the purpose and the consequences it entails. Also, according to the principle of proportionality, all the main or complementary sanctions applied to the offender must be dosed according to the gravity of the deed. [32].

Another very important aspect is the violation of the provisions of art. 23 par. (11) of the Constitution, by overturning the burden of proof. In its jurisprudence, the Constitutional Court has ruled that "*the protocol of acknowledgement the sanction of the contravention enjoys the presumption of legality, but, when a complaint is made against it, the very presumption it enjoys is challenged. In this case, the competent court will administer the evidence provided by law, necessary in order to verify the legality of the validity of the findings. The person who filed the complaint is not obliged to prove his*

own innocence, the court having the obligation to administer all the necessary evidence (...)[33].

Therefore, the presumption of veracity of the contravention report cannot be located above the presumption of innocence, but the insufficient description of the contravention deed does not allow the persons to make an effective defense in contradiction with the ascertaining body, putting them in a situation of inequality, respectively of inferiority, regarding the possibility of formulating defenses for proving the illegality or unfoundedness of the findings made in the contravention report. The courts are also unable to carry out an efficient and real control of legality and soundness, given that it cannot be assessed to what extent a certain act can be characterized as being of a contravention nature or not, as well as to what extent the sanction applied falls within the limits provided by law, by observing the criteria for individualizing the sanction.

Government Emergency Ordinance no. 34/2020 for the amendment and completion of the Government Emergency Ordinance no. 1/1999, violates the provisions of art. 115 par. (6) of the Constitution. Thus, through the provisions of art. 1 point 1 and point 5 of the normative act mentioned above, which modified the provisions of art. 28 by introducing complementary contravention sanctions, respectively art. 33% 1 in the Government Emergency Ordinance no. 1/1999, art. 115 para. (6) of the Constitution, by violating the constitutional requirement that conditions the legislative delegation by the observance of the interdiction regarding the affectation of the constitutional rights and freedoms, as well as by the interdiction of adopting some measures of forced transfer of some goods in public property.

The criticized texts affect art. 44, art. 41 and art. 31 of the Constitution, regarding the right of private property, labor and social protection of labor and information and concerns measures for the transfer of goods confiscated in public property. Regarding the measure of confiscation, likely to infringe, disproportionately, the right to private property, it should be noted that the measure is not only a limitation of the right to private property, but even depriving the owner of his right or by transferring the good in the state's property [34].

The Constitutional Court, in its jurisprudence, found that the confiscation measure constitutes a deprivation of property, therefore a complete and definitive takeover of an asset, the holder of the right over that asset no longer having the possibility to exercise any of the attributes conferred by the right he had in his patrimony and not a limitation of the property right.

According to the principle of proportionality, any measure taken must be adequate (capable to objectively achieve the purpose), necessary (indispensable for the fulfillment of the purpose) and proportional (respectively there must be a relationship of proportionality between the means used and the intended purpose), which implies verifying the existence of a fair balance between the general interest and the imperatives of defending the fundamental rights of the individual. [35].

The legislator, in this case, the Government, did not respect the adequate and proportional character of the measures adopted by the emergency ordinance, considering the extremely evasive and general regulation of contraventions, in the absence of clear and concise guidelines, the ascertaining agent can apply both the main

contravention sanction of the fine, as well as the complementary contravention sanction of confiscation of the goods destined, used or resulting from the contravention.

The provisions of art. 1 point 5 of the Government Emergency Ordinance no. 34/2020, which introduced art. 33% 1 in the Government Emergency Ordinance no. 1/1999, infringe the right to work and the social protection of work and the right to information, reported in art. 53 by non-compliance with the requirement of proportionality in the temporary restriction of the exercise of certain rights. Although it was adopted in a state of emergency, the criticized normative act required that the measures ordered be adequate, necessary and proportionate.

4 Conclusions

In Romania, from the beginning of the state of emergency until now, we have the highest number of contravention sanctions applied to citizens from Europe, over 300,000, in a total value of over 600 million lei (120 million euros) for non-compliance with the restrictions established by military ordinances.

This aspect denotes, on the one hand, the lack of proportionality between the means used and the intended purpose, as well as the lack of alternative means by which the population can avoid leaving the house according to the provisions of the military ordinances.

Regarding the representation, I consider opportune the establishment at national level, of an online platform, like the already existing ones, SICAP, Virtual private space within ANAF, etc., through which any natural or legal person can create an account with his personal data identification, to be verified and validated by the platform administrators at the time of activating the account in the platform, an account that can be accessed based on a password and to serve as a means of certification of documents as coming from the user of the account, attesting at the same time, the date of the document as well as the signature of the person.

Also, within the conventional representation in court, currently the law stipulates that "the power of attorney to represent a natural person given to the agent who does not have the quality of lawyer is proved by an authentic document"[36]. or "(...) by verbal declaration, made in court and recorded at the end of the hearing, showing the limits and duration of the representation[37]. Given the restrictions established during the state of emergency, I propose that the verbal declaration of proxy before the court can be made by video-conference. Theoretically, the principal will be in front of the court, which will be able to identify him, but basically, the presence will be virtual, online from the distance, through technology.

Such a practice was adopted by the Superior Council of Magistracy, 'In cases that will be judged during the mentioned period, the courts will proceed as far as possible at the hearing in video conference system (...)[38].

Another solution that will allow in the future the access of people in special situations, to notarial services, is the creation at the level of the National Union of Public Notaries in Romania, of a platform through which any person, natural or legal, can conclude documents online. By video-conference, the Public Notary gets in touch with the parties, identifying them and verbally obtaining the confirmation of the

document requested by the parties for authentication. During this process, the parties will communicate in advance to the notary, by correspondence, sending all the documents necessary for drafting the documents required, and then, after drafting and bringing it to the attention of the parties, a video-conference will take place to finally send the deed in electronic format.

The proposals of *de lege ferenda* mentioned above, can be modified and adapted, so that in the future, any natural or legal person will be as little affected as possible, in case of siege or emergency conditions.

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[12] A) travel in professional interest, including between home/household and the place/places of professional activity and back.

B) travel for the provision of goods that cover the basic needs of persons and pets, as well as goods necessary for the development of professional activity;
C) travel for medical assistance that cannot be postponed or made remotely;
D) travel for justified reasons, such as caring for/accompanying the child, assisting the elderly, sick or disabled or the death of a family member;
E) short trips, close to home/household, related to the individual physical activity of the persons (excluding any team sports activities), as well as for the needs of pets/domestic animals;
F) travel for blood donation to blood transfusion centers;
G) travel for humanitarian or voluntary purposes;
H) travel for agricultural activities;
I) the movement of agricultural producers for the sale of agri-food products.

[13] A) travel to provide goods that cover the basic needs of persons and pets/pets;
B) travel for medical assistance that cannot be postponed or made remotely;
C) travel for justified reasons, such as caring for/accompanying a minor, assistance to other elderly, sick or disabled people, or in case of death of a family member;
D) short trips, close to the home/household, related to the individual physical activity of the persons (excluding any collective physical activities), as well as for the needs of pets/domestic animals.

[14] Art. 3, of the Military Ordinance no. 3/2020.

[15] Law no. 455/2001 regarding the electronic signature

[16] Art. 12 of Law no. 455/2001 regarding the electronic signature.

[17] Art. 5 of Law no. 455/2001 regarding the electronic signature.

[18] Decree of the President of Romania no. 195/2020.

[19] Romanian Constitution art. 93 paragraph (1) The President of Romania establishes, according to the law, the state of siege or the state of emergency in the whole country or in some administrative-territorial units and requests the Parliament to approve the adopted measure, within 5 days from its taking.

[20] I. Muraru, E.S. Tănăsescu, *Constitutional Law and Political Institutions,* Volume II, Ed. C.H. Beck, Bucharest, 2004, p. 205.

[21] I. Muraru, E.S. Tănăsescu, *Constitutional Law and Political Institutions,* Volume II, Ed. C.H. Beck, Bucharest, 2004, p. 205.

[22] Romanian Constitution art. 77 paragraph (1) The law is sent, for promulgation, to the President of Romania. The promulgation of the law is done within maximum 20 days from the receipt; Paragraph (2) Before promulgation, the President may request the Parliament, only once, to re-examine the law; Paragraph (3) If the President has requested the re-examination of the law or if the verification of its constitutionality has been requested, the promulgation of the law shall be made within 10 days from

the receipt of the law adopted after the re-examination or from the receipt of the Constitutional Court decision.

[23] Romanian Constitution art. 146, the Constitutional Court has the following attributions: letter. A) decides on the constitutionality of the laws, before their promulgation, at the notification of the President of Romania, of one of the presidents of the two Chambers, of the Government, of the High Court of Cassation and Justice, of the People's Advocate, of at least 50 deputies or by at least 25 senators, as well as, ex officio, on initiatives to revise the Constitution; Lit. E) resolves the legal conflicts of constitutional nature between the public authorities, at the request of the President of Romania, of one of the presidents of the two Chambers, of the Prime Minister or of the President of the Superior Council of Magistracy.

[24] Romanian Constitution art. 115 paragraph (1) The Parliament may adopt a special law empowering the Government to issue ordinances in areas that are not subject to organic laws; Par. (2) The empowerment law shall establish, obligatorily, the scope and date until which ordinances may be issued; Par. (3) If the enabling law requires it, the ordinances shall be submitted to the approval of the Parliament, according to the legislative procedure, until the fulfillment of the empowerment term. Failure to comply with the deadline will result in termination of the effects of the ordinance.

[25] Romanian Constitution art. 115 para. (4) The Government may adopt emergency ordinances only in extraordinary situations whose regulation cannot be postponed, having the obligation to motivate the urgency within them; Par. (5) The emergency ordinance enters into force only after its submission for debate in the emergency procedure to the competent Chamber to be notified and after its publication in the Official Monitor of Romania. The chambers, if they are not in session, must be convened within 5 days from the submission or, as the case may be, from the referral. If within a maximum of 30 days from the submission, the notified Chamber does not rule on the ordinance, it is considered adopted and is sent to the other Chamber which also decides in the emergency procedure. The emergency ordinance containing norms of the nature of the organic law shall be approved by the majority provided for in Article 76 (1); Par. (6) Emergency ordinances may not be adopted in the field of constitutional laws, may not affect the regime of fundamental state institutions, rights, freedoms and duties provided by the Constitution, electoral rights and may not concern measures of forced transfer of public property.

[26] I. Muraru, E.S. Tănăsescu (coord.). *The Romanian Constitution. Commentary on articles,* Ed. C.H. Beck, Bucharest 2008, p. 861.

[27] Romanian Constitution Art 53, paragraph (1) The exercise of certain rights or freedoms may be restricted only by law and only if required, as the case may be, for: the defense of national security, order, health or public morality, The rights and freedoms of citizens; Conducting criminal

investigation; Prevention of the consequences of a natural calamity, of a disaster or of a particularly serious disaster.
Paragraph (2) The restriction may be ordered only if it is necessary in a democratic society. The measure must be proportionate to the situation which determined it, be applied in a non-discriminatory manner and without prejudice to the existence of a right or freedom.

[28] Government Emergency Ordinance no. 1/1999, art. 24 lit. E) the special rules and measures that are in place in the area where the state of siege or the state of emergency has been established, as well as the sanctions applicable in case of non-compliance;

[29] Emergency Ordinance no. 1/1999, Art. 27 with subsequent amendments and completions: Violation of the provisions of this emergency ordinance or of the provisions of military ordinances or orders issued during the state of siege and the state of emergency attracts disciplinary, civil, contravention or criminal liability, as the case may be.

[30] Government Emergency Ordinance no. 1/1999, Art. 9 with the subsequent amendments and completions: "(1) The leaders of the public authorities, of the other legal persons, as well as the natural persons have the obligation to respect and apply all the measures established in this emergency ordinance, in the normative acts related, as well as in the military ordinances or in order, specific to the established state. (2) The leaders of public authorities and administrators of economic operators who provide public utility services in the fields of energy, health, agriculture and food, water supply, communications and transport have the obligation to ensure the continuity of essential services for the population and defense forces.

[31] European Court of Human Rights, Judgment of 5 January 2000 in Beyler v. Italy, paragraph 109, and Judgment of 8 July 2008, in Fener Rum Patrikligi v. Turkey, paragraph 70.

[32] Constitutional Court, Decision no. 732/2018.

[33] Constitutional Court, Decision no. 1084/2011.

[34] Constitutional Court, Decision no. 197/2019, recital no. 35.

[35] Constitutional Court, Decision no. 266/2013 and Decision no. 662/2014.

[36] Art. 85 para. (1) NCPC.

[37] Art. 85 para. (2) NCPC.

[38] Art. 1, point 5 of Decision no. 191/10.03.2020 and C.S.M.

The abuse of right in labor law. The resignation

Tudor F.

"Titu Maiorescu" University, Doctoral School – Law (ROMANIA)
E-mail: florianatudor@gmail.com

Abstract

The abuse of rights has been and remains a topical theoretical-practical research subject that involves a series of legal mechanisms in an attempt to reduce or eliminate the effects produced. Situated on the immediate border of the excessive exercise of rights, the abuse of rights produces a series of negative consequences for the addressee(s) (either patrimonial or non-patrimonial), while the efforts of judicial practice and doctrine to identify, propose and create a normative framework for the application of certain effective sanctions are notable.

The concept of abuse of rights has had its doctrinal recognition since the end of the 19th century. Despite the currently unanimous doctrinal, jurisprudential and legislative recognition, the judicial protection of the injured rights and the reparation of the damage caused by such circumstances is insignificant compared to the magnitude of the phenomenon.

The present study analyzes the doctrinal evolution and the foundation of the concept of abuse of rights, its application and manifestation in labor law, especially in the case of the institution of resignation.

Keywords: The foundation of the theory of abuse of rights, abuse of rights in labor relations, abusive resignation, sanctioning of substantial and procedural abuse of law.

1 The foundation of the abuse of rights.

The prerequisite of the abuse of rights is the very existence of the subjective right, and the concept can be defined, in essence, as the exercise of the right in bad faith and outside the internal and external limits recognized and protected, likely to cause harm[1].

[1] Over time, definitions of abuse of law have been numerous and related to the theory adopted. For example, in the interwar period it was stated that "*A right, exercised in contradiction with these customs, in addition to normal and rational needs, ceases to be a right, ie a lawful act, and becomes an abuse. Thus, the custom becomes the measure of the lawful exercise of a right, in the absence even of any textual prohibition. This system constitutes the subtle and controversial theory of abuse*

An in-depth study of the evolution of this concept shows that the general trend, until the end of the 19th century, was to deny/challenge[2] the abuse of right, despite the fact that until then, separately, there were jurisprudential solutions[3], through which the abuse of subjective right was sanctioned.

Abuse of rights occurs when the exercise of the right is abnormal/inappropriate. Precisely considering the specificity of subjective law, as a (prerogative) legal possibility, which is complemented by the exercise of law as a legal materialization of this possibility, at the doctrinal level we talk about the subjective abuse of rights while the objective law is not defined as "*all legal norms elaborated by the state for the purpose of the normal development of people's common life* "[6].

The one who would be recognized as the founder of this theory, which was born as a reaction to the absolutism of civil rights [5, p. 82], but also as an expression of the interests of the ruling class [1, p. 63], is Louis Josserand. He argued that "*subjective rights, social products, conferred by society, are not assigned in the abstract for us to exercise at our discretion ad nutum; each of them has its reason to be, its mission to fulfill. When we exercise them, we are obliged to conform to this spirit, to act in this direction. Otherwise, we will divert the right from its destination, we will abuse by committing a mistake that could incur liability*. " [7].

Once the recognition of the theory of abuse of law was instated, the doctrinal controversies varied on the definition or, rather, on the elements that will be analyzed to qualify the exercise of rights as abusive or not, thus outlining two conceptions that are diametrically opposed: subjective conception and objective conception.

The conception that went down in history as a subjective theory placed the existence of abuse of right in interdependence and closely related to the psychological element, intentionally, consisting of the intention to harm [8]. According to this theory, whenever a person exercises a right with the intention of harming another, the use of the right ceases to be lawful and falls within the scope of abuse.

The main criticisms of this theory have been about: (i) excluding the possibility of abusing the right in case of recklessness or negligence; (ii) does not take into account any external factor, consisting in the removal or diversion of the right from the social

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*of law (...) "[*3], and currently, in the contemporary doctrine, the definition of abuse of law is as "*the exercise of a subjective right in violation of the principles of its exercise."* [4, p. 34], *Thus resulting that it is equivalent to an abuse of right to exercise a right performed with "(i) disregard of law and morality; (ii) in bad faith; (iii) exceeding its limits); (iv) disregarding the economic and social purpose for which it was recognized."* [4, p. 35].

[2] The denial of the theory of abuse of law was based on the old Roman law that started from the absolute character of the citizen's rights, "*pater familias*" which, initially, knew no limits. To this foundation were added the principles outlined by the maxims of the jurisconsults according to which no one was liable for damages when he exercised his right. [4, p. 18].

At the end of the 19th century, Marcel Planiol, known for vehemently challenging the theory of abuse of law, was known for his expression that law ceases where abuse begins – "*le droit cesse ou l'abus commence*". Other authors of the time (Duguit, Legy, Sommiere) could not conceive of the existence of limits within which to exercise the subjective right, this being equivalent to the very denial of the subjective right. [1, p. 57].

[3] According to the French case-law, compensation has been awarded for damages caused to another by the excessive exercise of the right by the holder who has not proved a serious and legitimate interest, qualifying as unlawful acts such as making a false basket on the roof of his house only to hinder the neighbor, recourse to legal proceedings only for harassing purposes, dismissals made without a serious reason, the abusive exercise of parental rights, etc. [5, p. 82].

and economic purposes for which it was dictated; (iii) appeals to the criterion of morality – an unstable criterion and which represents a social-historical phenomenon, moral values having as essential function the consolidation or change of social relations [4, p. 25].

On the other hand, in the development of the objective theory, derived from the notion of misuse of authority[4] specific to the administrative law, the emphasis was placed on the criterion of the social destination of the right, assessing the existence of an abuse of right whenever the law is exercised "*contrary to the purpose of the institution, its spirit and purpose.*"[10]

Criticisms of this theory have focused on: (i) ignoring the subjective factor that was the main element of subjective theory; and (ii) defining the social purpose in relation to the conceptions of the time and the different political orientations throughout history – which is a criterion as variable and unstable as the moral criterion, which was the essence of the subjective theory [9].

In the Romanian civil law, it was embraced without reservations the theory that the exercise of subjective rights can be abusively carried out, the theory of French origin being developed by Romanian doctrinaires and applied by national courts[5].

Internally, doctrinal debates on the objective and subjective conception continued, and later other theories were addressed, such as the assimilation of abuse of right with tortious and quasi-tortious civil liability. This last hypothesis was finally abandoned, one of the main arguments referring to the fact that the civil liability in tort is foreign to the existence or the abusive exercise of a right [1, p. 73].

Currently, in the internal regulation, the law enactment of the abuse of right in private law[6] has been achieved by applying the *theory of choosing the criterion*, thus allowing the adaptation and extension of the scope to as many practical situations as possible.

2 The specifics of abuse of right in labor law

The first doctrinal discussions on the applicability of the theory of abuse of the right to labor law were initiated in France by the French Law of December 27th, 1890. The before mentioned law was adopted in response to the great strikes that paralyzed the French railways and through it was regulated, for the first time, the unilateral termination of the employment contract concluded for an indefinite period

[4] "The misuse of authority defined the situation in which the author of an act used his power for another purpose and for reasons other than those envisaged in conferring these rights." [9]

[5] "The foundation of the theory of abuse of rights lies in the idea of <*naeminem laedere*> and the maxim is supported: <*qui suo jure utitur, naeminem laedit*>. The exercise of rights is not a cause for exemption but a source of liability when there is a close causal link between the damage suffered by someone and the act of the perpetrator. " [11].

[6] Art. 15 Civil Code: No right may be exercised in order to harm or damage another or in an excessive and unreasonable manner, contrary to good faith.
Art. 12 Code of Civil Procedure: (1) Procedural rights must be exercised in good faith, according to the purpose for which they were recognized by law and without violating the procedural rights of another part. (2) The party who exercises his procedural rights abusively is liable for the material and moral damages caused. She may also be required by law to pay a court fine. (3) Also, the party that does not fulfill in good faith its procedural obligations is responsible according to par. (2).

without the need to prove/invoke serious/legitimate reasons, without giving notice and without paying an indemnity. In practice, the application of this law has led to an almost absolute manifestation of the employer's power through massive unfounded, immediate and unpaid dismissals. [12]

In national law, until 1929 when the Law on Employment Contracts was adopted, was recognized the freedom of the employer to unilaterally terminate the individual employment contract concluded for an indefinite period, the matter being regulated by the absolute and subjective provisions of art. 1471 Civil Code. However, the premises of a certain limitation, based on the act of good faith, have appeared since 1908, these being the first manifestations of the idea of abuse of right[7] in labor law.

In contemporary law, starting from the very concept of atypical subordination that the employee has to the employer and the "dominant"[8] position of the latter, a position that can easily open the way for excesses and/or abuses by the employer to employee, labor law is seen as a right of protection for the employee. The law thus seeks to limit the possibility of abuse by the employer.

Undoubtedly, situations in which the employer abusively exercises his rights are exponentially more frequent. But both the analysis of judicial practice and doctrinal studies prove that the employee can be, in many cases, the initiator of an abusive exercise of his rights.

3 Sanctioning the abuse of rights. Remedies

The manner in which the abuse of right can be sanctioned has been the subject of doctrinal study since the interwar period, the French doctrine [13] claiming that sanctioning abuse of right in kind would be inadmissible, reparation being possible only by equivalent, in the form of damages.

The theory was refuted both by judicial practice and by the doctrinaires of that time, retaining the possibility of sanctioning in kind the abuse of law in various forms such as: (i) the application of a sanction in kind that involves both preventive and reparative; (ii) sanctions of a purely reparative nature, such as to prevent the commission of unjust and imminent damage; (iii) the refusal of the author of the act to benefit from the legal protection of his right [14, pp. 241-242].

Undoubtedly, the vehicle for salvaging the injured rights and recovering the damage caused by exercising a right outside its internal and external limits, is the deduction of the dispute before the courts – applying the specific rules of the chosen procedure (fulfillment of the conditions for a civil action, followed, on the merits of the case, by proving the fulfillment of the conditions of civil liability in tort in order to be able to repair the damage).

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[7] "*"Since 1908, this interpretation has crystallized into two principles, namely: first, that although the right of unilateral termination is absolute and uncontested, the technique of exercising this right can only be relative and limited by the concept of the usefulness of this exercise; secondly, that beyond this limit of utility, the exercise of the right becomes abusive, vexatious and useless and therefore harmful and as such, can be integrated within art. 998 and 999 of the Civil Code ". [12]*

[8] Not to be confused with the concept of abuse of a dominant position in competition law – Competition Law no. 21/1996.

The judicial practice is receptive to the ascertainment and retribution of the abuse of right manifested both substantially and procedurally. In this sense, both a recent[9] decision and other judgments rendered by Romanian courts at the end of the 19th century[10] are relevant, where it is noted, in essence, that the values defended by sanctioning abuse of right take precedence over other fundamental rights when they are abusively exercised for the sole purpose of harassment.

4 The resignation and the abuse of rights

The resignation, as a unilateral act of will of the employee in the sense of termination of employment, is regulated in art. 81 Labor Code, where the conditions of validity are provided, as well as specific applications regarding the notice period.

The possibility of exercising an abuse of rights in the particular case of resignation still rises doctrinal controversies. Starting from qualifying the right to resign as an absolute/discretionary right, some authors considered that the right to leave an employment contract is not likely to be exercised abusively [15; 4, p. 60], while other authors considered that the exercise of the right to resign may involve, as an exception, abusive components, taking into account its term and object [4, pp. 112-113; 16].

The qualification of the exercise of the right as abusive cannot be achieved *in abstracto* by reference to the discretionary nature of the right without taking into account the state of affairs as a whole, which determined the exercise of the right, as well as the (damaging) consequences. The mere fact that the right to resign is a personal and "discretionary" right does not, *de plano*, equate to the possibility of excluding possible situations in which it may be abused.

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[9] Sentence no. 3441/02 July 2014 rendered by the Bucharest Municipal Court, unpublished, which found the minority abuse committed by a minority shareholder of a listed company by the simultaneous or successive judicial claims having: – generic and identical content (by intervention or annulment/finding of nullity of the decisions of the general assembly of the plaintiff company), followed only selectively by the fulfillment of the obligations established in the stage of regularization of the request or followed by the waiver of the trial; – the formulation, with repeated character, of some manifestly unfounded or inadmissible requests within the pending processes, respectively requests of recusal, requests regarding the exception of illegality, respectively of unconstitutionality; – the repeated formulation of requests for bail by the judges involved in solving the cases, not followed by the payment of the judicial stamp duty. The court ordered the immediate cessation and prohibition for the future of the abuse of the minority committed in the forms found, respectively prohibited the formulation of main, accessory, additional and/or incidental requests that take the abusive form found. On appeal, before the Bucharest Court of Appeal, the solution of the first instance was maintained, the case being currently in the procedural stage of the appeal, on the role of the High Court of Cassation and Justice, in the filter procedure.

[10] We refer here to the civil decision no. 175 of 1882 rendered by the Brăila Municipal Court where it was held that "Although the right to sue is a sacred right, this right must have a limit, that of good faith, because otherwise it is a real abuse, a mistake that causes damage and which therefore requires civil reparations. Thus, the fact of making and continuing an vexatious process, constitutes a civil crime provided by art. 998, and for the existence of the civil crime there is no need to be a material damage, but a moral damage is enough to oblige the perpetrator to compensation (...) the spirit of the law leaves no doubt in this regard, it wants to protect all human rights, and all his things, for personal peace and the security of our wealth are the most precious goods, they constitute the essence of our being. "

Closely related to the employee's right to resign, it is also the employer's right to be notified of the employee's intention to terminate the individual employment contract.

The employer's right to be notified is grafted onto the need to allow him a period of time in order to (re) organize the activity of the enterprise, most of the time, by substituting the resigning employee for another person. Unlike the employee, the employer may waive this notice period as he deems appropriate in relation to the organization of the company's activity.

4.1. *Possible situations in which the right to resign has been abused by the employee*

A. When the resignation is based on a desire to destabilize the enterprise or a sector of the enterprise and/or on a desire to cause damage, the following situations shall be taken into account. The case law and doctrine refer by way of example, the following:

a. The situation in which an employee, being aware of his/her essential/indispensable role in a project, resigns and thus causes the production to stop or the extension of the completion period of that project. By way of example, in the doctrine, the case is presented when the employee, the only specialist existing in the respective area, is employed for a period of 3 months, in order to carry out repair work on an industrial machine indispensable to the technological flow, the estimated period for completing the works is 3 months, and the employee after 2 months, without a plausible reason, terminates the contract unilaterally, respecting only formally the notice period, with the consequence of making it impossible for the employer to employ another person for the same purpose in the remaining time of one month [4, p 112].

We consider that the situation presented above must be analyzed from two perspectives, respectively:

(i) Respecting, only formally, the notice period does not constitute a criterion capable to characterize the act of the employee as an abusive exercise of the right to resign. The relevance of this aspect is found in terms of disciplinary liability of the employee for violation of duties.

(ii) On the other hand, what may be classified as an abusive exercise of the right to resign is the act of the employee who, being employed on a fixed-term basis for a project limited in time, chooses to leave the project before its completion being conscious of or even pursuing serious prejudice to the interests of the employer.

b. The case of a mannequin who abruptly breaks his employment contract, on the day of the presentation to the clientele of the collection that included clothing models created after the measures of the employee who resigned [12].

In this situation, regardless of the discussions on the notice period, the abusive exercise of the right to resign and the employee's intention to harm the employer's activity is all the more obvious in the context of a personalized creation.

c. The case of an accountant who leaves the company without notice taking with him various documents [12].

We appreciate that this situation is not a manifestation of an abuse of right, but, in reality, is an example of violation of legal and/or contractual provisions. The separation of the normal exercise of the right from its abnormal exercise and, therefore,

characterizing the use as abuse, is a sensitive one. In carrying out this demarcation, the criteria developed by the doctrine criteria in supporting the objective theory and the subjective theory, as well as the legal provisions (currently, art. 15 of the Civil Code and art. 12 of the Civil Procedure Code) are useful.

Moreover, the abusive exercise of the right should not be confused with the tort/illicit deed. The abusive exercise of rights "consists in violating the economic and social purpose of the right, recognized and guaranteed, the deviation of the right from its destination" and "is committed on the basis of the existence of a subjective right and within the exercise of that right" [1, p. 73]. Instead, the tort/illicit deed consists "in violation of the social norms sanctioned as such by the normative content of the law" and has no foundation/"has nothing to do with the existence or exercise of a subjective right." [1, p. 73].

d. The case of the employee who interrupts the prospecting operation he is working on and launches into a denigration campaign passing into the service of the competitor[12].

Similarly, we consider that all the characteristics and relevant factual elements must be analyzed in order to correctly determine the factual situation and to avoid confusion of the abuse of right with the tort/illicit deed.

e. The situation of the resignation of all employees of an employer. Practically, in such situations, employees seek either to exert pressure on the employer to determine the latter to accept certain requests, or to intentionally harm the employer. [4, p. 113].

This situation represents what the doctrine refers to as a "resignation strike" and "would have involved the mass resignation of all employees, thus the termination of the employment contract at their own initiative." [17], being specific to certain categories of staff and/or employees from certain industries that are indispensable for the functioning of the state mechanism and/or that provide essential public services.

f. The situation of the unexpected notice given to the employer regarding the intention to resign followed shortly by the employment of the employee at a unit competing with the initial employer. [4, pp. 112-113]. With respect to this situation, in the specialized doctrine and in jurisprudence, contrary opinions have been issued arguing the fact that the resignation to exercise a competing activity does not in itself constitute an abuse of the right to resign and that the facts subsequent to the resignation cannot characterize resignation as an abusive act [12].

We consider the opposite opinion as to the one that most accurately captures the situation described. We are once again faced with a situation in which the abuse of rights is confused with the wrongful act. The employer has at hand the legal instruments necessary to defend himself against such a risk – art. 21 et seq. Labor Code relating to the non-compete clause.

B. When the resignation is presented for the sole purpose of evading an imminent disciplinary investigation, in order to avoid the stages and/or the (possibly) unfavorable outcome for the employee.

5 Conclusion

In an ideal legal context, employment relationships should be circumscribed to the principle of good faith and, like any other legal relation, should not be used for the purpose of harassment, either to avoid or facilitate legal proceedings or as a tool for negotiating more advantageous conditions.

Despite the existence of the concept of abuse of right since the nineteenth century and despite doctrinal criticism since the interwar period regarding the existence of infinitely isolated judicial solutions to the scale of the phenomenon, even today judicial practice does not excel at finding and sanctioning the abusive exercise of rights.

There is a certain reticence in the practical application of the theory developed since the nineteenth century precisely in view of the difficulties of proving the damage in order to achieve the sanctioning of abuse of right in kind or equivalent (damages), the latter sanction being the most common in practice. However, the criterion of the frequency of application of the sanction by equivalent is not such as to stop the phenomenon of abuse of rights, its efficiency being low in relation to the aim pursued. Therefore, in the recent doctrine [18] it has been stated that such a sanction can only be a complementary one as it does not resolve the substance of the conflict nor is it effective regarding the return of the parties to the situation prior to the exercise of the abusive right.

The legal relation of substantial law marked by the existence of an abuse of right, can evolve with the same characteristics in terms of procedural law – the hypothesis of capitalization of rights in court and the abuse of procedural law. In labor law disputes, there is an increasing exercise of procedural rights and, for reasons that may be related to professional convenience, these situations are not found and sanctioned, although the contemporary legislative framework provides a several of procedural vehicles to ensure the desideratum of the exercise in good faith of the rights.

In labor law specific relations, the abusive exercise of the right to resign and the rights closely linked to this institution is possible and often encountered in practice. The reasons for the abusive exercise of these rights are divided between how to seek harm and a violation of the rights of the employee and/or employer and how to divert the purpose for which the institution of resignation exists as a consequence of evading the application of legal provisions.

The procedural capitalization of the rights infringed by the abusive exercise of rights is recommended but maintaining the proportionality between the abusive right and the damage caused precisely to avoid situations in which the person who was the initial victim does not become the "aggressor"/"abuser".

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Possibility of forced execution of social parts in fiscal matters. Capitalization of the social parts in order to settle the budget receivables

Gaspar A.-M.

PhD student, "Titu Maiorescu" University of Bucharest (ROMANIA)
E-mail: ana_maria_gaspar@yahoo.com

Abstract

The article aims to address a topic of interest to enforcement bodies, which can use any means provided by the legislature to recover tax claims owed by debtors.

The entry into force of the Code of Civil Procedure, the Code of Fiscal Procedure and the Fiscal Code has generated and generates a series of contradictions, and against the background of these contradictions the enforcement bodies are still unjustified all the more as the courts tend to win the case, most often to the debtors.

Through this article I set out to highlight the fact that enforcement bodies may also resort to the enforcement of shares or shares of the debtor, respectively of intangible movable property, even if the legislature has not stipulated expressly in the provisions of the Code of Fiscal Procedure these issues.

Hereby, this article aims to deal with the way in which the procedure for the sale of shares in private companies and equity capital may be used, regardless of the type of company, by the enforcement bodies, in order to recover the tax receivables due to the local budget or the state budget.

Keywords: fiscal executor, budget receivables, capitalization of shares/equity capital.

1 General considerations

Enforcement is one of the fundamental institutions of law, this being regulated both by the Code of Civil Procedure and by the Fiscal Procedure Code.

An important aspect that must be specified is the fact that, by modifying the provisions of art. 66 of Law no. 31/1990 as a result of the adoption of Law no. 152/2015, the legislator expressly established the possibility of forced execution on the social parts, the creditors being able in this way to recover their debts due in several ways.

Thus, through the amendments adopted, the legislator expressly stipulated that the shares may be seized or sold by the debtor's creditor under the same conditions as the shares.

As it is well known, the sale of shares to closed companies and equity capital is governed by the provisions of the Code of Civil Procedure (art. 757). In the Code of Fiscal Procedure there is no provision regarding this way of recovering tax claims.

However, according to the legal norms in force, the legislator stipulated that, where the Fiscal Procedure Code does not provide, the provisions of the Civil Code and the Code of Civil Procedure apply, to the extent that they may be applicable to relations between public authorities and taxpayers.

From the analysis of the provisions of art. 623 of the Code of Civil Procedure it can be observed that the legislator regulated the general competence of the bailiff, as well as the categories of claims exempted from the forced pursuit carried out by the bailiff.

According to the provisions of art. 220 of the Fiscal Procedure Code, the legislator stipulated that the tax authorities that administer tax receivables are empowered to perform the execution procedure through fiscal executors organized in their specialized compartments.

Thus, whenever the recovery of budgetary receivables is called into question, whether they are due to the general budget or to the local budget, the legislator has unequivocally stipulated that they will be recovered through tax executors, and the enforcement procedure will be initiated by them according to the prerogatives granted to them by the provisions of the Fiscal Procedure Code [1].

In order to understand what can be enforced by a tax executor, it is necessary to determine the areas in which the Fiscal Procedure Code can be applied. Thus, even from the first articles of the Fiscal Procedure Code, the legislator provided that it regulates the rights and obligations of the parties to the fiscal legal relations regarding the administration of fiscal receivables due to the general consolidated budget, regardless of the authority that administers them.

According to the provisions of the Fiscal Procedure Code, the legislator established that the tax authorities that administer tax receivables are empowered to carry out precautionary measures and to perform enforcement proceedings [2].

Compared to those mentioned above, even if the Fiscal Procedure Code does not contain provisions regarding the sale of shares to private companies and of equity capital, the tax executor may at any time apply the provisions of the Code of Civil Procedure governing this procedure.

2 Exposing the problem

The issue that needs to be analyzed concerns how the procedure established by the provisions of art. 757 of the Code of Civil Procedure can be used by an enforcement

body in order to recover the tax receivables owed by a taxpayer to the local budget or the state budget.

When we are in the presence of the recovery of tax receivables, it must be established that the forced execution of tax receivables or tax obligations is a way of settling them, which is why the effect of the capitalization of the shares of a company must also be followed if this procedure takes place.

Thus, it is very noticeable that we are in a situation where the taxpayer has not fulfilled his tax obligations on the date on which they became due, thus giving rise to the right of the State to enforce tax claims, with a single condition that is given by the existence of a debt title that will become an enforceable title, otherwise no enforcement measures will be able to be taken [3].

According to the provisions of the Fiscal Procedure Code, the legislator stipulated that at the moment the enforcement procedure is initiated it is necessary to have a debt title, a title that will become an enforceable title on the date on which the tax claim is due by the expiration of the payment term provided by law or established by the competent tax authority, as well as in any other manner provided by law [4].

In the present case, we are in the presence of an enforcement initiated by a tax authority against a company (taxpayer) in order to recover the tax receivables due by it to the local budget.

As a result of the enforcement procedure initiated by the fiscal body in order to recover the debts owed by the debtors, it challenged the enforcement orders issued, trying by any means to evade the payment of the debts due.

In the present case, the tax authority used all the measures provided by the legislator, in the sense that it ordered the seizure of the debtor's accounts, the seizure of real estate held by the company, in order to be able to start the procedure of their capitalization, but due to a material error, the real estate foreclosure was abolished by the court.

As it is well known, according to the provisions of art. 227 para. 5 of the Fiscal Procedure Code, enforcement takes place in any of the forms provided by the code, simultaneously or successively, until the realization of the right recognized by the writ of execution, and the enforcement body may resort to any of the methods provided by law to satisfy the debt.

Moreover, through the amendments brought in 2015 by the legislator, the enforcement bodies were also given the opportunity to start the procedure of enforcement of the social parts, all the more so as the legislator stipulated that, where the Fiscal Procedure Code does not provides, the provisions of the Civil Code and the Code of Civil Procedure shall apply, insofar as they may be applicable to relations between public authorities and taxpayers.

In the present case, the fiscal body, for the capitalization of the claim contained in the writ of execution, performed both acts of real estate execution and execution by seizing the bank accounts of the debtor, and insofar as it is possible to carry out enforcement simultaneously in the forms provided by law, may be invoked the illegality of the documents specific to one of these forms, the debtor contesting only the forced execution of real estate on real estate taking into account the fact that those assets are subject to a request for restitution based on the provisions of Law no. 10/2001.

Another aspect that must be mentioned is that in the enforcement appeal filed, the debtor did not invoke reasons which would lead to the abolition of the entire enforcement, which does not bring an appeal against the enforcement itself, but only of the acts of execution that concern the ensemble of real estates.

I also specify the fact that the real estate to be capitalized was subject to the provisions of Law no. 10/2001, and according to the provisions of art. 21 para. 5, any alienation or mortgage operation is absolutely null.

Even if no other goods have been identified or the amount of the seizure does not actually result, this does not mean that the tax authority can no longer recover the claim and can no longer recover its debts owed by the company.

Thus, the tax executor must use any leverage provided by the legislator in order to recover debts owed to the local budget, which is why he can also use the shares held by the debtors, given that, in the present case the debtor holds shares in another company, and the enforcement acts themselves have not been abolished, and the amendments brought by Law no. 152/2015 art. 66 of Law no. 31/1990 may constitute a lever that can be used by the enforcement bodies in order to recover the debts.

3 Relevant legal issues

Analyzing the provisions of the Code of Civil Procedure regarding the capitalization of the shares of a company, I have found, first of all, that, in addition to the correct conduct and good faith involved in the conduct of economic and legal relations,there are a number of practical reasons why a tax authority is interested in recovering tax receivables due, and the reasons are determined by the effects that the delay in making the payment may have on the level of receipts, and in the present case the effect on which the non-payment of the debts on time, as well as payment evasion is to the detriment of the state.

It is true that if we were in a utopian society such problems would not arise, and the state should no longer impose coercive measures that can be taken on those debtors who do not pay their debts on time.

The forced execution of the social parts is a solution made available to the creditor by the provisions of the New Code of Civil Procedure and strengthened by the amendments brought by Law no. 152/2015 of article 66 of Law no. 31/1990, this can be done on the basis of any enforceable title provided that the debtor holds shares in a company this aspect can be verified by the creditor through the diligence performed at the Trade Register

Thus, the provisions of art. 757 of the Code of Civil Procedure establish a special regime for the capitalization of securities and other goods with a special circulation regime. In all situations provided by the legislator, it is necessary to comply with the formalities and conditions provided by the special law [5].

The provisions of art. 757 para. 3 of the Code of Civil Procedure concern the sale of shares to closed companies and shares regardless of the type of company. The legislator provided that the shares or equity capital may be capitalized by amicable sale, thereby establishing a rule for the sale of shares to the private companies and of equity capital, only if this type of sale will not be made without the agreement of the creditor, the capitalization will be carried out by the executor through the public auction,

provided that the law does not provide for a special system of movement of such movable property [6].

According to the provisions of art. 757 para. 4 of the Code of Civil Procedure, the legislator provided that the sale by auction of shares held in closed companies or equity capital can be carried out by the executor or by a specialized agent who will draw up the specifications.

Thus, as can be seen from the analysis of the text of the law, the legislator used the generic notion of executor without specifying whether this type of procedure can be used only by the bailiff, which is why this type of procedure can also be used by a tax executor.

The specifications drawn up by the executor are obligatory to include certain mentions expressly provided by the legislator, respectively the constitutive act of the company, the annual financial statement for the last two financial years, as well as any documents necessary for assessing the consistency and value of the company rights related to the shares or equity capital put up for sale.

The lack of an element of those expressly provided by law attracts the sanction of nullity and, since it is expressly provided by law, the injury is presumed, the interested party may prove otherwise under the conditions of art. 175 of the Code of Civil Procedure [7].

It is mandatory that the specifications be communicated to the debtor, the creditor, the issuing company and the other associates in order to be able to formulate objections within 5 days from the date of communication.

Considering that, in the present case, we are dealing with a forced execution initiated by a fiscal body, which though its own fiscal executors initiated such a procedure, the communication to the creditor may be made or may be presumed to have been made by keeping a copy of the specifications in the enforcement file, the institution of forfeiture not being incident here, as long as the enforcement is not carried out by means of a bailiff but by means of the fiscal executor who executes an obligation due to the fiscal body where he carries out his activity [8].

The Civil Code confers on the bailiff the competence to resolve the objections, by executory conclusion, given with the summoning of the parties, conferring in this sense to the bailiff full powers all the more as the conclusion of the bailiff is also enforceable.

If in the previous paragraphs the legislator used the general notion of executor as the person who can initiate such a procedure, when legislating the way of resolving the objections he established that they will be solved by an executory conclusion. However, in view of the fact that we are in the presence of a forced execution initiated by a tax authority, I consider that it is not necessary to invest the enforceable title with an enforceable formula. Moreover, the fiscal executor can issue an administrative act by which he can solve the objections formulated against the specifications, a fiscal administrative act that can have the same executory force as the conclusion issued by the bailiff.

According to the provisions of the Fiscal Procedure Code, enforcement can be initiated when a debt title becomes an enforceable title on the date when the tax claim is due by the expiration of the payment term provided by law or established by the competent tax authority. Thus, this is the moment when the enforcement body will issue

a summons, which will be communicated to the debtor together with the executory title, giving the debtor the possibility to formulate an enforcement appeal.

In the situation where the debtor does not pay within 15 days from receiving the summons of the debts due for which the payment term has expired, according to the provisions of art. 230 para. 1 of Law no. 207/2015 on the Fiscal Procedure Code, the enforcement body will proceed to the continuation of the enforcement measures in any of the forms provided by law.

Thus, to the same extent that the fiscal body may order the capitalization of movable or immovable property, the fiscal body may also order the forced execution of the shares held by a debtor by complying with the provisions of the law, aspects that are enshrined in the provisions of art. 227 para. 4 of Law no. 207/2015 on the Fiscal Procedure Code.

According to the aforementioned provisions, the legislator expressly stipulated that the fiscal body may initiate the enforcement procedure and for those goods that are subject to a special movement regime, provided that the provisions imposed by law are complied with, in this case, the provisions of art. 757 of the Code of Civil Procedure.

Once the seizure of the shares has been applied, they are made unavailable and the debtor can no longer dispose of the shares held during the enforcement.

Moreover, the executor, whether we are talking about the fiscal executor or we are referring to the bailiff, has the obligation to register the seizure in the trade register, as well as in the Electronic Archive of Real Movable Guarantees, so that the seizure also becomes opposable to third parties.

As provided by the provisions of art. 757 of the Code of Civil Procedure, in case the amicable sale cannot be made, the executor will proceed to the sale of the shares by public auction, reason for which this procedure can also be used by a enforcement body in order to recover the debts due to the debtor as long as these receivables could not be recovered through any other enforcement procedure, and the legislator expressly stipulated the possibility of the execution of intangible movable property such as shares or social parts.

4 Conclusions

As it is well known, the enforcement of tax claims is carried out by issuing an enforceable title by the competent body according to the provisions of the Tax Procedure Code, but enforcement begins by communicating the summons to the debtor, issues that have materialized in this case under analysis, by the enforcement body.

Thus, according to the legal provisions in force after the communication of enforcement acts to the debtor, the tax enforcement body may order the continuation of enforcement by any of the means expressly provided by law, including by capitalizing the shares held by the debtor in a company.

The reason behind the legislative solution analyzed was the creation of a climate of stability and legal security, as well as the concern of the state to find effective methods to determine the taxpayer to fulfill its tax obligations, regardless of their nature and amount.

Thus, the legislation is meant to effectively ensure the fulfillment of a legal and constitutional obligation of natural or legal persons, namely the payment of tax burdens,

regardless of their nature, to local budgets. This obligation is a guarantee that the Romanian state has established and given to the enforcement bodies all the necessary means in order to recover the tax receivables owed by the taxpayers.

Given the fact that we are in the presence of tax claims due to the state budget, debtors should not consider the fact that, as long as the special legislation does not expressly provide for certain legal provisions, tax enforcement bodies can not and do not benefit and other means of recovering tax receivables, all the more so as the possibility of enforcement of the shares has been established, and enforcement bodies may use this procedure to recover debts due.

The Fiscal Code and the Fiscal Procedure Code, even if they are applied with priority when we are in the presence of an enforcement procedure initiated by a fiscal body, this does not mean that the provisions of these two normative acts cannot be supplemented with the provisions of the Civil Code and the Code of Civil Procedure.

Taking into account the fact that the procedure of forced execution of tax claims has as main purpose the settlement of unpaid debts by the debtor, it must be understood that the state by the legislative rules in force established a set of rules to be applied and social and by expressly stipulating the possibility of capitalizing on them has created an optimal legislative climate that can be used successfully by enforcement bodies.

It is true that the legal framework may be incomplete or does not cover every case, but when we are in the presence of recovery of tax claims, even if the debtor is the state and not a natural or legal person who has initiated a procedure enforcement under the common law, the legislator established this possibility and to create for himself a procedure that can be used to recover debts due.

Thus, the procedure for the enforcement of intangible movable property, such as shares or social parts, can also be used in full by enforcement bodies for the recovery of tax claims, there being no reason for this method of recovery of unpaid debts to it is also not used by the enforcement bodies in order to recover the tax receivables due to the local budget or the state budget.

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Guidelines on lawyer's professional liability

Savu E.-C.

Ph.D. Student, University "Titu Maiorescu" Bucharest (ROMANIA)
E-mail: cristinasavu.avocat@gmail.com

Abstract

The lawyer's liability is based on professional duties and on the specific deontology afferent this liberal profession. In professional relationships created in the practice of the profession, the lawyer may be held disciplinary, civil or criminal liability, any of these forms of liability having an autonomous existence. If the disciplinary and criminal liability does not imply the mandatory existence of a prejudice, the civil liability presupposes the causing by the lawyer of a prejudice resulted from practicing the profession with the non-observance of the provisions of the specific legislation and of the deontological rules[1]. In this case, civil liability is equivalent to the meaning of "professional liability", as retained *de lege lata*[2] or *malpractice*, as retained in recent doctrine[3] and which usually arises from non-compliance with professional duties.

Keywords: lawyer, civil liability, professional liability, malpractice. diligence obligations, the diligence of a good professional

1 Premises of the professional liability of the lawyer

The role of the lawyer in the functioning of the judiciary is particularly important[4]. In a society based on respect for justice, the lawyer plays an eminent, unique role[5], being indispensable to justice and litigants. Lawyers promote and defend human rights, freedoms and legitimate human interests[6], thus being indispensable partners of justice, protected by law[7], serving the public interest[8], and their activities represent, in a state of urgency[9], *essential* public services[10].

The norms that regulate the profession, the fundamental principles of its practice, professional ethics and deontology are the main landmarks that guide the fulfillment of the lawyer's mission in society, their observance being essential in order to ensure the rule of law. His mission imposes on him multiple duties and obligations, both to the client, the authorities before whom the lawyer assists or represents his client, his profession in general and each confrere, in particular, and to the public, for whom a liberal and independent profession, subject to compliance with the rules it has imposed

on itself is an essential means of defending human rights before the state and other powers[11].

The issue of professional liability of the lawyer, as well as other professionals in the field of justice has begun to arouse increased interest in parallel with the emergence and development of cases of professional liability, especially those of medical malpractice, but not only. If until relatively recently the professional castes of doctors, notaries, lawyers were protected in our cultural and social system due to education and erudition almost recognized to these specialists, virtues that attracted respect and trust, in the context of the evolution of legal responsibility, this paradigm was gradually influenced by the ideology of the nowadays citizen who, being animated by a belief in compensation, seeks in the risks and injustices of the life a source of income[12], which enhances even lawyer‘s professional liability.

Law professionals[13], respectively those who practice the various legal professions have a high "potential" to cause harm to people they come in contact with because the professions are deeply social, interpersonal, collective. This negative potential has been exploited by insurers who have diversified the range of liability insurance for many legal professions, currently members of the legal professions having the obligation to insure for liability, by taking out a malpractice insurance[14]. The legal professions work together to achieve the act of justice, while maintaining the isolation of the caste, so that the legal responsibility of the legal professional is confirmed in the interaction of these professions. Moreover, the ethics of the legal professions despite regulations, established practices and professional beliefs is a diffuse concept, which leads to different interpretations.

Lawyers are the first line in justice, the first who mediate the contact between a litigant, who has become a client and other legal professionals. Usually, the lawyer collects, but not only collects the fee for the services provided or for the professional mandate exercised, but collects all the blows of the struggle in which he engaged, including the disgrace of other legal professionals he comes in contact with, and sometimes, unfortunately, even the disgrace to the one in whose service he is, because from *hero to antihero* it‘s a fragile thread. When a professional is called upon, the client is expecting both a justification of the price paid, assuming that he will do his job in the most competent way, because *unusquisque peritus esse debet artis suae*[15], and especially the achievement of the desired result. At present, society is demanding, the frustration of losing a lawsuit or a right is accepted only by identifying a culprit, and the mistake is hardly tolerated. Therefore, the failure to achieve the desired result is easily blamed on the lawyer. At the same time, a fully satisfied litigant is *rara avis* in the context in which, even if he obtained the desired result, he considers that it occurred too late, with too high costs or it would have been obtained anyway without lawyer‘s involvement.

On the other hand, law has become increasingly unpredictable, legislative changes are taking place rapidly, jurisprudence is non-uniform and traditional rules of professional career are no longer limited to paradigm shifts. The characteristic of the profession that involves continuous professional training cannot cover the situations in practice, because as "life beats the film", social necessity precedes the law. At the same time, the result of a trial, even the most obvious, depends on a series of variable and

never predefined factors, unrepeatable and imponderable, often unrelated to the lawyer's sphere of control.

Lawyers at the confluence of the two worlds, that of legal professionals with that of laymen (ordinary citizens) are forced to maintain a continuous balance between practice management and continuous professional training, a complex framework in which one can slip and lack of due diligence in providing professional service.

2 The legal nature of lawyer's civil liability

The source of the lawyer's professional duties is the legal assistance contract that is concluded between the client and the lawyer, so that his obligations towards his own client will derive from this contract. In general, the essential contractual obligations fall into the category of the obligation *to do*, defined as the duty of the person to perform a work and in general any positive performance other than those falling within the notion of giving. In this sense, the obligation assumed by a lawyer is to provide a certain service or to perform certain works[16], in case of total, partial or improper non-execution, his contractual liability may be incurred, under the conditions of the related legal regime. Of course, the contractual liability will be incurred for non-compliance with any contractual obligation *lato sensu*, because the content of the contract is both what is expressly stipulated, but also the usual clauses, which are not expressly stipulated but are implied and the consequences that established practices between the parties, customs, law or equity give them to the contract by its nature[17].

However, the lawyer has a series of non-contractual professional duties, inherent in any activity specific to the profession, so that in the event of causing damage by violating them will be liable to tort, both to the client, if the breached duties exceed the agreed contractual framework, and to third parties, in other situations. We consider those duties that are limited to the scope of the obligation *not to do*, for example, the lawyer is obliged not to use words or expressions likely to harm the dignity of the judge, prosecutor, other lawyers, parties or their representatives in the trial[18]. In this case, the misconduct of the lawyer can cause moral suffering, maybe even material, which leads to the initiation of tort liability, in the same time with the disciplinary one, in which non-compliance with this duty represents a serious disciplinary violation[19].

In practice, the distinction concerns questions of prescription which would arise from a different assessment of the lawyer's form of liability as to the applicable prescription terms, the possibility of amending them, the different moments from which they start or the validity of the agreements. exclusion, limitation or aggravation of liability or on agreements on how to repair any damage – the criminal clause.

2.1 *The nature of the lawyer's professional duties. Obligations of means or obligations of result? The interest of distinction*

In his activity, the lawyer puts all his mastery and skills in carrying out the duties entrusted to defend and support the client, so that, in principle, his professional duties

are obligations *of means*[20], in this respect the lawyer is required to use all the necessary means to achieve the promised result. Legal texts incident to the legal profession use the notion of "diligence obligations" in the sense of obligations *of means*, being more appropriate in the context in which the concept of *professional diligence* is found in the scope of many duties imposed on the lawyer. Moreover, the distinction between obligations *of means* or *prudence* and *diligence* and *obligations of result* or *determined* even if they are found in the doctrine prior[21] to the new civil code[22] that enshrined them was introduced in the legislation after the entry into force of the specific legislation of the lawyer regarding diligence, as a foundation of its activity.

In the activity of assisting and/or representing a client in a legal procedure, a lawyer shall assume *diligence obligations*[23]. Of course, this legal classification is a relative presumption, until proven otherwise. Compliance with the prohibitions expressly regulated in the legislation of the profession obviously[24] represents obligations of result, the lawyer being required to refrain from violating them.

If we refer to a certain trial, the lawyer cannot assume towards the client the obligation of result consisting in winning that case – result that he cannot procure only by his actions or inactions, but he shall assume a series of obligations of different nature, thus: the lawyer is obliged to formulate and register the request within a certain term agreed by the parties, to appear at the court deadlines, to submit written notes or conclusions when the court so decides, to formulate the appeals within the deadlines strict permits by law (obligations of result), to thoroughly study the case entrusted to him, to show conscientiousness and professional probity, to use the means provided by law that he considers favorable to the client (obligations of means). In other words, the lawyer will be required to make every effort to achieve a certain result – winning the case, to pursue this goal, without being forced to obtain the desired result by the client, result which depends on factors other than the activity itself of the professional lawyer, such as the procedural behavior of the opponent, the psycho-social orientation of the judge etc. On the other hand, the lawyer is obliged to provide the client with certain intermediate results which are included in his sphere of control and competence and in respect of which the obligation is undoubtedly a result.

This distinction between means obligations and result obligations is interesting from the perspective of the different scope of the performance guarantee – higher in the case of result obligations and narrower in terms of means obligations – with the consequence of a differentiated assessment of non-performance of contractual obligations. In correlation with the provisions of article 1548 of the Civil Code regarding the existence of a presumption of fault by the simple fact of non-performance, in case of result obligations, non-procurement of the promised result is equivalent to non-performance of contractual obligation and generates a presumption of guilt of the debtor of the obligation, different from means obligations which don`t benefit from such a presumption, the client having to provide more complex evidence to prove the lawyer's guilt.

When qualifying a certain obligation of means or result, we use the exemplary criteria referred to in article 1481 para. 3 Civil Code[25], considering especially the degree of risk and the scope of control that the lawyer can exercise in performing the service, but also the specific parameters imposed on the professional lawyer which verifies the diligence to fulfill the obligation.

2.2 *The diligence of a good professional*

If the unlawful act causing injury was committed in the practice of the profession, the term of comparison will be an abstract professional model, from the category of professionals to which the offender belongs, and recklessness and negligence will be assessed in light of the rules governing the profession regarding the existence of diligence and specific provisions[26].

The lawyer will have to perform his duties not only with the diligence that a good owner submits in the administration of his goods[27], required in the execution of contractual obligations in general, but to provide all the diligence to defend the rights, freedoms and legitimate interests of his clients for fulfilling the professional service entrusted to him[28]. Thus – if the diligence of a good professional is the duty of the lawyer to carry out his activities conscientiously and professionally, in relation to the client, third parties, public and private authorities and institutions – all diligence requires an increased requirement in assessing his professional conscience and probity.

In the activity of assistance and representation, the lawyer is required to have an adequate professional diligence, which involves the thorough preparation of cases, cases and projects, according to the nature of the case, his experience and professional beliefs. This training must be carried out promptly and with the inherent professional competence, ensured by the use of adequate legal knowledge, specific practical skills and by the reasonable training necessary for the assistance or concrete representation of the client. Adequate professional competence involves the analysis and careful investigation of the factual circumstances, the legal aspects of the incident issues in a factual situation, the adequate preparation and permanent adaptation of the specific strategy, tactics, techniques and methods in relation to the evolution of the case or file, in which the lawyer is employed. Therefore, where the lawyer does not have the professional competence trained for the complexity of a particular case, he has the obligation to refrain from engaging, except in those situations and circumstances that are urgent to safeguard and/or protect the rights and interests of the client, if they would be affected by the delay. But, even in such exceptional situations, the lawyer will limit himself only to what is reasonably necessary according to the circumstances and legal provisions.

In the counseling activity, the lawyer's diligence requires to act tactfully and patiently in order to present and explain to the client all aspects of the case in which he assists and/or represents him. The lawyer shall seek to use the most appropriate language in relation to the client's condition and experience, so that he has a correct and complete representation of his legal situation. The lawyer is obliged to advise his client promptly, conscientiously, correctly and to inform him about the evolution of the case entrusted to him. The lawyer shall consult permanently and appropriately with the client to establish the purpose, strategy, technical and tactical means adopted, the modalities of the counseling, as well as the technical solutions he will follow to achieve the most appropriate assistance and representation of the client in according with client's options regarding the purpose of the assistance and representation, but without abdicating his independence and professional belief, not being obliged to follow those techniques and legal procedures arbitrarily indicated by the client. Whenever the client proposes an approach that the lawyer considers having negative legal consequences, he shall warn

the client about the consequences or, as the case may be, will be able to terminate the legal assistance contract. To the extent that the client has been reasonably informed of the costs and possible consequences of the planned techniques and procedures, the lawyer shall retain responsibility for them.

The lawyer will provide the client an honest legal opinion regarding the factual and legal consequences of the investigated case, within the limits of the information provided by the client. The lawyer is obliged to refrain from the conscious assistance and advice the client in criminal activities, and if the client's actions and purposes, although apparently legal at the beginning of the assistance and/or representation, prove during it to be criminal, it is entitled to withdraw immediately and to waive the assistance and representation of the client. The client's use of the lawyer's opinions and advice for illegal purposes, without the knowledge of the lawyer who provided that opinion or advice, does not make the lawyer responsible for the client's illegal action and purposes[29].

Counseling and representing a client oblige the lawyer to look at the case from his own perspective and to give the client selfless advice, which will not be limited to exposing legal provisions, but will also consider the moral, economic, social consequences and political that might be relevant in that situation[30]. In today's information society, the client is often informed about the legal provisions, so he comes to the lawyer not to find out the legal provision, but to receive sophisticated legal services, a personalized and effective strategy to defend his interests, a strategy that considers both the objective circumstances of the case and the subjective issues which accompany it and which are often major impediments to an amicable settlement of the dispute[31].

In the frequent activity of representation, the lawyer is required the *diligence of a good professional*[32], meaning that the lawyer is obliged to act promptly in representing the client, according to the nature of the case, to establish strategies and tactics to guide his activity on the principle of using professional approaches in favor of the client, to respect the professional secrecy regarding them, to keep permanently under control his degree of professional and extra-professional occupation, so that he can adequately treat each case, according to the nature of the circumstances and the specifics of the case, even having the obligation to refuse a client. whenever he is aware that he cannot promptly provide the requested professional service. At the same time, the lawyer will treat with respect and courtesy any person involved in the legal proceedings in which he assists or represents the client and will refrain from harassing and prejudicial methods for third parties, if they are obviously indifferent and irrelevant in relation to the interests of the represented client. Moreover, the lawyer will refrain from intentionally ignoring the objectives and purposes of representation established by the client, so as to fail to achieve them by reasonable means, permitted by law and the status of the profession and harm the client during professional relations. The lawyer has the obligation to reasonably inform the client about the current situation of assistance and representation and to respond promptly to any requests for information from the client, explaining to him the circumstances of the case, the current situation, possible future developments and possible results, reasonably corresponding to the concrete circumstances of the case[33].

If the lawyer assists/represents several clients jointly, throughout the representation, he will constantly consult with each of the jointly represented clients, regarding the decisions to be taken and the decisive reasons for their adoption, so that each client be able to make their own decisions based on complete information. The lawyer can initiate steps for a joint counseling of the conflicting parties in an attempt to resolve the relationship between the respective clients in an amicable and profitable way for all. The lawyer must ensure that joint representation will not diminish the right of each client resulting from the client-lawyer relationship, as everyone has the right to a fair and diligent representation by that lawyer.

The lawyer may assess a situation relevant to his client for the benefit of a third party, if he is entitled to consider that the assessment is compatible with other aspects of the client-lawyer relationship and only with the client's consent[34]. The lawyer is obliged to communicate to the client the information he holds in connection with his case, even in the event that the communication would be contrary to his personal interest[35].

3 Conclusions

Lawyer‘s professional liability, understood as civil liability arising from the non-fulfillment or improper fulfillment of the obligations contracted in the practice of the professional service provided will be reported with priority on the concrete qualification of the nature of the breached duty, if it is an *obligation of means* or *an obligation of result*, according with the parameters and requirements of professional diligence, imposed as a guarantee of the satisfactory performance of the professional service provided by the lawyer for the client and for the whole society.

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[9] It is about the state of emergency caused by the epidemiological situation created by the SARS-CoV-2 virus and established by Decree 195/2020 on the establishment of the state of emergency on the Romanian territory (published in The Official Journal of Romania, no. 212 of March 16, 2020).

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b) the existence and nature of the consideration and the other elements of the contract;
c) the degree of risk involved in achieving the result;
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Institution of the special conservator in the case of the debtor's death during the foreclosure stage

PhD student Savu V.-I.

University "Titu Maiorescu", the Law Faculty (ROMANIA)
E-mail: savuvladionut@yahoo.com

Abstract

Foreclosure is the proceedings by which the creditor, holder of the right acknowledged by Court order or by any other enforceable document, constraints, with the participation of the authorized state bodies, its debtor who is not willingly executing the obligations resulting from such a title.

Subject to **art. 625 paragraph (1)** of the Civil Procedure Code, *"Foreclose shall comply with the provisions of the law, rights of the parties and other stakeholders"*.

To ensure compliance with such legal provisions, the foreclosure must be done under the limits of and subject to the legal provisions, rights of the parties and all the other stakeholders.

Subject to the provisions of **art. 645 paragraph (2)** of the Civil Procedure Code, the quality of creditor or debtor may be transfered at any time during foreclosure. Transference may be done by law, by convention, by inheritance, by merging, by division or by any other means leagally allowed.

Subject to **art. 1159** of the Civil Procedure Code, if the debtor deceased, the creditor may continue or initiate prosecution.

The foreclosure documents fulfilled until the date when the transference of the quality takes effect, under the conditions of the law, in relation with the inheritors of the creditor's or of the debtor's rights, as the case may be.

The principle of foreclosure legality imposes, among others, compliance with the rights of the parties, which results into the necessity of a distinct and detailed settlement of the situations that, before the initiation of the foreclosure or during such, the debtor deceased, especially since some executional proceedings are non-contentious and do not imply the obligation to inform the debtor or his participation.

In the situation of *mortis causa* transference of the debtor's assets, the Civil Procedure Code, in the 5th Book, About foreclosure, Title I, General Provisions, Chapter IV, Foreclosure, Section 3, Foreclosure against the inheritors, settles the situations, respectively the conditions when foreclosure may be started, respectively continues against the inheritors of the debtor.

These special rules determine the cases when foreclosure is forbidden (**art. 687** of the Civil Procedure Code), the proceedings that must be followed to start foreclosure against the inheritors (**art. 688** of the Civil Procedure Code) and the proceedings for continuation of foreclosure against the inheritors (**art. 689** of the Civil Procedure Code).

The analyse of foreclosure legality under such circumstances is done with reference to the date of the debtor's death.

Therefore, if at the date when foreclosure begins the debtor is deceased, the provisions of **art. 687 paragraph (1)** the first thesis of the Civil Procedure Code according to which *"if the debtor dies before the bailiff is apprised, no foreclosure may be initiated (...) "……"and if the debtor dies after, it may not be continued as long as the inheritance was not accepted by the people invited to the inheritance or, if they are not present, as long as it was not appointed, under the conditions of the law, a guardian of the inheritance or, as the case may be, a special guardian for execution, under the conditions of art. 58"* become applicable.

It is noted that the limitation is assigned by conjunction "and", which expresses an opposition report in relation with the second thesis in this text.

As a consequence, the actual prosecution of the heritage left by the debtor may only be done after the situation of the persons who may become inheritors is clear or after a guardian is appointed.

The situation in this study relates to an essential aspect from the second thesis of art. 687 paragraph (1) of the Civil Procedure Code, *the institution of the special guardianship in case of debtor's death during foreclosure.*

Keywords: special guardianship, foreclosure, debtor's death, protection of creditor's rights

1 Introduction

The institution of the special guardian (curator litis), respectively the legal special guardian, after the New Civil Procedure Code comes into force, exclusively lies with the lawyer, subject to art. 58.

Since this is about foreclosure and implementing acts submitted to the control of the Court in charge with the foreclosure, this is the legal proceedings and the special guardianship activities from Law no. 25/2017 regarding the modification of Law no. 51/1995 for organizing and practicing the lawyer profession, a special guardianship that lies exclusively with the lawyer in this phase.[1]

Law #51/1995 on the Organization and Exercise of the Solicitor's Profession, as amended under Law #25/2017, establishes special conservatorship as one of the professional undertakings of the solicitor.[2]

The New Civil Procedure Code, in Art. 58, regulates the institution of special conservatorship. This text specifically stipulates that appointing a special conservator is done by the court of law that is trying the case, from the ranks of solicitors nominated

[1] Legal Universe no. 11/2018 – Special guardianship, lawyers' special legal monopole
[2] See Law no. 51/1995 as amended under Law no. 25/2017 – main changes brought to Law #51/1995

by the Bar Association for each court of law, and that the special conservator thus acquires all the legal rights and obligations of a legal representative.

The phrase "special conservator" describes solicitors who have chosen to exercise this capacity, in a written application submitted to the Bar Association they are members of. Their appointment is done on the basis of the special public Registry which is established under Art. 91 dash 1, para. (3) in the Law on the Status of the Solicitor's Profession.

1.1 *A brief history of the special conservatorship*

The notion of special conservatorship existed in the Civil Procedure Code of 1865, in force before the year 1948 as well as the Civil Procedure Code that was in force after the year 1948.

Special conservatorship was used much less, and as an example of that I could point to the stipulations of **Art. 66 in the Civil Procedure Code of 1865, in force before the year 1948**, and which specifically stipulated that in the hypothesis where one party in the trial is incompetent or under interdiction and does not have a legal representative, or in case the trial is likely to be delayed, the chief judge of the court could appoint a special conservator who would represent the interests of the incompetent person until a proper legal representative was appointed.[3]

Another situation that held a role for the special conservator was that of a missing person, in which case under **Art. 621-623 Civ. Proc. Code of 1865, in force before the year 1948** the chief judge of the court of the last domicile of the missing person could appoint a special conservator on request from the interested party and such conservator would represent the interests of the missing person in court.

In 1948, once the Civil Procedure Code of 1865 was amended, the notion of special conservatorship remained in place but was defined differently. Thus **Art. 44 in the Civil Procedure Code of 1865, in force after the year 1948**, regulates special conservatorship as a temporary legal representation[4], to be used in certain exceptional situations (person lacking exercise capacity and without a legal representative, conflict of interests between the represented and the representative).

I also recall here the stipulations of Emergency Government Order #138/2000 which **supplemented Art. 44 in the Civil Procedure Code of 1865, in force after the year 1948**, in terms of establishing a special conservatorship in the civil trial when the defending legal entity did not have a legal representative.

[3] Civil Procedure Code of 1865, in force before 1948, Art. 66.
[4] Civil procedure law. General Theory. Publishers "Editura Didactică și Pedagogică," Bucharest, 1983

2. Special conservatorship in the case of a debtor at the stage of foreclosure – Art. 687 para. (l), Art. 688 para. (l) and (3) and Art. 689 New Civil Procedure Code (NCPC)

Special conservatorship was established by the lawmaker in order to prevent failure to observe due process in the case of persons coming under Art. 58 NCPC.[5]

Among the cases regulated by the NCPC and where special conservatorship can be ordered we also have the case of the debtor's death at the stage of foreclosure – Art. 687 para. (l), Art. 688 para. (l) and (3) and Art. 689 NCPC. We are practically in the hypothesis where the debtor died after the judicial officer is appointed, or after the start of the foreclosure, and thus are seeing applicability of Art. 58 NCPC.

2.1 Situations where foreclosure can be ordered or *continue against a debtor's heir*

In the situation described above, where the debtor dies after the foreclosure started, the procedure cannot continue if the inheritance has not been accepted by the legal inheritors or if, in their absence, a curator of the estate or a special conservator for the foreclosure has not been appointed[6].

The above situation requires some discussions and concrete, practice-based examples.

Thus, in the hypothesis where the deceased debtor was subject to foreclosure as a provider of a security interest, the trustee of a bank credit contract, it is evident that the potential legal heirs do not have an interest to speed up the opening of the inheritance procedure.

Under **Art. 687 para. l Civ. Proc. Code**, if the debtor dies after foreclosure has started it cannot continue as long as a curator of the estate or, as the case may be, a special conservator for the foreclosure has not been appointed under Art. 58 Civ. Proc. Code[7]

Also, under **Art. 689 Civ. Proc. Code** *if foreclosure had started at the date the debtor died it shall be suspended and cannot be resumed against the accepting inheritors any earlier than 10 days after the date when the latter have been notified of the continuation of foreclosure, with appropriate applicability of Art. 688 Civ. Proc. Code*, and under **Art. 688 para. l Civ. Proc. Code** *" if the debtor dies before the start of the foreclosure and it is found that no accepting inheritor is available and no curator of the estate has been appointed, on request from the creditor of the judicial*

[5] Constitutional Court, Decision no. 364/2014, M. Of. Part I, no. 542/22 July 2014; Constitutional Court, Decision no. 377/2014, M. Of. Part I, no. 693/23 September 2014.

[6] V.M. Ciobanu, T.C. Briciu, C.C. Dinu, *Civil Procedural Law, 2nd Edition revised and enlarged,* National Publishing House, 2018.

[7] Civil Procedure Code updated in January 2019 – Art. 687 – Edition under the care of Judge Vasile Bozeșan.

officer the foreclosing court shall immediately appoint a special conservator until the lawful curator of the estate is appointed, with appropriate applicability of Art. 58.[8]

In this hypothesis it is the creditor (bank) that has an interest in seeing the foreclosure continue, and they will file the motion with the court to have a special conservator appointed.

2.2 *Preliminary procedure engaged in by the creditor before addressing the court the appointment of a special conservator*

Under **Art. 102 para. (3) in the Law of Notaries Public and Notary work #36/1995**, *the motion to open the inheritance procedure can be filed by any of the legal inheritors, by the creditors of the inheritance or of the legal inheritors, as well as by any other individual who can justify a legitimate interest.*[9]

Practically after the judicial officer is notified of the death of the debtor he/she will contact the Chamber of Notaries Public in whose jurisdiction the last domicile of the deceased is located and ask that they record the start of the foreclosure in the special Registry required by and issue a certificate attesting whether the debtor's assets were claimed or not and, in the affirmative, who the persons are that have the capacity of inheritors, and also whether a curator of the estate was appointed before the inheritance was accepted by at least one of the legal inheritors.

In the hypothesis where such motions have not been filed according to what the law requires, the creditor can file their motion with the jurisdictional court of law and ask for a special conservator to be appointed as a party in the foreclosure.

2.3 *How long does the creditor have to file their motion in court after the debtor died?*

This is a question that does not have a straight answer because the law does not contain any specific stipulations.

A corroborated interpretation of Art. 687 para. l and a Art. 688 para. l Civ. Proc. Code shows that we can theorize *the law is intended to protect the rights of creditors who have an equitable right of redemption against the deceased* and who cannot be prevented from exercising that right, **with the crucial mention** *that this applies if the inheritors, in ill-faith or out of neglect, fail to engage in the inheritance procedure with celerity.*

In the context, the provisions of art. 688 paragraph (1) of the Civil Procedure Code transpose this preference right of the creditors' to the inheritance in matters of foreclosure, stating on one hand, that foreclosure in view of making their receivables may start after the death of the debtor and that, on the other hand, in its place there will be, during foreclosure proceedings, on the grounds of paragraph (2) of art. 688,

[8] See Art. 688 and Art. 689 Civil Procedure updated in January 2019 – Edition under the care of Judge Vasile Bozeșan.
[9] See Art. 102 in the Law of Notaries Public and Notary work #36/1995.

following inheritance acceptance all accepting inheritors, if there are only major inheritors.

As a general rule, the inheritor has the possibility of succesional option according to his own will.

Under the circumstances, of initiation of foreclosure for its de cuius assets, the inheritors, under the mask of a psychical pain, being acquainted with the assets of the deceased's estate, may hide, peculate or obstruct their execution by delaying such, which may equal either a voluntary dishonesty or indifference, negligence.

In my opinion this is a point where a number of interpretations are possible of this notion, which is subjective and left entirely up to the court, and stated as "*if the inheritors, in ill-faith or out of neglect, fail to engage in the inheritance procedure with celerity."*

Under **Art. 1.103 Civil Code** the notion of inheritance option operates as follows:

(1) The right of inheritance option shall be exercised within one year of the date the inheritance was opened.

(2) The option deadline is calculated:

a) as of the date of birth of the individual called upon to be a legal inheritor, if the birth occurred after the inheritance procedure was launched;

b) as of the date the death was recorded in the Civil Registry, if the record was done on the basis of a judicial finding of the demise of the person leaving the inheritance, except for the case where the legal inheritor was aware of the demise or where the finding on the demise was returned at a prior date, because in such case the calculation starts at the date of awareness or prior decision;

c) as of the date the legatee knew or should have known about the assets coming to them, if the testament listing those assets is found after the inheritance procedure is launched;

d) as of the date the legal inheritor knew or should have known about the kinship underlying their capacity as legal inheritor, if such date is subsequent to the date the inheritance procedure is launched.

(3) Applicable to the duration specified in para. (1) are the stipulations in Book Vl concerning the suspension and reinstatement within the deadline inside which the creditor is entitled to pursue the foreclosure.

2.4 *Considering the abovementioned legal stipulations, do any logical questions arise?*

a) Can the possible inheritors be regarded as being in ill-faith or negligent if they do not launch the inheritance procedure within one year of the date the deceased person's death was recorded?

b) Do the stipulations of Art. 687 and Art. 688 Civ. Proc. Code clash with those of Art. 1.103 Civil Code?

c) Is it legal for the foreclosure court to appoint a special conservator before completion of the one-year deadline since the date the deceased person's death was recorded in the Civil Registry?

My opinion about these questions must carry the following caveats:

The matter in the first question is a delicate one. There is no legal instrument to assess the notion ill-faith or neglect inheritor, as the person's psychological (and spiritual) state will vary from one human to another. People can have different psychological reactions to the *death of the deceased person*, so I believe that in this hypothesis *precedence should be given to the deadline of one year since the date the deceased person's death was recorded in the Civil Registry*.

Under these circumstances my opinion becomes obvious as to question 2 as well: the stipulations of Art. 687 and Art. 688 Civ. Proc. Code will clash with those of Art. 1.103 Civil Code in case of failure to comply with the deadline of one year since the date the deceased person's death was recorded in the Civil Registry.

As for question 3, the jurisprudence of the various courts of law is diverse. Judges are human too, just like the inheritors, so their judgments will vary.

Even if the fundamental principle is that a judge shall not judge with their heart, we should not forget some of the old wisdom that "*a judge shall judge themselves before judging others*" or "*a judge who does not weigh the goal of the trial by adding themselves to the scales of the Law will not be able to return a fair judgment*[10]" and that is also why awards will differ from one judge to another.

3 Responsibilities of the special conservator in case of death of the debtor at the stage of foreclosure

A systematic interpretation of the stipulations under Art. 687 and 688 Civ. Proc. Code shows that special conservatorship can be ordered under a curator of the estate is appointed as under Art. 1136 Civil Code, or until the inheritance is accepted and debated,

The special conservator is only appointed so as to avoid delay of the foreclosure by the deliberate failure to exercise the right of inheritance option and, at the same time, to protect the interests of the estate until such time as the inheritance is accepted or a curator of the estate is appointed.

Appointing the special conservator is intended only for the conservation and administration of the estate until such time as the succession debates begin, but the execution procedure will take place in an adversarial manner towards the accepting inheritors or the curator of the estate who was appointed specifically to attend the foreclosure procedure.

4 Conclusions

Special conservatorship in case of a debtor's death at the stage of foreclosure is intended to protect the rights of the creditors who have an equitable right of redemption against the deceased, and the special conservator thus appointed only pursues the

[10] Wisdom Collection – Complete Aphorism Works – Reference edition of 2019 by author Sorin Cerin.

conservation and administration of the estate until such time as the succession debates begin or a curator of the estate is appointed.

It can also be ordered before completion of the one-year deadline as under Art. 1.103 Civil Code, because it does not cause and changes in the estate and the goal is to avoid delay of the foreclosure by the deliberate failure on the part of the possible inheritors to exercise their right of inheritance option.

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Judicial Partition Procedure

PhD student Zăvoi I.-C.

"Titu Maiorescu" University of Bucharest (ROMANIA)
Doctoral School of Law
Bailiff – Craiova District Court
E-mail: cristian.zavoi@gmail.com

Abstract

The analysis of the judicial partition procedure cannot be conceived without reviewing the concepts of joint-tenancy and co-ownership, because partition necessarily implies a joint-tenancy or co-ownership which is to be ended.

When the right of ownership over a single good or over a universality of goods belongs to several persons, their right appears in the form of a common property right. The common property right comes in two forms, namely in a share in the right of property respectively, in the right of joint tenancy (right that belongs to spouses). In the first form, respectively, in a share in the right of property, the right is divided into shares or fractions, and in the second form, respectively in the right of joint tenancy, the joint tenants have an unlimited right, i.e. unfractionated, in regard to the good or goods that form the object of the joint tenancy.

If the right of ownership of several persons refers to a universality of goods, we are speaking about a joint tenancy.

Keywords: joint tenancy, share, co-ownership, right of ownership.

1 Introduction

The death of a natural person determines the transmission of their patrimony to one or more persons, and the joint tenancy is in fact the coexistence of their rights. The joint tenancy with right of survivorship arises only if the inheritance is collected by at least two heirs.

In the New Civil Code, the concept of joint tenancy was not defined distinctly, but through a reference to Art. 1143 para. (1) of the Civil Code, where it is shown that "no one can be forced to remain in joint tenancy. The heir can always ask to leave the joint tenancy, even when there are conventions or testamentary clauses that provide otherwise".

The partition of property finds its regulation in the New Civil Code, respectively Art. 1100 – Art. 1163, which although it governs the partition of the inheritance, is also applied in the hypothesis of a partition of co-ownership.

The effect of the judicial partition is the identification of the part of the good or goods, in their materiality, which will belong to each owner of exclusive property.

Therefore, the ideal and abstract share of the property ownership over a good or over a universality of goods materializes over a material part of the good or goods that make the object of the property ownership. In reality, the co-owner will have exclusive ownership over those parts of the property or over those goods. From the moment of the partition, each ex-co-owner will exercise the attributes of the property ownership exclusively on the material quotas obtained.

In other words, the partition of property turns the individual right characterized by quotas in the property ownership over the good into a divided right and exclusively over a determined material quota of the common good or goods[1].

In such a situation, the partition of property can be done ***conventionally*** – when the joint tenants or heirs agree on how to make the partition of property or by ***court decision***, when the parties do not agree on how to divide the common good. In any of these situations all the co-owners must take part in the partition of property, *per a contrario,* the absence of any of the joint tenants representing a case of absolute nullity.

The right to request the termination of the joint-tenancy belongs to each co-owner, however Art. 673 of the Civil Code regulates the possibility of the court to suspend the settlement of the partition of property for a period of maximum 1 year, if there is a risk that the interests of a co-owner may be affected.

We should mention that the succession in undivided co-ownership is based on two principles: no joint tenant has exclusive right over any good and each joint tenant has an exclusive right over an ideal quota that belongs to them from the inheritance.

The lawmaker, through Art. 1143 para. (1) of the Civil Code enshrined the principle of imprescriptibly of the right to request the termination of the joint-tenancy, no matter how long it has been since the succession procedure was initiated. Therefore, the joint tenancy can end at any time, each of the joint tenants having the right to request the termination of the joint-tenancy.

Although the right to claim the partition of inheritance is not subject to statute of limitations, by way of exception, it may be affected by *usucapio*. Thus, under Art. 930 of the Civil Code, if one of the joint tenants had possession of an immovable asset for at least 10 years, s/he may obtain an ownership right thereon. In their support, Art. 675 of the Civil Code establishes that "the partition of property may be requested even when one of the co-owners ***used exclusively the property***, unless he usucapted it". In this sense was the previous regulation which provided that the partition may be requested even then when one or more of the heirs possessed separate parts of the succession, if there was no deed of partition of property or if the prescription cannot be opposed.

In accordance with Art. 672 of the Civil Code if, remaining in joint-tenancy is of interest to the joint-tenant, the lawmaker would allow them to conclude an agreement to maintain the status of joint-tenancy for a maximum of 5 years, but if the agreement concerns an immovable asset, the agreement must be made only in compliance with the

[1] Pușcaș, Nicolae. (2002). *Drepturile Reale Principale*. Bucharest: Scorpio 78 Publishing

formalities provided by law, respectively the agreement to be in authentic form, as well as in compliance with the publicity formalities. According to the doctrine such an agreement would result in a provisional partition of property, a partition between joint tenants, which has as object only the possession and use and not a property right to its fullest extent.

At the same time, we shall emphasize that the imprescriptibly of the right to request the termination of the joint-tenancy is imperative, in the sense that any manifestation expressed either in the will or by a convention of the heirs whose object is the waiver of the right to request the partition of property and the obligation to remain in joint-tenancy is struck by nullity.

In the current legislation concerning civil procedure, as well as in the old regulation, three ways of sharing the goods subject to judicial partition of property are provided, in case the parties do not reach any agreement regarding their partition, namely:

2 Partition in kind

The partition in kind should be the prevailing type of partition [Art. 676 para. (2) of the Civil Code and Art. 989 para. (1) of the Civil Procedure Code]; if a partition in kind is possible, even if the lots are unequal, the court may not, without the consent of the co-owners, resort to another method of partition[2].

If the parties do not reach an agreement or do not conclude a transaction according to the regulations of Art. 983 of the Civil Procedure Code, based on the same text of law, the court will establish the assets subject to partition, the quality of co-owner, the share due to each as well as the claims arising from the state of joint tenancy that the co-owners have to each other. If the object of the partition is an inheritance, the court, in addition to the above, will also establish the debts transmitted by inheritance, the debts and claims of the co-heirs to the deceased, as well as the obligations of the inheritance.

In such a situation, the court will proceed to the partition in kind, establishing the lots and their allocation. If the lots are not of equal value, they are completed by a sum of money. The formation of the lots can be ordered directly by the judge, this solution resulting from Art. 984 (2) of the Civil Procedure Code.

The formation of the lots will be done according to Art. 988 of the Civil Procedure Code, which stipulates that, "the court will take into account, as the case may be, the agreement of the parties, the size of the share due to each from the mass of goods to be divided, the nature of goods, domicile and occupation of parties, the fact that some of the co-owners, before requesting the division, made constructions or improvements with the agreement of the other co-owners or similar. "

The principles enshrined in the cited text of the law are essential in any partition of property and not only in the matter of partition of succession, they seek to ensure equality between co-owners.

In conclusion, this text of law enshrines the principle according to which the partition of movable or immovable assets is done in kind.

[1] G. Boroi, M. Stancu (2019). *Fișe de procedură civilă*. Hamangiu Publishing House, Bucharest.

3 Partition by allotment

If the partition in kind of an asset is not possible or would cause a clear decrease in its value or would adversely change its economic destination, upon the request of one of the co-tenants, the court may provisionally assign the property in its entirety. If several co-owners request the property, then the court will proceed according to the criteria shown in Art. 987 of the Civil Procedure Code. By decision, the court will also establish the term in which the co-tenant to whom the asset was provisionally assigned, has the obligation to pay the amounts corresponding to the quotas due to the other co-tenants.

If the person to whom the asset has been provisionally assigned pays, within the deadline set, the amount of money due to other co-owners, then the court will assign the asset to him/her.

However, if the person to whom the property was assigned does not pay the amounts within the term established by the court in this respect, the court will assign the property to another co-owner, under the same conditions.

For good reasons, pursuant to Art. 989 of the Civil Procedure Code, the court, upon the request of one of the co-owners, will be able to assign the property to him/her by decision, establishing at the same time the amounts due to the other co-owners and the payment due date. Given that this procedure is exceptional, the reasons why the property could be attributed to a co-owner are the jurisdiction of the court, as they are specifically assessed for each case.

In this situation, we should mention that the other joint-tenants benefit from a right under a mortgage over the property assigned for the payment of the owelty, under Art. 2386 para. (5) of the Civil Procedure Code.

The determination of the lots, in the judicial practice is made according to complex criteria, not necessarily according to the ideal and abstract share of the property right over the asset or assets that are subject to partition. Thus, the Cluj Court of Appeal, by decision no. 298 of 13 February 1998, held that "without the consent of the co-owner, one of the joint tenants cannot be attributed all the assets in kind, and to others only the value of the part due to them, as long as it is possible to hand over the same quantity and quality in kind".

On the other hand, the Brașov Court of Appeal by civil decision no. 159/R of 23 February 1993, noted that during the partition, the immovable asset was assigned to the co-owner who did not have the highest ideal and abstract share in law (having only 1/3), as: "the size of the shares is important, but not necessarily decisive, and the court correctly assessed the fact that, unlike the plaintiff, the defendant has no other home, has lived in the building since 1956 and has made numerous improvements to the buildings"[3].

[1] Brasov Court of Appeal, civil section, civil decision no. 159/R of 23 December 1993. *Culegere de practică judiciară pe anii 1994-1998.*

4 Partition by sale

With regard to the matter of sale at public auction, it must be emphasized that the court will determine whether the sale will be made by agreement between the parties or by the bailiff.

If the sale was not made by agreement between the parties, the court will summon the parties and order sale by the bailiff.

Thus, Art. 992 of the Civil Procedure Code regulates the procedure of the sale at public auction, namely that only after the decision ordering the sale of the property by a bailiff remains definitive, the latter will proceed to the sale at public auction. In this regard, the bailiff will set the auction term, which may not exceed 30 days for movable property and 60 days for real estate, counted from the date of receipt of the decision issued by the court and will notify the co-owners about the date, time and place of sale, established by the bailiff by an announcement that will be displayed in the places established by law, as well as in a local or national newspaper, as the case may be.

Thus, for movable assets, the bailiff will draw up and display the announcement at least 5 days before the auction term, and for the immovable assets, the announcement will be drawn-up and displayed at least 30 days before the auction.

According to the principle of availability of the parties, the co-owners may agree that the sale of the goods will be made at any price offered by the participants in the auction, but at the same time they have the power to agree that the sale will not be made below a certain price.

The provisions of this article shall be supplemented accordingly by the provisions of the Civil Procedure Code concerning the sale at auction of movable and immovable assets stipulated by the enforcement proceedings.

From the content of Art. 991 para. (3) of the Civil Procedure Code: "If any of the parties did not agree with the sale or if this sale was not made within the term established according to para. (2) the court, by decision given with the summoning of the parties, will order that the sale be made by the bailiff ", it can be deduced that the court has the obligation to put in the debate of the parties if they agree with the sale of the asset, and only if they expressly refuse, to order the sale of the asset at auction by the bailiff.

Lastly, within the procedural cycle, the court, prior to the appointment of the bailiff, verifies whether the conditions for the sale at auction are met.

The initiation of the enforcement procedure will be possible only after the final decision of the court ordering the sale of goods, otherwise all the acts performed by the bailiff within the enforcement procedure will be struck by absolute nullity.

Once the decision of the court is received, the bailiff will proceed to establish the date for the auction, as it is no longer necessary to carry out any deeds prior to establishing the date, the announcement of sale, respectively the approval for enforcement, and the summons, etc.

Therefore, the bailiff must proceed according to the general provisions on enforcement, he must set the price or proceed to appoint an expert, in compliance with the provisions of Art. 757 of the Civil Procedure Code for movable assets and of Art. 835 and 836 of the Civil Procedure Code for immovable assets.

The bailiff will set the first term for the auction, a term that cannot be longer than 60 days nor shorter than 20 days for immovable assets and a maximum of 30 days (a term that will be calculated from the date of receipt of the decision), but not less than 5 days for movable assets, counted from the date of receipt of the decision, and will notify the co-tenants about the date, time and place of sale.

Thus, 5 days prior to the first auction term for the movable property, the bailiff has the obligation to display the announcement, which will show the date, time and place where the auction will take place, and if the auction is organized for the sale of immovable property, then the announcement shall be displayed at least 30 days before the auction.

Based on the principle of availability of the parties, the joint-tenants may agree that the sale should be made at any price, or on the contrary, the sale should not be made below a certain price.

From the above it would result that, if the price established in the announcement for sale is not obtained, the bailiff has the obligation to consult the joint-tenants regarding the sale price of the goods, as the provision from Art. 991 para. (5) of the Civil Procedure Code, is a norm derogating from the provisions regarding the sale of goods at auction, this being applicable only in the situation when the co-owners do not take any decision regarding the sale of goods. If the agreement of all the joint-tenants is not obtained, but only of some of them, this text of law is not applicable.

If the movable or immovable goods that were the object of the sale at auction were capitalized by the bailiff, the latter shall not proceed to the distribution of the amounts of money obtained because, according to the provisions of Art. 993 para. (2) of the Civil Procedure Code, the amounts resulting from the sale at auction will be distributed by the court according to the right of each co-owner.

Therefore, in the procedure regarding the partition of property, the role of the bailiff is reduced only to the sale of the goods subject to partition, not being necessary to make the pre-sale forms or the distribution of amounts obtained from the sale of the goods. However, the other enforcement deeds, respectively evaluation, setting the auction date, drawing up the action report and the auction deed must be carried out[4].

5 Conclusions

The partition can be achieved in one of the following three ways, expressly and *limitatively* provided by law, respectively: partition in kind, partition in allotment and partition by sale. These types are also shown in the law, but undoubtedly the prevailing principle must be that of partition in kind.

The principle of selling the property by agreement or by the bailiff is only a subsidiary way for the partition of property.

[4] E. Oprina, I. Gârbuleț (2013). *Tratat teoretic și practic de executare silită. Vol. I.* Universul Juridic Publising.

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[3] Pușcaș, Nicolae. (2002). *Drepturile Reale Principale*. Bucharest: Scorpio 78 Publishing House.
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