



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

9TH EDITION, BUCHAREST, MAY, 13-14 2021

FAMILY AND FAMILY HERITAGE. CHALLENGES AND NATIONAL, EUROPEAN AND INTERNATIONAL LEGISLATIVE PERSPECTIVES

Volume coordinated by

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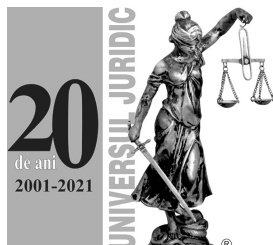
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Section A

INTEGRATING CHILDREN'S RIGHTS INTO FAMILY RELATIONSHIPS: INTERNATIONAL AND REGIONAL LEGAL PERSPECTIVES

Nicolae Voiculescu¹

Abstract

The rights of the child are, for the science of human rights, aspects of major interest that problematize the vulnerability of a social category that is distinguished by insufficient physical and mental development. Given these bio - psycho coordinates-social values of the child, his quality of rights holder should be understood in the context of the relationship with the family - the element able to provide support for the improvement of the human model that the child poses in his development. Accepting these research theses, this paper advances as a scientific objective the analysis of the way in which, under the auspices of the most relevant international / regional legal instruments, two interrelated legal categories interact: children's rights and the family environment. From the observation of the models of correlation of the two legal categories in the international and regional systems of protection of children's rights derive particular models of capitalization of children's rights in society.

Keywords: *children's rights, family environment, best interests of the child, right to privacy and family*

Children's rights and family relations in the UN human rights system: necessary connections and interpretations

Human rights norms reiterate, as a legal leitmotif, the protection of traditional family values in the context in which vulnerable social categories are placed at the center of the discourse - among them, children occupying a primordial place. The international community inserts the connection between the family and the rights of the child in relevant international legal documents given that the child's membership in family coordinates is the fundamental premise for exercising other rights such as the right to identity, the right to survival and development, the right not to be separated from one's parents.

Relevance of the family in exercising the rights of children is highlighted in the preamble to **the UN Convention on the Rights of the Child** [1] which states that *the belief that the family, as the basic unit of society and the natural environment for the growth and welfare of all its members and , in particular, children, should receive protection and the assistance they need to- and can fully assume ts responsibilities within society .*

Representing the international treaty on the rights of the child, the Convention inserts family values at the heart of the civil and political, economic, social and cultural guarantees promoted in order to ensure the exercise of children's rights.

Placing the child in the family environment is important in order to empower all actors properly involved in the process of raising and educating children. To this end, Article 5 of the Convention governs the obligation of States Parties to the Convention to respect and support the fulfilment of the responsibilities of relevant social actors with responsibilities

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for the protection of the rights of the child, regardless of whether the aforementioned responsibilities are imposed on the *child's natural parents, or according to tradition, local members of the extended family or community, legal guardians or other persons who have, by law, children in care, to provide, in a manner appropriate to the capacities evolving child's direction and guidance in the exercise by the child of the rights recognized in this Convention*.

The UN Committee on the Rights of the Child's interpretation of Article 5 of the Convention is broadly expressed, both in terms of the concept of "family" and in relation to the support and well-being of children regardless of age and level of development of them. Although parents are the primary social responsibility for ensuring the care and development of children, the Committee draws attention to the inclusion in the conceptual sphere of the family of all types of social arrangements (from those specific to the nuclear family, to those related to the extended family and traditional or modern communities) provided that they act in accordance with the principle of the best interests of the child. In the same sense, the responsibility of social agents providing care services should be comprehensively understood, by reference to newborns, middle-aged children and adolescents who have not yet reached the age of majority. With regard to newborn children, the UN Committee on the Rights of the Child considers that they are not passive beneficiaries of care but are active social agents who, seeking protection and understanding from parents (as primary caregivers) or other caregivers, need welfare to develop. [2] The encouraging of the parent-child relationship ensures the premises for the formation of children's personality and, implicitly, leads to the shaping of the right to identity. According to the Committee, the development of children's abilities is based, first and foremost, on the guidance provided by primary caregivers (natural parents or extended family). Cultivating children's inclinations, talents, spirituality are actions based on the learning and maturation processes - which cannot be complete in the absence of the parental role of parents. The latter will take into account the child's decision-making autonomy and maturity so that parental counselling does not acquire authoritative values and is conducive to the exercise of children's right to participate (Article 12 of the Convention) and the right to freedom of thought, conscience and religion (Article 14 of the Convention). [3]

The parent-child relationship is one of the regulatory coordinates of Articles 18 and 27 of the Convention, on the one hand reiterating the physical and spiritual connection of ancestral parent-child origin and, in the alternative, advancing the obligation of States Parties to support primary caregivers in fulfilling the main responsibility (such as promoting the well-being and development of children in accordance with the principle of their best interests). According to the UN Committee on the Rights of the Child, the right of the child to develop relations with both parents is adjacent to the principle of the best interests of the child. Exceptionally, the best interests of the child may differ from the child's need for integration into the natural family if this would have a negative impact on the child's psyche due to neglect, deprivation of affection, exposure to acute emotional stress or situations of nature to disrupt their mental health. [4]

The principle of the best interests of the child governs all aspects of its relationship with the family environment, in this respect, being representative: Article 9 on the right not to be separated from parents; Article 10 on the right to family reunification; Article 18 on parental responsibilities, Article 20 advancing the legal framework on situations where the child may be deprived of the family environment and alternative care; Article 21 laying down the rules

applicable to the adoption of children; Article 37 stipulating the circumstances of separation of children from detained parents, etc. Based on the issues presented, it is clear that the holistic vocation of the Convention is based on the correct application of the principle of the best interests of the child. Although the UN Committee on the Rights of the Child emphasizes that the provisions of the Convention are not subject to hierarchy, all of which are of equal importance in the effective realization of the rights of the child, none of these provisions can be violated by a negative interpretation of the rights of the child. [5]

Noting the relevance of the principle of the best interests of the child in the implementation of the provisions of the Convention, the Committee analyzed its legal nature, identifying a tripartite approach: (1) *as a substantial right* having the child who can claim to be considered in assessing a complex issue affecting him directly; In conjunction with this right, States Parties to the Convention have a specific obligation which is self-enforcing at the national level and may even be invoked before the courts; (2) *legal principle* on the basis of which the hermeneutics of the provisions of the Convention are realized: if a legal provision is open to multiple interpretations, the one that is in accordance with the best interests of the child will be preferred; (3) *procedural rule* because the justification / motivation of any decisions having an impact on children's rights must be developed in accordance with ensuring the well-being and exercise of their rights. [6]

The UN Convention on the Rights of the Child sets out a model for regional human rights protection systems with regard to placing the relationship between the rights of the child and the family in a legal context.

The most recent concern of the United Nations in the field of protection of children's rights, manifested against the background of the reconfiguration of social relations in the context of the COVID-19 pandemic, concerns the way in which children are adapted to virtual reality. The right to education of children is directly dependent in its exercise on access to the digital environment. Parents and caregivers must ensure, at the family level, the climate necessary for the access and exercise of the child's right to the virtual environment. Through the General Comment no. 25 [7] UN Committee on the Rights of the Child has integrated aspects of family relationships on the issue of adapting children to the virtual environment, pointing out that, to ensure the transition of children from the physical to the digital space, parents or carers of children must be initiated in the field. The Committee recognizes the special role of parents and caregivers in guiding children in the acquisition of digital skills, encouraging States Parties to ensure that parents and caregivers have the opportunity to acquire digital literacy themselves, observing ways in which technology can support children's rights. The training of parents and other persons providing care to children must be carried out on two distinct coordinates: (1) familiarizing them with basic skills / knowledge in the field and (2) raising awareness of caregivers to respect the autonomy of children and the protection of personal data, in according to their evolving capabilities. The fundamental principle that should coordinate family relationships is based on understanding the uniqueness and specificity of the parent-child relationship; in turn, this principle must be instrumented in ensuring the child's approach to the digital environment through family members. The guidance provided by the latter to the child will be guided by an appropriate balance between ensuring the protection of the child and encouraging his or her emerging autonomy, based on empathy and mutual respect.

The relationship between the rights of the child and the family in the legal system of the Council of Europe: counterweight or continuity of the UN system?

At the Council of Europe level, in order to facilitate the ratification of the UN Convention on the Rights of the Child, the **European Convention on the Exercise of the Rights of the Child** has been drawn up with the aim of protecting their best interests, including by developing procedural measures before judicial authorities. The latter have obligations to facilitate the exercise of children's rights within the procedures applicable to family cases. [8] According to the Convention, the objective of the regulations contained therein converges towards the promotion of the rights of the child both in substantive (substantive) and procedural matters. Recognizing that promotion is more comprehensive than procedural protection, the Convention reiterates that ensuring the right climate for the exercise of children's rights involves, first and foremost, establishing strong and coherent parent-child relationships and, in the alternative, recourse to family proceedings before judicial authorities administrative and judicial powers. In the scope of family proceedings, the Explanatory Report to the Convention with highlights, by way of example: issues relating to custody, parentage, adoption, guardianship, administration of children's property, elimination or restriction of parental responsibilities, protection against cruel and degrading treatment. [9]

The procedural dimension of family cases determines the context of application of the right of children to be consulted, to express their opinions and to be informed about situations / decisions that may affect them. Similar to the UN system of protection of the rights of the child, the system of protection established under the European Convention on the Exercise of the Rights of the Child does not establish an order of importance in which the procedural rights of children can be exercised but does not condition their exercise by an expressed request of their holder. According to the Explanatory Report to the Convention, the child's right to information must be exercised even if he or she does not invoke that right in relation to the procedural authorities. However, some circumstances are necessary: states must define the criteria that allow them to assess the degree to which children are able or not to form and express their own opinions for certain situations that directly concern children such as consenting to or prohibiting a planned decision regarding their personal life such as adoption. [10]

The UN Convention on the Rights of the Child regulates the right to a legal representative as an alternative to the protection of children through parents, while the European Convention on the Exercise of Children's Rights provides for the possibility of appointing a legal representative in favor of the child. In this situation, the appointment of the special representative is the responsibility of the child (insofar as his or her level of maturity ensures the premises of a coherent option) or other competent persons / bodies. In carrying out the proceedings, the obligations of the judicial authorities are subject to compliance with the principle of the best interests of the child and the test of the latter's application is in turn subject to the possibility for the judicial authorities to obtain all relevant information to make a decision in the best interests of the child. Among the sources that can provide representative information to the judicial authorities, the child himself has an important role, being the competence of the judicial authority to decide to what extent it will take into account the child's opinion, corroborated with his degree of maturity.

Aware of the specific context on the protection of children's rights caused by situations of formal separation of parents, the member states of the Council of Europe have agreed to

develop standards for ensuring family relations between divorced parents and children, including in divorce situations. **The Council of Europe Convention on Contact with Children** [1 1] sets out 3 levels of interaction between children and their family members from whom they are conjuncturally separated so as to encourage the maintenance of family relationships: (1) level of direct contact (refers to personal contact between the child and his / her parents / other family members); (2) the level of formal contact (by phone, letters, faxes, e-mail); (3) the level of contact made by providing timely information about children to people requesting contact with him (sending recent photos, school reports, medical documents). [1 2]

The need for this regulation lies in facilitating personal relationships between family members and children, especially in situations where ensuring contact involves maintaining family relationships with an element of extraneity, always pursuing the best interests of the child. Although in principle the Convention seeks to maintain contact between children and parents, this issue is likely to be extended to persons other than parents, especially if the child has, over time, developed relationships with such a person. Through its regulations, the Convention emphasizes that the issue of maintaining contact between children and other family members involves a complex approach, emphasizing the need for accountability of bodies and authorities involved in the implementation of relevant international legal instruments in the field.

The Convention creates the appropriate regulatory framework for the protection of the rights of the child in the light of the family relationships that the child is likely to develop. By accepting that the child's identity and personality are shaped in accordance with the values arising from interactions with family members, the Convention clarifies the conceptual framework for them, establishing the significance of *family ties*. Extensively interpreting this concept, the Explanatory Report to the Convention emphasizes that these are connections that do not necessarily reflect the genetic situation: family relationships subsist even in the case of a *de facto* cohabitation situation but also in the case of *atypical interactions* (parentage resulting from adoption or reproductive medicine).

From the point of view of the legal nature, the child's right to have family relations with both parents is not an absolute right, as it is subject to restrictions or limitations by virtue of the principle of the best interests of the child. Thus, the principle of the best interests of the child is the indicator against which the need for a restriction or limitation will be assessed; the effective elements for establishing restrictive measures on the right to have family ties consist in the following: there must be no less restrictive solution; any restriction or exclusion must be proportionate; the need for restriction or exclusion will be duly justified. The possibility of restricting or limiting the right to establish family ties is mitigated if we take into account the interaction between parents and children and more rigidly in the hypothesis in which the family relations between the child and other members are evaluated. Assuming the parent-child attachment given the socio- affective connection between them, the justified cases of isolation that are in the best interests of the child are: the parent's lack of interest in the child's situation, physical and / or mental abuse applicable by the parent to the child, etc.

Family life has done on numerous occasions and subject analysis and interpretation of *the European Court of Human Rights* in relation to Article 8 of the **European Convention on Human Rights**. Following this, it was considered that the child's right to respect for family life includes a number of compound rights, such as the child's right to be

cared for by his parents, the right to maintain personal relations with both parents, the right not to be separated from parents unless this is in the best interests of the child, as well as the right to family reunification [13]. The ECHR stated that the obligation of the state not to interfere in family life implies, at the same time, a positive obligation to take the necessary measures both to support parents and families and to protect children from possible abuse [14].

States have a wide margin of appreciation when making the initial decision to separate children from their parents, but this margin of appreciation decreases with the period of time when children are separated from their parents and state authorities should invoke reasons very strong in support of their decision to maintain the separation [15].

The right to maintain personal relationships with parents is relativized to the specific situations to which it is related. Thus, in the case of a decision to separate the parents, the scope is wider, and normally limited only to the best interests of the child. If separation is decided by the state, in situations such as, for example, expulsion or incarceration of a parent, state authorities must respect a fair balance between the parties' interests and the obligation to guarantee the interests of the child [16].

In addressing the issues arising from family life, the ECHR urged States parties to organize and resort to civil mediation. In this regard, she referred to *Recommendation no. R (98) 1 of the Committee of Ministers of the Council of Europe on family mediation* [17], according to which recourse to family mediation can "improve communication between family members, reduce conflict between the parties to the dispute, lead to amicable settlements, ensure personal relations between parents and children, reduce the economic and social costs of separation and divorce for the parties themselves and for the states" [18].

In resolving the various issues raised by parents' relations with regard to their children, the Court emphasized that the courts must take measures to reconcile the divergent interests of the parties, taking into account the preeminence of the child's interests [19].

In addition, the Court recalled in particular that the will expressed by a child with sufficient discernment is a key element to be taken into account in any judicial or administrative proceedings concerning him. The right of a child to be heard and to participate in decision-making in family proceedings that primarily affect him or her is still guaranteed by several international legal instruments. In particular, Article 13 of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* provides that the authorities may refuse to order the return of the child if it finds that the child opposes it and that, in view of his age and maturity, it is appropriate to take this view into account [20].

The African system of child protection: the resurgence of a *sui generis* model

At the African regional level, the protection of the rights of the child benefits from a coherent normative configuration, establishing a two-way system based on the African Charter on the Rights and Welfare of the Child [20] - as a fundamental legal instrument and the African Committee of Human Rights Child Welfare [21] - as the main mechanism for monitoring and controlling the Charter.

Colonialism, the dissonance between the maintenance of continental and national cultural identity and the integration of universal guarantees related to human rights are elements that problematize the maintenance of a family climate adequate to respect the rights of the child. The political and legal features of the African system of human rights

protection make it difficult to protect vulnerable groups. In relation to the latter, the right to have family relations are of fundamental importance; from the component dimensions of family relations derive the right to personality and the right to identity.

Interpreting extensively the content of the rights of the child, **the African Charter on the Rights and Welfare of the Child** regulates important aspects of the child's identity and personality: the right to a name and nationality (Article 6); family protection (Article 18); parental care and protection (Article 19); parental responsibilities (Article 20); protection against harmful social and cultural practices (Article 21); protection of children against parental separation (Article 25); protection of children with incarcerated mothers (Article 30).

In the analysis of *the African Committee of Experts on the Rights and Welfare of the Child*, the right to a name and nationality implies the recognition and enforcement of three interconnected rights: (1) the right to a name; (2) the right to register the birth and (3) the right to nationality. The Committee opinion is that the three rights converge towards the establishment of a child's personality and his or her social integration. In the Committee's view, the steps to be taken by parents / legal guardians of the child in order to ensure the social integration of their child consist of: taking the necessary steps to register the birth of the child and to establish parental affiliation - aspects that of the nationality of the state in which the child is born. Although birth registration is not in itself an element that confers the nationality of children, it is a form of proof of the connection between the child and the state. In order to fulfill the obligation of a State to prevent and reduce the statelessness of children, it is necessary for it to take all necessary measures to ensure that all children born in its territory are registered, including children born out of wedlock, children in single care parent, children with foreign / unknown parents. In order to ensure enhanced protection of children, registration of births is mandatory for all children born in a given territory even if it is clear that the requirements for the legal granting of the nationality of the State concerned are not met. [2 2]

In the concluding part of the General Commentary on Article 6 of the Charter, the Committee of Experts emphasizes that the responsibility for ensuring the implementation of the right to a name and a nationality lies with the parents / guardians and the States Parties. In particular, the obligation of States Parties to play an active role in ensuring that education and awareness-raising campaigns on birth registration are properly undertaken is emphasized. The article sets out a number of parental responsibilities for the upbringing and development of the child and, in a correlative manner, imposes on States Parties a number of obligations designed to supplement the obligations of the parents. In any case, the obligation to take proactive action is necessary under the broader obligations to take special measures to protect the child and to ensure that his or her best interests are taken into account. [2 3]

Concerns have been expressed in the recent work of the Committee regarding the fulfillment of the objectives set out in Articles 19 and 20 of the Charter on the protection of children through parents / guardians in the context of the separation of children from parents. In its Commentary on Article 30 of the Charter, the Committee draws attention to the fact that in the event that the child's parents / guardians are deprived of their liberty, the situation becomes vulnerable given that, being dependent on parental care, if it is removed, by default there will be a restriction on the rights of the child. In the application of a custodial sentence in relation to a person who is raising and caring for children, the judicial

authorities are obliged to apply additional guarantees such as: the application of special procedures (under which the authorities can act / decide as a matter of urgency, the choice of a non-custodial sentence if the option is possible, the protection of the best interests of the child). [24] These guarantees do not amount to entitling parents / guardians to exoneration from criminal liability for the offenses committed. In the Committee's view, States Parties should ensure that judicial officers are properly trained to assess the best interests of the child in relation to the seriousness of the crime and the protection of public safety when considering the incarceration of a mother / parents.

If an arrest is ordered, the authorities must consider providing appropriate alternative care for the child.

Child marriages are, at the level of the African protection system, a subject that involves the analysis of the right to have family relations from the perspective of the principle of the best interests of the child. Cultural norms govern family relationships and, based on them, childcare providers may decide to subject them to harmful practices in order to ensure the full integration of the child into the cultural community to which they belong. In order to prevent and combat child marriages, early or forced marriages and thereby ensure the rights of children, including in relation to the family environment and the cultural community to which they belong, the Committee of Experts considered that States Parties would be the first relevant actors in whose accountability is needed in order to change mentalities on this issue. In the Committee's view, the fundamental legislative measures in preventing and combating the practice of child marriage consist in: (1) prohibiting, by specific legal means, engagement and marriage for boys and girls under the age of 18; (2) ensuring the expression of the free and full consent of the future spouses in the completion of the marriage; (3) ensuring the full implementation of specific policies, legislation and sanctions on forced marriages; (4) streamlining the normative framework at national level by any means, including carrying out constitutional reforms (these will be based on the establishment of non-derogable clauses under which equality will be established at the conclusion of marriage but also the obligation of minimum age at marriage); (5) implementation of formal verification procedures such as birth registration, marriage age verification and marriage registration; (6) the adoption of appropriate remedial measures for children who are already parties to forced, arranged or early marriages. [25]

The rights of the child in the inter-American system of human rights protection - a matter of *jus cogens*

At the inter-American regional level, the paradigm for the protection of children's rights is built on two fundamental legal instruments: the American Convention on Human Rights [26] and the Inter-American Convention on the International Return of Children [27].

Article 19 of **the American Convention on Human Rights** fulfills a dual regulatory function in relation to the recognition of children's right to family relationships, establishing, on the one hand, in principle, guarantees for the protection of the child from his or her family and, on the other hand, guarantees in favor of the child which are borne by society and the state. In the content of the American Convention on Human Rights, the rules establishing the relationship between children and their families are limited to articles whose marginal name evokes the rights of the child only in the alternative: (1) Article 12, paragraph 4, on freedom of conscience and religion states that *parents or guardians, as*

appropriate, have the right to ensure the religious and moral education of children in accordance with their own beliefs; (2) Article 13, paragraph 4, on the freedom of thought and expression, regulates the protection of the rights of the child as a legal limitation of public manifestations related to this freedom; (3) Paragraphs 4 and 5 of Article 17 govern the protection of children's rights in family relationships in the context of divorce or the birth of children outside traditional, marriage-based families. It is important to note that the rules of the American Convention on Human Rights (Article 27, points 2 and 3) enshrine the non-derogable nature of the rights of the child in exceptional circumstances - the guarantees attached to them being included in the category of *jus cogens* rules.

On the other hand, **the Inter-American Convention on the International Return of Children** aims to ensure contact between children and the family in a specific context - that of termination / suspension of family relationships due to inappropriate measures taken by States Parties in the case of placement. the relationship between the rights of the child and the family environment in an international context. According to Article 1 of the Convention, the purpose of this Convention is to ensure the prompt return of children habitually resident in a State Party who have been wrongfully removed or who, after being legally removed, have been wrongfully detained. The Convention aims to further ensure the application of visitation and custody rights.

Instead of conclusions: reflecting supranational standards at the national level

The UN Convention on the Rights of the Child has been a source of inspiration for representative legal instruments in the field of children's rights adopted at the regional level. Consequently, the ratification of the Convention by the Romanian state is a means of emulation of regional standards and an instrument of adherence to a minimum set of international guarantees on the rights of the child.

Based on this premise, in the regular evaluation of Romania regarding the implementation of the UN Convention on the Rights of the Child carried out during the 75th session of the Committee (held between May and June 2017), recommendations were made that reference to issues similar to those identified in the regional systems for the protection of the rights of the child. The UN Committee on the Rights of the Child reiterates the Recommendations addressed to the Romanian state following the evaluation carried out in 2009, expressing its concern for the aggravation of the phenomenon of violence against children amid their deprivation of a family environment. Having considered in conjunction with Articles 5, 9-11, 18 (1) and (2), 20-21, 25 and 27 (4) of the Convention, the Committee is committed to observing national limits in ensuring an effective child-family relationship: (1) the number of children in institutional care is high and the majority is represented by children from vulnerable social categories; (2) the absence of adequate mechanisms to identify children in situations of risk and of the early intervention services; (3) insufficiency and inadequacy of psychosocial support in relation to institutionalized children, (4) inadequacies in the activity of monitoring institutionalized children and investigating reports of physical and sexual abuse, including trafficking in children for sexual exploitation; (5) discrimination against children with disabilities, etc. [28]

In order to prevent and combat institutionalization, the Committee recommends the Romanian State to identify solutions in accordance with the best interests of the child, excluding the reason for financial shortages as an objective justification of the phenomenon of institutionalization.

Particular attention should be paid to the situation of children facing cross-sectional forms of discrimination (which have as their specificity the conjugation of the age criterion with other discriminatory criteria such as race, ethnicity or the presence of disabilities). Mainly, the difficulties of institutionalization can be overcome by speeding up measures to place children in family care and by facilitating access to adoption procedures (domestic or international). [29]

It is more and more obvious that the radiography of the Romanian society, marked by serious social problems that directly affect the quality of family life, and in it of children, such as the high degree of impoverishment of the population, underfunding of the education system, synopses of the health system, The massive phenomenon of social exclusion, the demographic collapse coupled with maintaining a sustained pace of migration, requires a responsible analysis and systematic and effective action at the national level.

References

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18 Judgment of 6.12. 2011, in the case of *Cengiz Kiliç v. Turkey*

19 Judgment of 10. 01. 2017, in the case of *Kacper Nowakowski v. Poland* .

20 Judgment of 1.02. 2018, in the case of *MK v. Greece* (n ° 51312/16).

21 Adopted by the Organization of African Unity (OAU) in 1990 and entered into force in 1999. Although drafted and adopted under the auspices of the Organization of African Unity, the Charter is currently applied as a legal instrument of the African Union with a view to legal transformation. of the Organization of African Unity in the African Union in 2001.

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THEORETICAL AND PRACTICAL ASPECTS REGARDING THE CONTRIBUTION OF COMMUNITY PROPERTY TO THE COMPANY BY THE SPOUSES

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Abstract

The legal issue that appears in the current normative "landscape" is related to the application and interpretation of the legal provisions regarding the contributions of goods from the spouses' community property to the legal nature of the rights of the other spouse who does not become an associate in an associative structure, and to the effects of the cessation of the existence of the associative structures on the rights due to the spouses.

The interest of this scientific approach is determined by the need for an interdisciplinary treatment of the treated subject; interdisciplinarity which implies the combined analysis of the legal provisions which are applicable to the matrimonial regime of the shared ownership with those that regulate the associative structures (companies mainly, commercial companies, associations, foundations, etc.). Within the associative structures (entities), some have legal personality, which means that the goods contributed in the company or, as the case may be, in the share capital, enter into the assets of the legal person that is constituted (see companies, associations, foundations, etc.); others do not acquire legal personality (see simple companies, joint ventures, etc.) although they have "de facto" assets, in which contributions of the shared goods of the spouses can be included.

Keywords: shared goods, spouses, consent, shares, company

Introduction

The issue of the contribution to the company of the spouses with their community property presents a particular theoretical, but especially practical, interest, as it is a current a topical issue, so the debates on this issue are doctrinal and jurisprudential challenges that deserve to be addressed.

The interest of this scientific approach is determined by the need for an interdisciplinary treatment of the treated subject; interdisciplinarity which implies the combined analysis of the legal provisions which are applicable to the matrimonial regime of the shared ownership with those that regulate the associative structures (companies mainly, commercial companies, associations, foundations, etc.). Within the associative structures (entities), some have legal personality, which means that the goods contributed in the company or, as the case may be, in the share capital, enter into the assets of the legal person that is constituted (see companies, associations, foundations, etc.); others do not acquire legal personality (see simple companies, joint ventures, etc.) although they have "de facto" assets, in which contributions of the shared goods of the spouses can be included.

Moreover, within the structures set up according to GO no. 44/2008¹, modified, respectively the authorized natural person, the individual enterprise and the family enterprise, the "patrimony of affectation" can be constituted in which goods from the

¹ Published in the Official Gazette of Romania no. 328 of April 25, 2008;

community property of the spouses could be included, in fact, as in the case of the exercise of liberal professions even if they are associative (notary companies, law firms, etc.), or individual companies.

The legal issue that appears in the current normative "landscape" is related to the application and interpretation of the legal provisions regarding the contributions of goods from the spouses' community property to the legal nature of the rights of the other spouse who does not become an associate in an associative structure, and to the effects of the cessation of the existence of the associative structures on the rights due to the spouses.

The issue being very complex, we propose that, in this study, we address the controversial issues in the specialized doctrine and in the judicial practice regarding the contribution of common property of the spouses in the commercial companies.

1. The legal framework of the contributions of community property of the spouses in the company. Legal effects

In the context of the regulations of the current Law no. 287/2009 on the Civil Code² and of Law no. 71/2011³ on the application of the Civil Code, as a legislative novelty, the legislator expressly provides for two aspects particularly important for the existence of (commercial) companies, namely, **firstly**, the possibility of one or both spouses having the legal capacity to become a partner or associates in a (commercial) company, and, **secondly**, the possibility that the community property constitute a contribution to its share capital. The two aspects result from the content of the second sentence of Article 1882 (1) "*A spouse may become a partner by common property only with the consent of the other spouse, the provisions of Article 349 being applied accordingly*".

Thus, indirectly, the legislator provides for the possibility for spouses to become partners in a company) and, if goods are brought from the community property, there must be the consent of the other spouse.

Regarding the legal capacity of the spouses to form a partnership between them, under the previous legislation (Civil Code of 1864 and Family Code) there have been controversies in doctrine and different jurisprudential solutions.⁴

As far as we are concerned, we agreed with the opinion expressed in the doctrine according to which the spouses can constitute, among themselves, a (commercial) company and can bring to the share capital, as a contribution, goods from the community property, thus achieving a division of spouses during marriage⁵.

From the moment the spouses become associates/shareholders, they acquire their own status regulated by the provisions of the company legislation (Law no. 31/1990, republished, with subsequent amendments and completions⁶) with rights and obligations independent of the quality of spouse and general regulations on special incapacities for use, such as the prohibition of the sale of property between spouses (Article 1367 of the Civil Code of 1864) on the idea of a disguised donation. Thus, I supported the possibility of the

² Published in the Official Gazette of Romania no. 505 of July 15, 2011.

³ Published in the Official Gazette of Romania no. 409 of June 10, 2011.

⁴ For details, See, M. Avram, Drept civil. Familia (Civil Law. The Family), Hamangiu Publishing House, 2013, p. 300;

⁵ See also O. Căpățână, Societățile comerciale (Commercial Companies), Lumina Lex Publishing House, Bucharest, 1991, p. 72;

⁶ Published in the Official Gazette of Romania no. 1066 of November 17, 2004.

transfer between spouses of shares or the sale of shares, without the Civil Code being applied for these operations, but Law no. 31/1990 instead – the Company law.

At the same time, in accordance with Article 348 of the Civil Code "*Community property may be subject to a contribution to companies, associations or foundations, in accordance with the law*", that is, under the conditions of the general regulations, as common law, mainly those of the Civil Code but also under the conditions of the special regulations applicable to the associative structures, respectively which, insofar as they are a derogation from the general law (Civil Code) they will be applied with priority according to the "*specialia generalibus derogant*" principle.

Also regarding the general legal framework (Civil Code) applicable to the contribution in the company of goods from the community property, we highlight the content of Article 349 of the Civil Code according to which "*Under the sanction provided for in Article 347, neither of the spouses may dispose of the community property as a contribution to a company or for the acquisition of shares or, as the case may be, shares alone, without the written consent of the other spouse*".

The exception from the sanction of the annulment of the act concluded by one of the spouses to contribute a good from the community property without the consent of the other spouse, is expressly provided for by the legislator in the second sentence of Article 349, respectively "*In the case of companies whose shares are traded on a regulated market, the spouse who has not given his written consent to the use of the common property can only claim damages from the other spouse, without affecting the rights acquired by the third parties.*"

But in order to determine the possibility of bringing in the patrimony of the (commercial) company the goods from the community of goods of the spouses, we must highlight some conceptual aspects regarding the contribution as a **legal operation** but also as a tangible or intangible **asset** which may be the subject of the legal contribution operation, matters which require the application of the common (general) provisions of the Civil Code regarding the Company Contract, mainly Articles 1881, 1882, 1183, 1897, 1899 of the Civil Code as well as the provisions of Law no. 31/1990, (commercial) Company Law; republished, subsequently amended and supplemented (Articles 16, 84 in conjunction with Article 13).

2. About the contributions to the share capital of the companies

2.1. *The conceptual framework*

As it results from the content of Article 1881 of the Civil Code, the contribution consists in bringing together an asset for carrying out an activity in order to share the benefits that would result from it. One can contribute either the right of ownership over the good, or only the use over it⁷.

The term "contribution" has a double meaning: contribution, in the sense of obligation to contribute and contribution, in the sense of goods that are the object of the obligatory contribution relationship.

⁷ See S. Angheni, M. Volonciu, C. Stoica, Drept comercial (Commercial Law), 4th Ed., C.H. Beck Publishing House, Bucharest, 2008, p. 88; C. Stoica, S. Cristea, Drept societar (Company Law), Universitară Publishing House, Bucharest, 2008, p. 103 et seq..

The contributions are not only specific to the company contract. There are also contributions in the case of economic structures, lacking legal personality, such as the joint venture (Articles 1949-1954 of the Civil Code).

However, contributions play the most important role in the case of companies, since, from the moment they are put together, the contributions form the share capital (the initial assets of the company).

The legal contribution operation is presented in the form of a contract for consideration and transfer of rights.

If the contribution consists in the transfer of the property right, the contributor has the same obligations as the seller, including the obligation to guarantee for defects and eviction.

The company is, in turn, obliged to assign to the shareholder shares or stocks that give the holder patrimonial rights of claim regarding dividends, as well as non-patrimonial rights (respectively, the right to choose and be elected in the management bodies of the company).

The difference between "sale" and "contribution" is that, in the case of a sale, the contracting parties are aware of the existence and extent of the services, while in the case of the contribution the associate knows only the value of the goods he contributes, receiving in return shares or stocks, but does not know with certainty whether they will receive benefits (profit). Obtaining benefits depends on the activity of the company, which is influenced by the so-called "business risks".

If the obligation to contribute refers to the transfer of the right of use, the associate has the same obligations as the lessor in the lease contract.

The contributions that form the initial patrimony of the company can be unequal and of a different nature. In all cases the contributions must be effective. The absence of contributions or the fictive nature of a contribution can lead to the absolute nullity of the company contract. For example, the contribution of a good without any value is fictitious (expired patent). Also, the contribution of an encumbered asset (real estate mortgage, movable mortgage, pledge) whose value is much higher than the value of the contributed good is not allowed.

2.2.Object of the obligation to contribute

a) Cash contribution

The cash contribution is the contribution in currency (cash) and it is the most used method⁸.

According to Article 16 (1) of the Company Law, cash contributions are mandatory for the formation of any form of company.

The cash contribution should not be confused with the company's financing by making money deposits by the associates. Associates can give different amounts of money to the company, based on a loan agreement, amounts of money that are recorded in the current account of the company. Unlike these loans (financing) that the company's associates can make, the cash contribution is recorded in the financial statement in the account specific to the "capital".

⁸ Regarding the possibility of contributing sums of money in foreign currency, See *O. Căpățână*, op. cit., p. 173.

According to Article 68 of the Companies Law, the contribution to the share capital is not interest-bearing.

b) Contribution in kind

The contribution in kind can consist of: real estate, movable property, goodwill, patents, in general any goods that are in the civil circuit and can be transmitted in the patrimony of a commercial company.

Contribution in kind is possible in any form of company and must be assessed economically [Article 16 (2) of the Company Law].

Contributions in kind are paid by transferring the corresponding rights and by effectively handing the usable goods over to the company.

c) Contribution with receivables⁹

Regarding the contribution in **intangible assets**, the legislator expressly regulates three categories of such assets: receivables – stocks or shares, bills of exchange and other securities circulating in trade, the latter having the legal regime of the contributions in receivables regarding the liability of the associate.

Thus, in the case of the contribution of a receivable, the associate is responsible for their existence at the time of the contribution, as well as for its collection at maturity. If the company does not collect the receivable from the assigned debtor, the associate who brought the receivable (as a contribution) will be liable for the payment of the amount due, legal interest and any other amount, as damages.

Important is the opinion of the legislator regarding **stocks and shares** issued by another company that they do not consider as **receivables, but intangible assets** in the general sense¹⁰. The contribution in shares or shares is considered a contribution in intangible assets, respectively property titles, because, according to Article 1897 (2) of the Civil Code, *„the associate who contributes stocks or shares issued by another company is responsible for making the contribution just like a seller to the buyer”*.

The shares, the stocks, are, from the point of view of the classification of the goods, intangible goods, just like receivables. The fact that they are intangible assets does not mean that from the point of view of contribution they can be qualified as "contribution in kind".

We have reservations about this qualification given by the legislator to the legal nature of the shares or of the shares that are brought to the share capital as a "contribution".

In our opinion, if the shares and shares (issued by another company) are brought to the share capital of another company, then they represent a contribution in receivables. The partner who brings the shares or shares has the status of transferor, the company that receives them in the share capital is the transferee, and the company that issued the shares or issued them is a third party debtor.

Also, the fact that the contribution of shares or shares is assimilated to the sale transaction is not a sufficient argument to qualify them as contribution in kind; knowing that the assignment of a claim, if for a fee, the provisions of the assignment of a claim *„shall be duly completed with those relating to the sale-purchase contract or, as the case may be,*

⁹ See I. Băcanu, Aporturile în creanțe (Contributions in receivables), in RDC nr. 2/1999, p. 40;

¹⁰ On the nature of the contribution in shares as a possible contribution in kind, See S. Bodu, Principii juridice privind capitalul social al unei societăți pe acțiuni (Legal principles concerning the share capital of a joint stock company), in RRDA no. 2/2003, p. 3; I. Băcanu, Aporturile în creanțe (Contributions in receivables), in RDC no. 2/1999, p. 40, the author considers that contributions in shares or stocks are assimilated to sales contributions.

with those governing any other legal transaction in which the parties have agreed to perform the service consisting in the transmission of a claim" [Article 1567 (3) of the Civil Code].

Finally, **the contribution in kind of tangible goods** has the legal regime differentiated according to the nature of the right that is transmitted to the company by the contribution of the respective good (Article 1896 of the Civil Code). Thus, if the property right or other real right over a good is contributed, the associate is responsible for making the contribution exactly like a seller to the buyer (the company), and if the right of use over a good is contributed, the obligations of the associate are similar to a lessor towards the lessee (the company).

If a fungible good is contributed, the company acquires the right of ownership over it, even if this is not expressly provided in the contract.

d) Contribution in labor (industry)

The contribution in labor consists in the commitment that the partner assumes to carry out an activity in the company, providing it with knowledge, professional techniques, so as to perform a job on behalf of the company or to provide a service, including the diligence or steps taken by the founders during the formation of the company.

One of the theoretical, but especially practical problems, is about the qualification of the contribution of *know-how* (*savoir faire*). Is *know-how* a contribution in kind of intangible movable property or is it a contribution to labor (industry)?

Considering the opinions expressed both in the Romanian literature¹¹, as well as the foreign one¹², **we consider that the contribution in know-how** is a contribution in labor (industry), even if from certain points of view it is assimilated to intellectual property rights.

The main arguments that lead us to the conclusion of the qualification of *know-how* as a contribution in industry are: the person providing the *know-how* does not have exclusive rights over the object of the *know-how* and, as a result, it is difficult to assess economically. On the other hand, *know-how* is protected only by contract, through terms inserted in the contract.

3. The consent of the spouse of the associate who contributes with community property of the spouses to the share capital

As we mentioned in the previous sections, joint property can be subject to the contribution to the share capital of a company, in accordance with the law.

Thus, from the interpretation of the provisions of Article 1882 (1) Thesis II of the Civil Code and from the expression of the legislator it results that if the common goods of the spouses are contributed to the share capital by one of them, the prior consent of the other spouse must exist, otherwise one cannot become an associate, so we are faced with a condition placed for the establishment of the legal capacity of the respective spouse to become an associate.

Moreover, given the fact that the legal transaction of contribution is qualified as an act of alienation because, as a rule, the respective property passes into the property of the

¹¹ St .D. Cărpenu, S. David, C. Predoiu, Gh. Piperea, *Legea societăților comerciale, comentariu pe articole* (Company law, commentary on articles), 3rd Ed., C.H. Beck Publishing House, Bucharest, 2006, p. 97; O. Căpălină, *Societățile comerciale* (Commercial Companies), op. cit., p. 194; S. Angheni, M. Volonciu, C. Stoica, op. cit., p. 91.

¹² A. Viandier, F. Deboissy, *Droit des sociétés*, 16^e édition, Litec, Paris, 2004, p. 66-67.

(commercial) company that is constituted, according to Article 346 (1) of the Civil Code "*Deeds of alienation or encumbrance with real rights concerning the common property may be concluded only with the consent of both spouses*".

The consent of the other spouse must be expressed in writing, the need for the written form being expressly provided for by the legislator in Article 349 (1) of the Civil Code "Under the sanction provided for in Article 347, neither spouse may, alone, without the written consent of the other spouse...".

Therefore, the form of consent of the other spouse, for bringing to the share capital of a common good, is the written form, the legislator not specifying whether it must be registered under a private agreement or registered in an authentic form, nor whether the necessity of the document is an "*ad probationem*" or an "*ad validitatem*" condition.

In our opinion, the form of the document consecrating the consent of the other spouse depends on the nature of the good that is contributed to the share capital.

If the property is immovable, the express consent of the other spouse must be expressed in the form of the authentic document, whereas if the property contributed is a movable property, the form of private agreement is sufficient.

With regard to the legal force of the document by which the consent of the other spouse was expressed, we consider that we are in the situation when the written form is required regardless of whether it is an authentic or private agreement¹³.

The legal argument on which we base our opinion is Article 347 (1) of the Civil Code, according to which "*The deed concluded without the express consent of the other spouse, when required by law, is voidable*". Therefore, if the sanction provided by the legislator is the only relative nullity, we consider that the written form of the consent of the other spouse to the contribution of common goods is an "*ad validitatem*" condition, and not an "*ad probationem*" condition.

Therefore, what is sanctioned with relative nullity is "*the act concluded without the express consent of the other spouse*" which, in the analysis we undertake, is the articles of incorporation of the company (contract and Articles of Association or single articles of association) this being an annulment that occurs due to the lack of written consent of the other spouse who does not acquire the quality, and the status of partner of the (commercial) company that is formed.

Basically, there are two legal acts: **the first one**, the act of will of the spouse who does not become an associate, a unilateral act and the **second one** - the Articles of Association of the company, which may be, on a case by case basis, either a company contract, a contract, a single articles of association or just a statute. The relative nullity with partial effect is a sanction directed against the Articles of Association of the company, of the second legal act which is dependent on the first, respectively the consent of the other spouse which must be expressed in writing, according to the will of the legislator.

In the situation where the document representing the will of the other spouse is missing, what is also lacking is their consent with respect to their spouse – the associate – concluding the Articles of Association of the company. Regarding the articles of incorporation of the (commercial) company, it must meet the formal conditions provided by Law no. 31/1990 in conjunction with the provisions of Article 1884 of the Civil Code.¹⁴

¹³ Pentru opinia contrară, See, *M. Afrăsinei, în Noul Cod Civil, comentarii pe articole* (the New Civil Code, comments on articles), Hamangiu Publishing House, 2013.

¹⁴ See, S. Angheni, *Drept comercial, Tratat* (Commercial Law, Treatise), C.H. Beck Publishing House, 2019, p. 132; M. Avram, *op. cit.*, p. 304;

4. The effects of the contribution to the share capital of the community property of the spouses

In the event that goods from the community property are contributed to the share capital of a company, the spouses can become partners, as only one of them can acquire this quality.

If both spouses acquire the status of associates/shareholders alone or with third parties, the shares or, as the case may be, the stocks received from the company as "securities"¹⁵ or "shareholdings"¹⁶ are common goods, in joint tenancy or in tenancy in common. It is important to make this clarification because it is possible that, by the separate (registered) act or even by the Article of Association, the spouses may establish (divide) the contribution to the acquisition of the common good brought to the share capital, agreeing on differentiated shareholding rates, situation in which the matrimonial regime of the community of property changes from the situation of joint tenancy to the one tenancy in common, based on shares that are not in all cases equal. In these circumstances, one of the spouses cannot claim equal participation with the other spouse in the shares acquired from the company in exchange for the contribution of common property, because, by the constitutive act, they agreed on a differentiated number of shares. The case law on the division of common assets/the liquidation of the matrimonial regime is in the same vein¹⁷.

The legal issue that existed under the rule of the Family Code (currently repealed) is resolved by Article 349 (3) of the Civil Code, according to which *"The quality of associate can be recognized to the other spouse, if they have expressed their will in this respect. In this case, each of the spouses has the quality of associate for the shares or the stocks assigned in exchange for half of the value of the asset, if, by convention, the spouses did not stipulate other shares. The shares or stocks of each spouse are their own property"*.

The spouses acquiring the status of associate in a (commercial) company in exchange for the contribution of common property will have the rights and obligations as provided by the Special Law, Company Law no. 31/1990, republished, with subsequent amendments and completions, acquiring both patrimonial rights, mainly the right to dividends, according to their shareholding in the share capital (if there is no other stipulation in the Articles of Association), the right to the shareholding of the net balance sheet of the assets (in case of dissolution of the company) etc., as well as non-patrimonial rights (right to vote in the general meetings of the associates/shareholders, the right to be elected in the management structures of the company, etc.).

In the event that only one of the spouses acquires the status of associate/shareholder, the shares/stocks are common goods (in joint tenancy or tenancy in common, as the case may be) however, there is also the opposite opinion, according to which the shares/stocks of one of the spouses, by contributing goods from the community of goods, would be their own property, not distinguishing between the relations between the (commercial) company that was formed and the relations between the spouses. In the relations with the company the shares/stocks of one of the spouses are considered their own goods, because they represent

¹⁵ For the terminology used See, M. Avram, op. cit., p. 302 et. Seq.;

¹⁶ For the expression "shareholdings" See O. Bodu, Aporturile sociale – Partea a II-a (Company Contributions – Part II), Revista Română de Drept al afacerilor no. 2/2017, p. 17;

¹⁷ Bistrița District Court, Decision no. 634/09.04.2021;

the contribution of the associate but in the relations between the spouses they represent common property¹⁸.

We are thus in one of the cases of "**joint management**" according to which "the conclusion of acts of disposition regarding certain common goods, expressly provided by law, can take place only with the consent of both spouses"¹⁹ or in the presence of "**exclusive management**"²⁰ in the relationship between the spouse who is the associate/shareholder and the (commercial) company concerned.

Exclusive management is explained by the fact that the spouse, by becoming an associate, acquires the rights and obligations provided by the (commercial) company law, including the right to transfer the shares or sell the shares without the need for the consent of the other spouse.

Regarding the dividends (benefits) obtained from the company's activity, there are different opinions in the doctrine, considering either that what should be applied, by analogy, is the legal nature of the salary which is the **personal property** of the associated spouse until the time of collection, only then becoming a **common property**, or that it would be a **claim** of the associate spouse, and the dividends received will then constitute **common property**²¹.

As far as we are concerned, we consider that if a good has been contributed from the community of property, with the consent of the other spouse who is not an associate/shareholder (Article 349 (2) of the Civil Code) shares/stocks are common goods, so dividends will have the same legal nature, that of common property, according to Article 548 (4) of the Civil Code. Conversely, if each spouse acquires the status of associate through a voluntary division of property in the community of property, the assets brought to the share capital of the (commercial) company, the shares/stocks, are own goods, which means that dividends also have the legal nature of own goods being considered fruits of own goods, based on Article 340 h) in conjunction with Article 548 (4) of the Civil Code.

Conclusions

In conclusion, from the research undertaken, the following main ideas emerge on the contribution to society of community property of the spouses:

a) spouses may associate to form a (commercial) company, either with third parties or as sole associates/shareholders, acquiring the legal status regulated by the Civil Code and the Special Law – (commercial) Company Law;

b) the contribution to the share capital of the company may consist of assets from the community property of the spouses;

c) the contribution of common goods by one spouse may be made only with the written consent of the other spouse, the written form being an "*ad validitatem*" condition;

¹⁸ See, St. D. Cărpenaru, S. David, C. Predoiu, Gh. Piperea, *Legea societăților comerciale. Comentariu pe articole* (Company law. Comment on articles), 4th Ed., C.H. Beck Publishing House, Bucharest, 2009, p. 124; M. Avram, *op. cit.* p. 307;

¹⁹ See, C.M. Crăciunescu, *Prezentare generală a regimurilor matrimoniale în Noul Cod civil, studii și comentarii* (Overview of matrimonial regimes in the New Civil Code, studies and comments), vol. I, M. Uliescu (coord.), Universul Juridic Publishing House, 2012, p. 763;

²⁰ See, M. Avram, *op. cit.*, p. 308, p.

²¹ *Idem*; p. 307 and the doctrine mentioned there;

- d) if both spouses become partners, a conventional division of the assets brought to the share capital can be achieved, establishing equal or unequal shareholding quotas;
- e) shares/stocks are the property of the spouses if both are associated, including dividends, as fruit arising from their own property;
- f) if a spouse acquires the quality (status) of associate, the shares/stocks are community property, including dividends received from a contribution of community property.

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DOMESTIC VIOLENCE AGAINST WOMEN. PANDEMIC FIGURES AND ROMANIAN LEGISLATIVE MEASURES

Aurora Ciucă¹

Abstract

In the last year, in addition to the dramatic episodes of the pandemic, there has been an alarming increase in cases of violence against women.

Which are the causes, what measures have been taken by the state to comply with the international obligations assumed and, especially, what is the effectiveness of these measures are some of the questions that formed the basis of this study.

Keywords: *violence against women, pandemic figures, legislative measures and their effectiveness.*

1. Some historical landmarks on the condition of women

Domestic violence is the oldest, most hidden and most treacherous form of violence. This global problem that affects the dignity of the human being has multiple causes: inter-generational (family history of the aggressor), social stressors (alcohol, drugs, unemployment, poverty, isolation), educational deficiencies, educational differences between partners, etc. In the first place, however, we can mention the traditional role of women in a "men's world" and the maintenance of patriarchal structures.

The idea of man's superiority has been maintained throughout all ages. While in ancient Greece, women (described by Aristotle as "an error of nature") were not even allowed to go out in public (the private sphere of women, children and slaves being inferior to the polis), in ancient Egypt women acquired some rights (of ownership, for example). The *non-persona* woman is a phrase that spans the ages from Roman antiquity to the beginning of the last century. The Roman woman passed from under the authority of her father under that of her husband, who administered her wealth, while she could not buy any property. The rules required total obedience to the husband who had the right to punish his wife or sell her as a slave.

Identified by the church fathers with Eve, the bearer of original sin, the woman was associated by Tertullian (in *De cultu feminarum*) with "the body, the temptation and the devil", representing a public danger [1]. Centuries later, Thomas Aquinas stated that both woman and man are created in the likeness of God, but within the limits of the same masculine authority [2]. This long process of demonizing women is sporadically presented in the twelfth century by troubadours (southern France) and their songs for ladies whose intangibility was the *sine-qua-non* condition of love [3].

Hostility towards women also manifested itself in the form of men's aversion in relation to marriage (which was a way to enter into alliances, to transfer money and property). The most vehement were the career men who saw in this institution an impediment (for example, Boccaccio [4] criticizes Dante's marriage to Gemma di Manetto Donati) but also monks or priests who preached celibacy. Erasmus of Rotterdam (who, like Luther, speaks out against the celibacy of priests) formulates a new marital ideal. The idea that the woman should get married early, so as not to fall prey to vices [5], and as a result, her life was a

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long line of domestic obligations was maintained. The man was supposed to support his family but had the right to apply corporal punishment to his wife and children.

The voices of European women were heard before the French Revolution when King Louis XVI allowed his subjects to record their grievances in "notebooks of grievances" and women demanded the right to education and work [6]. Olympe de Gorge (a rebellious young woman who left from an arranged marriage and lived in Paris as a *femme de lettres*, becoming politically involved) drafted the *Declaration of the Rights of Woman and Female Citizen*, which, following the sections in the *Declaration of the Rights of Man and Male Citizen*, introduced the idea of equality between men and women in all areas. Unfortunately, the efforts of this woman about whom the press of the time wrote that "she wanted to divide France" and that she "forgot the virtues of a woman" [7] ended with death on the scaffold (applauded even by some women ...).

Until the nineteenth century, alliances were established based on predominantly patrimonial interests and the transgression of traditional rules by women was severely sanctioned by the community. Broken families were considered anomalies and morally disqualified. The era of industrialization allowed the relocation of women, the getting out of the control of the community by assuming their own destiny.

In Romania, the women's emancipation movement and the fight for rights has also been a long and difficult process. It is enough to remember some representatives of the claims from 1848 (Ana Ipătescu, Maria Rosetti, Elena Cuza, Pelaghia, Zoe Golescu), from the Union of Principalities (Elena Ghica, Constanța Dunca Schiau) or from the War of Independence (Maria Rosetti Roznovanu, Iudita Măcelariu) and their contemporaries, Alexandrina Cantacuzino, Maria Buțureanu, Calypso Botez, Elena C. Meissner who carried on the fight for ideals and created the first organizations for women's rights [8].

If we refer to domestic violence, although the main cause of divorce (before 1990) was violence (especially physical), the procedures were cumbersome and included the term of "period of thinking" (between 3-6 months) which practically helped to maintain the violent atmosphere. After 1990, the marriage registered a setback, the divorce was more and more accepted, as a result of the "destigmatization" and simplification of the procedures, the organization of the first university courses for gender studies began and the laws were amended.

2. Domestic violence in international conventions

Women's rights are defined internationally in the UN Charter (1945) and the Universal Declaration of Human Rights (1948), which provide for equal rights for women and men, in the Covenants for Civil, Political, Economic, Social and Cultural Rights (1966). The Convention on the Elimination of All Forms of Discrimination against Women (1979) and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul, 2011) are the most important documents at this time.

The Istanbul Convention states (in the Preamble) that "realisation of *de jure* and *de facto* equality between women and men is a key element in the prevention of violence against women" and emphasizes that "violence against women is a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men to the prevention of the full progress of women".

Domestic violence against women is defined (art. 3) as:

- *"a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats with such acts, coercion or arbitrary deprivation of liberty, whether in public or in private life;*
- *all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shared the same residence with the victim.*

According to the Convention, the Member States have the obligation, on the one hand, to refrain from engaging in any act of violence against women and, on the other hand, to take *"legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention, that are perpetrated by non-State actors"*.

As the title suggests, the Convention pursues two directions of action against violence: prevention and combating. In order to prevent, states must aim to: raise awareness of this phenomenon, education, training of professionals, organization of prevention and treatment programmes (art. 13-16).

For the protection of women victims, information measures are needed, the provision of general assistance services and of assistance services for the drafting of individual /collective complaints, the establishment of shelters and emergency telephone lines, the application of support measures for victims of sexual violence and child witnesses and measures for reporting to the competent authorities (art. 18-28).

The monitoring mechanism established by the Convention, the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), will ask Member States questions on the implementation of the provisions of this document and make the necessary recommendations.

Romania ratified the Convention in 2016 and, as shown in the response to GREVIO [9] based on art. 68, made considerable efforts to implement it [10]².

3. Domestic violence in Romania

At the beginning of the 1990s, the long-awaited opening towards democracy took place in Romania as a premise for the recognition of human rights. Membership of the Council of Europe, the signing of the European Convention on Human Rights also meant a reassessment and a redefinition of the role of women. However, the phenomenon of domestic violence, although visible, has been mentioned quite rarely in the public discourse, being treated with harmful discretion for reasons related to the mentality and traditional cultural models.

The first law on preventing and combating domestic violence was the one adopted in 2003, Law no. 217. However, in the following years (2004-2011), 800 persons were killed in the family environment [11]. The law was substantially amended in 2012, by introducing provisions on protection orders and identifying seven types of violence. However, even after

²A Working Group coordinated by the Superior Council of Magistracy has been created collaborating with non-governmental organizations, ministers, lawyers and experts in the field of education. Among the national measures, the extensive report emphasizes, among others, the adoption of Law no. 174/2018 amending and supplementing Law 217/2003 on domestic violence and Law no. 178/2018 amending and supplementing Law 202/2002 on equal opportunities.

2012, there were 1009 applications recorded for the issuance of the protection order, but only 23% of them were applied [12]. According to the (2014) Report of the EU Agency for Fundamental Rights (FRA), 30% of women in Romania have been affected by physical or mental violence [13]. 14% of women have suffered violence from their partner and the evolution of the phenomenon of violence is worrying, the statistical data indicating increases from year to year. In 2016, the data of the General Inspectorate of the Romanian Police show that out of the total number of registered victims, there were 17,537 women [14].

Obviously, these figures indicate law enforcement dysfunctions. As such, the new amendments are brought by law 174 of July 13, 2018 (on amending and supplementing Law no. 217/2003 for preventing and combating domestic violence), in light of the provisions of the Istanbul Convention and the obligations assumed by it.

Without proposing an exhaustive presentation, I'll mention the most important:

- the principles of equal opportunities, protection of life and safety of the victim, respect for human rights and the principle of integrated approach are introduced (in addition to the principle of legality, respect for human dignity, the principle of preventing acts of domestic violence, speed and partnership).

- the definition of violence is reformulated in terms of the Istanbul Convention (art. 3 (b): *“for the purposes of this law, domestic violence means any inaction or intentional action of physical, sexual, psychological, economic, social, spiritual or cyber violence, which occurs in the family or domestic environment or between spouses or former spouses, as well as between current or former partners, regardless of whether the aggressor lives or has lived with the victim”*;

- the 7 forms of violence are indicated and the acts that can be qualified as mental, physical, social and spiritual violence are listed [15]³;

³ Art.4. Domestic violence manifests itself under the following forms:

a) Verbal violence - addressing in an offensive, brutal language, such as the use of insults, threats, degrading or humiliating words and expressions;

b) Psychological violence - imposition of personal will or control, causing states of tension and mental suffering in any way and by any means, by verbal threat or in any other way, blackmail, demonstrative violence against objects and animals, ostentatious display of weapons, neglect, control of personal life, acts of jealousy, coercion of any kind, unlawful pursuit, surveillance of the home, workplace or other places frequented by the victim, making telephone calls or other communications by remote transmission means, which by frequency, content or the moment when they are issued create fear, as well as other actions with similar effect;

c) Physical violence - bodily injury or health damage by hitting, pushing, slamming, pulling hair, stabbing, cutting, burning, strangulation, biting, in any form and of any intensity, including disguised as the result of accidents by poisoning, intoxication and other actions with a similar effect, the subjection to strenuous physical exertion or to activities with a high degree of risk to life or health and bodily integrity, other than those from letter e);

d) Sexual violence - sexual assault, imposition of degrading acts, harassment, intimidation, manipulation, brutality in order to have forced sexual relations, marital rape;

e) Economic violence - prohibition of professional activity, deprivation of economic means, including lack of primary means of subsistence, such as food, medicine, basic necessities, the act of intentional theft of a person's property, prohibition of the right to own, use and dispose of joint assets, unfair control of joint assets and resources, refusal to support the family, imposing heavy and harmful work to the detriment of health, including on a minor family member, and other actions with a similar effect;

- the notion of “family member” is redefined [16]⁴;
- the obligation to collect, in order to monitor, the relevant statistical data by the central and local public administration authorities competent in preventing and combating domestic violence (data to be centralized by ANES and presented in an annual national study) is introduced;
- the Ministry of Labour and Social Protection is designated as the central public authority that draws up the social assistance policy and promotes the rights of victims of domestic violence and ANES as a specialized body of the central public administration, with legal personality, subordinated to this ministry and, at the same time, the need for collaboration with the Ministry of Home Affairs, the Ministry of Education and Research, the Ministry of Health and the Ministry of Transport, Infrastructure and Communications in order to develop and disseminate documentary materials on prevention, causes and consequences of domestic violence is stressed (art.8, 9,10)
- an emphasis on the establishment of social assistance services in public-private partnership is observed;
- the importance of the collaboration of public authorities with responsibilities in the field with different categories of professionals is emphasized: “social workers, psychologists and legal advisers or persons with social work responsibilities, employees of the general directorates of social work and child protection, social work departments, public services of social work, local police officers, social workers, psychologists and legal advisers, as well as staff with social work responsibilities of non-governmental organizations or authorized social service providers with whom one of the public authorities has concluded a service agreement for the provision of this activity” (art.15)
- the number of social services for preventing and combating domestic violence is multiplying [17]⁵;

f) Social violence - imposing the isolation of the person from family, community and friends, prohibition to attend an educational institution or workplace, prohibition / limitation of professional achievement, imposing isolation, including in the joint housing, deprivation of access to the living space, dispossession of identity documents, intentional deprivation of access to information, as well as other actions with similar effect;

g) Spiritual violence - underestimating or diminishing the importance of meeting moral-spiritual needs by prohibiting, limiting, ridiculing, penalizing the aspirations of family members, the access to cultural, ethnic, linguistic or religious values, prohibiting the right to speak in the mother tongue and teaching children to speak in the mother tongue, imposing adherence to beliefs and unacceptable spiritual and religious practices, as well as other actions with similar effect or similar repercussions;

h) Cyberviolence - online harassment, online hate speeches, online harassment, online threats, unauthorized publication of information and intimate graphic content, illegal access of interception of communications and private data and any other form of misuse of information technology and communications via computers, smartphones or other similar devices that use telecommunications or can connect to the Internet and can transmit and use social or e-mail platforms in order to make one feel ashamed, humiliate, scare, threaten, silence the victim.

(2) In no form and under no circumstances may custom, culture, religion, tradition and honour be considered as justification for any type of violence defined in this law.

⁴ Art. 5 a). Ascendants and descendants, brothers and sisters, their spouses and children, as well as persons who become relatives by adoption, according to the law;

b) Spouses and / or former spouses; siblings, parents and children of other relationships of the spouse or ex-spouse;

c) Persons who have established relationships similar to those between spouses or between parents and children, current or former partners, regardless of whether or not they have lived with the aggressor, ascendants and descendants of the partner, as well as their siblings;

- a very large space is allocated to the provisions of the temporary protection order as an instrument in support of victims of violence. It can be issued on the spot by police officers if the person who called the 112 emergency service declares that he/she is a victim of violence or if official examiners notice traces of violence on the victim's body or traces of destruction in the home, or that other family members or the children are in shock. Basically, the first means of proof underlying the issuance of the temporary protection order is the *ex propriis sensibus* finding of the officers and the recording in a document or the registration of the facts found by technical means. Other means of proof consist in the consultation of the databases to which they have access according to their duties and the recording of the facts found in a document, the statements of persons involved in acts of domestic violence or of persons who have witnessed acts of domestic violence and of other persons who may disclose information about persons involved in acts of domestic violence; video or audio recordings or photographs, regardless of the origin thereof; documents, including messages or posts in the electronic and/or mobile telephony medium. In order to check allegations of domestic violence, police officers have the right to enter the home or residence of any natural person without their consent (or at the registered office of any legal person, without the consent of their legal representative) and, to that end, if necessary, they may use force and means in an appropriate and proportionate manner. Also, actions of this type may be recorded with the audio-video or photographic means provided, without the consent of the persons, the recordings or photographs representing evidence. The measures that can be taken by means of a protection order refer to: the temporary eviction of the aggressor from the common housing, regardless of whether he is the holder of the ownership right; reintegration of the victim and, where appropriate, of the children into the common housing; obliging the aggressor to keep a certain minimum distance from the victim, from his family members or from the residence, place of work or educational unit of the protected person; obliging the aggressor to permanently wear an electronic surveillance system; obliging the aggressor to hand over the weapons in his possession to the police. The duration of the temporary protection order is 5 days (120 hours) but it is extended if the order is confirmed by the prosecutor, until the court settles the request for the issue of a protection order which has a duration of up to 6 months. The measures taken against the aggressors by protection orders become mandatory immediately after these are issued, without a summons. Within 24 hours from the date of issue, the temporary protection order shall be submitted for confirmation to the prosecutor, who shall have 48 hours to decide on the need to maintain the protection measures ordered by the police. The prosecutor may

⁵ Article 16 (1): Social services for preventing and combating domestic violence may be organized under a residential system, full-time or on a permanent basis, with or without legal personality, of local or county interest.

(2) Social services for preventing and combating domestic violence organized in a residential manner, intended for victims of domestic violence, with accommodation for a determined period are: a) Reception centres in emergency regime; b) Recovery centres; c) sheltered housing.

(3) The social services for preventing and combating of domestic violence daily basis shall be:

a) Centres for preventing and combating domestic violence; b) Centres for information services and public awareness; c) Assistance centres for aggressors.

(4) The social services for preventing and combating domestic violence on a permanent basis are:

a) Information and counselling services for victims of domestic violence such as an emergency telephone line -*help-line*; b) Integrated emergency services for victims of sexual violence.

(5) Social services for aggressors are organized on a daily basis and aim their rehabilitation and social reintegration, by ensuring education and counselling measures. According to the law, centres can monitor addiction treatment.

order, as the case may be, the cessation of the measures or the confirmation of the measures ordered. In the latter situation, he/she shall submit the temporary protection order and the documents underlying the issuance and confirmation thereof to the court of jurisdiction in the territorial area of which it was issued, together with an application for the issuance of the protection order. The duration of the temporary protection order shall be extended until the court rules.

- the emergency intervention for the provision of social services through a mobile team composed of representatives of the Public Social Work Service (SPAS) that checks the alerts, assesses the situation and takes the necessary steps to overcome the risk immediately, consisting of: transport to the health unit closer to the victim (if applicable), notification of the criminal investigation bodies, notification of the competent bodies for the issuance of a temporary protection order, involvement of the DGASPC (General Directorate of Social Assistance and Child Protection), or, as the case may be, of the SPAS (Public Services of Social Assistance), for accommodation in residential centers fit for the needs and application of the case management for victims and aggressors is provided.

Finally, the most recent amendment of law 217/2003 is operated by Law no. 183/2020, which provides that:

- assisting or hosting the victims, respectively assisting the aggressors in the units provided by law will be performed based on a social services agreement (which in case of the minor will be signed by the parent, companion or legal representative),
- the legal assistance of the person requesting the protection order is mandatory;
- infringement of the measures ordered by the protection order by the person against whom this order was issued represents an offense and is punishable by imprisonment from 6 months to 5 years.

4. Pandemic figures

History has shown us that women are always more affected by crises (economically and socially). The UN [18] estimates that there will be 15 million cases of domestic violence worldwide this year.

The results of a study conducted by the FILIA Centre show that in Romania, unemployment among women has increased by 50% (compared to 16% for men) [19]. According to the data of the National Agency for Equal Opportunities between Women and Men, during the state of emergency (March 16-May 14, 2020), 230 of the 603 calls received, reported cases of violence [20]. At the same time, at the national telephone line for victims of domestic violence (1-800-500-333) the total number of calls registered in March-October was 1394 [21] and at the emergency number 112, 70889 calls were registered in relation to conflicts and physical aggression with victims (which represents an increase by almost 18% as compared to 2019) [22].

During the same period, 6472 protection orders were issued. The issue of protection orders was a complicated one during the state of emergency, when access to justice was limited and / or moved online (or impossible for women who did not have the necessary devices or skills).

In the first nine months of 2020, the Police registered: 20,565 cases of battery or other acts of violence that took place between family members, 341 cases of rape and sexual assault [23]. Probably, this is just the "seen" tip of the iceberg, many cases being unreported.

5. *Instead of conclusions. About the effectiveness of remedies*

In order to comply with the obligations assumed by the Istanbul Convention, we note that Romania has made clear progress in several areas of protection against domestic violence, responding to the need for protection and support (Chapter IV of the Convention) by the achievement of a cooperation between state agencies (including the judiciary system, prosecutors, government law enforcement agencies, non-governmental organizations). Also, a step forward was made by the setting up of general (art. 22 of the Convention) and special assistance services (art. 22), shelters (art. 23) and emergency telephone lines (art. 24). According to the National Agency for Equal Opportunities between Women and Men and (ANES), at the end of June 2018, there were 61 centres under a residential system, of which 45 emergency reception centres (37 public and 8 private) and 16 recovery centres (11 public and 5 private). In Romania, there are also 32 day-services, of which 25 are centres for preventing and combating domestic violence (16 public and 9 private) and 7 are information and awareness centres for the population [24].

In addition to the above-mentioned measures, the Romanian Criminal Code criminalizes (art.199) domestic violence by referring to crimes that can be committed against the person and increasing the special maximum limit of penalties provided for these, when committed against a family member. In the case of the crimes provided in art. 193 and art. 196 committed against a family member, the criminal action may be initiated ex officio. The relevant offenses are: murder (art. 188), aggravated murder (art. 189), battery or other acts of violence (art. 193), bodily injury (art. 194) when it caused permanent consequences as a result of the deed from art. 193; blows or injuries causing death (art.195), bodily injury through fault (art.196). Also, other crimes related to gender violence are also held: harassment (art. 208), trafficking in human beings (art. 210), trafficking in minors (art. 211), pandering (art. 213), use of the services of an exploited person (art. 216), use of child prostitution, rape (art. 218), sexual assault (art. 219), sexual intercourse with a minor (art.220), sexual corruption of minors (art.221), recruitment of minors for sexual purposes (art.222), sexual harassment (art.223).

As mentioned, coordinating bodies in the field of data collection concerning domestic violence have been designated, campaigns of awareness and training of professionals have been organized.

Very recently (March 23, 2021), for the implementation of the Istanbul Convention, ANES (National Agency for Equal Opportunities) organized a video conference within the "Minerva" Project which aims to facilitate access to emergency assistance for victims of domestic violence (mainly through the unique emergency number 112). In this context, they wanted to create and "provide a small panic button for the victim to wear and which has a dual role: signalling the state of danger immediately by quickly alerting the single emergency service 112 but also sending an SMS to DGASPC, for the provision of specialized services" [25].

Also, ANES announced (on April 1, 2021) that, in order to implement the Istanbul Convention in Romania, in the working groups, the priorities consist in the development of: Minimum mandatory specific standards on case management for victims of domestic violence (to be implemented in an order of the Minister of Labour and Social Protection) [26], the unitary methodology on measures to prevent cases of domestic violence, the unitary methodology on case management for victims of sexual violence, the specific minimum mandatory standards on the case management of the aggressor in cases of

domestic violence, and an inter-institutional working procedure on the reporting, collection and monitoring of data in the field of preventing and combating domestic violence [27].

However, we believe that much remains to be done in order to meet the obligations regarding the prevention of violence which, in the terms of the Convention, involves “changing social and cultural patterns, eradicating prejudices, customs, traditions and other practices based on women’s inferiority or stereotypical roles for women and men” (art. 12).

The latest judgments of the ECHR against Romania show, unfortunately, *“the superficiality of state bodies in assessing the gravity of the situation by the failure of the authorities to address the criminal investigation from the perspective of domestic violence”*, by failing to examine on the merits the complaint of cyber violence as closely related to the complaint on domestic violence and the inability to comprehensively capture the phenomenon of domestic violence in all its forms [28] and the inability to address the facts *“from the perspective of domestic violence”*. The Court finds that in Romania *“domestic violence is tolerated and perceived as normal”*, the population and especially women not being aware of the existing legal framework and *“the passivity of the authorities reflects a discriminatory attitude”* [29]. Also, the lack of cooperation between the authorities in order to identify acts of violence and of the effective investigation (starting from the existence, *prima facie* of the medical certificate attesting the alleged violence [30] and the ineffectiveness of the investigations were outlined [31].

At the same time, it appears from Romania's report to GREVIO (mentioned above) that so far, no measures have been taken in the matter of forced marriages. Although, apparently, they are not a practice, in Romania there is no data. Likewise, there is no evidence regarding the extension of the statute of limitations for certain acts (sexual violence, rape, forced marriage, genital mutilation, abortion or forced sterilization) attesting that there is the possibility of initiating proceedings after the victims have reached the age of majority (according to art.36-39 of the Istanbul Convention).

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ROMANIA AND THE COURT OF JUSTICE OF THE EUROPEAN UNION: CASE STUDY ON THE FAMILY LAW

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Abstract

Romanian private individuals (natural or legal persons) have used the judicial protection offered by the Court of Justice of the European Union in numerous occasions since Romania has joined the European Union in January 2007. However, the CJEU acted only in few cases on issues related to the family law although there are provisions in the European Union primary and secondary law in this branch of law. Against this background, this article aims to present, firstly, the most relevant provisions on family law in the European Union legal order, and, secondly, the CJEU case law that already exists in this field, which has a specific relevance for Romanian.

Keywords: Romania, European Union, Court of Justice of the European Union, Family law.

I. Introduction

On 1 January 2022, it will be 15 years since Romania has joined the European Union (EU).¹ During this decade and a half, Romania has been integrated in the institutional structures of this international organization, with all the legal consequences deriving from the public international law and EU legal order. Furthermore, Romania has begun to influence, with varying intensity, different Union's policies. As is well-known, Romania ranks sixth in terms of population and its territory makes it the eighth largest EU Member States. However, in economic terms of 2018, the EU spent € 4.865 billion in Romania (equivalent to 2.45% of the Romanian economy) and this State contributed € 1.655 billion (equivalent to 0.83% of the Romanian economy) to the EU budget.²

Romania's membership of the EU has not meant an immediate integration into the Union. It has taken several years of adaptation for this State in order to begin to have a more active presence in various areas within the EU. A very good example of this has been the presence of both Romania and Romanian individual or legal persons before the Court of Justice of the European Union (CJEU) since January 2007.³ As is well known, the condition

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¹ For a general overview of the development of the negotiation process for Romania's accession to the EU, see: Oanta, G.A. (2008). Rumanía y Bulgaria en la Unión Europea: de la adhesión a la integración. *Revista de Derecho Comunitario Europeo* 29, pp. 91-132.

² Data available at: https://europa.eu/european-union/about-eu/countries/member-countries/romania_en (accessed on 4 May 2021).

³ An analysis of these aspects in the first seven years of Romania's accession to the EU was extensively made by: Oanta, G.A. (2014). *The Arrival of Romanian Cases before the Court of Justice of the European Union*.

of Romania as an EU Member State involves, among other issues, an attribution of the exercise of jurisdictional competences in favour of the CJEU. Under Article 19(1) TEU, *'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'*. In relation to this, it should be mentioned that the European Commission, under Article 258 TFEU, brought the first action of infringement of the EU law by Romania in 2009 (case C-522/09).⁴ Furthermore, for the first time, Romania was condemned in such an action by the CJEU in 2016; this is a decade after joining the EU (case C-104/15).⁵ Although Romania's judicial organs made only two references for a preliminary ruling under Article 267 TFEU in 2007, in 2019 Romania made 39 references for a preliminary ruling and ranked therefore fourth among the EU Member States before the CJEU ahead of States such as Belgium, France or The Netherlands. This can be understood as an active dialogue between the CJEU and the Romanian courts and tribunals.⁶

It is the national judges of EU's Member States, who carry out most of the jurisdictional control on the interpretation and applications of the EU rules. The CJEU only deals with those competences that have been specifically assigned to it by the treaties. In relation to it, mention should be made to the four different procedures that may be developed facing the CJEU: the contentious procedure, the preliminary procedure, the cassation procedure and the advisory procedure. All the disputes that may be started in the framework of these procedures interact and complement each other in order to form the jurisdictional control system of the EU.

Regarding the individuals' access before the CJEU, it is considered that the Treaty of Lisbon has introduced some specific improvements regarding the conditions of access for nature and legal persons to the EU courts. A citizen cannot bring an action against another person (nature or legal) or against a Member State before the CJEU. However, the individual is entitled to appeal to the General Court either a decision adopted by an EU institution – as long as he can prove that he is the addressee of the decision (that is, the person towards whom that decision is directed) or be directly and individually affected by that action – or against the regulations that may affect him directly not including enforcement measures – not needing to prove, now, the existence of individual affectation, and if there was not direct affectation, the actionable should have to try the preliminary ruling before the national court in order to contest those particular acts.

The judicial practice of the Court of Luxembourg shows how, during the nearly fifteen years of Romania's membership to the EU, this State has taken part in different cases not only as applicant but also as defendant – either on its own or together with other Member States. In addition, private individuals (natural or legal persons) with Romanian nationality have resorted to the CJEU or the Romanian courts and tribunals have requested for preliminary rulings on the interpretation of the EU law or of the validity of acts adopted by the European institutions. However, in the author's view, family law has so far received little attention from the CJEU. This is due both, on the one hand, to the EU competence

In Rolul Europei intr-o societate polarizata. Conferinta internationala de Drept, Studii Europene si Relatii Internationale. Bucuresti, 9-10 mai 2014 (Ed. Hamangiu, Bucharest), pp. 61-76.

⁴ Judgment of the CJEU of 14 April 2011, *European Commission v Romania*, C-522/09, Rec. 2011, p. I-2963, ECLI:EU:C:2011:251.

⁵ Judgment of the CJEU of 21 July 2016, *European Commission v Romania*, C-104/15, ECLI:EU:C:2016:581.

⁶ In this regard, see: Court of Justice of the European Union (2007). Judicial Activity; Court of Justice of the European Union (2020). Annual Report 2019. Judicial Activity, p. 154.

limitations set out in the primary law in relation to family law, and, on the other hand, to the few preliminary rulings that have so far been referred to the CJEU by Romanian national courts on family law. Against this background, this article will be divided in two main Parts. Thus, in the *First Part*, a brief approach to the EU family law will be made; and the *Second Part* will focus on those cases brought before the CJEU that we consider to be the most salient regarding the EU family law and as regards Romania and Romanian individuals.

II. The Family Law as Part of European Union Legal Order

Each EU's Member State regulates on its territory the issues related to family according to its Constitution as well as its legal and cultural traditions. Furthermore, there are provisions of the EU primary law and different normative acts, which have been adopted by the legislative European institutions so far, that contribute to the enlargement of the system of protection for people living in the territory of the EU's Member States.

Firstly, in relation to the *EU primary law*, it should be mentioned that there are various provisions in the TFEU, the Protocol no 7 on privileges and immunities and the Declaration no 61 made by Poland, as well as in the Charter of Fundamental Rights of the EU, which refer specifically to the family law.

Thus, Title V of the TFEU on the Area of freedom, security and justice refers to the possibility for the European Parliament and the Council to adopt legislative measures – under the ordinary legislative procedure – on *'the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification'* (Article 79(2)(a) TFEU). Furthermore, there are specific provisions on measures concerning family law with cross-border implications that, under Article 81(3) TFEU, *'shall be established by the Council, acting in accordance with a special legislative procedure'*. In this regard, the Council has the obligation to act unanimously and the European Parliament has to be consulted.

This Article, which is dedicated to judicial cooperation in civil matters, also sets out the possibility for the European Commission to make a proposal in relation to the family law with cross-border implications. Based on such a proposal, the Council *'may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament'*. Such a decision need to be notified to each national Parliament that has the possibility to express its opposition within six months of the date of such notification, in which case it will not be possible anymore to adopt such a decision.

Regarding the privileges and immunities, the Protocol no 7 of Treaty of Lisbon assure the officials and other servants of the EU the right of not being *'subject to immunities restrictions or to formalities for the registration of aliens'* in the territory of any of the EU's Member States and *'whatever their nationality'* (Article 11(b)).

In the author's view, Declaration n° 61 of Poland on the Charter of Fundamental Rights of the EU represents an important derogation from the provisions on family law contained by the EU primary law. Thus, this State declared that this Charter did not *'affect in any way'* its right to legislate in the field of family law.⁷

⁷ Declaration n° 61 states: *'The Charter does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity'*.

The Charter of Fundamental Rights of the EU contains several provisions on family law, which are considered related to the rights focused on freedoms, equality and solidarity.⁸ Indeed, Article 7 provides that every person *'has the right to respect for his or her private and family life, home and communications'*. Under Article 9, *'the right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights'*. Specifically, regarding the special relationship between a child and his or her parents, it is recognized that every child may have maintain on a regular basis such a relationship unless this would be contrary to his or her interests (Article 24(3)).⁹

This legal umbrella provided by the Union primary law is completed by Article 33(1) of the Charter of Fundamental Rights of the EU according to which the protection of family must be guaranteed in the EU from a legal, economic and social perspective.

Secondly, regarding the *EU secondary law*, we would like to point out that so far the European Commission, the Council and the European Parliament have adopted different acts on family law within the competence framework established by the above-mentioned articles of EU primary law. In the author's view, at present the Council Regulation (EC) no 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations¹⁰, and the Council Regulation (EC) no 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility,¹¹ are the most relevant compulsory acts adopted by the EU in the field of judicial cooperation in civil matters. As it will be presented in the following part of our article, both Regulations¹² have

⁸ The Charter of Fundamental Rights of the EU was adopted in Nice on 7 December 2000 and adapted in Strasbourg on 12 December 2007. Under Article 6(1) TEU, it has the same legal value as the EU's constitutive treaties and it therefore has a compulsory legal character. The consolidated text of the Charter is available at *OJ C 202*, 7.06.2016, p. 389. On a detailed analysis of this legal text, see, among others: Dutheil de la Rochère, J. (2009). *La Carta de Derechos Fundamentales de la Unión Europea: ámbito de aplicación, orígenes y otros aspectos generales*. In: Beneyto Pérez, J.M. (ed.) *Tratado de derecho y políticas de la Unión Europea* (Ed. Aranzadi Thomson Reuters, Cizur Menor), pp. 161-217; Favrey, B. (dir.) (2010). *La charte des droits fondamentaux de l'Union européenne après le Traité de Lisbonne* (Ed. Bruylant, Bruxelles); Mangas Martín, A. (dir.) (2009). *Carta de los Derechos Fundamentales de la Unión Europea: comentario artículo por artículo* (Fundación BBVA, Bilbao); Mock, W.B.T. (2010). *Human rights in Europe: Commentary on the Charter of Fundamental Rights of the European Union* (Carolina Academic Press, Kent).

⁹ Article 24 of the Charter of Fundamental Rights of the EU also sets out that: *'1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters, which concern them in accordance with their age and maturity. 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration'*.

¹⁰ 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, *OJ L 7*, 10.01.2009, p. 1.

¹¹ Council Regulation (EC) no 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility are the most relevant compulsory acts adopted by the EU in the field of judicial cooperation in civil matters, *OJ L 338*, 23.12.2003, p. 1.

¹² For a detailed analysis of Regulation (EC) no 4/2009 and Regulation (EC) no 2201/2003, see, among others: De la Iglesia Monje, M.I. (2020). *Una visión práctica del diálogo prejudicial en el ámbito de la responsabilidad parental (El TJUE garante del interés superior del menor)*. In: Aguilera Morales, M. (dir.) *Tribunal de Justicia de la Unión Europea, Justicia Civil y Derechos Fundamentales* (Ed. Thomson Reuters-Aranzadi, Cizur Menor), pp. 83-138.

contributed to the implementation of EU family law considerations as well as to the enlargement of individuals' legal protection in the Union through the CJEU case law.

III.A Panorama of the Romanian Cases Brought before the Court of Justice of the European Union on Family Law

Romania has been an applicant or defendant in a relatively small number of cases brought before the CJEU so far.¹³ However, this situation notably changes when private individuals (natural or legal persons) of Romanian nationality are the ones who benefit from the judicial system of the EU.

The private individuals' access to the CJEU can be made either *directly* – impugning a decision adopted by an institution of the Union before the General Court, in the conditions established in that regard by the treaties – or *indirectly* – through national courts, which can bring a preliminary ruling before the Court of Luxembourg -. In line with the study of the CJEU case law, we can state that private individuals' access to the CJEU is basically made by means of a preliminary ruling, as set out in Article 267 TFEU, by virtue of which the national judges can, and sometimes must, direct to the CJEU in order to request a precision in a question of interpretation of the EU law for being able, for example, to check the conformity of the national law with the European one.

It is worth emphasizing that whenever a question about the interpretation and validity of the EU law is brought up before the courts of the Member States, the previously mentioned body could or will have to ask the CJEU to rule on it. In relation to these provisions, it has to be mentioned that any court of a State has discretionary nature when subjecting that question to the Court of Luxembourg, but it will have to do it when it is a judge or tribunal against whose decision there is not possible appeal before a national higher court. The interpretation offered by the CJEU will be binding not only on the national court that made use of that procedure, which will have to apply it to the main dispute, but also on the rest of national jurisdictional bodies that go through a similar problem. This way, the EU tries to ensure an effective and homogeneous application of its legislation, avoiding any divergent interpretation of it, and controlling the validity of an act of the Union law as well.

Regarding the family law, it should be stressed that so far Romania has not been involved in any case brought before the CJEU on issues related to this branch of law, neither as an applicant nor as a defendant. The situation is quite different when referring to Romanian individuals. It is considered that Romanian courts and tribunals have been more active in the field of family law in their relationship with the CJEU. To date, these judicial bodies have asked the CJEU by means of preliminary rulings in four cases. In the author's view, the most relevant cases on family law before the CJEU has been as follows:

Case	Reference	CJEU Judgment/Order	Date	Main Issue	Type of Action
<i>Florian Freitag</i>	C-541/15	Judgment ECLI:EU:C:2017:432	8/06/2017	European citizenship. Recognition in Germany and the entry in the civil register of a change of surname to a name legally acquired in Romania	Request for a preliminary ruling

¹³ For a general overview of Romania's presence before the CJEU, see: <http://www.mae.ro/node/55544>

Case	Reference	CJEU Judgment/Order	Date	Main Issue	Type of Action
<i>Coman and others</i>	C-673/16	Judgment ECLI:EU:C:2018:385	5/06/2018	European citizenship. Marriage between persons of the same sex.	Request for a preliminary ruling
<i>EP v FO</i>	C-530/18	Order ECLI:EU:C:2019:583	10/07/2019	Judicial cooperation in civil matters. Jurisdiction in matters of parental responsibility and best interests of the child.	Request for a preliminary ruling
<i>OF v PG</i>	C-759/18	Order ECLI:EU:C:2019:816	3/10/2019	Judicial cooperation in civil matters. Notion of “parental responsibility”.	Request for a preliminary ruling

Source: Gabriela A. Oanta

Most of the preliminary rulings submitted from Romania in this field of family law make reference above all to judicial cooperation in civil or criminal matters as well as to issues related to the European citizenship. In two of the four occasions, the CJEU resolved by means of judgments and in other two cases, the Court expressed its position through orders.

The first request for a preliminary ruling on family law related to a Romanian national was formulated by a German court on 16 October 2015, in the proceedings brought by *Mircea Florian Freitag* concerning the recognition, in Germany, and the entry in the civil register of a change of surname to a name legally acquired in Romania. Mr. Florian Freitag was born in Romania in 1986, under the surname Pavel. Both of his parents had Romanian nationality. After his parents' divorce, his mother married a German national, Mr Freitag, who in 1997 adopted his wife's son that acquired German nationality. In 2013, the applicant changed his surname, at his own request, back to Pavel. During the process of the name change in Romania, the applicant in the main proceedings had his habitual residence in Germany. Furthermore, the applicant in the main proceedings then requested that the name change also be recognised under German law and that the civil register be updated accordingly.¹⁴

The German Court decided to stay proceedings at the domestic level and refer the following questions to the CJEU for a preliminary ruling: ‘Are Articles 18 and 21 TFEU to be interpreted as meaning that the authorities of a Member State are obliged to recognise the change of name of a national of that State if that person is at the same time a national of another Member State and has, in that other Member State, by means of a change of name not associated with a change in family-law status, (re-)acquired his original family name received at the time of birth, even though the acquisition of that name did not take place during the habitual residence of that national in that other Member State and was carried out at his own request’.¹⁵

¹⁴ See: judgement of the CJEU of 8 June 2017, *Florian Freitag*, C-541/15, ECLI:EU:C:2017:432, paras. 16-21.

¹⁵ *Ibidem*, para. 25.

The CJEU ruled in this case that Article 21 TFEU should be interpreted ‘as precluding the registry office of a Member State from refusing to recognise and enter in the civil register the name legally acquired by a national of that Member State in another Member State, of which he is also a national, and which is the same as his birth name, on the basis of a provision of national law which makes the possibility of having such an entry made, by declaration to the registry office, subject to the condition that that name must have been acquired during a period of habitual residence in that other Member State, unless there are other provisions of national law which effectively allow the recognition of that name’.¹⁶

On 29 November 2016, the Curtea Constituțională (Constitutional Court) made a request for a preliminary ruling in the proceedings *Relu Adrian Coman, Robert Clabourn Hamilton and Asociația Accept versus Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne – case Coman and others*.¹⁷ The Consiliul Național pentru Combaterea Discriminării was an intervenor. This case referred to a request concerning the conditions under which Mr. Hamilton might be granted the right to reside in Romania for more than three months. Mr. Coman, who holds Romanian and American citizenship, and Mr. Hamilton, an American citizen, had met in New York in June 2002 and had lived there together from May 2005 to May 2009. Mr. Coman had then taken up residence in Brussels in order to work at the European Parliament as a parliamentary assistant, while Mr. Hamilton had continued to live in New York. They were married in Brussels on 5 November 2010. In December 2012, Mr. Coman and Mr. Hamilton contacted the Inspectorate to request information on the procedure and conditions under which Mr. Hamilton, a non-EU national, could obtain the right to reside lawfully in Romania for more than three months. The Romanian authorities answered that Mr. Hamilton had a right of residence for three months in Romania because, under the Romanian Civil Code, marriage between people of the same sex is not recognised. As a result of it, *Coman and others* brought an action against the decision of the Inspectorate before the Judecătoria Sectorului 5 București (Court of First Instance, District 5, Bucharest, Romania) seeking a declaration of discrimination on the ground of sexual orientation and requesting that the Inspectorate be ordered to end the discrimination and to pay compensation for the non-material damage suffered.¹⁸

The CJEU ruled in this case that Article 21(1) TFEU ‘must be interpreted as precluding the competent authorities of the Member State of which the Union citizen is a national from refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognise marriage between persons of the same sex’. In addition, the Court estimated that this Article should ‘be interpreted as meaning that, in circumstances such as those of the main proceedings, a third-country national of the same sex as a Union citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that state has the right to reside in the territory of the Member State of which the Union citizen is a national for more than three months’.¹⁹

Different aspects of the judicial cooperation in civil matters have constituted the core issues of two cases on family law brought before the CJUE, namely *EP v FO* and *OF v PG*.

¹⁶ Ibidem, para. 48.

¹⁷ Judgment of the CJEU on 5 June 2018, *Coman and others*, C-673/16, ECLI:EU:C:2018:385.

¹⁸ Ibidem, paras. 9-13.

¹⁹ Ibidem, para. 58.

Thus, in the first case, the Tribunalul Ilfov (Regional Court, Ilfov) asked the CJEU in the proceedings between *EP* and *FO* regarding the award of custody of their minor child, the determination of the child's habitual residence and the payment of maintenance in respect of that child. Specifically, it was about the interpretation of Article 15 of Regulation (EC) no 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.²⁰ The affected child was born in France in October 2006 as the result of the marriage between EP, a Romanian national, and FO, a French national. Since the separation of her parents in 2013, the child was living with her mother in Romania. In 2014, EP filed a petition for dissolution of the marriage with the Judecatoria Buftea (Court of First Instance, Buftea), together with an application for custody of the child and the payment of maintenance by FO, the child's father. FO considered that there was a lack of jurisdiction of the Romanian courts and, as an alternative, he filed a cross-petition for dissolution of the marriage on the grounds that EP was at fault, and applied for the exclusive right to exercise parental responsibility, custody of the child and the payment by EP of maintenance for the benefit of the child.

In 2014, the Judecatoria Buftea (Court of First Instance, Buftea) decided to dismiss the pleas raised by FO and, one year later, the same court declared that the law applicable to the dispute in the main proceedings was the Romanian legal order. In 2016, either EP or FO 'filed a petition for divorce by mutual consent, but each party also applied for the unilateral right to exercise parental responsibility, a residence order in respect of the minor child and the payment, by the opponent, of maintenance for the benefit of the child. In the alternative,

²⁰ Article 15 of the Regulation (EC) No 2201/2003, entitled 'Transfer to a court better placed to hear the case', provides:

'1. By way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child: (a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or (b) request a court of another Member State to assume jurisdiction in accordance with paragraph 5.

2. Paragraph 1 shall apply:

(a) upon application from a party; or (b) of the court's own motion; or (c) upon application from a court of another Member State with which the child has a particular connection, in accordance with paragraph 3. A transfer made of the court's own motion or by application of a court of another Member State must be accepted by at least one of the parties.

3. The child shall be considered to have a particular connection to a Member State as mentioned in paragraph 1, if that Member State:

(a) has become the habitual residence of the child after the court referred to in paragraph 1 was seized; or (b) is the former habitual residence of the child; or (c) is the place of the child's nationality; or (d) is the habitual residence of a holder of parental responsibility; or (e) is the place where property of the child is located and the case concerns measures for the protection of the child relating to the administration, conservation or disposal of this property.

4. The court of the Member State having jurisdiction as to the substance of the matter shall set a time limit by which the courts of that other Member State shall be seized in accordance with paragraph 1. If the courts are not seized by that time, the court which has been seized shall continue to exercise jurisdiction in accordance with Articles 8 to 14.

5. The courts of that other Member State may, where due to the specific circumstances of the case, this is in the best interests of the child, accept jurisdiction within six weeks of their seizure in accordance with paragraph 1(a) or 1(b). In this case, the court first seized shall decline jurisdiction. Otherwise, the court first seized shall continue to exercise jurisdiction in accordance with Articles 8 to 14.

6. The courts shall cooperate for the purposes of this Article, either directly or through the central authorities designated pursuant to Article 53'.

FO applied for joint custody of the child'. The Court of First Instance, Buftea 'granted the divorce of EP and FO by mutual consent, declared that parental responsibility is to be exercised jointly, declared that the child is to reside with her mother, defined the arrangements for the father to have access to the child and ordered the father to pay maintenance for the benefit of the child'.²¹

Ten month later, both individuals brought appeals before the Tribunalul Ilfov (Regional Court, Ilfov) against the judgment given at first instance. Thus, FO argued that the Judecatoria Buftea lacked jurisdiction to rule on the dispute before it and requested that the judgment be set aside. Moreover, both parties sustained that 'the substance of the judgment should be varied in their favour'²² and the referring court stated that the Judecatoria Buftea had taken into consideration the best interests of the child who had been living in Romania with her mother, where she attended a French school and was well integrated in her environment.²³

In the author's view, in this case the CJEU has provided clarity on the interpretation of such a complex article as Article 15 of Regulation (EC) no 2201/2003. As far as family law is concerned, we would like to mention that the CJEU held that the best interests of the child, when assessing whether the courts of that Member State are better placed to hear that case, is not a relevant criterion.²⁴

The forth request for a preliminary ruling in which Romanian individuals were involved was presented by the Judecatoria Radauti (Court of First Instance, Radauti) concerning the interpretation of various Articles of Regulation (EC) No 2201/2003. The provisions were invoked in the proceedings between *OF* and *PG*, two nationals of Romania who were living in Italy, in relation to an application for divorce in which their child was affected directly. Before asking for divorce in Romania, the Tribunale di Aosta (District Court, Aosta, Italy) found that the spouses had separated de facto, awarded exclusive custody of the child to the mother (*PG*) and ordered to the father (*OF*) to pay him maintenance. Years later, the father brought an application for divorce before the Judecatoria Radauti.

As the CJEU ruled on a number of procedural issues, we would like to focus only on those aspects related to family law. Thus, in the author's view, what interests us for the purposes of our paper is that the CJEU replied to the Romanian national court that the concept of '*parental responsibility*', as defined in the above mentioned Regulation, 'must be interpreted as covering decisions relating to, in particular, custody of the child and the child's place of habitual residence, but it does not include parental contributions towards the costs of the child's care and upbringing, which is covered by the concept of 'maintenance obligations' and comes within the scope of Regulation No 4/2009' on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.²⁵

²¹ Judgment of the CJEU on 10 July 2019, *EP v FO*, C-530/18, ECLI:EU:C:2019:583, paras. 11-12.

²² Ibidem, para. 16.

²³ Ibidem, para. 17.

²⁴ Ibidem, para. 43.

²⁵ Order of the Court of Justice on 3 October 2019, *OF v PG*, C-759/18, ECLI:EU:C:2019:816, para. 55.

4. CONCLUSIONS

The exclusive role of the CJEU as the guardian of respect for the EU legal order in the interpretation and application of the Treaties could lead it into a new judicial area relating to family law. Indeed, a new and, for the time being, incipient way of judicial protection of the rights of individuals deriving from family law is gradually opening up through the actions and remedies provided by EU law. This is an evolutionary and progressive process, as is the action of the CJEU in many areas.

So far, the contribution of the CJEU on family law related to Romanian has been related to domestic actions brought by judicial organs under Article 267 TFEU. In this way, individuals are acting, above all, indirectly before the CJEU.

Until now, this activity has been represented by four cases in which the CJEU ruled on diverse issues, such as: the possibility to register a change of surname in one Member State as a consequence of acquiring another name that is legal in a different Member State, marriage between persons of the same sex, as well as the judicial cooperation in civil matters regarding various interpretations of the notion 'parental responsibility'.

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THE VALUE OF FAMILY IN GREECE: CONSTITUTIONAL PROTECTION AND LEGISLATIVE DEVELOPMENTS

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Abstract

This study purports to highlight the value of the family institution in Greece. Reference is made to the historical context of shaping the institution of family. The constitutional protection of family is examined. Policies supporting families are analyzed and their protection at the level of private law is outlined.

Keywords: *Family, family protection, constitution, policies*

1 Introduction

The concept of family is broader than the concept of marriage or other related ones, because it does not concern just a simple legal relationship but also an institution that has been the foundation of the human society. Family is an institution and a value that is protected in the context of public law by the Constitution itself and in the context of private law by a variety of laws. Both the constitutional and the ordinary legislator in Greece practically recognize the importance of family for both the Greek Nation and individual.

2 Historical Background

In order to understand the value of family in Greece, it must first be examined how it has been shaped, throughout the ages, in Greek civilization as the foundation of society and as the basis of the city-state (*polis-kratos*). In Greek mythology, family is personified by Goddess Hestia, sister of Zeus and protector of the home (family) and family life. She received the first offering of every sacrifice that took place inside the house; she is mentioned in Hesiod's "Theogony" and Plato's "The Laws" [1]. An Orphic Hymn is, also, dedicated to her.

Homer's perception of family is archetypal throughout Odyssey [2]. For Odysseus family is sacred. His whole struggle to return to his homeland, to reunite with his wife, Penelope, and his son, Telemachus, to regain the dominion of his home and the kingdom of Ithaca is because his main objective is the so-called day of return (*nostimon imar*) [3].

Aristotle begins his first book of Politics by examining what a city is and what its purpose is [4]. In so doing, he explores its components. He acknowledges that the main pillar of a city is the house (*oikos*), which includes family members and family property. The city's rulers are particularly interested in maintaining the house and its continuation. Additionally, in ancient and classical Greek texts, institutions related to family are highlighted and approached legally for the first time, such as marriage, cohabitation, dowry, adoption, divorce, hereditary succession, etc.

In the Byzantine Empire, family remains the foundation of the society. It is patriarchal, while from the 9th century onwards it takes a nuclear form [5]. In the Komnenian period, conditions of family honor and virtue are reestablished and specific moral principles are required in order for an individual to be a member of specific families. The institution of marriage is sovereign. Religious rules are turned into state rules transforming the legal

framework of marriage [6]. This, however, is not so surprising since in both the East and the West, the model of marriage is shaped (in the context of different fermentations) by the Church taking into consideration its political and ideological role. There are, also, changes concerning the position of women, whose role is gradually improved.

During the Ottoman rule, the Greek family maintained its national consciousness and the Christian orthodox religious faith. Historic families play a leading role during the Greek Liberation Revolution of 1821.

3 The Constitutional Framework after the Constitutional Revision of 2019

The longstanding financial crisis in Greece, the biggest after World War II, as well as the ensuing COVID-19 pandemic, highlighted the crucial role of the Greek family and its great importance to society, the economy, the Republic and the Nation. During the crisis, the Greek family substituted the weak welfare state, supported financially, psychologically and morally its younger members, and helped them face the difficulties and problems in their work, their studies and the everyday life. The Greek family protected social cohesion, achieved economy of scale for its members, substituting the welfare state, which was not ready to support the financially weak, and today contributes to the restart of the economy, the reorganization of the state and of course the demographic strengthening of the nation.

The Greek family is still standing, despite difficulties and will continue to contribute to the creative development of the nation, whatever that means for the economy, the social insurance system, the improvement of the standards of living and national security.

3.1 Family in the Greek Constitution

The article 21 par. 1 of the Constitution establishes the right to marry and found a family, and also, puts under State protection the institution of marriage (*Institutionelle Garantien*) [7]. The constitutional mandate to protect marriage is intended to support marital and family life by implementing specific policies, and to prohibit interventions that have negative effects on them.

Marriage is a legal term in contrast to the notion of family, which according to the prevailing opinion is considered a lifelong lasting relationship between individuals of different sex that is regulated by law [8]. The right to marry refers to the freedom to choose a spouse and timing of marriage, as well as to be protected from the consequences of the dissolution of marriage.

Particular reference is made in Art 21 par. 2 of the Constitution to the special care of the State to which families with many children, widows and orphans are entitled to. In addition, Art. 21 par. 4 stipulates the special State care for the acquisition of a home for people in need, also because home is important for creating a family.

The Constitution links demographic policy to the existence of family and encourages policies by the executive and the legislative authorities that incentivize childbearing. This provision is highly important for a country like Greece, where low fertility and immigration constantly dilute the active and dynamic population, causing severe consequences to the economy, the social security system and of course national security.

Based on the above and recognizing family as the vital cell of the Greek society, the IXth Revisionary Parliament of 2019 by a large majority supplemented par. 1 of Art. 21 of the Constitution with the following provision: “The State shall care for ensuring decent living conditions for every citizen through a guaranteed minimum income scheme, as

provided by law.” Although this attitude in support of family was previously also adopted by the Council of State (Cases No 668/2012 and No 2287/2015), the Constitution emblematically confirmed the importance that the Greek State and Greek society attribute to the institution of family, recognizing not only its historic, but also its contemporary role, as the foundation of society and of the Nation [9].

Furthermore, Art. 9 par. 1, which considers every person’s home as a sanctuary and the private and family life of the individual as inviolable, is also relevant to the protection of family.

3.2 The European and International Institutional Framework for Family Protection

Greece as a member of the European Union is bound by the Charter of Fundamental Rights of the European Union, which stipulates the right to marry and to found a family in Art. 9, the rights of the child in Art. 24, and the protection of family and professional life in Art. 33. Additionally, the constitutional framework is complemented by international conventions created by the Council of Europe and the United Nations, which are ratified by Greece and form an integral part of domestic law.

At European level, the European Convention of Human Rights (ECHR), which was ratified by Decree-Law 53/1974, provides for the right to respect for family life in Art. 8 and for the right to marry in Art. 12 [10], while the revised European Social (ESC), which was ratified by Law 4359/2016, provides for the right of the family to social, legal and economic protection in Art. 16 and for the right of children to social, legal and economic protection in Art. 17.

At international level, the International Covenant on Economic, Social and Cultural Rights (ICESCR), which was ratified by Law 1532/1985, provides for the protection to families, mothers and children in Art. 10, while the International Covenant on Civil and Political Rights (ICCPR), which was ratified by Law 2462/1997, provides for the protection to families in Art. 23 and for the protection to children in Art. 24.

4 Family Support Policies

The Constitution delineates specific policy measures for family protection. The competent government body responsible for the formulation, implementation and monitoring of those policies is the Ministry of Labor and Social Affairs, along with public organizations and local authorities.

4.1 General and Special Policies for Family Protection

The policies for family protection possess a dual character. On the one hand, they promote social welfare and are designed to reduce vulnerability and alleviate poverty. On the other hand, they act as demographic incentives that create favorable conditions for the increase of births. To begin with, these policies can be divided into general and special.

4.1.1 General Policies

The general policies concern the whole population and mainly consist of benefits and allowances, tax reductions or exemptions, as well as social services [11]. They have a more pronounced character of social protection and also a dynamic character.

The State provides the “Child Benefit” to families for every dependent child (Art. 214 of Law 4512/2018, as amended by Art. 15 of Law 4659/2020). In addition, it grants the

“Maternity Benefits” (pregnancy-postpartum period) (Art. 9 of Law 2224/1994 and Art. 11 of Law 2874/2000) and, recently, in line with best European practices it launched the “Childbirth Benefit” in the context of a new demographic policy (Art. 1 of Law 4659/2020).

Further, the “Family Benefit” is granted to civil servants (Art. 11 of Law 1505/1984 as replaced by Art. 12 of Law 2470/1997). The Supreme Special Court (AED) found that the favorable salary treatment of married civil servants is constitutional, because of the protection afforded by the article 21 of the Constitution to marriage, family, mothers and childhood (Case No 3/2001) [12].

Moreover, the general policies for family protection also include tax deductions in the form of tax-free income allowance for dependent children (Art. 16 of Law 4172/2013 as replaced by Art. 9 of Law 4646/2019), as well as complementary social services, which aim to reconcile family and professional life, such as maternity and paternity leave, and access to nursery schools and all-day primary schools [13].

4.1.2 Special policies

The special policies concern the protection of certain types of family, which are deemed to be in need of special care. Since the criterion is the number of children per family, these policies are mainly demographic in nature.

The special policies for family protection are addressed primarily to large families. The constitutional guarantee of the special care of the State to families with many children is preceded by Art. 1 of Law 1910/1944, which stipulated that “Large-Family Status” is granted to parents who have at least five children. Subsequently, Art. 1 of Law 860/1978 extended “Large-Family Status” to parents who have at least four children. Thus, the constitutional guarantee has strengthened the protection of large families effectively through more favorable legislation.

A significant step forward was the launch of the “Large-Family Benefit” and the “Lifelong Pension” to mothers of four or more children (Art. 63 of Law 1892/1990). Besides, the European Court of Human Rights (ECtHR) in the case of *Fawsie v. Greece* (2010) considered that granting this benefit allowed the State to “express its respect for family life”, as it is indicated in the Art. 8 of the ECHR and is included within the scope of the latter.

Further, the case law confirmed the protection afforded to large families. The introduction of eligibility criteria based on income for the provision of the aforementioned benefits (Art. 39 of Law 2459/1997) was deemed unconstitutional by the Council of State, because it considered that the special care of the State to families with many children aims at addressing the demographic problem (Case No 1095/2001) [12]. Consequently, the need to strengthen the demographic policy was identified and in the constitutional revision of 2001 a new par. 5 was added to Art. 21, which explicitly enshrined the obligation of the State to plan and implement a demographic policy.

Moreover, the State, recognizing the demographic importance of large families, granted certain benefits to families with three children (Law 3454/2006). In addition, the “Large-Family Benefit” was specifically extended to families with three children (Art. 6 of Law 3631/2008). Based on current demographics, the issue of the complete equalization of families with three children with larger ones arises and, consequently, their further support by the State is requested.

Large families are supported by the State with social measures, as well. For instance, a quota is reserved by the Supreme Council for Civil Personnel Selection (*ASEP*), which amounts to 16% for families with at least four children and 12% for families with three children (Art. 13 of Law 4765/2021).

4.2 Guaranteed Minimum Income

The guaranteed minimum income is a modern tool for fighting poverty and social exclusion. It is addressed to families, as well as individuals and is designed for the short-term relief of people who are temporarily without financial income. In case of widespread and prolonged unemployment, it is accompanied by active labor market policies, that is policies aimed at vocational training and education [15].

The adoption of a minimum guaranteed income scheme underwent an interesting path. In 2014, a pilot minimum guaranteed income scheme was launched in two regions of Greece (Art. 1 of Law 4093/2012). A few years later, in 2016, the so-called social solidarity income scheme was gradually implemented in 30 municipalities (Art. 235 of Law 4389/2016). Finally, in 2020, after the constitutional revision of 2019, which enshrined the obligation of the State to ensure decent living in Art. 21 par 1 of the Constitution, the minimum guaranteed income scheme was consolidated on a nationwide basis (Art. 29 of Law 4659/2020).

4.3 The Financial Crisis

The financial crisis of 2010-2018 was a litmus test for the welfare state [16]. Given the insufficient resources, the State had to balance family protection against other constitutional provisions. Thus, the family benefits scheme was reshaped in view of the unfavorable economic conditions and funding was reallocated in order to be better targeted. The constitution acted as a shield ensuring protection to those in need.

In particular, in 2012, the “Single Child Support Allowance” was introduced that incorporated all the existing benefits including the “Large-family Benefit” (Art. 1 of Law 4093/2012). However, a year later, in 2013, a new “Special Large-family Benefit” for families with three or more children was launched (Art. 40 of Law 4141/2013). Finally, in 2018, these two were merged into a single “Child Benefit”, which is contingent on the family income and the number of children (Art. 214 of Law 4512/2018).

Moreover, in 2012, the “Lifelong Pension” to mothers of large families was abolished (Art. 1 of Law 4093/2012), which was guided by a demographic incentive. Still, according to the Council of State said abolition was considered constitutional, because the “Lifelong Pension” overlapped with other benefits and the minimum guaranteed income (Case No 719/2018).

5 Family Law Provisions

Family law, which forms the Book IV of the Greek Civil Code (GCC), regulates family relations and particularly relations between spouses and relations between parents and children. The GCC was introduced in 1946 and expressed the ideology that prevailed in Greece at the time of its drafting, i.e. the interwar period. Its main characteristics were the strong patriarchal character and the emphasis on the stability of marriage and family.

The Constitution as revised today has influenced significantly the evolution of family law [17]. During the last decades, vast social and economical changes happened

contributing to the transformation of marriage and family, as well as to the redistribution of roles between genders [18]. These changes were reflected in the Constitution, which apart from protecting the family in Art. 21 par. 1, for the first time explicitly guaranteed equality between men and women in Art. 4 par. 2 and provided a seven years transition period for legislative adaptation according to this provision (Art. 116 par. 1).

Consequently, after a long period of elaboration, family law was reformed by Law 1329/1983, which aimed at the implementation of equality between men and women and the general modernization of the provisions [19], especially in view of the ratification of the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) by Law 1342/1983.

5.1 Marriage and relations between spouses

Legislative developments in marriage aimed at safeguarding equal redistribution of roles between spouses and the gradual secularization of marriage. Thus, Law 1250/1982 introduced civil marriage, which was recognized as being equivalent to religious marriage (Art. 1367 of the GCC). Also, the reform of 1983 facilitated divorce proceedings by introducing the so-called irreparable breakdown of marriage as grounds for divorce (Art. 1439 of the GCC). Divorce by mutual consent was also made possible (Art. 1441 of the GCC).

The reform of 1983 changed significantly the personal and property relations between spouses thus contributing to the gradual removal of the patriarchal nature of family and relevant anachronistic institutions [20]. Specifically, the husband ceased to be the head of the family. It was provided that both spouses decide jointly for every issue of their married life (Art. 1387 of the GCC) and they are jointly obligated to contribute, each according to their abilities, to the needs of the family (Art. 1389 of the GCC). Additionally, the mandatory change of surname for wives (Art. 1388 of the GCC), as well as the institution of dowry (Art. 1400 of the GCC) were abolished.

Further, the introduction of cohabitation agreements by Law 3719/2008, initially between individuals of different sex marked an expansion of the scope of family. Subsequently, cohabitation agreements were extended to same-sex couples by Law 4356/2015 in light of the case of *Valianatos v. Greece* (2013), in which the ECtHR held that Greece was in violation of Art. 14 (freedom from discrimination) taken in conjunction with Art. 8 (respect of private and family life) of the ECHR, due to the exclusion of same-sex couples.

5.2 Relations between parents and children

The changes in the relations between parents and children developed in two directions, the implementation of equality between parents and the recognition of children as subjects of rights [21]. In particular, the term “father power” (*patria potestas*) was replaced by the term “parental care”. It was provided that parents jointly exercise parental care, which includes custody, property management and power of representation (Art. 1510 of the GCC), and that any decision regarding the exercise of parental care is made in the best interests of the child (Art. 1511 of the GCC). Besides, children born out of wedlock were granted the same legal status as children born in wedlock.

5.2.1 The award of parental care after divorce

The award of parental care after divorce is of particular interest, since it balances parental rights and the best interest of the child. The law provides that in case of divorce or separation the issue of parental care is resolved by the court (Art. 1513 of the GCC) [22]. So, the court may: a) award parental care solely to one of the parents, b) award parental care jointly to both parents, if they both agree, c) divide the exercise of parental care between the parents or grant it to a third party.

According to prevailing case law the exercise of parental care is allocated between the parents and custody is awarded solely to one parent [23]. The court, acting in the child's best interest, is inclined to award custody solely to one parent, predominantly the mother, who is considered better suited; the father is awarded communication rights. However, it is held that this constitutes a form of discrimination against the father [24].

Today, the stereotype of the stay at home mother and the working father, who is absent, is outdated. Fathers actively participate in the upbringing of their children. The relation of parents with their children should not be affected by the dissolution of their marriage [25]. Additionally, the ECtHR has held that Greece was in violation of Art. 8 (respect of private and family life) of the ECHR in the cases of *Kosmopoulou v. Greece* (2004), *Tsoulakis v. Greece* (2009) and *Fourkiotis v. Greece* (2016) concerning the exercise of communication rights.

Furthermore, since contact with both parents is considered necessary for the healthy development of children's personality, the judicial practice to award custody solely to one parent is detrimental to the child. In this respect, the UN Convention on the Rights of the Child (CRC), which was ratified by Law 2101/1992, stipulates in Art. 3 that a primary consideration in all actions concerning children should be the best interests of the child and in Art. 18 that both parents have common responsibilities for the upbringing and development of the child [26].

5.2.2 Ongoing reform

In light of these developments, a bill was recently introduced in Parliament, which regulates parental care after the dissolution of marriage. It takes into account the principle of non-discrimination between parents and the best interests of the child. Thus, it is in line with international best practices and constitutes a paradigm shift.

Firstly, joint exercise of children care is established a rule, so that both parents can equally participate in the upbringing of their children (new Art. 1513 of the GCC). Exceptionally, the court can deviate, taking under consideration the specific characteristics of each case, and can either allocate children care between parents or award it solely to one parent or a third party (new Art. 1514 of the GCC).

Secondly, it is provided that for important issues related to the care of the child, including naming, religion, health issues, educational issues and change of residence, decisions must be made jointly by the parents (new Art. 1519 of the GCC). In addition, a rebuttable presumption of communication is adopted, so that children would spend one third of their time with the non-resident parent, which ensures increased and balanced communication of children with both parents (new Art. 1520 of the GCC).

Thirdly, the necessary legal and procedural tools for the resolution of any dispute that may arise are upgraded. Thus, special educational programs are organized by the National

School of Judges, so that family law cases are heard by specialized judges, and alternative dispute resolution methods, such as mediation, are applied in family law cases.

6 Conclusion

The Greek Constitution, as well as the international conventions that are incorporated into domestic law, protected the role of the Greek family mandating the legislator to establish protection policies, which are dynamically adjusted to modern conditions. The contemporary Greek legal civilization reaffirmed the value of family.

The historical reflection of the family's role and the analysis of its institutional protection reaffirm its value, because the Greek family has acted during harsh times as a shield for cultural values and as the matrix for national consciousness. During the financial crisis family proved to be the foundation of society; especially during the recent pandemic as a safe haven of humanitarianism and solidarity.

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THE CONCEPT OF “FAMILY” AND FAMILY RELATIONSHIPS ACCORDING TO THE ROMANIAN CONSTITUTION

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Abstract

The right to family life is one of the most spectacular developments, especially towards the end of the 20th century and the beginning of the 21st century. This study emphasizes the landmarks of this evolution, in terms of the scope of guarantees that are subsumed, with reference to the enshrinement in the Romanian Constitution of the right to family and family life and the interpretation of the Constitutional Court of Romania, to the crossroads of times and international, European, national regulations.

Keywords: Family life, marriage, same-sex couples, paternity, gender equality, constitutional review

I. Introductory considerations

The twentieth-century and, especially, the period after the Second World War is characterized, among other things, by spectacular development of regulations dedicated to the enshrinement, defence, and guarantee of fundamental rights and freedoms [1]. International, governmental and non-governmental bodies have made efforts to ensure the proclamation of human rights and freedoms as universal and equal rights for all, as well as for their effective protection, with the consequence of expanding the instruments of protection and guarantee of fundamental rights at international, regional and national level. In this context, the adoption of the thesis of Title II of the current Constitution of Romania – Fundamental rights, freedoms and duties of citizens was based, as one of the framers of the Constitution recalls, Professor A. Iorgovan, the idea of “the permanent evolution of the concept of rights, thanks to certain documents of «an indisputable moral, political and legal value», starting with the Declaration of Independence of the United States and ending with the documents that are adopted before our eyes” [2] . The Report of the Constitutional Commission “suggests the theory on generations of rights that ultimately aim to raise the human being and through them the human being finds its freedom, inner peace, peace of mind, salvation and happiness.” [3]

Among these rights, the protection of family life occupies a central place, being part of the category of inviolability, namely those fundamental rights which, by their content, ensure life, the possibility of free movement, physical and mental safety, and the security of the individual’s residence. The profound significance of family and family life protection is suggestively revealed by the Supreme Court of the United States nearly a century ago when, in cases such as Meyer v. Nebraska (1923) and Pierce v. Society of Sisters (1925), it held that the Fundamental Law protects the sacred character of the family precisely because the institution of family is deeply rooted in the history and tradition of the nation [4]. At the same time, the right to family life is one of the most spectacular developments, especially at

the end of the 20th century and the beginning of the 21st century. This study emphasizes the landmarks of this evolution, with reference to the enshrinement in the Romanian Constitution of the right to family and family life and the interpretation of the Constitutional Court of Romania, at the crossroads of times and the international, European, national plans.

II. The constitutional framework of reference

The Romanian Constitution contains two main texts concerning family and family life, both in Title II, dedicated to fundamental rights, freedoms and duties. It is about Article 26 - *Intimate, family and private life*, according to which “(1) *Public authorities shall respect and protect the intimate, family and private life.* (2) *Any natural person has the right to freely dispose of himself unless by this he infringes on the rights and the freedoms of others, on public order or morals.*” and Article 48 - *Family*, according to which “(1) *The family is founded on the freely consented marriage of the spouses, their equality, as well as the right and duty of the parents to ensure the upbringing, education and instruction of their children.* (2) *The terms of entering into marriage dissolution and nullity of marriage shall be established by law. Religious wedding may be celebrated only after civil marriage.* (3) *Children born out of wedlock are equal before the law with those born in wedlock.*”

In the constitutional architecture, the cited provisions are correlated and subsumed to the general principles governing the constitutional ensemble, as well as to the principles governing the matter of fundamental rights [5]. The Constitutional Court emphasized that “intimate, family and private life shall be protected by law if it manifests itself within the legal order, and not outside it” [6]. With regard to the European Framework of Reference, the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the *Convention*) contained in Article 8 - *Right to respect for private and family life* and Article 12 – *Right to marry* are particularly relevant, as well as those of the Charter of Fundamental Rights of the European Union (hereinafter the *Charter*) contained in Article 7 - *Respect for private and family life* and Article 9 - *Right to marry and the right to found a family*, applicable in the national law according to the rules established by the constitutional provisions of Article 11 - *International law and national law*; Article 20 - *International treaties on human rights* – Article 148 - *Integration into the European Union* [7].

Regarding the drafting of constitutional norms regarding family life, which remained unchanged during the revision of the Constitution, Professor A. Iorgovan noted, in recording the works on the theses of the Constitution, the “very subtle” proposal of Mr. Ion Predescu “namely the introduction of the word «respect» in order to define the essence of the relationship between public authorities and natural persons, when it comes to the intimate, family and private life of a person. The amendment received only 89 votes, but it was taken over by the Commission, incorporated in the Draft, retained by the Constitution (Article 26 paragraph 1) and, hence, by history.”[8] This emphasis has caught our attention, given the profound meaning of the word “respect”, univocal and timeless, as evidenced by the judgments of the Supreme Court of the United States evoked in the introductory part.

But how has the meaning of the concept of “family” evolved and what does it mean to protect family life? We have further selected some examples of case-law to illustrate these developments and to substantiate the reflection on the extension of the scope of guarantees subsumed to the right to family life.

III. Jurisprudential developments

1. Right to family life / respect and protection of family life has a much broader legal content than the right to marry and family relationships resulting from marriage

Although the statement that constitutes the title of this section seems to belong to the field of evidence, the current wording of the constitutional norms of reference, cited above, has required a distinction to be made in this regard. This distinction was made by the Constitutional Court on the occasion of an initiative to revise Article 48 of the Constitution - *Family*, an initiative that referred specifically to the institution of marriage, in the sense of expressly regulating the fact that it takes place between a man and a woman.

With reference to the issue analyzed here, the Court first found that the text proposed to be amended has the marginal name *Family*, and, in its content, it establishes a series of principles and guarantees regarding marriage. Given the content of the regulation, the Court noted that Article 48 of the Constitution “enshrines and protects the right to marry, and family relationships resulting from marriage, distinct from the right to family life / respect and protection of family life, with a much broader legal content, enshrined and protected by Article 26 of the Constitution, (...) The concept of family life is complex, including *de facto* family relationships, distinct from family relationships resulting from marriage, the importance of which has enabled the framer to highlight distinctly, in Article 48, the protection of family relationships resulting from marriage and the relationship between parents and children.”[9] Although the interpretation of the Constitutional Court is explanatory, we consider it necessary that in a future revision of the Constitution to change the marginal name of Article 48, so as to reflect the content of that article, namely *the right to marry*, as otherwise clearly establish the Convention or the Charter.

As for the constitutional regulation, in itself, of the right to marry and the solution pronounced by the Constitutional Court on the initiative for revising the Constitution, we note the interpretation that we could qualify as originality, in historical context, of the right to marry. The Court held that «by replacing the phrase “between spouses” with the phrase “between a man and a woman”, it is made only a clarification as to the exercise of the fundamental right to marry, in the sense of expressly establishing that it shall be concluded between partners of different biological gender» [10]. According to the Court, this is the original meaning of the text, as long as in 1991, when the Constitution was adopted, marriage was seen in Romania in its traditional sense as a union between a man and a woman. The Court took into account both the legislative context since the adoption of the 1991 Constitution and the systematic interpretation of the constitutional norms of reference.

Thus, regarding the legislative context in which the Constitution was adopted, unchanged until an intervention of the Constitutional Court that we would describe as “revolutionary”, we recall that Article 200 of the Criminal Code of 1968 [11] punished with imprisonment the relationships between people of the same sex. Only in 1994, by a decision of the Constitutional Court [12], it was upheld the exception of unconstitutionality having as subject-matter the Article 200 (1) of the Criminal Code and it was found that the provisions of this paragraph are unconstitutional, insofar as they apply to sexual relationships between adults of the same sex, freely consented, which are not committed in public or do not cause public scandal.

As concerns the systematic interpretation of the current constitutional framework, the Court noted that Article 48 of the Constitution defines the institution of marriage in correlation with the protection of children, both “*out of wedlock*” and “*in wedlock*”,

concluding that “therefore, the biological component which substantiated the conception of the framer regarding the marriage, being no doubt that it was seen as the union between a man and a woman, as long as only from such a union, whether in wedlock or out of wedlock, children can be born.”[13]

As a result, the Court found that the initiative for the revision of the Constitution is constitutional in relation to the provisions of Article 152 (2) of the Constitution, as it does not suppress the right to marry or guarantees thereof.

Of course, this interpretation of the Constitutional Court is susceptible to debate, in the light of existing developments at European and global level, of the acceptance and regulation of same-sex marriage. However, in this respect, the necessary distinctions must be made between the sphere of “family life” and that of “marriage” and their proper protection through legal instruments. Whether there is a consensus on family life at the level of the European Court of Human Rights (hereinafter the *ECHR*) and the Court of Justice of the European Union (hereinafter the *CJEU*) on the applicability of the protection of same-sex relationships, which we will develop in the next section, regarding marriage it is considered to be an issue related to the competence of States to regulate it by national law [14]. Thus, comparing Article 12 of the Convention and Article 9 of the Charter of Fundamental Rights of the European Union, ECHR “noted that the latter intentionally failed to refer to a man and a woman [see case *Christine Goodwin v. the United Kingdom* (MC), no. 28957/95, Judgment of 11 July 2002§ 100]. The commentary to the Charter, which obtained legal force in December 2009, confirms that Article 9 is designed to have a wider applicability than the corresponding articles in other instruments on the protection of human rights. At the same time, its reference to national laws reflects the diversity of national regulations, which range from the authorization of same-sex marriage to its express prohibition (...) Taking into account Article 9 of the Charter, the Court will no longer consider that the right to marry enshrined in Article 12 must in all cases be limited to marriage between persons of different gender. However, as things currently stand, the authorization of same-sex marriages remains an issue governed by the national laws of the Contracting States. The Court notes that, in this respect, marriage has deep-rooted social and cultural connotations that can differ considerably from one society to another. The Court reiterates that it must not rush to replace its own assessment with that of the national authorities, which are better placed to assess and respond to the society’s needs.”[15]

We have noted that the evolutions at European level are part of a more cautious approach, precisely due to the cultural, social, even identity diversity. In the USA, the Supreme Court of the United States held in the case *Obergefell V Hodges* (2015) that the right to marry applies both to same-sex couples as well as to different-sex couples. In this context, the Supreme Court of the United States held that the right to marry is based on four “principles and traditions”, involving concepts such as: (1) marriage (and choosing who to marry with), which is inherent to the individual autonomy protected by the Constitution; (2) the fundamental nature of marriage in support of a union of persons who have made a commitment; (3) marriage protects children and families; (4) marriage is essential to the social order of the nation because it is at the heart of many legal benefits. Considering such a structured approach as rational, we consider that perhaps the most sensitive component in terms of social acceptance of same-sex marriages is the one that protects children and families.

Regarding the perception under this aspect at the level of the Romanian society, we consider that the mentioned initiative for the revision of the Constitution was not edifying. Even if it had the citizens as authors, and a significant support (a number of 39 counties - Alba, Arad, Argeş, Bacău, Bihor, Bistriţa-Năsăud, Botoşani, Braşov, Brăila, Buzău, Caraş-Severin, Călăraşi, Cluj, Constanţa, Dâmboviţa, Dolj, Galaţi, Giurgiu, Gorj, Hunedoara, Ialomiţa, Iaşi, Ilfov, Maramureş, Mehedinţi, Mureş, Neamţ, Olt, Prahova, Satu Mare, Sălaj, Sibiu, Suceava, Teleorman, Timiş, Tulcea, Vaslui, Vâlcea Vrancea and the municipality of Bucharest, each fulfilling the condition of having at least 20,000 legally certified signatures in support of the legislative initiative), in the referendum for approving the law revising the Constitution the participation quorum was not met [16] so the law for the revision of the Constitution has not been approved.

2. The relationship that a same-sex couple has falls within the scope of the concept of “family life”, similar to the relationship established in a heterosexual couple

The determination of the scope of application of the limits of the right to family life with regard to homosexual couples was brought before the Constitutional Court in a case in which the constitutionality of the prohibition in Romania of same-sex marriages was challenged, as well as the recognition of same-sex marriages legally concluded in other States, in the light of the freedom of movement and establishment in the European Union. At the request of a legally married same-sex couple in Belgium, who challenged Article 277 of the Civil Code, requesting that their status be recognized in order to benefit from the right of residence on Romanian territory as a family, the Constitutional Court addressed the CJEU to clarify the applicability of the Directive on the freedom movement in the European Union invoked by the appellants.

Thus, in the case *Coman v. Romania* (C-673/16) [17], at the request of the Constitutional Court of Romania, the CJEU ruled that in a situation where a citizen of the Union exercised his freedom of movement by moving and actually living, in accordance with the conditions laid down in Article 7 (1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, in a Member State other than that of which it is a national and has established or consolidated on that occasion a family life with a third-country national of the same sex to whom he is bound by a legal marriage concluded in the host Member State, Article 21 (1) TFEU must be interpreted as opposing the competent authorities of the Member State of which the Union citizen is a national refuse to grant a right of residence in the territory of that Member State to that national, on the ground that the right of that Member State does not stipulate the same-sex marriage. Likewise, Article 21 (1) TFEU must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, a third-country national of the same sex as a citizen of the Union whose marriage to the latter was concluded in a Member State under the law of that State shall have a right of residence for more than three months in the territory of the Member State of which the Union citizen is a national. That derived right of residence may not be subject to more stringent conditions than those laid down in Article 7 of Directive 2004/38.

Starting from those ruled by the CJEU, the Constitutional Court applied, within the constitutional review regarding the provisions of Article 277 (2) and (4) of the Civil Code, the norms of European law contained in Article 21 (1) TFEU [Treaty on the Functioning of the European Union – A/N] and those of Article 7 (2) of Directive 2004/38 / EC [of the

European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States – A/N], appreciating that they have constitutional relevance, as they aim at a fundamental right, namely the right to intimate, family and private life. In this light, the Constitutional Court found that the relationship of a same-sex couple falls within the scope of the concept of “private life” as well as the concept of “family life”, like the relationship established in a heterosexual couple, which determines the incidence of the protection of the fundamental right to private and family life, guaranteed by Article 7 of the Charter, Article 8 of the Convention and Article 26 of the Romanian Constitution. Enjoying the right to private and family life, persons of the same sex, who form stable couples, have the right to express their personality within these relationships and to benefit, in time and through the means provided by law, from a legal and judicial recognition of appropriate rights and duties.

Therefore, the Constitutional Court found that the provisions of Article 277 (2) of the Civil Code, according to which “same-sex marriages concluded or contracted abroad by either Romanian citizens or foreign nationals are not recognized in Romania”, cannot constitute the ground for the competent authorities of the Romanian State to refuse granting the right of residence, on the territory of Romania, to the spouse - national of a Member State of the European Union and / or of a third State, a person of the same sex, who is bound by a marriage, legally concluded on the territory of a Member State of the European Union, with a Romanian citizen, domiciled or residing in Romania, or a citizen of a Member State of the European Union, who has the right of residence in Romania, for the reason that Romanian national law does not provide / recognize the same-sex marriage. Thus, given that the provisions of Article 277 (4) of the Civil Code states that “The legal provisions regarding the free movement on the Romanian territory of the citizens of the Member States of the European Union and the European Economic Area remain applicable”, the prohibition of recognition of marriage does not apply if the citizen of a Member State of a third State, a person of the same sex, married to a Romanian citizen or to a national of a Member State of the European Union, pursuant to Article 21 (1) TFEU and Article 7 (2) of Directive 2004/38, requests the granting of the right of residence, for a period longer than three months, on the territory of Romania, in order to reunite the family [18].

The CCR’s approach reflects and capitalizes on the developments at the European level regarding the scope of rights protecting same-sex couples. In this respect, the ECHR has established that the concept of family within the meaning of this provision is not limited to relationships based on marriage and may include other *de facto* “family” relationships, in which the parties live together outside of marriage [19]. The ECHR noted that since 2001, when the decision in case *Mata Estevez* was adopted, there had been a rapid change of society’s attitude towards same-sex couples in the many Member States. Since then, a considerable number of Member States have granted legal recognition to same-sex couples. Likewise, specific provisions of European Union law reflect a growing trend to include same-sex couples in the notion of “family”. Given this development, the Court considered it artificial to continue to consider that, unlike a heterosexual couple, a same-sex couple cannot enjoy a “family life” within the meaning of Article 8 [20].

3. People who have relationships similar to those between spouses or had relationships similar to those of spouses fall under the protection of the right to “family life”

This interpretation of the concept of family life was made by the Constitutional Court when it found the unconstitutionality of the legislative solution contained in Article 117 (1) letters a) and b) of the Code of Criminal Procedure, which excludes from the right to refuse to be heard as a witness the persons who have established relationships similar to those of the spouses.

The case brought before the court occasioned, on the one hand, the presentation of an evolution regarding the legal meaning of the concept of “family member” and, on the other hand, the “correction” of a legislative inconsistency in this respect. The Court found that, according to Article 177 (1) letter c) of the Criminal Code, *family member* means, among others, not only the husband, but also the persons who have established relationships similar to those of the spouses, if they live together. The provision indicates two categories of persons that make up the concept of “*family member*”, namely the actual (formal) members of a family [Article 177 (1) letters a) and b) of the Criminal Code] and the persons assimilated to them [Article 177 (1) letter c) of the Criminal Code]. According to the doctrine, the reason that determines the legislator to connect various negative or positive effects of some legal and criminal institutions with the finding of family membership is also found in cases where the existence of the relationship in question is legally and formally set in an official form (such as marriage), as well as when it comes to a factual situation, but involving the same effective daily dynamics. The Court has noted that criminal law often uses the concept of “*family member*” as defined, integrating it either into the structure of general criminal rules or special criminal or procedural rules giving expression to legal institutions of heterogeneous legal nature, such as the regulation, in the criminal law in force, of the special causes of impunity, in the case of non-denunciation offenses [Article 266 (2) of the Criminal Code], favouring the offender [Article 269 (3) of the Criminal Code], concealment [Article 270 (3) of the Criminal Code] and non-denunciation of offenses against national security [Article 410 (2) of the Criminal Code], when the act is committed by a “*family member*”, which, according to Article 177 of the Criminal Code, also includes “*persons who have established relationships similar to those of the spouses, if they live together*”.

As a result, the Court found a lack of correlation between the criminal procedural norms contained in Article 117 (1) letters a) and b) of the Code of Criminal Procedure and those contained in Article 119 of the Code of Criminal Procedure related to the legal definition of “*family member*” established in Article 177 of the Criminal Code, given that the latter criminal norm is necessary to be reflected in the criminal procedural law in force. Thus, the Romanian criminal procedural legislation is among those that regulated a right to refuse a hearing for certain categories of persons, but the Romanian legislator did not regulate this right in a clear, accessible and predictable manner. Consequently, the legislative solution contained in Article 117 (1) letters a) and b) of the Code of Criminal Procedure, which excludes from the right to refuse to be heard as a witness the persons who have established relationships similar to those of the spouses, if they live or no longer live with the suspect or defendant, is unconstitutional, infringing the provisions of Article 16 (1) on equality of citizens before the law referred to in Article 26 (1) on family life, from the Fundamental Law.

In this context, the Court held, *inter alia*, that “the person who has a relationship with the suspect / defendant similar to those of the spouses - without being formalized - does not have the right to refuse to be a witness, although, according to the doctrine, from a moral, emotional point of view and the right to start a family, there is no relevant difference between legally married life partners and those involved in a consensual union, and hearing the latter in their partner’s case creates the same possible problems in the couple or the same justified doubts about the sincerity of the statement, as in the case of the statement of the legitimate spouse”[21].

4. Other developments on family relationship, in terms of equality of rights. Gender equality.

The complex dimension of family relationships and the richness of guarantees that accompany the constitutional protection of the family and family life are also revealed by the application of constitutional principles, in particular the equality of rights. The application of these principles in the constitutional review has led, moreover, to essential changes in the legislation on family and family life.

Thus, for example, the Constitutional Court found that it is unconstitutional to grant the right to childcare leave only to active military personnel, to the exclusion of the other parent, also a military officer. According to the Court, with reference to the ECHR case *Schuler-Zgraggen v. Switzerland* (1993), gender equality is an important goal of the Member States of the Council of Europe and only very strong considerations can lead to the assessment that the establishment of differential treatment is compatible with the Convention. The Constitutional Court has held that, in the case of the legal text subject to constitutional review, the recitals taken into account by the legislator cannot be considered strong enough to justify, objectively and rationally, the establishment of differential treatment between women and men, active military personnel, on the occasion of granting the childcare leave. Both categories of people have the same professional status, which leads to the conclusion that the only justification for the difference in treatment is based on the difference in gender [22].

In application of the same constitutional principle, the Court found, in another case, that the legislative solution which excludes the convicted man who has a child under one year from the possibility of postponing the execution of imprisonment or life imprisonment violates the equality of citizens before law and public authorities, without privileges and without discrimination, and the obligation for public authorities to respect and protect intimate, family and private life. Thus, in the context of the new regulation of the institution of postponing the execution of custodial sentences, the Constitutional Court considered that the legislative solution contained in the provisions of Article 589 (1) letter b) first sentence of the second thesis of the Code of Criminal Procedure, which excludes the convicted man who has a child under one year from the possibility of postponing the execution of the prison sentence or life imprisonment, violates the constitutional provisions. Thus, from the perspective of the right to care for the child - a fundamental component of the right to respect for family life enshrined in the provisions of Article 26 (1) of the Constitution -, “the convicted man who has a child under one year is in a situation similar to that of a convicted woman who has a child of the same age, and the difference in treatment between the two categories of persons convicted, in terms of recognizing the possibility of postponing the execution of the prison sentence or life imprisonment, has no objective and reasonable

justification". The Court also noted, *inter alia*, the Judgment of 3 October 2017, pronounced in the case of *Alexandru Enache v. Romania*, by which the ECHR found that - although the institution of postponing the execution of a custodial sentence, being of a criminal nature, is essentially different from the parental leave, which is a measure of labour law - however, in the question of whether, during the first year of the child's life, a convicted father is in a situation similar to that of a convicted mother, the recitals held in the cases of *Petrovic v. Austria* and *Konstantin Markin v. Russia*, (concerning that leave) are fully applicable in the present case. According to the ECHR, the institution of postponing the execution of a custodial sentence primarily aims at the best interests of the child in order to ensure that he or she receives appropriate care and attention in his or her first year of life. However, even if there may be differences in their relationship with the child, both the mother and the father can pay this attention and this care [23].

Likewise, the application of the principle of equality determined the finding of the unconstitutionality of the provisions of Article 54 (2) of the Family Code which recognized only to the father, and not to the mother and to the child born in wedlock, the right to initiate action in denial of paternity [24]. Having regard also to the case of the ECHR *Kroon and Others v. The Netherlands*, Judgment of 27 October 1994, the Constitutional Court considered that a reconsideration of its case-law regarding the solution of the exception of unconstitutionality of the provisions of Article 54 (2) of the Family Code (Decision no. 78 of 13 September 1995, published in the Official Gazette of Romania, Part I no. 294 of 20 December 1995), following to find that the text in question infringes the provisions of Article 16 (1), Article 26, Article 44 (1) and Article 45 (1) of the Constitution. The enshrinement, by the provisions of Article 54 (2) of the Family Code, of the right to promote an action in denying the presumed paternity only in favour of the presumed father, excluding the mother and the child born in wedlock, equally holders of a legitimate interest in promoting such an action, constitutes a violation of the principle of equality in rights provided by Article 16 (1) of the Constitution.

On the same line of legal reasoning, the Court found that the provisions of Article 60 (1) of the Family Code, in the form in force prior to amendments to Law no. 288/2007 amending and supplementing Law no. 4/1953 – Family Code, which established that the period of 1 year in which the action may be brought in establishing paternity out of wedlock begins to run from the date of birth of the child, violates his/her right to privacy, as it deprives him/her of the possibility to act consciously and voluntarily, after acquiring full capacity to establish his or her parentage. [25]

We consider a corollary of these developments a recent decision of the Constitutional Court that addresses in a broader sense the issues addressed here, with reference to gender stereotypes. Thus, the Court found a violation of equal rights in conjunction with human dignity, academic freedom, freedom of conscience and freedom of expression through legal interdiction, in units, in educational institutions and in all areas intended for vocational education and training, including in units that provide extracurricular education, activities to spread the theory or opinion of gender identity, understood as the theory or opinion that gender is a concept different from the biological sex and that the two are not always the same. [26]

It is a legislative initiative that referred to the prohibition of proselytizing based on sex and gender, which was transformed - through amendments to the parliamentary adoption procedure - into a law containing an absolute ban of any activity of expression/knowledge in

the spaces intended for the education and professional training of the idea/theory according to which the gender identity is different from the biological sex. The Constitutional Court upheld the objection of unconstitutionality formulated by the President of Romania regarding this law, holding, inter alia, the violation of the provisions of Article 1 (3) and (5) of the Constitution regarding the rule of law and the observance of the Constitution and the laws, as well as of Article 20 (2) on the priority of international regulations on fundamental human rights. The Court noted that «the Romanian legislation prohibits discrimination on the grounds of sexual orientation, includes legislative solutions for situations involving sex change, the distinction between the concepts of “sex” and “gender”, therefore, clear provisions and following the obligations assumed by Romania as signatory party to international treaties on the subject of “gender identity”. Likewise, through Article 20 of the Constitution, the internal normative system is connected to the international normative framework on human rights and the evolutionary interpretation given by international courts such as the ECHR, enshrining the priority of the highest standards on fundamental rights. Through Article 148 of the Constitution, the binding European norms have priority in the situation when they are contrary to the internal ones. The prohibition by law of the expression and knowledge in the educational units of the issue of gender identity other than as an identity between gender and biological sex is equivalent to the promotion of normative solutions that exclude each other, being likely to create a confusing and contradictory normative framework, contrary to the quality of the law imposed by Article 1 (3) and (5) of the Constitution ». (99) Such a normative solution appears contrary to the legal logic and lacks any reasonable motivation. (100) »

IV. Conclusions

Formulating brief conclusions with reference to the jurisprudential landmarks presented, we note that the right to family life and the concept of family itself have undergone spectacular developments since the adoption of the Constitution in 1991 and until now. Moving away from the patriarchal meaning, family life currently covers a wide range of social relations, thus imposing reconsideration in terms of positive and negative obligations of the State.

This development at the national level has been strongly influenced by international instruments for the protection of fundamental rights and by the case-law of the ECHR and the CJEU, from which we have also provided some benchmarks that we have considered to be significant.

Furthermore, in Romania, same-sex marriages are not regulated, but a “breach” was made regarding its recognition, through the interpretative decision that the Constitutional Court ruled on Article 277 of the Civil Code, based on the judgments of the CJEU in the case *Coman v. Romania*.

It is not clear the position of the Romanian society regarding same-sex marriages, as long as the initiative to revise Article 48 of the Constitution was inconclusively, namely by an invalid referendum.

Anyway, the general legislative evolutions are in the sense of combating gender stereotypes, evolutions confirmed, paradoxically, by a legislative initiative that wanted to raise to the rank of law these stereotypes and which the Constitutional Court sanctioned, detailing, at the same time, the applicable national and international legislative framework.

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NEW PROVISIONS ON THE EXTENSIVE CONFISCATION SECURITY MEASURE

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Abstract

The paper analyzes the conditions for the application of the extended confiscation security measure, as a result of the recent amendments brought by Law no. 228/2020. The new form of regulation represents the transposition into national legislation of Directive 2014/42 / EU on the freezing and confiscation of instruments and proceeds of crime committed in the European Union. At national level, the criminal and criminal procedure provisions in the field of extended confiscation were analyzed and those regulations that required amendments for a full transposition of the aforementioned directive were identified. The study highlights the new conditions under which the security measure may be ordered, from the perspective of the scope, of the activities carried out by the convicted person who substantiates it, of goods that may be subject to confiscation and the group of persons from whom it may be ordered.

Keywords: *Extensive confiscation, security measures, proceeds of crime, presumption of lawful acquisition of property*

1. Short history

Extended confiscation consists in the forced and free of charge transfer to the state property of certain things, which belong to the person who committed a crime, considering their origin from criminal activities, carried out by that person, constantly, for a certain period of time, prior to the offense for which she/he is convicted.

The extended confiscation (criminal sanction, which has a personal and irrevocable character) was introduced in the Romanian criminal legislation by Law no. 63/2012, which amended both the previous Criminal Code², by introducing a new article, art. 118¹, with the marginal name “Extended confiscation”, as well as the Criminal Code in force³, by introducing a new article, art. 112¹, with the same marginal name.

The reason for issuing the normative act was the transposition of art. 3 of the Framework Decision no. 2005/212/JHA⁴ on the confiscation of goods, instruments and other property related to the offense. According to para. (10) of the preamble to that Framework Decision, its purpose is to ensure that all Member States have effective rules on the confiscation of products related to the offense, inter alia, as regards the burden of proof on the source of property held by a person convicted of an organized crime. Article 3 of the named normative act confers increased confiscation attributions to the member states, for goods resulting from criminal activities carried out by the convicted person or if it is established that the value of the possessed goods is disproportionate in relation to the convicted person's legal income.

Art. 112¹ of the Criminal Code was subsequently amended by Law no. 49/2018, at let. i) of para. (1) being included, together with the offenses of non-compliance with the regime of weapons, ammunition, nuclear materials, the offenses of non-compliance with the regime of explosive materials and restricted explosives precursors.

2. Recent changes to the extended confiscation regulations

The regulation regarding the extended confiscation was significantly modified by Law no. 228/2020⁵

The stated objective of the law was the transposition into national legislation of Directive 2014/42 / EU on freezing and confiscation of instruments and proceeds of crime committed in the European Union⁶, whose deadline for transposition into national systems was October 4, 2016 and which involved a substantial legislative effort. In a first stage, the necessary legislative framework for the better administration of the confiscated goods during the criminal process was created, by establishing the National Agency for the Administration of Confiscated Goods, by Law no. 318/2015.

In the next step, the criminal and criminal procedural provisions on special or extended confiscation were analyzed and those regulations that required amendments for a full transposition of the aforementioned directive were identified. Thus, it was found that, although Romania benefits from a coherent and comprehensive legislative framework, developed in accordance with international standards on the confiscation of the proceeds of crime, this framework has certain lacks, compared to European requirements.

3. Conditions for the application of extended confiscation following the transposition of Directive 2014/42 / EU

3.1. Scope of extended confiscation

The scope of application of the measure was extended, by waiving the list of crimes included in para. (1) of art. 112¹ of the Criminal Code.

Although this amendment does not derive directly from the implementation of the directive, both the new directive and the previous directive leaving the freedom of Member States to assess beyond the European minimum, the reasons given were that a fight against crime can be achieved much more effectively by applying the extended confiscation to all the crimes susceptible to procure a material benefit, being maintained, at the same time, the condition of the gravity of these crimes, materialized by a maximum punishment provided by law of 4 years or more.

In fact, in the previous regulation, there were a number of listed offenses which were obviously not likely to provide material benefit to the perpetrator (for example, the offense of forming an organized criminal group which is a danger offense, and not a result one, the material benefit can be obtained only through the crime that constitutes the purpose of the criminal association, and not through the association itself).

At the same time, a number of offenses likely to provide such a benefit, for example, offenses of duty (embezzlement, abuse of duty, conflict of interest, usurpation of office, etc.) were excluded from the scope of extended confiscation.

3.2. Conditions necessary for the application of the extended confiscation security measure

3.2.1. The nature of the criminal activities carried out by the convicted person

According to the previous regulation, the extended confiscation could be ordered if there was a certainty that the convicted person also carried out other criminal activities than those for which the conviction was ordered, but of a similar nature.

According to art. 5 para. (1) of Directive 2014/42 / EU, "(1). *Member States shall take the necessary measures to allow the confiscation, in whole or in part, of the property of a*

person convicted for an offense which is likely to produce, directly or not, economic benefits, when, on the basis of the circumstances of the case, including the facts and evidence available, such as the fact that the value of the assets is disproportionate to the legal income of the convicted person, a court appreciates that the goods were obtained from criminal activities."

As the European regulation does no longer impose any condition regarding the criminal activity that is not the object of the conviction, the Romanian legislator eliminated from the internal regulation the condition that this criminal activity should be as the one provided in art. 112¹ para (1) of the Criminal Code, the direct consequence being that the extended confiscation will be possible in all cases where the judge is convinced that the goods subject to confiscation were obtained from criminal activities.

From an evidentiary point of view, according to the Directive, *"this does not mean that the goods in question must be found to be the result of criminal activity. Member States may provide, for example, that it is enough for the court to assess on the basis of probabilities or to reasonably presume that the goods in question are significantly more likely to have been obtained as a result of criminal activity than in other activities. In this context, the court must examine the specific circumstances of the case, including the facts and evidence available, on the basis of which a decision on extended confiscation could be taken."*

In order to establish the internal standard of proof, we should start from those established by the Constitutional Court in the recitals of Decision no. 365/2014, in which it was noted that *"we should not start from the premise that the presumption of lawful acquisition of property can be overturned only by evidence, respectively by proving that the goods in question come from committing crimes. If this were the approach, the extended confiscation would be devoid of any reason to exist, because if it comes to proving every criminal act from which certain goods come, it will lead to the conviction of the perpetrator for these acts, and therefore to the special confiscation the goods thus obtained, the measure of extensive confiscation no longer finding its usefulness. Therefore, a relative legal presumption can be overturned not only by evidence, but also by simple presumptions, a fact established in the doctrine as well"*.

Therefore, since the issue of extended confiscation does not raise the issue of a criminal charge, there is no need for clear evidence that would create a conviction beyond a reasonable doubt, the measure being possible to be also ordered on the basis of the conviction of the court formed following a public procedure, the presumptions on which the accusation is based being not absolute, this conclusion being deduced from the considerations of the decisions of the Constitutional Court on the standard of proof - which is specific to the relative presumption.

The possibility to use simple presumptions to prove the illicit character of the acquisition of the goods that are to be the object of the extended confiscation was recognized by the legislator by introducing the second thesis at para. 1 of art. 112¹ from the Criminal Code. According to this thesis, the court's conviction that the goods come from criminal activities can be based on the disproportion between the lawful income and the person's wealth, reported at a time interval of 5 years before and, if necessary, after the crime, until the date of issuance of the act notifying the court.

The current form of regulation no longer provides the condition of the "obvious" nature of the disproportion between the convicted person's property and income. The amendment is beneficial, given that, as shown in the special literature⁷, the term was inaccurate, being

likely to generate difficulties of application, given the fact that no benchmark was defined for the assessment of this disproportion.

With regard to the condition of obtaining property from criminal activities, it has been considered in judicial practice that extended confiscation cannot be ordered if *"accusation did not bring any evidence in this direction, either through a conviction decision, either through other ways, that confirms their involvement (of the defendants) in any form in carrying out illicit acts of a criminal nature producing income."*

Regarding the jewels collected from the defendants' homes in the same circumstances, their quantity, nature and weight do not exceed a normal frame, also related to the number of family members, being notorious that each person owns such objects, inheritance or received as a gift at various events. (anniversaries, changes of marital status, baptism, etc.). In addition, even in this case, there was no proof that those were bought in the last 5 years prior to the commission of the facts subject to the file brought to court, from money obtained as a result of committing crimes.¹⁸

Also, in another case, the court held that the defendant *"has large sums of money, given that he has no occupation, but the defendant states that he is a poker player. The manner in which the defendant was involved in the activity of the organized criminal group, the fact that he was involved together with A., B. and C. in the relocation operations of the cigarette production equipment, proving that he had a decisive role in making decisions and their execution by C., are factual elements on the basis of which the court formed its conviction that the sums of money come from criminal activities. This conclusion is even more imperative given the efforts of defendant E. to hide sums of money in a safe, opened by his brother-in-law, E.E., who was acting under the guidance of the defendant."*

3.2.2. The time interval taken into account when applying the measure

The application of the measure therefore implies the establishment of a time interval that begins no later than five years before the date of the crime for which the conviction was ordered and ends on the date of issuance of the indictment. Although the legislator uses the term "notification act", in accordance with those expressed in the literature⁹, we consider that the provision of the extended confiscation security measure is not compatible with the procedure of the plea agreement, which does not allow the administration of evidence in conditions of adversarial proceedings, except in so far as, in the course of the criminal investigation, conclusive evidence was administered in this respect, to which the defendant agreed and which involve the confiscation of property owned by him, not by other persons.

In the case of crimes with duration in time (continuous, of continuity and by habit), we appreciate that the time interval of 5 years will be calculated from the date of the last act of execution, which represents the date of exhaustion of the criminal activity.

3.2.3. The offense for which the conviction is ordered

It is necessary that the court has ordered the conviction of the defendant for one of the offenses provided in art. 112¹ para. (1), namely an offense likely to provide him a material benefit and for which the punishment provided by law is imprisonment of 4 years or more.

Extended confiscation is the only security measure for the disposition of which it is not sufficient to commit an act provided by the criminal law, unjustified, being necessary therefore the establishment and application of a punishment.

Similar reasons are incidental in the situation where it is ordered to postpone the application of the punishment, given the fact that in this case also the commission of the crime is established with certainty.

Thus, according to art. 396 para. (4) from the Code of Criminal Procedure, the postponement of the application of the sentence shall be pronounced if the court finds, beyond any reasonable doubt, that the deed exists, constitutes a crime and was committed by the defendant, under the conditions of art. 83 - 90 from the Criminal Code.

According to art. 83 of the Criminal Code, the postponement of the application of the punishment cannot be ordered if the punishment provided by law for the committed crime is 7 years or more, while, according to art. 112¹ para. (1) Penal Code, extended confiscation may be ordered for crimes punishable by imprisonment of 4 years or more.

Therefore, we consider that the regulation could be supplemented, in the sense that the security measure should be properly applied also in case when the sentence is postponed.

The opinion is all the more pertinent as, recently, the Court of Justice of the European Union, having to deal with a reference from a Bulgarian court, ruled that "Council Framework Decision 2005/212 / JHA from 24 February 2005 on the confiscation of the proceeds, instruments and goods connected to the crime, must be interpreted as not precluding legislation of a Member State which provides that the confiscation of illegally acquired property is ordered by a national court at the end of a procedure unconditioned either by the finding of a crime, nor, *a fortiori*, by the conviction of the alleged perpetrators of such a crime."¹⁰

3.2.4. Goods that may be confiscated

The Directive aimed at revising and extending the provisions of Framework Decisions 2001/500 / JHA and 2005/212 / JHA on several issues.

Thus, it was appreciated that it is necessary to clarify the concept of *products from crime*, by including, along with direct products obtained from criminal activity also the indirect benefits resulting from it, including from the reinvestment or transformation of direct products.

Also, in the notion of proceeds of crime were to be included goods converted into other goods, those combined with goods acquired from legitimate sources, up to the estimated value of the combined products, as well as the income or other benefits derived from the proceeds of crime or goods in which those products have been transformed, converted or combined.

Extended confiscation, unlike special confiscation, does not have as its object goods directly related to the crime which is the object of the case and for which the conviction is ordered (which may be goods produced or acquired by committing the deed provided by criminal law, goods used or intended to be used for the commission of an act provided by criminal law, goods used to ensure the escape of the perpetrator or the retention of the use or the product obtained, goods given to determine the commission of a deed provided by criminal law or property whose possession is prohibited by law criminal law).

What is particular to extended confiscation is a presumption of unlawful acquisition of property, other than that which may be the subject of special confiscation (presumption based on the disproportion between the convicted person's legal income and the value of his property, as well as other solid evidence that results from the case), which determines the court's conviction that these goods also come from criminal activities.

The regulation from art. 1121 para. (1) fully transposes the notion of product, as this notion is defined in art. 2 point 1 of the Directive.

As it has been ruled in the jurisprudence of the Constitutional Court, only the goods acquired after April 22, 2012, the date of entry into force of Law no. 63/2012¹¹, may be subject to extended confiscation.

3.2.5. *The persons from whom the goods may be confiscated*

Extended confiscation can be ordered against the person who committed a crime, but also against his family members, persons with whom she/he has established similar relations to those of the spouses or between parents and children, if they live together, or legal persons on whom the convicted person has control.

According to the Directive, *"The practice whereby a suspected or accused person knowingly transfers property to a third party in order to avoid confiscation is common and increasingly spread. The current legislative framework of the Union does not contain mandatory rules on the confiscation of goods transferred to third parties. Therefore, the need to allow the confiscation of goods transferred to or purchased by third parties is increasingly pressing. The acquisition by a third party is referring to situations in which, for example, the goods were acquired, directly or indirectly, for example through an intermediary, by a third party from a suspected or accused person, including when the offense was committed in his name or for his benefit, when the accused person does not have any property that can be confiscated. Such confiscation should be possible at least in cases where third parties knew or should have known that the purpose of the transfer or acquisition was to avoid confiscation, based on specific facts and circumstances, including the fact that the transfer took place for free or in exchange for a significantly lower amount of money than the market value of the goods. Rules on confiscation applied to third parties should concern both natural and legal persons. In any case, the rights of bona fide third parties should not be infringed."*

As a consequence, in art. 112¹ para. (2) second thesis was provided the possibility of ordering the extended confiscation *"also on the goods transferred to third parties, if they knew or should have known that the purpose of the transfer was to avoid confiscation"*.

The regulation establishes a mixed criterion, that the third person knew or should have known that the purpose of the transfer in his favor is to avoid confiscation of property.

The essence of the regulation is therefore the intention of the convicted person to remove from his patrimony the goods that can be pursued. This is done only with respect for the rights of bona fide third parties, meaning the confiscation cannot be ordered in the conditions in which the acquiring third party could not realize the illegal nature of the transfer.

At the same time, although art. 112¹ para. (3) from the Criminal Code stipulates that, for the application of extended confiscation, the value of the goods transferred by the convicted person or by a third party to a family member or a legal person on which the convicted person shall consider when assessing the illicit nature of the property holds control, it is not expressly provided that the confiscation measure may also be ordered in respect of these goods.

Therefore, art. 112¹ should have been supplemented by an express provision on the possibility of ordering extended confiscation also to a family member or legal person over whom the convicted person has control, to whom the convicted person or, as the case may be, a third party has transferred property.

4. Conclusions

The new provisions regarding the security measure of extended confiscation are likely to ensure both the desideratum of guaranteeing the security of legal relations, and the implementation of the obligations imposed on the Romanian state by binding Community legal norms.

The express provision of the possibility of confiscation of the assets that are in the patrimony of third parties opened the way for the establishment of precautionary measures on the goods belonging to them.

According to art. 249 para. (4) from the Code of Criminal Procedure: "(4) Precautionary measures for special confiscation or extended confiscation may be taken over the goods of the suspect or defendant or over other persons in the property or possession of which are the goods to be confiscated."

In this sense, in order for the security measure of extended confiscation not to become devoid of content and thus to become an illusory measure, by alienating the goods targeted by confiscation, it was introduced, at art. 249 of the Code of Criminal Procedure, a new paragraph according to which "(4¹) In the case of property that may be subject to special confiscation or extended confiscation, it is mandatory for the prosecutor to take precautionary measures to avoid concealment, destruction, alienation or evasion from prosecution of these goods."

At the same time, with regard to the application of criminal law in time, we consider that, for reasons similar to those set out above in the jurisprudence of the Constitutional Court, the security measure of extended confiscation, in its new configuration, can only be ordered for crimes committed after the date of entry into force of Law no. 228/2020 and for goods transferred to third parties after this date.

The measure of extended confiscation, by its extent and gravity, constitutes a punishment within the meaning of the jurisprudence of the European Court of Human Rights (*Engel v. The Netherlands*, judgment of 8 June 1976), so that it must enjoy all the procedural guarantees imposed by the European Convention on human rights and fundamental freedoms (hereinafter referred to as the Convention) in the case of a criminal trial.

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[3] Legea nr. 286 din 17 iulie 2009 privind Codul penal, publicată în M. Of. al României, Partea I, nr. 510 din 24 iulie 2009.

[4] Decizia-cadru 2005/212/JAI a Consiliului Uniunii Europene din 24 februarie 2005 privind confiscarea produselor, a instrumentelor și a bunurilor având legătură cu infracțiunea, publicată în Jurnalul Oficial al Uniunii Europene seria L nr. 68 din 15 martie 2005.

[5] Publicată în M. Of., P. I, nr. 1.019 din 2 noiembrie 2020.

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AN OVERVIEW OF FAMILY PROTECTION IN INTERNATIONAL HUMANITARIAN LAW

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Abstract

The Geneva Conventions focus on persons as individuals. However, they include some relevant considerations on the protection of family units. In this paper, the rights provided for family members will be briefly discussed in the light of the Geneva Conventions, customary Humanitarian Law and recent jurisprudence of international criminal courts and tribunals, in order to assess their extent.

Keywords: *Family, International Humanitarian Law, Geneva Conventions, right to information, civilians, prisoners of war, internees, prisoners of war*

Introduction

Although the Geneva Conventions certainly focus on the individual, they include some provisions on the protection of family as a unit. These Conventions only contain some 20 direct references to families¹. The Regulations concerning the Laws and Customs of War on Land, annexed to the Convention (II) with Respect to the Laws and Customs of War on Land, of 29 July 1899, compelled occupants to respect ‘family honour and rights’². This provision was included in Article 46 of the Regulations concerning the Laws and Customs of War on Land, annexed to the Fourth Hague Convention (1907), with parallel wording, and is now reflected in the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (GC IV), albeit with a slightly different content³. Furthermore, the Geneva Conventions deal with more specific aspects and expressions of what family rights mean within the context of armed conflicts. It can be assessed the majority of provisions can only be applied to civilians and not prisoners of war, since they

¹ Arts. 70 and 71 of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949 (GC III); Arts. 25, 26, 49, 50, 82, 97, 98, 106, 107, 116, 137 and 140 of the GC IV; Arts. 16(3), 32, 34, 74, 75(5), 77(4) and 78(3) of AP I, and Arts. 4(3) and 5(2)(a) of AP II. See Banda, F., and Eckelaar, J. (2017). ‘International Conceptions of the Family’, *International & Comparative Law Quarterly* 66, pp. 833 – 862, for an analysis of the development of the concept of ‘family’ in Public International Law.

² Article 46. For precedents, see Art. 37 of the 1863 Instructions for the Government of Armies of the United States in the Field (Lieber Code); Art. 38 of the 1874 Brussels Declaration concerning the Laws and Customs of War, and Art. 49 of the Oxford Manual on the Laws of War on Land, adopted by the Institute of International Law in 1880. See also the links between Human Rights Law and International Humanitarian Law in Kleffner, J. K., ‘Scope of Application of International Humanitarian Law’, in Fleck, D. (Ed.) (2013). *The Handbook of International Humanitarian Law*, Oxford University Press, Oxford, pp. 43-78, at 72.

³ Article 27, excluding ‘family honour’ while maintaining the reference to ‘family rights’. See also Rule 105 of the ICRC’s study on Customary International Humanitarian Law in Henckaerts, J. M., and Doswald-Beck, L. (2005). *Customary International Humanitarian Law*, Volume I: Rules, ICRC / Cambridge University Press, Cambridge, available at <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf> (last accessed 23 April 2021) (hereinafter ‘the ICRC’s study on Customary International Humanitarian Law’), which provides: ‘Family life must be respected as far as possible’ and encompasses the maintenance of family unity, contact between family members and the provision of information on the whereabouts of family members.

are regulated in the GC IV⁴. The provisions of International Humanitarian Law regarding families can follow under either of these categories: 1) Right to information, 2) Right to maintain family unity, 3) Considerations regarding accommodation or lodging of families and/or women and children, and 4) Other family rights. The topics covered in this article will be presented in that order.

1 Right to information

The most developed International Humanitarian Law provisions on family are those referring to information, in order to reduce the uncertainty surrounding the fate of a person during or after an armed conflict⁵. First and foremost, families have the right to receive information on the whereabouts and to re-establish contact with any of their members in case of dispersion due to the war⁶. This right is provided for in Article 25 of the Fourth Geneva Convention, under which all persons in the territory of a party to a conflict or in a territory occupied by it are entitled to give news of a strictly personal nature to members of their families, regardless of their location⁷, and to receive news from them. Their correspondence must be forwarded speedily and without undue delay⁸. However, there is no individual right to insist that a party undertake any particular action⁹. Under Article 26 of the GC IV, parties to the conflict shall facilitate enquiries made by members of families dispersed due to the conflict in order to renew contact with one another and to meet, if possible¹⁰. Obviously, the GC IV does not prevent other States from facilitating information to families, but they are under no obligation to do so under its provisions. In addition, parties to the conflict shall further encourage the work of organisations trying to reunite dispersed families, providing that they meet certain requirements set forth in Article 26 of

⁴ In fact, there are only two provisions on family protection in the GC III.

⁵ See Hingorani, R. C. (1982). *Prisoners of War*, 2nd Ed., Oxford and IBH Publishing Company, New Delhi, p. 164.

⁶ In the Commentary of 1958 to Article 25 of the GC IV, 192, it is also conceptualised as a right of families and includes the right to give and receive family news, encompassing “[...] all particulars, news, questions, information, etc. concerning the personal and family life of a person”. However, as stated in Commentary of 1958 to Article 25 of the GC IV, 194, the news must be of a strictly family nature. The view of information as a right is shared in the Commentary of 1987 to Article 32 of AP I, paras 1197 to 1201 and 1211. This right has been developed in Art. 17(2)(d) of the International Convention for the Protection of All Persons from Enforced Disappearance of 6 February 2006, as well as in Principles 16(1) and 17(4) of the Guiding Principles on Internal Displacement, presented to the UN Commission on Human Rights by the Special Representative of the UN Secretary-General on Internally Displaced Persons, UN Doc. E/CN.4/1998/53/Add.2, 11 February 1998. See also Rules 117, 124 and 125 of the ICRC’s study on Customary International Humanitarian Law.

⁷ According to the Commentary of 1958 to Article 25 of the GC IV, 192, the right to family news ‘belongs to the whole population of the countries engaged in the war, including those living in their own country’.

⁸ Art. 25 of the GC IV.

⁹ See para 1212 of the Commentary of 1987 to Article 32 of AP I.

¹⁰ This Article applies only to members of dispersed families, not to all displaced persons, as stated in the Commentary of 1958 to Article 26 of the GC IV, 196. Therefore, the interest to safeguard and protect the family unit is conveyed. See the ties of these provisions with the European Convention on Human Rights and the relevance of the national authorities’ reactions and efforts to alleviate the suffering of the victims’ families in the European Court of Human Rights Judgment in the case of *Timurtaş v Turkey*, App. No. 23531/94, 13 June 2000, ECLI:CE:ECHR:2000:0613JUD002353194; Decision in the case of *Fazlić and Others v Bosnia and Herzegovina*, App. Nos. 66758/09, 66762/09, 7965/10, 9149/10 and 12451/10, 3 June 2014, ECLI:CE:ECHR:2014:0603DEC006675809, and Judgment in the case of *Nježić and Štimac v Croatia*, App. No. 29823/13, 9 April 2015, ECLI:CE:ECHR:2015:0409JUD002982313. See also Henckaerts, J. M., and Doswald-Beck, L., *op. cit.*, pp. 263 and 425.

the GC IV. Human Rights Law reinforces the obligation to account for the fate of missing war victims and prisoners of war, since the lack of information about the whereabouts of a family member can constitute ill-treatment¹¹.

The right to information exists even when a family member has become a prisoner of war. However, in this case, it is more restricted, since it only includes the right of the prisoner of war to write a card to his or her family, among other correspondence, either directly or via the ICRC¹². Additional information, such as changes in the prisoners' health, can be sent through further letters or cards, or through telephone or video calls, recorded messages or emails¹³. The detaining power must provide prisoners of war with the cards in a language they understand, the necessary writing materials or electronic devices, an appropriate location to fill in the cards and an explanation of the importance of completing the cards, as well as assist those in need of help to do so¹⁴. However, prisoners of war shall not be coerced to complete or send the cards, especially when there are concerns for the safety of their families¹⁵. Therefore, families do not enjoy a right to receive information against the will of the prisoners of war¹⁶. In case of sickness or transfer to hospital, the particulars of prisoners of war should be transmitted to the national bureaux as soon as possible, although it is not compulsory to enable them to write to their families¹⁷.

Similarly, in case of internment, sickness or transfer to a different place of internment, civilians also enjoy such a right as soon as they are interned, and not later than one week after their arrival in a place of internment or a hospital, in order to inform their relatives of their detention, address and state of health¹⁸. Aside from the aforementioned card, interned civilians (internees) shall be allowed to send and receive at least two letters and four cards monthly¹⁹. Internees who have been without news for a long time or find it difficult to receive news from their relatives or to give them news by ordinary post, as well as those who are considerably far from home, shall be allowed to send telegrams²⁰.

¹¹ Krähenmann, S. (2013). 'Protection of Prisoners in Armed Conflict', in Fleck, D. (Ed.), *The Handbook of International Humanitarian Law*, 3rd Ed., Oxford University Press, Oxford, pp. 359-411, at 385.

¹² Arts. 70 and 71 of the GC III. According to para 3137 of the Commentary of 2020 to Article 70 of the GC III, the term 'family' should be construed broadly. This card was already provided for in Article 36 of the Geneva Convention on Prisoners of War of 27 July 1929 and it is included in Rule 125 of the ICRC's study on Customary International Humanitarian Law. See Dubois, O.; Marshall, K., and Sparkes McNamara, S. (2012). 'New technologies and new policies: the ICRC's evolving approach to working with separated families', *International Review of the Red Cross* 94(888), pp. 1455-1479, on the evolution of the ICRC's work with separated families.

¹³ See paras 3156, 3163 and 3164 of the Commentary of 2020 to Article 70 of the GC III, and paras 3174 and 3186 of the Commentary of 2020 to Article 71 of the GC III. Provisions on correspondence of prisoners of war can be traced back to Article 16 of the 1899 Hague Regulations. See also Dubois, O.; Marshall, K., and Sparkes McNamara, S., *op. cit.*, pp. 1465-1466.

¹⁴ See paras 3132, 3135, 3144 and 3154 of the Commentary of 2020 to Article 70 of the GC III.

¹⁵ See paras 3134, 3135 and 3156 of the Commentary of 2020 to Article 70 of the GC III.

¹⁶ The same caveat is applicable to the internment card provided for in Art. 106 of the GC IV, as construed in the Commentary of 1958 to the Fourth Geneva Convention, p. 446. In the same vein, see Sassoli, M., *International Humanitarian Law*, Elgar, Cheltenham, 2019, p. 342.

¹⁷ See para 3125 of the Commentary of 2020 to Article 70 of the GC III.

¹⁸ Article 106 of the GC IV. Under this provision, these cards 'shall be forwarded as rapidly as possible and may not be delayed in any way'.

¹⁹ Article 107 of the GC IV and Rule 125 of the ICRC's study on Customary International Humanitarian Law.

²⁰ *Ibid.* Note that the most recent interpretation of the concept of 'telegram', which, according to para 3218 of the Commentary of 2020 to Article 71 of the GC III, should include more modern means of communication, such as email, telephone or video calls.

The Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (AP I) of 8 June 1977, further develops this right. Article 32 of AP I recognises the right of families to know the fate of their relatives as a general principle of the section in which it is included. This section provides for the search, identification and recovery of missing persons, as well as for the treatment of the remains of deceased persons during the occupation or hostilities; the protection, maintenance and access to the gravesites by relatives of the deceased, and the return of the remains of the deceased and their personal effects²¹.

The other side of the coin is the prohibition to share information about a person when it would prove harmful or detrimental to the person concerned or to their families, except in case of communicable diseases whose notification is compulsory (when he or she be a patient)²². This prohibition extends to the national Bureaux established in accordance with Article 137 of the GC IV. It constitutes an exception to the obligation to reply to all enquiries received by the national Bureaux regarding protected persons. However, the information may not be withheld from the Central Information Agency, which is under a similar obligation²³.

2 Right to maintain family unity

The Geneva Conventions include several provisions that create a right of civilians from the same family to reunite or stay together in case of evacuation or internment²⁴. Customary International Humanitarian Law includes similar provisions in case of displacement²⁵. In case of total or partial evacuation of a given area by the occupying power in accordance with Article 49 of the GC IV, the occupying power shall ensure that members of the same family are not separated to the greatest practicable extent²⁶. By analogy, the right not to be

²¹ Arts. 33 and 34 of AP I.

²² Art. 16(3) of AP I. See also para 3157 of the Commentary of 2020 to Article 70 of the GC III.

²³ Art. 140, paragraph II, of the GC IV reads: 'The function of the Agency shall be to collect all information of the type set forth in Article 136 which it may obtain through official or private channels and to transmit it as rapidly as possible to the countries of origin or of residence of the persons concerned, except in cases where such transmissions might be detrimental to the persons whom the said information concerns, or to their relatives'.

²⁴ For other aspects of this principle, see Nicholson, F. (2018). *The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied*, UNHCR, Geneva, available at <https://www.unhcr.org/5a8c40ba1.pdf> (last accessed 23 April 2021). See also Principle 17 of the Guiding Principles on Internal Displacement, presented to the UN Commission on Human Rights by the Special Representative of the UN Secretary-General on Internally Displaced Persons, UN Doc. E/CN.4/1998/53/Add.2, 11 February 1998, and Art. 9(2)(h) of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, adopted in Kampala, 23 October 2009.

²⁵ Rule 131 of the ICRC's study on Customary International Humanitarian Law reads: 'In case of displacement, all possible measures must be taken in order that the civilians concerned are received under satisfactory conditions of shelter, hygiene, health, safety and nutrition and that members of the same family are not separated'.

²⁶ The International Criminal Tribunal for the former Yugoslavia (ICTY) in the case *Prosecutor v Vujadin Popović and Ors*, IT-05-88-T, Judgement of 10 June 2010, para 901, found that, under the GC IV, evacuation was an exceptional measure which was permitted when, for example, an area was in danger as a result of military operations or was liable to be subjected to intense bombing, or when the presence of persons in an area hampered military operations, but should not be used as a pretext to remove the population and effectuate control over a territory. In addition, evacuated individuals should be transferred back to their homes as soon as hostilities in that area have ceased. In *Prosecutor v Vidoje and Dragan Jokić*, Judgement of the ICTY of 17 January 2005, IT-02-60-T, para 599, the ICTY further stated that, although there was no provision on the need to ensure that members of the same family are not separated to the greatest practicable extent in non-international armed

separated should extend to the transferral of persons evacuated back to their homes. This conclusion is not provided for in Article 134 of the GC IV²⁷, but can be drawn from AP I, under which the parties to a conflict shall facilitate ‘in every possible way’ the reunion of families dispersed as a result of armed conflicts and shall encourage in particular the work of the humanitarian organizations engaged in this task in accordance with the provisions of the Conventions and of AP I and in conformity with their respective security regulations²⁸.

It is essential that the occupying power respect the general constraints for transfers of people provided for in Article 49 of the GC IV, such as the prohibition of forcible transfers and deportations of protected persons outside the bounds of the occupied territory, subject to exceptions²⁹. Furthermore, there are some provisions on the protection of vulnerable people, such as children, who must be issued special cards in order to facilitate their return to their families and country³⁰. These cards should include the address of the child’s family³¹. The reunion of families temporarily separated is also provided for in the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (AP II), of 8 June 1977. Article 4(3) of AP II, on some fundamental guarantees regarding children care and aid, establishes that all appropriate steps shall be taken to facilitate the reunion of such families³². This means that parties to the conflict should not only permit searches undertaken by members of dispersed families, but even facilitate them (for example, by transmitting family messages by radio), as stated in the 1987 Commentary to the Protocol II³³. Separation of family members in violation of these

conflicts, the Trial Chamber did not find any reason why this general principle should not be applicable. See also Quigley, J. (1992). ‘Family Reunion and the Right to Return to Occupied Territory’, *Georgetown Immigration Law Journal*, 6(2), pp. 223 – 252, on the right to return.

²⁷ Art. 134 reads: ‘The High Contracting Parties shall endeavour, upon the close of hostilities or occupation, to ensure the return of all internees to their last place of residence, or to facilitate their repatriation’.

²⁸ Art. 74 of AP I. See also the N’Djamena Declaration on Ending Recruitment and Use of Children by Armed Forces and Groups: Contributing to Peace, Justice and Development, signed by Cameroon, the Central African Republic, Chad, Nigeria, Niger and Sudan, N’Djamena, 7-9 June 2010.

²⁹ It should be borne in mind that the deportation or forcible transfer of population, when committed as part of a widespread or a systematic attack directed against any civilian population, may constitute crimes against humanity, under Art. 7(1)(d) and (i) of the Rome Statute of the International Criminal Court, done at Rome on 17 July 1998, or war crimes, under Art. 8(2)(a)(vii) and Art. 8(2)(b)(viii) of the Rome Statute of the International Criminal Court. Moreover, the

³⁰ Art. 78(3) of AP I. See also, for instance, Plattner, D. (1984). ‘Protection of Children in International Humanitarian Law’, *International Review of the Red Cross* 240, available at <https://www.icrc.org/en/doc/resources/documents/article/other/57jmat.htm> (last accessed 23 April 2021); Stewart, F., and Boyle, J., ‘Policy to Protect Children From and During War’, in Cornia, G. A. (Ed.) (2001). *Harnessing Globalisation for Children: A Report to UNICEF*, UNICEF, New York, available at <https://www.unicef-irc.org/research/ESP/globalization/chapter14.pdf> (last accessed 23 April 2021), and Rodríguez-Villasante y Prieto, J. L. (2011). ‘La Protección del Niño en los Conflictos Armados por el Derecho Internacional Humanitario. Los Niños Soldados’, *AFDUAM* 15(1), pp. 217 – 239.

³¹ Art. 78(3)(j) of AP I.

³² See 1987 Commentary to Art. 4(3) of AP II, para 4547, on the meaning of the word ‘shall’ as establishing a duty. See also paras 4549 – 4551 on the definition of ‘child’ depending on biological and psychological maturity, as well as on the culture. Art. 25(2) of the International Convention for the Protection of All Persons from Enforced Disappearance provides for the obligation of State parties to take the necessary measures to search for and identify the children who are subjected to enforced disappearance or whose parents or legal guardians are subjected to enforced disappearance and to return them to their families of origin.

³³ See paras 4553 and 4554.

provisions may amount to ‘other inhumane acts’ constituting crimes against humanity³⁴ or even genocide, if there is genocidal intent³⁵. Protection of children is of uttermost importance, since forcibly transferring children of a group to another group may amount to one of the forms of genocide provided for in Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, of 9 December 1948, and in Article 6 of the Rome Statute of the International Criminal Court.

3 Considerations regarding accommodation or lodging of families and/or women and children

During internment, civilians from the same family have the right to be lodged together in order to lead a proper family life³⁶. Some provisions on vulnerable persons complement this right, namely women and children. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men’s quarters under the immediate supervision of women, and, whenever possible, they shall be held in the same place and accommodated with their families³⁷. Therefore, family units take precedence over gender and other individual considerations. In parallel, children arrested, detained or interned for reasons related to the armed conflict shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units³⁸.

4 Other family rights

Finally, the Geneva Conventions provide for other rights and considerations regarding families that are for the most part linked to the treatment civilians are entitled to while interned. Internees are not prisoners and, hence, they shall be allowed to receive visitors, especially close relatives, ‘at regular intervals and as frequently as possible’³⁹. As far as possible, internees shall be permitted to visit their homes in urgent cases and, in particular,

³⁴ See, for instance, *Prosecutor v Vujadin Popović and Ors*, IT-05-88-T, Judgement of the ICTY of 10 June 2010, para 937, and *Prosecutor v Vujadin Popović and Ors*, IT-05-88-A, Judgement of the ICTY of 30 January 2015, paras 559, 563, 785 and 1710 (reversing convictions for crimes against humanity). Note that the ICTY applied Art. 5(i) of the Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted 25 May 1993 by Resolution 827, as amended. Family members are entitled to receive compensation as indirect victims of international crimes, provided that they have suffered personal harm. See, for instance, *The Prosecutor v Bosco Ntaganda*, Reparations Order of the ICC, 8 March 2021, ICC-01/04-02/06

³⁵ See *Prosecutor v Radovan Karadžić*, IT-95-5/18-T, Judgement of the ICTY of 24 March 2016, paras 4943, 5655 and 5656. See also, *Prosecutor v Darko Mrdja*, IT-02-59-S, Judgement of ICTY of 31 March 2004, para 41, where the ICTY considered family separation as an aggravating factor. In *Prosecutor v Ivica Rajić, a.k.a. Vitor Andrić*, Sentencing Judgement of the ICTY of 8 May 2006, IT-95-12-S, paras 92 – 95, the ICTY also considered the impact of crimes on the victims and their families to evaluate the gravity of the crimes.

³⁶ Art. 82 of the GC IV.

³⁷ Art. 75(5) of AP I and Art. 5(2)(a) of AP II. See also Art. 85 of the GC IV and Rule 119 of the ICRC’s study on Customary International Humanitarian Law. On the protection of women under International Humanitarian Law, see Ojinaga Ruiz, M. R., ‘La protección de la mujer en el Derecho Internacional Humanitario’, in Rodríguez Villasante y Prieto, J.L., and López Sánchez, J. (Coords.) (2017). *Derecho Internacional Humanitario*, 3rd Ed., Tirant lo Blanch, Valencia, pp. 827-866.

³⁸ Art. 77(4) of AP I and Rule 120 of the ICRC’s study on Customary International Humanitarian Law.

³⁹ Art. 116 of the GC IV and Rule 126 of the ICRC’s study on Customary International Humanitarian Law. See also para 3186 of the Commentary of 2020 to Article 71 of the GC III, which provides for a right of prisoners of war to receive family visits in military manuals and domestic laws. This right has been included in Art. 17(2)(d) of the International Convention for the Protection of All Persons from Enforced Disappearance.

in cases of death or serious illness of relatives⁴⁰. Therefore, the GC IV encourages the maintenance of family connections to some extent. In the same vein, internees cannot be deprived of family documents (unless a receipt is given) or of basic belongings, money or allowances⁴¹. They shall also be granted all facilities consistent with the legislation in force in the territory of the detaining power to make remittances to their families and to other dependants⁴².

Other provisions deal with the rights of family members with regard to the remains of the deceased during an armed conflict. Under 34 of AP I, as soon as circumstances and the relations between the parties in conflict permit, the parties in whose territories graves and other locations of the remains of persons who have died as a result of hostilities or during occupation or in detention are situated must conclude agreements on access to the gravesites by relatives of the deceased and on the return of the remains of the deceased and of personal effects to the country upon its request or, unless that country objects, upon the request of the next of kin⁴³. This means that parties to AP I are under the obligation to facilitate requests on these points by family members. However, in the absence of such an agreement, the party in whose territory the gravesites are located may offer to facilitate the return of the remains of the deceased to their country. Therefore, there is no obligation to facilitate access to the gravesites to family members and, where such an offer has not been accepted the party may, after the expiry of five years from the date of the offer and upon due notice to the country, adopt the arrangements laid down in its own laws relating to cemeteries and graves⁴⁴. Only in these two cases, or in case of overriding public necessity, can a party exhume the remains of the deceased⁴⁵. In connection to these provisions, Annex IV to the Third Geneva Convention includes a mention to whether the grave of a prisoner of war is marked and can be found later by his or her relatives.

Finally, children in occupied territories are subject to special protection⁴⁶. If they are orphaned or separated from their parents as a result of the war and who cannot be adequately cared for by a near relative or friend, and the local institutions are inadequate for the purpose, the occupying power shall make arrangements for their maintenance and education, which should be carried out preferably by persons of their own nationality, language and religion⁴⁷. Moreover, information about their parents or other near relatives should always be recorded, if available⁴⁸.

⁴⁰ *Ibid.*

⁴¹ Arts. 97 and 98 of the GC IV.

⁴² Art. 98 of the GC IV.

⁴³ Art. 34(2)(a) and (c) of AP I and, regarding the ashes of deceased internees, Art. 130 of the GC IV. see also Rule 114 of the ICRC's study on Customary International Humanitarian Law, reading: 'Parties to the conflict must endeavour to facilitate the return of the remains of the deceased upon request of the party to which they belong or upon the request of their next of kin. They must return their personal effects to them'.

⁴⁴ Art. 34(3) of AP I.

⁴⁵ Art. 34(4) of AP I.

⁴⁶ On this matter, see Hernández Pradas, S., 'La protección especial del niño en el Derecho Internacional Humanitario', in Rodríguez Villasanté y Prieto, J.L., and López Sánchez, J. (Coords.) (2017). *Derecho Internacional Humanitario*, 3rd Ed., Tirant lo Blanch, Valencia, pp. 867-880.

⁴⁷ Art. 50, paragraph III, of the GC IV.

⁴⁸ Art. 50, paragraph IV, of the GC IV.

Concluding remarks

Family protection considerations are an often overlooked dimension of International Humanitarian Law. However, the rights of family members are rooted in the origins of International Humanitarian Law and they remain a fundamental part of humane treatment of persons during armed conflicts. The rights of family members been discussed and developed in the jurisprudence of international courts and tribunals, thus developing over time.

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ELDER ABUSE AS A BLACK SCAR ON THE FAMILY: GLIMPSES FROM THE STATE OF HARYANA (INDIA)

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Abstract

We have taken the birth on the land where the parents have enjoyed a sense of honour, pride and authority. (In Sanskrit- matro devobhava, pitro devobhava, it means parents are God) Generally being the oldest person they used to be the Head (Karta) of the joint family. Indeed with their vast experience they have been regarded as root of knowledge, wisdom and experience.

Keywords: Elder, curse, nature, family, constitution

Objective of the Paper

- ❖ To understand what is ageing?
- ❖ What are the drawbacks of ageing?
- ❖ Why the crowns are subject to cruelty today?
- ❖ How can we (Government, NGOs and as wards) be helpful in the life of elders?

India has approximately 80 millions of elderly people out of them 30 percent are subjected to some form of abuse or neglect by their own families. Nowadays we have given up our moral ethics towards our elders. The parents are being killed by their own children. Today on 25th September 2019, Mr Rishab a resident of Laxmi Nagar Colony Gurugram killed his father and injuries to mother who is in critical condition admitted in New Delhi Hospital. On 02nd Feb 2019 Surajbhan resident of village Lakhanmajra District Rohtak has killed his mother with axe, which is the sign of decline of the values from the society. In Dec 2018, in village Pandwan, Charkhi Dadri from District Bhiwani in Haryana, the son Rakesh has killed his mother namely Indravati for the want of some money he wanted to purchase liquor. Same type of incident took place in Bharat Colony in Faridabad when the son threw his father from the roof of the house. These are some reported cases which we come across in our knowledge, whereas most of the cases remain unreported.

Findings

- ❖ The education system is faulty. We are getting the Academic Degrees but human values are absent.
- ❖ Due to unemployment the youths have become bane for the society. In place of their utility, they are looting their parents to fulfill their day today demands.
- ❖ Most of the youths of the nation are out of control of their parents and are directionless, hence neglecting the honour towards their parents.
- ❖ The mindsets of the youths have become singular in nature; hence don't want to live with parents which are sign of declining the values in the society.
- ❖ Poor enforcement of laws leads to committing the offence towards elders.

To overcome elder abuse we need to disseminate value based education to our children. Due to vast experiences of their life, the elders are termed as the house of wisdom or the crown of the society. To get the respect and friendly environment is the elder's right not a privilege. We should make our crowns (elders) always happy which is the symbol of our Indian Traditions, Culture and spirit of the Constitution. The same is the objective for the celebration of World Elder Abuse Awareness Day on June 15 every year. In my full length paper I shall be dealing with various laws and approach of various religions in protecting the rights of elders.

1.1 Introduction

India is the second largest country in the world. Nowadays every third person is suffering from elder abuse within family itself.¹

1.1.1 Definition of Ageing

A single or repeated act or lack of appropriate behavior or mistreatment, occurring within any relationship, where there is an expectation or trust, which causes harm or distress to older persons, is called abuse.² Even not speaking to your mother for no apparent reason is abuse.³

Some of the Characteristics of Ageing are

- i. Ageing is common to all members of any given species;
- ii. Ageing is progressive; and
- iii. Ageing involves deleterious mechanisms that affect our capacity to perform a number of functions.

2.1 Role of United Nations in Protecting Elder's Rights

The United Nations is concerned not only with the quality of the life of human beings but also equally concerned with the longevity of the human beings. As a result of the gradual decline in death rates and rising life expectancy it is expected that all countries of the world during the next two decades will witness an increase in the proportion of their population aged 60 and above (Senior Citizens). By the year 2020 more than 1000 million people aged 60 and above will be living in the world. The United Nations is committed to the help of those countries which are facing the challenge for the needs of elderly persons and using effectively their contribution to development. October 1 is observed as the International Day for the Older Persons every year.⁴

2.1.1 Debate on Ageing

The question of ageing was first debated at the United Nations in 1948 at the initiative of Argentina. The issue was again raised by Malta in 1969.

¹ Helpage India Vol.18, January 2012.

² The definition is given as per the ILC's.

³ According to Sharatchandra Gokhale, president of ILC-I, abuse can be- physical abuse, psychological or emotional abuse, sexual abuse, financial or material abuse and intentional or unintentional neglect and abandonment.

⁴ In 1990, the General Assembly designated October 1 as the International Day for the Elder persons, later it was renamed as the International Day for the Older Persons.

2.1.2 International Plan of Action on Ageing

In 1978 General Assembly decided to hold a World Conference on the Ageing.⁵ Accordingly the world Assembly on Ageing was held in Vienna.⁶ The overall goal of the Plan was to strengthen the ability of individual countries to deal effectively with the ageing in their population keeping in mind the special concerns and needs of the elderly. The plan attempted to promote understanding of social economic and cultural implications of ageing and of related humanitarian and developed issues. The plan made 62 recommendations for action in many areas including health and nutrition, protection of elderly consumers, housing and environment family, social welfare, income security and employment and education. The Assembly in subsequent years called on governments to continue to implement its principles and recommendations. The Assembly urged the Secretary General to continue his efforts to ensure that follow-up action to the plan is carried out effectively.

2.1.3 Special International Conference

The General Assembly convened a Special International Conference in 1992 to mark the tenth anniversary of the adoption of the 1982 International Plan of Action on Ageing.

2.1.4 Proclamation on Ageing

General Assembly adopted a Proclamation on Ageing by which it decided to observe 1999 as the International Year of Older Persons. The Proclamation calls for international cooperation to be promoted for life-long health, income generation and new forms of productive ageing. It urges national initiative to view older persons as contributors to their societies and not as burden; engages the entire population in preparing for the later stages of life; help old and young generations to cooperate in creating balance between tradition and innovation in economic, social and cultural development.

3.1 Principles for Older Persons

The General Assembly adopted a set of Principles for Older Persons.⁷ These principles were related to the independence, participation, care, self fulfillment and the dignity of the older persons.⁸ They are as follows:

- i. Older Persons should have the opportunity to work and determine when to leave the work force.
- ii. Older Persons should remain integrated in society and participate actively in the formulation of policies which effect their well-being.
- iii. Older persons should have access to health care to help them in maintaining the optimum level of physical, mental and emotional well-being.
- iv. Older Persons should be able to pursue opportunities for the full development of their potential and have access to educational, cultural, spiritual and recreational resources of society.

⁵ World Conference on Ageing was held in Vienna from July 26 to August 6, 1982 wherein an International Plan of Action on Ageing was adopted.

⁶ International Plan of Action on Ageing 1982 was adopted vide General Assembly Resolution 37/51.

⁷ On December 16, 1991 by a resolution the General Assembly adopted a set of 18 Principles for Elder Persons.

⁸ These set of Principles were adopted vide General Assembly Resolution 46/91 dated December 16, 1991.

v. Older Persons should be able to live in dignity and security and should be free from exploitation and mental and physical abuse.

3.1.1 World Assembly on Ageing

The second World Assembly on Ageing was held in Madrid and adopted a Political Declaration on Ageing.⁹ In the plan of action three priorities were laid down for older persons. They were Older Persons and development, advancing health and well-being into old age and enabling the supportive environments.

3.1.2 The First Priority ensure the following

- i. Older persons and development focused on eight issues which included for urgent action to ensure the continuing integration and empowerment of older person.
- ii. Enabling them to participate actively in society development and the labour force.
- iii. Governments should focus on involving older persons decision making, creating employment opportunities for those who wish to work
- iv. Improving living conditions and infrastructure in rural areas.
- v. They should also alleviate poverty in rural areas,
- vi. Integrate older migrants within new communities and create equal opportunities for education and training.

3.1.3 The Second Priority ensure the following

- i. Advancing health and well being into old age
- ii. Governments should reduce the effects of factors increasing disease and
- iii. Dependence in older age, develop policies to prevent ill health and provide access to food and adequate nutrition.
- iv. The needs and perceptions of older persons should be integrated into the shaping of health policy.

3.1.4 The Third Priority ensure the following

- i. Enabling and supportive environments.
- ii. Recommendations for improving housing and living environments of older persons and
- iii. Promoting a positive view of ageing and enhancing public awareness of the important contributions of older persons.

It also stated the availability of accessible and affordable transport for older persons providing a continuum of care and services for older persons and supporting the care giving role of older persons.¹⁰ It noted that a vital first step towards implementation would be to mainstream ageing and the concerns of older persons into national development frameworks and poverty eradication strategies.¹¹

⁹ In April 2002, the Second World Assembly on Ageing was held in Madrid and adopted the International Action Plan and a Political Declaration which stressed the crucial importance of incorporating ageing issues into all development plans.

¹⁰ The final section of the Plan of Action stated national and international measures aimed at adequate implementation and follow-up.

¹¹ H.O. Aggarwal, “**International Law and Human Rights**” (2008), p 835.

3.1.5 World Health Organization for Health and Ageing

Rapid population ageing will lead to changing demands to health care systems in developing countries. Health care systems will be expected to accommodate care for older adults together with care for other groups. In already aged societies health care systems will have to adapt to increasing proportions of the oldest old. While ageing is not in itself a disease and old age should not be seen as equal to frailty and sickness, increasing demands on the health sector are inevitable. The challenge for the developing world is two-fold i.e. investing in “healthy ageing” from a public health perspective and making medical interventions more cost-effective and more widely available.¹²

4.1 Elder's Rights in India

The moral duty to maintain parents is recognized by all people. However, so far as law is concerned, the position and extent of such liability varies from community to community.

4.1.1 Role of Indian Judiciary in protection of elder's Rights

The judiciary has played a significant role in protecting the rights of elders in India by passing various judgements in favours of elders and by doing interpretation of various terms such as adoptive mother etc. some of the cases are explained as below

In the case of ¹³ **Dr. (Mrs.) Vijaya Manohar Arbat** the appellant, a medical practitioner at Kalyan, District Thane, was the married daughter of Respondent No. 1, Kashirao Rajaram Sawai, by his first wife, who died in 1948. Thereafter, Respondent No. 1 remarried and he is living with his second wife. He filed an application before the Judicial Magistrate, First Court Kalyan claiming maintenance from the appellant at the rate of Rs.500 per month on the ground that he was unable to maintain himself. A preliminary objection raised to the effect, that an application under section 125(1)(d) Criminal Procedure Code by a father to claim maintenance from his daughter was not maintainable was overruled by the Trial Magistrate and upheld by the High Court in revision. Hence the daughter's appeal by Special leave.

Dismissing the appeal, the Court HELD:

1 An application under section 125(1)(d) of the Code of Criminal Procedure, 1973, by a father claiming maintenance from his married daughter is perfectly maintainable.¹⁴

2. The object of section 125 Criminal Procedure Code is to provide a summary remedy to save dependents from destitution and vagrancy and thus to serve a social purpose. There can be no doubt that it is the moral obligation of a son or a daughter to maintain his or her parents. It is not desirable that even though a son or a daughter has sufficient means, his or her parents would starve. Apart from any law, the Indian Society casts a duty on the children of a person to maintain their parents if they are not in a position to maintain

¹² In response to the global challenges of population ageing, WHO launched a new programme on ageing and health in 1995 designed to advance the state of knowledge about health care in old age and gerontology through special training and research efforts, information dissemination and policy development.

¹³ **Vijaya Manohar Arbat vs Kashi Rao Rajaram Sawai And Another** {1987 AIR 1100, 1987 SCR (2) 331}

¹⁴ Section 337C of Criminal Procedure Code 1973.

themselves. It is also their duty to look after their parents when they become old and infirm.¹⁵

This case ¹⁶ reflects a sad state of affairs, as it involves a fight between the father and his sons. This shows that how the children become threat to their parents who brought them. This is a sign of decline of the values in the society which is against our culture and traditions.

In this petition ¹⁷ the petitioner has prayed for quashment of Misc. Criminal Case No.32/2003 pending before the Judicial Magistrate, First Class, Dharamjaigarh on the basis that the respondents herein are step-children of the petitioner herein and not entitled for any maintenance in accordance with Section 125 of the Code of Criminal Procedure, 1973 (for short 'the Code') and any proceeding pending before the Court below would amount to abuse of the process of the Court.

Learned counsel for the petitioner submits that the petitioner is step-mother of the respondents. The respondents are children of deceased Tirth Ram Sahu and Smt. Rajni Sahu (since deceased). A petition for maintenance was filed on behalf of the respondents against their step-mother (the petitioner herein) who is in possession of the property of their deceased father. Objection was raised by the petitioner that the step-mother is not liable for any maintenance to her step-children in accordance with Section 125 of the Code, but the same has been rejected by the Judicial Magistrate, First Class, Dharamjaigarh in Misc. Criminal Case No.32/2003 vide his order dated 11-7-2003, and the same was affirmed by the 4th Additional Sessions Judge (F.T.C.), Raigarh in Criminal Revision No.253/2003 vide his order dated 27-9-2004. Learned counsel further submits that step-mother is not liable for any maintenance under Section 125 of the Code. He placed reliance in the matter of Kirtikant D. Vadodaria Vs. State of Gujarat and others (1996) (4) SCC 479 in which it has been held by the Apex Court that in case of maintenance under Section 125 (1) (d) of the Code mother does not include step-mother for claiming maintenance against her step-son. On the other hand, the order impugned is supported by the respondents and it is submitted that the petitioner is in possession of the property of the father of the respondents, although the petitioner is step-mother of the respondents, she is under obligation to maintain her step- children and they are entitled for maintenance from the property of their deceased father which is in the possession of the petitioner. As has been held by this Court in the matter of Smt. Teejan Bai Chanderakar versus Rajeshwari Chandrakar the court held that normally mother is not liable for any maintenance, if father dies or unable to maintain, in that condition, mother may be liable for maintenance of their children. As has been held by the Apex Court in the matter of Kirtikant (supra), mother does not include step-mother for claiming maintenance against her step-son. In this case, the position is vice versa, step-children had claimed maintenance against their step-mother.

In the light of pronouncement in the matter of Kirtikant (supra), the word 'mother' used in Section 125 of the Code does not include step-mother entitled for maintenance from her step-son. Relying on the same analogy, step-mother is not liable for any maintenance to her step- children under Section 125 of the Code and step-children are not entitled to claim any maintenance against their step- mother. The present respondents may avail remedy before the competent Court and claim property of their father on the basis of succession. The Court

¹⁵ Section 335B-C of Criminal Procedure Code 1973.

¹⁶ **Vijay Kumar Prasad vs State of Bihar & Ors Appeal** (Cri.LJ 431 of 2004).

¹⁷ **Smt. Rama Devi Alias Chameli Sahu vs Jamna Sahu** Misc Criminal Case No.2893 of 2004.

below has wrongly rejected the objection of the petitioner for maintainability of the petition for maintenance and committed illegality. Continuance of such proceeding or any proceeding under Section 125 of the Code against the step-mother would amount to abuse of the process of the Court.

In this case¹⁸ the question that arises in this petition filed by the original opponent is whether the expression "mother" used in Section 125(1)(d) of the Code of Criminal Procedure, 1973 (No. 2 of 1974), (hereinafter referred to as 'the Code') includes "adoptive mother" as well. In view of the court, the expression "mother" in Section 125 of the Code includes an 'adoptive mother'.

4.1.2 Under Criminal Law

Criminal Procedure Code, 1973 is a secular law and governs persons belonging to all religions and communities. Daughters, including married daughters, also have a duty to maintain their parents.¹⁹

4.1.3 National Policy for the elders

The Government of India approved the National Policy for Older Persons on January 13, 1999 in order to accelerate welfare measures and empowering the elderly in ways beneficial for them. This policy included the following major steps

1. The Ministry of Justice and Empowerment has announced regarding the setting up of a National Council for Older Person, called *Agewell Foundation*. It will seek opinion of aged on measures to make life easier for them.

2. Attempts to sensitize school children to live and work with the elderly. Setting up of a round the clock help line and discouraging social ostracism of the older persons are being taken up.

3. The government policy encourages a prompt settlement of pension, provident fund (PF), gratuity, etc. in order to save the superannuated persons from any hardships. It also encourages to make the taxation policies elder sensitive.

4. The policy also accords high priority to their health care needs.

5. According to Sec.88-B, 88-D and 88-DDB of Income Tax Act there are discount in tax for the elderly persons.

6. Life Insurance Corporation of India (LIC) has also been providing several scheme for the benefit of aged persons, i.e. Jeevan Dhara Yojana, Jeevan Akshay Yojana, Senior Citizen Unit Yojana, Medical Insurance Yojana.

7. Former Prime Minister A.B.Bajpai was also launch 'Annapurana Yojana' for the benefit of aged persons. Under this yojana unattended aged persons are being given 10 kg food for every month.

8. It is proposed to allot 10 percent of the houses constructed under government schemes for the urban and rural lower income segments to the older persons on easy loan. The policy mentions:

Despite all these attempts, there is need to impress upon the elderly about the need to adjust to the changing circumstances in life and try to live harmoniously with the younger generation as far as possible.

¹⁸ **Baban Alias Madhav Dagadu Dange vs Parvatibai Dagadu Dange** (1978) 80 BOMLR 305.

¹⁹ Sec. 125-128 of the Code of Criminal Procedure in 1973 provides that parents are entitled for maintenance from their children.

4.1.4 The Maintenance and Welfare of Parents and Senior Citizens Act 2007

The Act provides to solve some of the problems of the senior citizens who are dumped by their own children. The Act ensures that state hospitals provide beds for all senior citizens as far as possible, provide them facilities for treatment of chronic, terminal and degenerative diseases, expand research activities for chronic elderly diseases and aging and provide earmarked facilities for geriatric patients in every district hospital duly headed by a medical officer with experience in geriatric care. A childless senior citizen can claim maintenance from any relative who possess his property or who would inherit it. The state government is directed to constitute a tribunal which would hear the cases regarding maintenance.

- ❖ The maximum maintenance allowance is to be specified by the state government which should not exceed 10,000 per month.
- ❖ There is the provision of imprisonment if a person defaults in the payment of maintenance as per the order of the tribunal.
- ❖ The appeal against the order of the tribunal can be made to the appellate tribunal within a period of 60 days.
- ❖ The tribunal may conduct a summary
- ❖ The parties cannot engage a legal practitioner for the proceedings to cut the cost of the proceedings.
- ❖ The Act provides for establishment of at least one old-age home in each district with a capacity to shelter 150 senior citizens.
- ❖ A senior citizen can also cancel the transfer of his property by will or gift by applying to the tribunal.
- ❖ The Act prescribes punishment for the abandonment of parents or senior citizens by a person who is liable to take care of them.

5.1 Conclusion

The above mentioned cases prove that we are losing the sense of respect towards our elders, which is sign of decline of the amount of civilization of our society. To overcome such type of problems we need to disseminate value based education to our children and there is a need to help our Government and NGOs to make the conditions better of our elders. In order to make use of the experiences of elders in the form of wisdom, we must pay respect to them. It is said that elders are the crown of the society.²⁰ We should make our crowns (elders) always happy which is the symbol of our Indian Traditions, Culture and spirit of the Constitution. The same is the objective for the celebration of World Elder Abuse Awareness Day on June 15 every year.

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A COMPARATIVE STUDY OF WORKING OF FAMILY COURTS IN TIMES OF PANDEMIC IN EUROPE

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Abstract

In the mid of 2020, the pandemic had significantly spread across the whole world and among the affected nations was Europe with 2/3rd of the total number of deaths by this COVID 19. This article is to present a comparative analysis of the consequences of the health crisis on family matters in Europe's jurisdictions and how their law offices are facing these major changes that makes them rethink their practice and the family justice. Lastly, the effects caused on human rights and the Rule of Law and Way ahead. International institutions such as the United Nations, at a global level, or the Council of Europe and the European Union, at European level, must engage in transnational coordination in the judicial response to emergencies such as the one the world has faced with COVID-19. The study covers the most affected countries i.e., France, the United Kingdom, Spain, Italy, Germany and Switzerland on the aspects of –

- a) How Applications in Family Matters is Filled in Front of Your Jurisdiction During the Lockdown and How Pending Cases is Dealt with?*
- b) Means of communication with courts in family matters during this time*
- c) The consequences of the "lockdown" on the rights of the parents*
- d) State of alternative dispute resolution methods used during this time*
- e) A general picture of Judiciary in the pandemic situation.*
- f) The consequences of the crisis will be on the practice of family law lawyers?*

Keywords: Family Court, Rule of Law, Human rights, Access to Justice, Council of Europe

FRANCE

In France due to the lockdown, the family courts restricted themselves to certain matters (international child abduction cases or urgent claims to obtain a restraining order in cases of domestic violence) and were physically closed. And the hearing of the pending cases was cancelled or postpone. Decisions that were supposed to be rendered during the "lockdown" can be postponed. Exceptionally, some decisions related to cases already heard in Court can be rendered and send to the parties by all means.

During the lockdown, the court to communicate with the parties to keep them informed by all means. This includes letters, emails, phone calls or via the RPVA (Private Virtual Network for Lawyers). Lawyers are encouraged to only communicate with the courts when absolutely necessary and have no other solution than waiting for information. Most clerks have been asked to stay at home and don't have access to the files anymore. Justice in France is at a standstill, slowed down as much as possible, and the communication measures announced in the law are ineffective. In France, the Parent's rights are still enforceable but are regulated in the context of movement of their children. The can't refuse to adhere to the

court's decision except in some exceptional circumstances. The role of family lawyers is thus more than ever crucial to accompany the parents to find solutions and help them to adjust the implementation of their rights in the best interest of the child.

France is also very much involved in the development of arbitration, which offers a wide range of possibilities when the matter is arbitrable, something we still have to work on in family matters to expand the spectrum. As most hearings or judicial deadlines are postponed at an unknown date, those who have not yet started the procedure are afraid of getting lost in it and those who have already been in it for a long time are afraid of getting stuck in it for longer.

The current Covid-19 pandemic, which has prompted the French government to issue a stay-at-home order over its entire territory, may cause an increase in the acceptance and use of virtual hearings by French courts. There have been recent reports of several courts using videoconferencing for hearings that would normally occur in person. While most of the examples we found seem to concern only criminal proceedings,¹⁰ we found at least one district that was considering experimenting with virtual hearings for civil proceedings.¹¹ The bar association of Lille, in northern France, has called for the use of videoconferencing for court hearings. As of April 1, 2020, virtual hearings were still awaiting approval from the judges of the various courts in the district.¹² Assuming the judges approve, the first experiments will take place at the tribunal de commerce, which deals with commercial cases, before being extended to other courts.

UNITED KINGDOM

It is astonishing to see that UK still has a physically working Judiciary and has categorised the kinds and number of courts which could be physically set. In terms of pending cases, around 40% of court work is proceeding. The vast majority is proceeding by way of remote hearings. Senior members of the Family Division have been very proactive in trailing technology that enables remote hearings to take place. The judiciary are prioritising public children work and some private children work such as child abduction and domestic abuse, together with urgent divorce applications and some urgent Court of Protection applications to include serious medical treatment cases and deprivation of liberty.

To communicate with the court is primarily through e-mails and in some cases telephones may be used. Judges are more "hands on" often communicating with parties directly.

Children and Family Court Advisory and Support Service (CAFCASS) has issued a guidance according to which the child's routine should be maintained unless there are justified medical/self-isolation issues. Mediation can be conducted remotely and is preferably also in the international cross border cases and arbitration has only recently been made available.

SPAIN

In Spain all the Judicial Bodies are suspended until further decree and only some exceptional cases could be entertained by the courts under Art. 158 of the Spanish Civil Code if urgent measures are required. The only way to communicate with the Court is by electronic means using Lexnet, a system for the management of remote and electronic notifications from the Courts to the professionals of the justice system. In the Royal Decree, there was no reference about the parent's rights specifically but, a discretionary power is

given to the court in many concerned areas life free movement of people and private vehicle of general public. There is no specific arbitration board but, this might be done on the basis of consent between the respective parties. The lawyers have already adapted to work on a remote-distance basis and have not noted any changes in our relationships with clients.

ITALY

Vastly, all the courts and proceedings are postponed or suspended except for some cases (some Juvenile Tribunal procedures, Alimony and child support procedures and urgent procedures regarding personal fundamental rights). But, there is no prohibition to file a case concerning any matter. And for pending cases, terms and hearings of the suspended procedures are postponed by law. But hearings of most non-suspended procedures are postponed as well by judges. In Italy, ordinary means of communication is used like e-mail or as specified by the Minister of Justice.

Rights and duties of parents are neither stressed nor oppressed. Governmental guidelines only recognize that visiting children or going to the other parent are legitimate reasons to go out of one's home. But neither the Governments nor the Courts have regulated other family law matters. Preventive mediation in family matters is not mandatory but "negoziata assistita" has not been suspended which allows spouses to separate, divorce, or to modify previous separation or divorce statements without going to the judge, but only by having an authorization by the public prosecutor. There is no prohibitions on lawyers to use e-tools like MS Teams or Skype to deal with clients and the documentation can be done via mail.

On April 8, 2020, the Italian Senate Budget Commission approved a legislative amendment allowing for videoconferencing in certain mediation procedures. The reform would amend Decree-Law No. 18 of March 17, 2020, to suspend certain mediation deadlines and establish videoconferencing as the method to continue pending mediation proceedings during the period March 9 through June 30, 2020. The amendment would also provide videoconferences, that, in mediation procedures conducted via lawyers may digitally sign the minutes and the respective conciliation agreement and attest that their clients have digitally signed such documents.

GERMANY

There has never been an official lockdown in Justice. Among all the guidelines and regulation issued by the government it did not mention about the courts. Applications in family matters can continue to be filed by written application, sent to the court by post or by the German secured digital service "beA", the official register of all attorneys in Germany with an official secure mail account with the Federal Bar Association. Though courts are working in a limited manner and limited to urgent matters such as domestic violence, guardianship issues or questions related to statutory limitations are treated. There are no remote hearings or video conferences. If considered necessary, there is still a hearing in a court room.

Violations of rulings on visitation rights can be pursued with a fine up to 25.000,00 EUR or imprisonment though there is no official guidance. When parents live abroad, visitation rights are usually not possible because of the closing of the borders.

Video mediations is the only type of private mediations that are suggested by private institutions or private mediators. Depending on the client's decision they can take place. All the informal face-to-face meetings are postponed instead mobile and e-mails are preferred.

The order of the court allowing videoconferencing must determine the location from which the parties will participate or where the evidence will be taken. The text of the law does not restrict these locations ("another location"), which can be a courtroom in the city where one of the parties resides, a law firm, company, or public videoconference room, among others. However, the location must be within the territory of Germany. Cross-border videoconferencing is only allowed for judicial assistance in cases under the European Small Claims Procedure Regulation. The trial or the taking of evidence will be simultaneously livestreamed to the courtroom and to the other location.

Almost all courts in the German states have installed the technical equipment to perform virtual trials. In some states, every court has its own equipment, whereas others have mobile systems that can be used by several courts. The software used also varies; the Higher Regional Court of Hannover, for example, uses Skype for Business. However, there is no legal right to have a virtual trial, meaning parties cannot force the courts to get the necessary technical equipment.

SWITZERLAND

The Swiss federal government, declared a state of extraordinary situation. Applications in family matters can continue to be filed by written application, sent to the court by registered post. The dates for pending cases were postponed further. But, for the urgent cases the courts may be opened subject to the guidelines issued by the government. All remotely conducted hearings must respect a certain number of rules, including guaranteeing quality of the stream's sound and image, as well as the recording and addition to the file of this record, and data protection.

Written communication has been the main mean of communication with courts in family matters during this time, although the courts' phone lines are still open daily during restricted hours.

Visitation rights except for the supervision visitation (whether in an official institution or with supervision conducted by a single supervisor in an open environment) are enforceable but following all the safety measures for both children as well as parents. court has referred to the contact of a number of organizations as well as sworn, registered mediators specialised in family cases, which have better ability able to operate and offer their services remotely. Lastly, family law lawyers will remember the experience of approaching issues in a more collaborative way where possible as a positive step and favour this in the future.

THE RULE OF LAW AND HUMAN RIGHTS

The Covid-19 pandemic has created considerable challenges for the rule of law in a number of States, including for the functioning of courts during these states of emergencies, curfews and lock-downs. Yet, courts have a vital function during and after the pandemic, in particular to ensure judicial scrutiny of emergency legislation, and to provide an effective remedy against excessive emergency measures in individual cases. Access to courts is also required in other urgent legal matters. Courts have been shut partially or in some cases

completely in many states and the judiciary and legal profession have had to adapt to different ways of working within a very short period of time.

The following are a number of key standards which remain and which in many instances are increasingly at risk during this time.

- Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and Article 6 of the European Convention on Human Rights (ECHR) set out The Right to Fair Trial. This encompasses the principle of the presumption of innocence, the rights to a public hearing and to defence.

1.1 The use of emergency powers to enable derogation from certain, but not all, rights or restrictions. International law obligates that such measures should not exceed that which is required by the exigencies of the situation and should be supervised and adhere to principles of necessity and proportionality.

1.2 Freedom of expression and the ability of others to discuss and, if necessary, critique the actions taken by the executive and to hold it to account.

1.3 Upholding the independence of the judiciary and the principle of separation of powers to ensure that issues that should be regulated by and subject to the authority of the courts are not taken on by the executive or other state authorities or indeed private entities.

1.4 International human rights law, including the International Covenant on Civil and Political Rights (ICCPR), incorporates the right to a “public hearing” in all determinations of criminal charges or of a person’s “rights and obligations in a suit at law.”

2 Recommendations by ICJ and Way ahead

2.2 The right of any person to be physically present for his or her trial on criminal charges should be fully respected, including in situations of crisis or emergency such as the COVID-19 pandemic.

2.2 Other considerations for the fairness and integrity of the proceedings, that would apply in an in-person hearing, should also be applied to a hearing by videoconference.

3 Way Ahead

3.1 Coordination: it has become important to share experiences and examples and to ensure coordination among different judicial sectors. Coordination groups can help to facilitate lessons learnt and examples of good practice.

3.2 Discussion on the financial implications of the measures needed to be put in place to ensure the safety and protection of judges, staff and those using the judicial system

3.3 Data gathering by courts themselves is also crucial. Collecting information on the cases handled under crises mode should not be forgotten. It is an important element to capture lessons learned, plan capacity and identify ways to prioritise cases for face-to-face hearings.

3.4 Regular review so that temporary measures do not inadvertently become permanent, unless this is considered desirable

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„SENTIMENTAL” ROBOTS (*LOVOTICS*) AND THEIR IMPACT ON PRIVATE AND FAMILY LIFE

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Abstract

*The emergence of a new category of artificial intelligence mechanisms - that of robots that replicate, from a sentimental/emotional point of view human manifestations and attitudes - is a fact that creates tensions in the classical theory of human rights from the perspective of interpreting and applying guarantees of protection with regard to private and family life. This paper aims to analyze, by reference to soft law instruments and representative doctrinal opinions, the possibility of recognizing the legal status of sentimental robots and the legal consequences of such formal recognition. Taking into account the particularity of sentimental robots, our analysis will give prominence to the repercussions brought by this peculiar robots on private and family life as a consequence of the possibility of granting a *suis generis* legal status in their favor.*

Keywords: artificial intelligence, lovotics, private and family relations, soft law.

The mechanisms of artificial intelligence based on emotion and feeling (*lovotics*): the premises for reconfiguring private and family life

Artificial intelligence (AI) is a reality (of both cognitive and applied nature) that reconditions human existence and its sphere of manifestation. The absolute topicality related to artificial intelligence determines, *ipso facto*, aggregate definitions that can present similarities and convergences, without merging in the form of an epistemological unity. Artificial intelligence is a specific field at the confluence of technology and technique that aims to accomplish tasks and objectives (such as machine learning, predictive analysis, natural language processing) - these aspects being traditionally associated with human beings. [1] Following the vein of evolutionary thinking, artificial intelligence is an instrument designed by the individual that hypostasizes and self-demonstrates through robotics, emulating the abilities of human intelligence. [2] Given that the resources and applications of artificial intelligence are emerging on the background of the manifestation of human consciousness and rationality, it is clear the inter-conditioning relationship "human intelligence" - "artificial intelligence" and the impact of the latter on all forms of manifestation of the human being. Exploiting the bivalent relationship described above, two explanatory guidelines of artificial intelligence have been systematized in the literature [3]: (1) rationalist and (2) humanist. The rationalist conception is based on the *scientific tests* verified in practice by reference to artificial intelligence products. For example, the *Turing test* assumes that in identifying artificial intelligence tools it is necessary to verify the extent to which the evaluated technological product can develop the skills needed to simulate human behavior. At the empirical level, the test is applied as follows: a human being questions the players (generically called A and B) using a virtual application (chat), seeking to assess, at the end of the questions, whether players A and B are technological entities or human beings. If the evaluator (human being) cannot establish, based on a general discussion which of the interlocutors is a technical application, respectively which

represents a human being, it means that the two entities (human and artificial) are indistinguishable. Thus, the *intelligence* conceptualized by Turing is, rather, the pursuit of translating the human specificity on artificial systems and not the intelligence understood in terms of rationality/systematized, organized thinking. [4] On the other hand, Isaac Asimov designs an algorithm for the interaction between robots and human beings provided that the former are aware of their condition: (1) the robot will not cause harm to human beings or, through non-intervention, will not allow a human being to be harmed (Law 1); (2) a robot must obey orders given by a human being as long as they do not conflict with Law 1 (Law 2); (3) a robot must protect its own existence as long as this does not conflict with Law 1 or Law 2 (Law 3).

Artificial intelligence is a "technological replica" of human intelligence, created by the individual in order to facilitate the achievement of tasks and objectives traditionally assigned to man. However, human intelligence manifests itself on multiple levels, going beyond purely rational aspects; in this sense, the science of psychology [5] theorizes on the types circumscribed to the intelligence of the human being, distinguishing between musical intelligence, spatial-visual intelligence, interpersonal, intrapersonal, linguistic, logical-mathematical, kinesthetic, naturalistic, existential intelligence. On the other hand, artificial intelligence values the logical-mathematical typology, showing a predilection for criticism, observations and scientific experiments, reasoning and algorithms.

The fundamental challenge of future artificial intelligence projects consists in the development of robotics in the direction of *interpersonal* intelligence (manifestation of empathy, tolerance and human relationships with others) and *intrapersonal* (the ability to assess their own identity). On these coordinates, in this paper we aim to adopt an inclusive approach to artificial intelligence, built by taking into account the affective-personal dimension. The unique element of robotic applications lies in their adaptation to emotional stimulus, specifically human, and to obtaining a response similar to human.

The stages related to the development of a specific artificial intelligence, capable of true processing of feelings have already been initiated by the development of robots based on affective artificial intelligence (*lovotics* [6]). The key findings of the research will focus on the impact of artificial intelligence on private and family relationships; the point of interest being outlined according to the final result: is the robot-human being emotional similarity a disguise of the human emotion or will this be a *suis generis* replica of a new affective typology? The answer depends directly on how researchers will be able to capture the physiological, physical, biological paradigm that triggers the emotional response of the human being. To the extent that the emotional response of robots will have a high degree of likelihood, the limits of epistemological investigation remain, being found in the detection of that mechanism that can mimic, in robotic applications, the primary source of human feeling.

The incongruity between reality and theory: a soft law normative framework for the man-robot sentimental/family relationship

Based on the theoretical and physical construct *Lovotics*, the relationship between man and robot is explored on the coordinates of increasing emotional similarity between the two entities. The robotic paradigm is no longer a rigid field and subsidiary to humanity, having only the calling to facilitate the use of applications capable of improving the life of the individual. By introducing the emotional-sentimental element in the construction and

functioning of the robot, the mimicry of the human being will become perfectible creating the premises for the robot, in return, to be perceived as a partner in the sentimental, personal and family life of the individual. The relationship between humans and artificial mechanisms was developed from an emotional perspective in order to insert, at the level of robotic constructs, states of attachment and love similar to those felt by individuals. Designing robots by developing new theories applicable to the realization of hardware devices and software algorithms, artificial intelligence probabilistically uses mathematical models to formulate love. [7]

For the juridical science and for the human rights theory, *Lovotics* research is revolutionary from at least three study premises: (1) the introduction of the emotional element in the field of artificial intelligence is a paradigm shift in understanding the process of designing and construction of robots; as robots borrow the characteristics that constitute the prerogative of the members of the human family, they resemble humans up to the point of total identification; (2) from the first premise follows the reconfiguration of the human-robot interaction mode in the conditions in which both entities benefit from self-awareness (at the rational, emotional, romantic level); (3) the ethical-moral consequences of this reconfiguration are directly applicable to marriage - as a legal institution whose main objective is the establishment of a family. The individual private sphere is questioned in its core, remaining open to research and regulation issues related to the recognition of the legal personality of robots holding artificial intelligence, respectively the integration of robots into family relationships with human partners and assuming parental status.

As it represents an innovative study perspective, changing the paradigm of manifestation of artificial intelligence (by introducing the emotional element) does not allow reporting to binding legal rules (developed nationally or internationally) nor invoking the principles of *jus cogens* on artificial intelligence. The legislation will be addressed through *soft law* documents that present possible guidelines for regulating emerging human rights issues that are adjacent to artificial intelligence.

In the study *The Ethics of Artificial Intelligence: Issues and Initiatives* elaborated by the European Parliament [8], the personal robot-human relationship is cautiously conceptualized vis-à-vis the foundations of such an interaction through the lenses of ethics, morality and the impact on personal rights of the individual. The reasoning presented in the study is based on scientific research, touching on multiple aspects: (1) if humans would develop emotional attachments to robots and, following the application of specific reasoning *lovotics* robots would replicate human affection with feelings of love, the result could affect the human psyche and the way of perceiving human relationship; (2) sentimental/sexual robots or robots predisposed to romantic relationships would distort people's perceptions of the value of human beings and the way humans and robots interact; (3) the establishment of sentimental connections between robots and human beings can lead, on the long run, to the reconfiguration of marriage relationships and the establishment of hybrid families. This point directly models the ethical and moral standards that traditionally positioned the robot as a tool subsequent to human needs, being conceived, designed and used for the purpose of serving man.

European Parliament Resolutions on the establishment of civil law rules on robotics [9] and the ethical aspects of artificial intelligence, robotics and related technologies [10] set out binding regulatory perspectives on the legal status of emotionally intelligent robots

and the ethical principles applicable to these issues. The correct legal way of regulating robots is the central point of the *European Parliament Resolution establishing rules of civil law in robotics*, with express recommendations made to the Commission - the latter being required to carry out actions to explore and analyze the implications of all legal solutions applicable to the field of creating a specific long-term legal status for robots, so that at least the most sophisticated autonomous robots can be established as having the status of electronic persons responsible for repairing any damage they may cause; at the same time, the application of electronic personality may be established in cases where robots have to make autonomous decisions or interact independently with third parties.

The insertion of artificial intelligence in the sphere of private and family life conditions the modification of the principles of human ethics and morality. The reasoning advanced by the European Parliament Resolution establishing rules of civil law in robotics aims, on the one hand, to make the design and operation of robots *accessible* so that people understand the reason that led to a certain robotic action (if we are talking about an emotional manifestation of the forms of artificial intelligence, the decisive steps are complex and are based on mechanical projections of human systems involved in the formation of feelings - from psychic, psychological to neurovegetative or endocrine mechanisms); on the other hand, ethical-moral principles act as tools to fill the gaps in the European *acquis* in order to establish a future legal framework aimed at protecting the human being in relation to forms of artificial intelligence. Thus, paragraph 13 of the Resolution refers to the features that should be integrated into the ethical-moral principles applicable to the emotional robot-human relationship: *the guiding ethical framework should be based on the principles of charity, non-malice, autonomy and justice, on the principles and values enshrined in Article 2 of the Treaty on European Union and also enshrined in the Charter of Fundamental Rights, such as human beings, dignity, equality, justice and fairness, non-discrimination, informed consent, privacy and family life, data protection; the fundamental principles and values of Union law, such as non-stigmatization, transparency, autonomy, individual responsibility and social responsibility, should also be taken into account.*

The foreshadow sentimental and family relations between the human being and the artificial emotional intelligence represent an autonomous subject of regulation, received, analyzed and susceptible to be normed on the coordinates of responsibility.

The Robotics Charter [11] falls into the category of *soft law* documents with a role in explaining the relationship between the author of artificial intelligence mechanism and the latter in order to reflect the responsibility of researchers in ensuring the values of dignity, privacy and safety of individuals. In the preamble, the Charter establishes minimum rules of conduct that must follow the principles of humanism, with encouragement to consider, in the early stages, the future implications of the technologies or objects being researched and to develop a culture of responsibility in order to address challenges and opportunities which may be crystallized in the future. Respect for fundamental rights, for the guarantee of individual well-being and self-determination are fundamental principles applicable to researchers in the field of robotics in order to guarantee the highest ethical and professional conduct. The design of artificial intelligence mechanisms with integrated emotional component follows the rules of guaranteeing human dignity and autonomy (of physical and psychological nature), the Charter establishing *expressis verbis* within the task of scientists the obligation to carry out the creation and implementation of robotic mechanisms in

accordance with the *precautionary principle*, anticipating the potential impact of the results on safety and taking appropriate preventive measures, proportionate to the level of protection, while encouraging progress for the benefit of society and the environment.

A particular problem highlighted by the Charter and applicable in assessing the possibility of creating a romantic human-robot relationship is that of *controlling robots through the reversibility of their functionality*. According to the Charter, reversibility, being a necessary condition of controllability, is a fundamental concept when programming robots to behave safely and reliably. A reversibility model "commands" the robot what actions are reversible and how to reverse them if they are creating unwanted effects. Under these conditions, researchers seeking to develop the mechanisms of artificial intelligence such as *lovotics* are facing a *demiurgic dilemma*: accommodating efforts to identify a mechanism capable of mimicking, from a sentimental point of view, the human being with the rigidity of controllability and the impression of reversibility of their functions. From this, a new limitation arises: if the specific actions to artificial intelligence mechanisms can be qualified in terms of "good" or "bad" - these being of a rational nature, the actions of sentimental/emotional robots cannot be perceived in the sense of classical ethics, imposing the reconfiguration of the operation mode of controllability/reversibility.

The incongruous aspects related to the possibility of emotional robots to establish emotional relationships with human beings in the perspective of formalizing family relationships persist even for reasons related to *the lack of legal obligation of the Charter*. As we mentioned above, the latter can only establish real legal obligations on researchers and designers in robotics only if the guidelines set out in the Charter are likely to be incorporated in a document which enshrines a contractual *suis generis* relationship. As the *Study Legal Affairs European Civil Law Rules in Robotics, drawn up at the request of the European Parliament's Committee on Legal Affairs* points out, [12] the role of the Charter is to set out fundamental principles in this area - which, if appropriated by the professional authorities of the field of study in question, may constitute directions of action and the basis of the obligation for the parties to whom they are addressed; on the other hand, their imposition on third parties is problematic given that the content of the rules set out in the Charter is not assumed by formal regulations by European officials. The way in which the provisions of the Charter affect third parties is an element that integrates into the issue of robot action in the context in which we identify the buyers of robots in the person of third parties. At this point another ethical dilemma arises: if the buyers of robots are not bound by the ethical rules set out in the Charter, can they be maintained in the subsequent relations established between the robots and the new owners? In order for the principles applicable to robots - as set out in the Charter - to be exploited *erga omnes*, a mandatory legal assumption is required, through specific rules - whose purpose is comprehensive, referring both to the beginning of the use of robotics (design and functionality) as well as to the mediated purpose of the development of artificial intelligence mechanisms (the possibility of their involvement in the mimicry of sentimental and family relationships achieved through the integration of the human factor).

Observing the social challenges of robotics, the European Commission is developing, at the beginning of 2020, a *soft law* tool [13] *White Paper On Artificial Intelligence - A European approach to excellence and trust* aimed at highlighting the social, ethical and development resorts that established the possibility of creating an articulated normative framework in the matter. One of the stated objectives in the field of artificial intelligence is

to create a unique ecosystem of trust between the Member States of the European Union, aiming to provide citizens with the legal certainty to innovate using artificial intelligence. The instrument developed by the European Commission evaluates the role of artificial intelligence mechanisms in terms of practical applications determined by algorithms and reasoning associated with AI such as those usable in the field of work, health, consumer protection, public administration activity, etc. The consequences of inserting the mechanisms of artificial intelligence in the family and emotional environment of the individual are not explored in order to develop an appropriate regulatory framework. The specificity of *lovotics* robots lies in the potential of their use in meeting the emotional needs of humans by offering a viable alternative to the traditional human partnership established on the basis of individual interaction. The document does not address the social scenario of the emotional relationship between robots and human beings, nor the possibility of formalizing it within the legal framework in the form of marriage or family. Although the benefits of artificial intelligence in social life are highlighted, the identification of their limitations is correlated exposed in the Commission's instrument. The limits of artificial intelligence are assessed in relation to the mitigation of human peculiarities in the context of the risks and challenges that artificial intelligence mechanisms project on human rights.

The potential harm brought by artificial intelligence mechanisms to human dignity, equality and non-discrimination, to the sphere of privacy and family life mentioned in the Commission instrument is a two-pronged issue: (1) maintaining the autonomy and independence of human beings in relation with robots in which the human being designs, conceives and ensures the functionality of the robots, being at the same time the beneficiary of the robotics actions; (2) establishing the limits of action of robots and determining the lines of autonomy of emotional/ sentimental robots in their relationships with their human partners. Indeed, if we place the human-robot relationship on the coordinates of socio-technical fields (medical, informational, media) the subordinate position is allocated to robotic mechanisms that are meant to bring services to humans; instead, on the coordinates of private and family life, the establishment of a possible human-robot emotional partnership causes uncertainties regarding a possible hierarchy between the two parties. In this context, the limits of action to which the artificial intelligence mechanisms must respond are blurred, being necessary to probe the point to which the dissociation between man and robot remains rigid, respectively the point where the perfect mimicry between the two entities is allowed.

The introduction of considerations for the protection of human rights and fundamental freedoms in the process of interacting with mechanisms based on artificial intelligence is made in the Commission's White Paper by setting out aspects of *human surveillance* in the relationship between humans and robots.

Human supervision ensures the appropriate direction of the action of artificial intelligence mechanisms in the sense of guaranteeing ethical use, based on their trust. Among the applications of human surveillance applied to artificial intelligence mechanisms presented by the Commission's White Paper are situations where, objectively, the action of robots can be considered harmful to human life: (1) *the result of the AI system becomes effective only if previously reviewed and validated by a person (for example, rejecting an application for social security benefits is a decision that can only be made by a person)*; (2) *the result of the AI system becomes effective immediately, but human intervention is ensured later (for example, the rejection of a credit card application can be processed by an AI*

system, but human review must be possible later); (3) monitoring of the AI system during operation and the ability of the human being to intervene in real time and subsequently deactivate it (for example, a stop button or procedure is available in a driverless car when a person determines that the operation of the car is not safe); (4) human intervention must remain possible in the design phase, by imposing operational constraints on the AI system (for example, a driverless car must cease to operate under certain low visibility conditions when the sensors may become less reliable; or must maintain a certain standard distance in any given condition from the previous vehicle). [14]

The right to privacy and family life in the perspective of the evolution of *lovotics*: possible legal solutions to accommodate family relationships between robots and humans

Family relationships are subject to social transformations and legal norms must be prompt in accommodating them and in shaping marriage and family relationships in a coherent and appropriate legal pattern. The inter-American system of human rights protection has reformed traditionalist conceptions of family relations, recognizing in the case of *Obergefell v. Hodges* [15] same-sex marriages under Amendment 14 of the United States Constitution [16]. Known in human rights doctrine as the equality amendment, the text of amendment 14 reads as follows: *All persons born or naturalized in the United States and subject to their jurisdiction are citizens of the United States and the State in which they reside. No State shall enact or enforce any law that reduces the privileges or immunities of the citizens of the United States; no State shall deprive any person of life, liberty or property without due process of law; nor shall it deny any person under its jurisdiction the equal protection of the law.*

The Asian human rights system has accommodated a modern challenge regarding artificial intelligence systems: in 2017, it granted the citizenship of a humanoid-type artificial intelligence mechanism (the case of the Sofia robot in Saudi Arabia), respectively the right of residence (the case of chat -bot [17] Shibuya Mirai in Japan). In both cases, a comprehensive conceptualization of the forms of artificial intelligence foreshadows the production of specific legal effects. The recognition, in favor of standard forms of artificial intelligence, of citizenship or of particular rights deriving from a legal status similar to citizenship determines another subsequent issue. Thus, it is necessary to assess the extent to which citizenship/rights granted to a humanoid form of artificial intelligence can lead to reconfigurations of human rights theory and practice. Granting citizenship/rights in favor of forms of artificial intelligence involves, on one hand, rethinking their assimilation with the legal status of humans and, on other hand, creates the premise for formalizing the sentimental relationship between robots and human beings. Some issues are crystallized: (1) if the self-awareness of the forms of artificial intelligence is realized in accordance with the pattern of human self-awareness, robots can be considered as specific subjects of law with legal capacity, being able to assume obligations and the exercise of rights? (2) can accepting a positive answer to this question lead to the establishment of robots as holders of specific rights, radically changing the science of human rights?; (3) the main legal dilemmas that will result from the assimilation of human-robot in the field of legal science aim, first of all, the coexistence of the sphere of rights related to artificial intelligence with that corresponding to human rights as well as the identification of neutral ways to resolve conflicts of rights.

In order to accommodate the existence of robots as subjects of law and sentimental/emotional robots as human partners in family relationships, two fundamental limits of the situations in which the robot Sofia and the chat-bot Shibuya Mirai find themselves must be noted: (1) citizenship and the right of residence, respectively, are legal operations carried out on the background of a previous legislative vacuum given the fact that, at the time of the facts, there was no coherent normative system in Saudi Arabia or Japan that would allow such legal recognition in favor of artificial intelligence; (2) after the accomplishment of the two legal operations and noting the normative vacuum at national level, no operations of legal accommodation of the new statutes offered to the robots (the citizen and the resident one) were performed.

The limits mentioned in the above lines require a progressive approach. Inspired by the legal regulations established in favor of robots, specialists in the field have designed humanoid-type artificial intelligence entities that have been used to form a family, being concluded between human beings and these entities *de facto marriages*. The share of these marriages is experiencing a sustained development, the phenomenon expanding trans-regionally: in China, engineer Zheng Jiajia designed and built his own life partner (Yingying) and in France, Lilly developed the 3D Inmmovator robot in order to conclude a marriage and in order to establish a family with the legalization of marriages between human beings and robots. On a small scale (summarized in synthetic devices, without artificial intelligence mechanisms inserted), in America, a man who recommends himself under the pseudonym Davecat is engaged in a *de facto* marriage relationship and, at the same time, in another relationship, of an adulterous nature, with two synthetic mechanisms, designed in the form of sex dolls. Another American, Ned Neffer, admits that he is in an informal marriage with Teagan - a mannequin head in a wheelchair. [18]

Under these conditions, the legal acceptance and accommodation of new family relationships, formed on the emotional union between robots/synthetic devices and human beings are future concerns of international, regional and national legal regulations on human rights. The legal norms that will be prefigured in this field must solve, in the previous stage, the legal status of the emotional/sentimental robots that are to be engaged in marriage relations with human beings. At present, the solutions applicable to marriages between robots and human beings are doctrinal and hypothetical: in the work *Legal Responsibility on Errors of the Artificial Intelligence-based Robots* by Viony Kresna Sumantri an autonomous reasoning is developed regarding the legal status of robots and the possibility of their marriage with human beings: *if Indonesia accepts the recognition of the citizenship of the robot Sofia by Saudi Arabia and does not draw up legal arrangements expressly contrary to this recognition (...) a robot citizen of Indonesia could marry a human being. Such recognition is provided for in Article 83 of the Indonesian Penal Code, which regulates marriages held abroad, which are allowed to take place with other Indonesian citizens as well as with other legally recognized citizens.* [19]

Alternative to conclusions: necessary reconfigurations and possible evolution scenarios

The introduction of the emotional element in the structure of artificial intelligence mechanisms brings robots closer to human beings in a substantial respect that was traditionally specific only to humans. The sharing, between human beings and robots, of the emotional element represents the starting point in the assimilation of the forms of artificial

intelligence with human beings on new dimensions: sentimental, spiritual, or that of self-consciousness. From this assimilation arises the possibility of representing robots as equal social partners of human beings and, implicitly, the possibility to base, on this type of innovative equality, family relationships.

The humanization of robots by inserting the sentimental dimension in their projection and functionality determines a social and legal updating of their legal status: until the humanized perception of robots, they were conceptualized as mechanisms employed in the service of humans and the legal regulations assigned to them emphasized the subordination of robots to human beings (we refer in particular to Directive 2006/42/EC of the European Parliament and of the Council of 17 May 2006 on technical equipment; Directive 2009/104/EC of the European Parliament and of the Council of 16 September 2009 on minimum safety and health requirements for the use of work equipment by workers; Recommendation of the Committee of Ministers to Member States CM/REC (2015) 5 on the processing of personal data in the context of employment etc.).

In the classical sense, artificial intelligence mechanisms were understood as tools/services intended for the use of individuals and, accordingly, their legal regulation consisted mainly of rules limited to industrial machinery or technical equipment.

Revolutionizing the sphere of artificial intelligence by designing mechanisms sensitive to emotional stimulus involves reconfiguring the traditional legal space (by changing the scope of fundamental legal notions - such as legal personality, legal capacity, legal rights and obligations) and, *in extenso*, the transformation of human rights science. Regarding the latter, the following inconsistencies can be identified that need to be addressed: (1) human rights theory is based on the theory of natural law according to which humans have rights based on their human nature or, the correlation of the status of robots with that of humans determines the re-evaluation of the natural law thesis and requires a fragmented approach: either sentimental robots will experience a total assimilation, representing an evolved human prototype, or sentimental robots will be an intermediate mechanism between human beings and rational robots, devoid of sentimental valences; (2) the scope of matters relating to private and family life, marriage, the issue of reproduction, the establishment of natural parentage or by adoption - will be sensitive to new regulations.

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Section B

HEARING THE VICTIM OF HUMAN TRAFFICKING

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Abstract

"Hearing the injured person - is the evidentiary procedure that follows the same general rules as hearing the suspect or defendant, but there are differences, specific rules that derive from the quality of this category of participants in the criminal process."

Keywords: *victim, hearing, human trafficking, psychology, hearing rules.*

From a sociological perspective, the family is seen as a way of organizing human existence, which is seen as a catalyst, whose importance increases and is decisive in the development of society, especially considering the troubled periods we go through, as well as the pressures to which its members are subjected at certain moments.

Since ancient times, the family has played the role of barometer of all social changes and not only, which allows us to say that changes in the content of the notion of family are the result of economic, political, moral and judicial factors.

From a legal point of view - in Romanian law, the notion of family was used in the following senses - I pers family meant the fatality of slaves owned by someone, second sense, the family was seen as a group of people under the same power, in the third sense - the family was seen as the totality of goods and persons in the power of a "pater familias".

The family entity has always been the foundation of society. It is notorious to recognize the importance of the family in the structure of the state, as well as the increased power that the head of the family has always had.

Although from the Middle Ages to the present, the influence of the customs of the popes, Christian doctrine, the transformation over time of social institutions changed the foundations on which the family was built, its evolution, even if over time was perceived as gross, is undeniable and led to the family we all know today.

As it is known, any disorder at the level of family relations endangers the establishment of the family and at the same time the loss of trust of the family members in the importance of the connection between them, but also the manifestation of some doors of "independence" and radicalization of conduct.

These minimal considerations related to the importance of the family in society, corroborated with the article, converge to the conclusion that the subject "hearing the victim of trafficking in human beings (persons) is particularly useful both theoretically and practically.

Victim - is the object of study of "victimology". Victimology, from a criminological perspective, is the current that aims to study the role of the victim in the analysis of the content of the crime and the limits in which the victim's activity contributed to the production of the antisocial phenomenon.

The victim of human trafficking is a person who is crossed the border or who is transported inside the state to be brought into a state of slavery or servitude.

In the current sense - human trafficking includes: recruitment, transport, transfer, shelter or reception of persons; the threat of using force or various forms of coercion that do not involve violence, such as fraud or deception; exploitation, especially for forced labor in

construction, agriculture and the domestic sector, but also for begging, prostitution and various forms of sexual exploitation.

Trafficking in human beings is considered a particular form of organized crime and honors, in essence, the illicit trade in human beings.

Trafficking in human beings is a cross-border phenomenon, but, as can be seen from the definition, crossing the border is not only a condition for classifying this crime as "trafficking".

The growth in Europe of activities aimed at trafficking in human beings for sexual exploitation, which are not infrequently linked to organized crime, is based on the fact that these ways of working allow criminal organizations to finance and expand other activities, such as be it terrorism, trafficking in arms and ammunition, drugs and money laundering.

The debates that took place in Palermo, led to the definition of human trafficking - since December 13, 2000. According to the Palermo Convention, "Human trafficking is the recruitment, transportation, transfer, shelter or reception of a person, by threat or by force or other forms of coercion, by kidnapping, by fraud, deception or abuse of power, by using a vulnerable situation, by giving or receiving money or benefits, to obtain the consent of one person who has control over another, for the purpose of exploitation. Exploitation means prostitution or other forms of sexual exploitation, forced labor or services, slavery or similar practices, servitude or organ harvesting; b) The consent of a victim of trafficking in human beings for intentional exploitation, for the purpose mentioned in paragraph a) is irrelevant, if any of the procedures shown above have been used; c) The recruitment, transport, transfer, shelter or reception of a child for the purpose of exploitation shall be considered human trafficking even if they do not involve any of the procedures provided for in paragraph a).

Romania has ratified the Palermo Convention (December 4, 2002) against transnational organized crime, as well as the Additional Protocol for the Prevention, Combating and Punishment of Trafficking in Persons, Especially Women and Children.

The definition given in Law 678/2001, regarding the prevention and combating of human trafficking, is similar.

The victim is the passive subject in the case of human trafficking.

The social relationship of victimization must be viewed in the light of the following components:

a) the initial moment of the violation of the legal disposition of exceeding the compliance report and of the birth of the conflict report;

b) the moment of the intervention of the judicial bodies representing the state - it is the moment when the procedural positions are established and when we witness the change of roles of the subjects.

Thus, the relationship between the perpetrator and the state representatives is established, judicial bodies that will proceed to prosecute him, on the one hand, and between the victim (injured person) and state representatives, on the other hand;

c) the third moment materializes in the application of the sanction towards the perpetrator accused of committing the crime. At this moment, the criminal action is solved, but also the civil action. Thus, the injured person, the victim of the crime, can receive the civil reparations he requested and can even be counseled from a psychological point of view in order to overcome the emotional shock produced after committing the crime.

For the topic of the article, the moment that folds on it, is the second, the moment of the criminal process - with the phases - criminal investigation, the preliminary chamber

procedure, the trial and the fourth phase that is identified with the -the third moment "the execution of the criminal decisions that remained final".

For example, in the criminal investigation phase, the first phase of the criminal process in the typical form is the activity of gathering the necessary evidence to establish the existence of the crime, identifying the perpetrators, establishing their responsibility, to see if it is necessary to order the referral judgment.

The activity of gathering evidence involves capitalizing on any factual element with informative value, which can lead to finding out the truth.

The legal instrument with which the evidence is obtained is called the means of proof.

The provisions of art. 97, paragraph 2 of the CPC, provide, by way of example, the means of proof by means of which the evidence can be obtained within the criminal process, among which are also "the triggers of the injured person".

The provisions of the criminal process provide the general rules for hearing persons (art. 104CPP).

Thus, there are general rules applicable to all those who are heard in criminal proceedings.

The suspect / defendant, the injured person, the civil party, the civilly liable party, the witness and the expert may be heard.

Their hearing can also be done by an authorized interpreter for the categories of people who cannot speak, do not understand or cannot express themselves well in Romanian.

The statement is recorded in writing with the mention of the start / end time, as well as with the mention of the questions and their holders.

Besides the general rules, they are also special.

In cases where the heard person shows signs of excessive fatigue or symptoms of a disease that affects his physical or mental ability to participate in the hearing may be interrupted or the person heard may be provided specialized medical assistance.

Regarding the hearing of the injured person, the provisions of art. 111 The CPC stipulates how this can be done.

Thus, at the beginning of the first hearing, the injured person is asked the same questions that the suspect / defendant receives - regarding identity, job, social situation. subsequently, the rights and obligations according to art. 81, 85 and 87 CPC) and is allowed to declare everything she wants.

Both before the hearing and during the hearing, the injured person is allowed to consult with the lawyer, can use his own notes and notes during the hearing, can make additions, clarifications or corrections and can be asked questions.

The injured person cannot refuse to give statements. Specific protection measures may be taken when injured persons have specific protection needs.

Also during the first hearing, the injured person can be informed of the defendant's situation - if preventive measures of deprivation of liberty have been ordered against the defendant, or if he has been sentenced to a custodial sentence, he can be informed about release or escape in any way.

Victims of children, victims of a dependency on the perpetrator, victims of terrorism, trafficking in human beings, violence in close relationships, sexual violence or exploitation, victims of crimes committed out of hatred or discrimination, victims of disabilities or those who have suffered considerable damage as a result of the seriousness of the crime.

From the psychological perspective, the hearing of the victim of human trafficking is combined with the provisions of the CPC but also with the provisions contained in Law no. 300/2006 for the ratification of the Council of Europe Convention for the Protection of Children against Sexual Exploitation and Sexual Abuse, from 2007, ratified by Law no. 252/2010, Directive 2012/29 / EU of the European Parliament and of the Council of 25 October 2012 laying down minimum rules on the rights, support and protection of victims of crime.

Therefore, the hearing of the victim of human trafficking can be performed by the representative of the Public Ministry - prosecutor, directly in the space where he carries out his activity, in order to have a space that would allow him to be heard in optimal conditions.

As we have already mentioned, when hearing the victims of these crimes, the presence of the psychologist is necessary precisely to create the victim's feeling of security, and the investigator the support he needs during the hearing.

For example, the investigator introduces himself to the victim as the person he can trust.

The impact that the presence of the judicial body has on the victim can lead to a failure of the hearing.

From a psychological perspective, prosecution is a sum of interpersonal relationships of a constant subject - the representative of the form of coercion (police officer, magistrate with other participants in the judicial drama (perpetrator, victim, witnesses, experts).) The specificity of these interpersonal relationships is the emotional treatment of the individual put in contact with the official representative of the authority, feeling characterized by a certain nervous load.

In general, the individual faces a feeling of fear generated by the distorted view of the repressive nature of justice.

The next moment consists in the obligation of the investigator to explain to the victim how the interview will take place, the fact that there will be more meetings and that it will involve a longer period of time.

The victim should be informed that it is important to obtain as much traffic information as possible during the hearings and that he or she will be asked many clarification questions. There is a possibility that these questions may seem trivial or meaningless to the victim, for this reason it must be explained that the role of the questions is to discover as many details as possible so that the investigation of her case is carried out as efficiently as possible. It must also be explained in clear, simplified language that in a trial the victim's credibility is always questioned. Therefore, the role of these details is to demonstrate, by independent means, that what Dana stated is true and consequently can be considered a credible witness.

There are four reasons why it is so important for the victim to receive this information and explanation before the hearing:

1. information about the investigation reduces the victim's stress and fear of the unknown which are normally associated with the hearing to be held;
2. the more the victim understands about the purpose of the hearing and about the role she plays, the more active she will be in providing answers, otherwise she may become frustrated because she does not know what will happen;
3. demonstrates a partnership commitment between the criminal investigation body and the victim;

4. helps the investigator to get a primary picture of the emotional and cognitive state of the victim.

From a psychological point of view, the rules of the hearing are the same as those provided by the provisions of the CPC.

Flexibility must be one of the main qualities of the investigator, and this must also be demonstrated regarding the breaks during the hearing. As we have seen before, there is a non-verbal signal that entitles the victim to take a short break whenever he feels the need. This could happen more and more often as the investigator begins to explore the physical, psychological and sexual abuse that the victim has suffered. Whenever the victim requests a break due to high levels of stress or anxiety as a result of painful memories, the investigator should determine (during the break) whether it is in the victim's best interest to continue exploring that area or whether he or she should deal with it in another area or may even postpone the continuation of the hearing to give the victim the opportunity to recover. If the victim is heard in the presence of the psychologist, his opinion should also be requested. The presence of the psychologist is necessary because he can explain to the investigator how far the exploration can go, regarding the sexual exploration of the victim and when a break becomes necessary, thus preventing the risk of re-traumatizing the victim. The principle *Do no harm!* must have priority in this type of hearings.

During breaks, the victim should be accompanied by a psychologist, social worker or left alone. The victim should be warned that it is not good to discuss important hearing issues with other people during breaks. If during the break the person accompanying the victim hears her talking to other people about essential aspects of the hearing, she should notify the investigator who will analyze this situation immediately after the break.

From a psychological point of view, the investigator must divide the hearing into four moments:

1. to build the relationship between him and the victim;
2. the victim is allowed to present the factual situation as she perceived it;
3. the next moment - implies the possibility for the investigator to ask open, specific, closed, guidance questions;
4. the last moment - that of the end of the hearing - in which the investigator thanks for the collaboration of the victim as well as the assistance team that accompanied her.

The investigator-victim relationship must be a relationship based on trust, a relationship of respect and maturity that can help clarify the issues that led to the commission of antisocial acts, but also to gain confidence that the perpetrator will be punished according to the contribution had it at the time of the crime.

A FEW CONSIDERATIONS REGARDING THE NORMAL WORKING TIME AND ITS ORGANIZATION IN THE CONTEXT OF THE NEED FOR FLEXIBILITY IMPOSED BY THE SOCIO-ECONOMIC REALITIES

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Abstract:

The present paper aims at an analysis of the main aspects regarding the working time and its organization in the current economic - social conditions. In this sense, by referring to the technology increasingly involved in daily life and on the labor market, employers are also looking for solutions to make working time more flexible in terms of legislation that is not exactly "friendly" to those desired by employers and employees.

Thus, the paper analyzes a concept of a mixed, variable and individualized working time organization model correlated with the provisions of Directive 88/2003 but also of the Romanian Labor Code.

The certainty of the need to adjust the legal provisions to the realities of the moment leads to the identification of solutions that understand both the needs of management and to protect the employee.

Keywords: working time; digitalization; flexibility; liability; individualized work schedule

1. General aspects

According to Romanian labor law, the reference value for determining normal working time is the working week of 40 working hours, which, in a normal program that involves a single regular shift, is divided into 5 days of 8 working hours each, from Monday to Friday.

The exceptions provided by the Labor Code take into account different organizations of working time, in specific shifts of 12 hours worked, followed by 24 hours of rest, respectively specific programs, ie variable work schedule and individualized work schedule. If regarding the 8-hour working day, the Romanian law provides some exceptions, nowhere in the Labor Code is there any regulated exception to the 40-hour / weekly work schedule. In this sense, for example, art. 113 paragraph (2) of the Labor Code stipulates in concrete terms that: "Depending on the specifics of the unit or the work performed, it is possible to opt for an unequal distribution of working time, respecting the normal duration of working time of 40 hours per week." or, at art. 116 para. (1) of the Labor Code that: "The concrete way of establishing the unequal work schedule within the 40-hour working week". Considering the lack of any other reference to the contrary or to another reference period for determining the normal working time, it results that in principle provision from art. 112 para. (1) of the Labor Code, a provision according to which: "For full-time employees, the normal duration of working time is 8 hours per day and 40 hours per week.", which has the value of a general rule in the field.[1]

Consequently, everything that exceeds the normal work schedule, usually 8 hours a day, and always 40 hours a week, would represent overtime, as a result of corroborating the provisions of art. 120 para. (1) with art. 111 of the Labor Code.

If by an *ad litteram* interpretation this is the only possible solution, it should be noted that in practice, the solution of the broad law is contradicted, especially social practice by opting for different models. Sometimes, even the jurisprudence tends not to observe the principal solution that limits the normal weekly working time to 40 hours, being used other reference periods.

Moreover, such a different interpretation is also objectively required. Thus, art. 115 para. (2) of the Labor Code regulates the regime of specific shifts, of 12 hours of work, followed by 24 hours of rest (shifts 12/24). It is a formula that is most often used where there is a continuous flow of activity. If, starting from the normal daily shift of 8 hours, it can be seen that it can be organized within the limited frame of the reference period of 40 hours, the shift of 12 hours, it is not possible to be included in a period of 40 hours, because if 40 is a multiple of 8, 40 is not at the same time a multiple of 12. So the requirement of the legislator is objectively impossible. Therefore, in social practice, where the 12-hour shift regime works, the reference period is not the week of 40 working hours, but the norm of the month, ie, the number of working hours at the level of that month.

It should be noted that at the level of a month there are two concepts that can be competing, namely the norm of the month, explained above, but also the average number of working hours in a month, as defined by the normative act. Thus, for example, by GD no. 4/2021, refers to “... *a normal working schedule of 169,333 hours on average per month*” - art. 1 para. (2) of GD 4/2021, a normative act that establishes the minimum basic salary in the economy in 2021. In determining the normal working time, however, the average value referred to in art. 1 para. (2) of GD 4/2021, the text being, rather, in connection with the aspects related to the determination of the minimum salary values. Thus, it is essential to report the average number of hours worked in a month in 2021, for example, when the issue of making a salary payment in an individual part-time employment contract arises. On the other hand, when what matters is the working time and not his salary, it is necessary that the reporting be made at the actual working time of the respective month, ie at the “*norm of the month*”. It is essential to note that the legislator, even if in an act of legal force lower than the Labor Code, still refers as a reference period to “month”, considering that this may also be a reference period to be considered for determining the normal work schedule.

It should be noted, however, that the reference to the “*norm of the month*” is not always likely to allow full coverage of the work schedule, taking into account the rest periods as required by law (24 hours between two shifts of 12 hours, respectively 48 hours of weekly rest). Therefore, it is very often possible for an employee to work less than the standard of the month, for example, 160 hours, but to benefit from the full basic salary, while, if the standard of the month is exceeded, all what goes beyond is overtime. Compared to such a hypothesis, the only possibility to reduce costs of this type would be to organize the work diagrams, so that, for example, in the first month the norm of the month of 168 hours is exceeded, because 176 hours are provided, then in the following month, if only 160 hours are provided, it is considered that the provisions of art.122 par. (1) of the Labor Code, the additional work of 8 hours performed being recovered in the following month with corresponding paid free time. However, the employer will in any

case be obliged, in such a situation, to pay 8 extra hours, even if, on average in the two months analyzed, the employee was in the normal working hours, because all hours must be paid effectively provided (176 hours worked in the first month), following that only as compensation will work in the following month the coverage of "overtime", with corresponding paid free time. If the hypothesis works the other way around, in the sense that in the first month, according to the diagram, 160 hours are provided, although the norm of the month involved 168 hours, and in the second month 176 hours, the provisions of art. 122 para. final of the Labor Code, putting into practice a common concept often used "*notebook hours*", in the sense of anticipating the compensation of additional time worked in the future, in a period of 12 months. And in such a case the employer will pay 8 hours in addition to the number of hours actually worked, given that in the future, when the month's norm will be exceeded, the employer will have to pay the hours actually worked at normal value. It should be noted, however, that using the compensation of overtime with properly paid free time or the early compensation of overtime, respectively the two solutions offered by art. 122 para. (1) and (3) of the Labor Code, the employer will not pay twice the overtime hours worked in the months when the work schedule cannot be otherwise calculated unless the month's norm is exceeded.

2. Forms of flexible organization of working time according to the Labor Code

In the idea of a flexible working time, the Labor Code regulates variable work (art. 116 - 117 of the Labor Code) and individualized work (art. 118 of the Labor Code).

It should be noted that regarding the variable work, the legislator refers *expressis verbis* to the reference period of 40 working hours per week, establishing in art. 116 para. (1) of the Labor Code that: "*The concrete way of establishing the unequal work schedule within the 40-hour working week, as well as within the compressed working week will be negotiated through the collective labor contract at the level of the employer or, in its absence, it shall be provided for in the rules of procedure.*" This means that daily working intervals other than the 8 working hours / day can be established, but provided that the weekly working time "closes" on the 40 hours requested by the legislator. Likewise, what would exceed the 40 hours of work per week would represent additional work, imposing the compensation regime imposed by law.

The individualized work schedule involves the division of working time into two distinct fractions, a fixed fraction, respectively a predetermined time interval within which the employee must be in the location established according to the individual employment contract, and a variable interval, available to the employee, following to set their schedule so as to cover normal working time. However, defining the individualized work schedule, after qualifying it as a form of flexible organization of working time, the Romanian legislator, in the content of art. 118 para. (3) of the Labor Code refers to the "daily working hours", which leads to the idea that the flexibility of working time must be related to the daily interval of 8 hours (fixed and variable period to fall within the daily working time of 8 hours). It would be more difficult to accept a 12-hour daily work schedule, given that this formula is exceptional, as found in the Labor Code.[2]

3. For flexibility the need to design a mixed, variable and individualized organization model

In order to obtain the maximum flexibility of working time, in the context of the above-mentioned legal requirements, it would be necessary to design a "mix" between the variable and the individualized program so that, on the one hand, there is the possibility for the employee to choose his start hours and end of his work schedule, and on the other hand, that the number of hours worked in a day is not equal.

If such a mixture were to be accepted, other provisions relating to working time and leisure, also of an imperative nature, specified by the Labor Code, would have to be taken into account. Thus, according to art. 135 para. (1) of the Labor Code, the daily rest (between two consecutive working days), may not be less than 12 hours. So, at first glance, in a variable work schedule, you could not work for more than 12 hours a day. On the contrary, I would say even less, because, if 12 hours of work were provided, applying the provisions of art. 115 para. (2) of the Labor Code, the duration of the working day of 12 hours should be followed by a rest period of 24 hours. Or, if one opts for the individualized program, it is assumed that every working day there will be a fixed, predetermined working time interval, so it is not possible after the continuous activity of 12 hours, a rest period of 24 hours. So, the daily work schedule will never be able to exceed 11:59 working hours.

And in the hypothesis described above, respectively of the "mix" between the variable and the individualized program, everything that exceeds 40 hours worked in a week represents additional work, giving the employee the right to the compensations specified by art. 122 and 123. of the Labor Code.

We mention that when the issue of normal working time is raised, the Romanian legislator does not refer to an average interval per week, but to an effective interval, strictly of 40 hours / week. The concept of average interval is used by the Labor Code only for the regulation of the maximum working time (48 hours on average per week according to art. 114 of the Labor Code, with the establishment of a reference period of 4 months, respectively 6 months (if so agreed), by the collective labor contract, respectively, exceptionally, and by adopting the necessary measures to ensure all aspects of protection of health and safety at work of the employee even for a maximum of 12 months). In the case of the normal work schedule, there is only one regulation that establishes the reporting at a longer time interval, respectively 12 months: it is about art. 17 lit. a) of Law no. 256/2018 which establishes that: "*By derogation from the provisions of chap. I and of the head. II of title III of Law no. 53/2003 - Labor Code, republished, with subsequent amendments and completions, the specific work schedule is organized taking into account the following: a) the average normal working time for employees engaged in offshore activity is 168 hours / month, calculated according to at a reference period of 12 months; the hours worked by employees who carry out offshore activity outside the working time established according to this letter, calculated at a reference period of 12 months, will be considered overtime and will be compensated ...*". In order to do so, the legislator felt the need to emphasize that the text is derogating from the general rule of the Labor Code which provides for other reference intervals for normal working time.

It should be borne in mind that Directive 88/2003 regulates, in principle, at European level, the maximum weekly working time, rest between two consecutive working days and compulsory weekly rest, but does not regulate anywhere the normal working time.

Furthermore, the Directive stipulates that derogations from its provisions on rest between two working days, weekly rest and the maximum permitted working time would be possible through collective agreements.[3]

Romanian law remains dependent on outdated regulations, removing ab initio any possibility of designing a flexible work schedule, but also the normal exercise of the employer's right to free organization. Therefore, the best solution to remove all these "troubles" would involve a legislative amendment, in the sense of removing from the above-mentioned texts of the Labor Code all references to normal working time limited to 8 hours per day, and always 40 hours a week. However, until then, given that the European Directive, 88/2003 allows derogations from maximum values related to working time, or minimum values related to the right to rest, a fortiori, even more so, it could be allowed determining other reference periods, to the extent that they would be agreed by the social partners.

4. Would there be a risk of a misdemeanor liability of the employer if he reported the work schedule to the "standard of the month"?

At first sight, the answer could be in affirmative, because the employer does not comply with the requirements of the law regarding normal working time, so that the Labor Inspectorate could apply sanctions. It should be noted, however, that art. 260 para. (1) of the Labor Code does not establish an express contravention consisting in violating the provisions of art. 112 of the Labor Code, or as the case may be, of the provisions of art. 116-118 of the Labor Code. In the content of art. 260 para. (1) of the Labor Code, the legislator refers to: violation of the legal regime of additional work (but, rather, it is suspected that the legislator took into account the lack of consent of the employee to perform work or inadequate compensation of overtime), non-compliance with the provisions granting a weekly rest of 48 hours after 5 consecutive working days, or violating the provisions related to the record of work performance (effective timing of work in relation to the work schedule displayed by the employer - art. 119 of the Labor Code).

Eventually, the contravention regulated by art. 260 para. (1) lit. d) of the Labor Code, which implies a sanction with a fine from 2000 to 5000 lei in case of stipulating in the individual employment contract some clauses contrary to the legal provisions (it is suspected that a flexibility of working time on a model that would involve a reporting to the regular monthly schedule, with a mixed variable and individualized schedule should be "insured" and through the manifest will of the employee, embodied in an addendum to the individual employment contract).

5. Conclusions

As long as there is a clear will of the employee to make his work schedule more flexible by using the formulas permitted by law (variable, unequal and / or individualized program), we do not believe that such clauses would be likely to harm interests of the employee. Such flexibility can be equally beneficial to both the employer and the employee, so that the agreement of the parties manifested by the individual employment contract can not be revoked (invoking the provisions of Article 38 of the Labor Code) or sanctioned by the authority. The employee has the legal right to agree with his employer

for the most flexible ways of organizing working time, as the employer, in order to achieve his specific interests, benefits from the organizational prerogative. The exercise of these rights, materialized in the reporting to another reference level (the norm of the month) cannot be considered a form of violation of the rights protected by law.

Beyond the "freezing" of the current legal provisions on this subject, the realities of the moment obviously require a completely different approach.[4] If a safeguarding of labor law is really desired, it can only be achieved to the extent that the requirements of reality are understood. In order to be able to have social protection, it is necessary to have a certain understanding of capital and management needs, including working time. Slogans will not be able to create the resources needed for future development. Instead, the understanding of realities, the treatment of work-centered relationships in good faith by both parties, the search for a real balance between social and capital and, last but not least, the real interest in ensuring adequate protection for each worker, are absolutely necessary to maintain adequate, fair, equitable legislation and in the interests of both actors involved in labor relations.

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- [2] For developments regarding flexible "work programs" - Al. Athanasiu, Magda Volonciu, L. Dima, O. Cazan, Labor Code. Commentary on articles Vol. II, CH Back Publishing House, 2009, pages 8 - 9); Alexandru Ticlea, Treaty on working time and rest time, Legal Universe, 2020; See also Costel Gilcă, Labor Code commented and annotated 2nd Edition, Rosetti Publishing House - commentary on art. 118.

[3] In European case law, the normal work schedule has been invoked, but with reference to how it is mentioned in the individual employment contract of the employee concerned. The attention of the European Court, related to the preliminary questions with which it was referred, was directed towards the observance of the provisions of art. 6 of Directive 2003/88, namely the extent to which the requirements for a maximum average of 48 hours per week have not been infringed.

See in this sense Nicușor Grigore against the National Directorate of Romsilva Forests - Bucharest Forestry Directorate. Reference for a preliminary ruling: Tribunalul Dâmbovița - Romania.

Article 104 (3), first subparagraph, of the Rules of Procedure - Social policy - Protection of the safety and health of workers - Directive 2003/88 / EC - Organization of working time - Concept of 'working time' - Meaning of 'maximum weekly working time' - Forester who, according to his employment contract and the applicable collective agreement, has a flexible work schedule of eight hours a day and 40 hours a week - National regulation according to which the forester is liable for any damage caused within the forest canton in its management - Qualification - Effect of overtime on the remuneration and allowances of the person concerned. Case C-258/10 - <https://eur-lex.europa.eu/legal-content/RO/>.

The case is taken over and developed in TRUICHICI M ADRIAN NEAGU LUIZA - LABOR LAW. JURISDICTION OF THE COURT OF JUSTICE OF THE EUROPEAN UNION - 1.06.2018 Universul juridic Publishing House - Fiscal Library

<https://sintact.ro/#/monograph/369101637/6?keyword=dreptul%20muncii&tocHit=1&cm=SREST>).

In fact, our entire approach developed in this study militates exactly in the direction of the need to establish reference values (it is perfectly possible to use the current value, respectively 40 hours / week) but the reporting should be "on average per week, and by no means in absolute value, as is the case today.

[4] Raluca Dimitriu - Labor law. Anxieties of the present. Rentrop & Straton Publishing House - 2016, pp. 19 - 20.

LAW AND DIGITALIZATION

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Abstract

The current stage of scientific and technical development has given technology the ability to generate changes in behavior, mentality and fundamental processes of society.

Klaus Schwab, in his work "The Fourth Industrial revolution" (2016), introduces the concept of Industry 4.0, the fourth industrial revolution that technologically integrates subsystems, physical, biological and digital.

A key social institution that is affected by these developments is the right, as a subsystem to regulate the social system and consequently, the legal profession.

Digital disturbances are not only a technological or economic problem, but also a legal one. The regulatory framework must be shaped to provide fertile and healthy soil for technological innovation to grow

Keywords: *disruptive technologies, digital disturbances, Data Mining, Big Data, Machine Learning,*

1. INTRODUCTION. DEFINITION OF DATA MINING

The paper analyzes the needs and requirements for adapting the rule of law, in order to address the legal challenges arising from the development and use of digital technologies and their products. It takes into account the categories of legal personality and the protection of digital technologies, as well as the foundations of their legal regulations. The paper defines ways to protect intellectual property rights in the digital sphere and considers the development of legislation to establish the responsibility of both developers and users of digital programs.

The DM study is determined by the need, common to many fields, to store, access, describe, model and understand increasing amounts of data generated in the process of digitizing the world. The challenge to discover knowledge from data, to discover meanings in an informational ocean led to the improvement of processing techniques but also the design of new areas of discovery and research of patterns that represent the repeatability, order, imprint, template in Big Data. This is how DM appeared as a synthesis between statistics, IA (Machine Learning) Big Data and DBMS. Most of the methods used in DM (data mining) come from the ML paradigm in which a learning algorithm is exposed to the data and during a training period develops a generalizable model for unseen data in a similar source. The objectives of DM are:

Predictive objectives are to use some of the variables to predict one or more of the other variables;

The prescriptive objectives concern the determination of the possibilities of evolution of the behavior by extrapolating the patterns in the future,

The descriptive objectives aim to identify patterns that describe the data and that can be understood by the user.

2. REVALUATION OF THOMAS BAYES 'THEOREM

The paradigms of statistics are:

1. The frequency paradigm. Representatives: Daniel Bernoulli (nephew of Jacob, son of Johan, brother of Nicolaus and Johan II). Law of large numbers:

For a large number of experiments, the frequency of occurrence of an event is equal to the probability;

2. The paradigm of plausibility. Representative R.A. Fisher, inference based on a sample. Maximum likelihood method;

3. The Bayesian paradigm. Representatives: Thomas Bayes, P.S. Laplace, Bruno de Finetti. It is based on Bayes' theorem.

The first two paradigms form the classical paradigm and the third represents Bayes' paradigm of statistical inference and probability.

$$P(A/B) \cdot P(B) = P(B/A) \cdot P(A) \quad (1)$$

$$P(A/B) = \frac{P(B/A) \cdot P(A)}{P(B)} \quad (2)$$

where:

- $P(A/B)$ is the probability of A conditioned by B, ie the conditional probability of the occurrence of event A since B is true;

- $P(B/A)$ is the conditional probability of occurrence of B given that A is true;

- $P(A)$ and $P(B)$ are the probabilities that A and B will appear independently of each other (marginal probability);

Bayes defines probability not in the sense of calculating how often an event occurs, but as a "partial belief," a ratio between the value at which an expectation should be calculated, depending on the occurrence of an event, and the value of what is expected after happened". Contrary to the established rules of science, this is a subjective definition, it does not require the analysis of repeatable events, but those events must be "observable".

$$P(V/D) = \frac{P(D/V) \cdot P(V)}{P(D)} \quad (3)$$

Where:

$P(V)$ Probability of the accused being guilty;

$P(D)$ Probability of finding evidence;

$P(V/D)$ The conditional probability that the accused will be guilty, given the evidence;

$P(D/V)$ Probability conditioned on finding evidence, assuming that the accused is guilty.

A person is subject to the lie detector for a type of crime. That type of crime has an incidence of 1% among the population. The reliability of the lie detector is 79%, ie in 21% of cases the results are false positive (the person is innocent). The person is tested positive.

What is the probability of being guilty?

The probability is 4.59%, which is why testing with the lie detector is not a recognized test but only indicative.

3. DATA SCIENCE (DS) ACTIVITIES IN THE LEGAL FIELD

1. Identifying, collecting and processing legal information on a case as well as the computerized formulation of a conclusion, which is a legal software product;
2. Organization, clustering and automatic classification of information;
3. Automating the revision of contractual clauses in order to validate them in a contract management workflow;
4. Automatic generation of legal documents by automatic processing of customer data;
5. Legal research to substantiate legal decisions;
6. Organization and management of contract filing in accordance with AI rules;
7. Admission, development and organization of the workflow in accordance with the rules of AI;
8. Approaches for LIBOR, GDPR, and BREXIT by involving AI technology in the services provided;
9. Predictive modeling on prices, disputes and transactional issues.

4. CHARACTERISTICS I 4.0

1. Speed - refers to the dynamics of generating (producing), creating or updating data; The noise of a database;
2. Variety - refers to the types of data: structured, unstructured, semi-structured;
3. Variability - refers to the multitude of data sources: sensors, numerical, alphanumeric documents, databases, activities on social networks, IoT, RFID;
4. Truthfulness (veracity) - trust in data;
5. Validity - adequacy of intermediate measurements to the final purpose (how valid an intelligence test is)
6. Vulnerability - the degree of risk regarding their loss;
7. Volatility - data life and its relevance over time;
8. Value - refers to the amount of knowledge it contains and can be reached through processing and analysis, which are of 4 kinds:
 1. Descriptive - describes what happened in the past;
 2. Predictive - using previous data to shape the future (predicting what is most likely to happen in the future);
 3. Prescriptive - recommends actions you can take knowing what is going to happen in the future (reflexivity);
 4. Diagnosis - helps us understand why something happened in the past.

5. THE FOURTH SCIENTIFIC PARADIGM - THE DATIFICATION OF LAW

1. Thousands of years - rudimentary sciences, with empirical, irrational results - simple relationships necessary for making tools;
2. Several hundred years - Theoretical sciences. Two distinct directions were imposed:
 - Scientific empiricism: Thomas Hobbes, John Locke, Francis Bacon, Charles Darwin, Francis Taylor - Taylorian universities;
 - Scientific rationalism: R. Descartes, G. Leibnitz, Baruch Spinoza, Galileo Galilei - the father of modern science.
 And empiricists are rationalists. Seeks to answer the question WHY ?, causality - the goal is to know how the world works;
3. The last seventy years - Computer science - "Interrogating the world"

The first three are cumulative, the fourth not.

4. The last fifteen years - eScience (Data Science) - "Download the world"

6. BIG DATA AND REGULATION

Big Data generates the need for regulation and the improvement of the way in which legal systems seek to govern technological innovation, individual and social conduct, through their own means through primary regulations or secondary rules.

Finally, the interaction between law and technology and between GDPR and Big Data must be understood by the interaction between competing regulatory systems, which conflict with other regulatory systems, such as market forces and social norms.

These regulatory claims may clash or reinforce each other, and one regulatory system may even make it unnecessary to claim another regulatory system.

There are many cases in which the legal intention to regulate the process of technological innovation has failed.

An example is the EU Directive 46 of 2000, which regulated the regulation of electronic money as a mere substitute for traditional currencies under the supervision of national financial authorities. New electronic payment methods and transactions, such as PayPal, have made EU provisions inadequate, forcing Brussels parliamentarians to adopt a new directive (D-2009/110 / EC).

7. CONCLUSIONS

7.1 The interaction between law and technology

According to a philosophical tradition that begins with Kant and continues with Kelsen, law can be understood as a technique.

As formulated in the general theory of law and state, what distinguishes the legal order from all other social orders is that it regulates human behavior through a specific technique that depends on the threat of physical coercion: "if A, then B." Now, if the law is a technique that regulates another technique and if that other technique is the process of technological innovation, we can consider that the law is a meta-technology.

From this point of view, it does not follow that we must accept any of Kelsen's logical commitments: meta-technology does not imply that the law is only a means of social control, nor that there are no other meta-technological mechanisms.

Insisting on the law's intention to govern the process of technological innovation, the focus should be on "why" and "how" to regulate human and social behavior.

7.2 The relationship of law with robotics

The intention of the law to regulate both human and social behaviors in the field of robotics can be divided into the following four categories:

(a) the regulation of human manufacturers and robot designers by ISO standards or liability rules for robot users;

(b) regulating user behavior by designing artificial intelligence (AI) applications, ie by designing them in such a way that illegal human actions are not permitted;

(c) regulating the legal effects of artificial behavior through established rules, for example, the effects of robotic contracts and negotiations;

(d) regulation of artificial behavior by design, ie by incorporating regulatory constraints into the design of the application.

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SPECIAL RULES REGARDING THE TRANSMISSION OF THE PROCEDURAL QUALITY IN THE INSOLVENCY PROCEDURE OF NATURAL PERSONS. THE DEATH OF THE DEBTOR

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Abstract

Law no. 151/2015, provides a legislative framework for the debtor a natural person in good faith, who may request the opening of one of the three forms of procedure regulated by law.

Although opinions have been expressed in the doctrine in the sense of a rudimentary regulation, or in some cases, even absent, the law brings a series of benefits to individuals facing financial problems, and the main benefit brought by law after completing certain stages is the possibility granted to the debtor to request the release of residual debts, under the conditions established by the normative act.

The cessation of the capacity of use of the natural person takes place at his death, which can be physically ascertained or declared in court, according to the relevant legal provisions.

The quality of debtor in the insolvency procedure can be transmitted, as a result of the debtor's death, according to some special rules, provided by Law no. 151/2015.

Keywords: *insolvency, debtor, natural person, insolvency procedure based on debt repayment plan, insolvency procedure by liquidation of assets, simplified insolvency procedure, legal capacity, death of the debtor.*

The Insolvency law of natural persons no. 151/2015, applies to the debtor a simple private individual or consumer, whose obligations do not result from the operation of an enterprise, within the meaning of Article 3 of the Civil Code.

The procedures regulated by law apply to the debtor-natural person who has his domicile, residence or habitual residence in Romania, for at least 6 months prior to submitting the application, is in a state of insolvency and there is no reasonable probability of becoming, within a maximum period of 12 months, able to perform its obligations again, as contracted, with a statement of a reasonable standard of living for himself and his dependents.

I. The evolution of bankruptcy legislation

I.1. Roman Law

The doctrine established that the institution of bankruptcy comes from Roman law, being a form of forced execution of the debtor's assets.

In the first regulations of the Romanian law, bankruptcy was considered a failure, sanctioned initially with the foreclosure of the person, and later with the foreclosure of the patrimony of the bankrupt.

The law of the Twelve Tables provided that the forced execution of the debtor had a personal character, so that this was done against the person of the debtor, and not against his patrimony. The personal forced execution of the debtor consists in the incarceration of the debtor by his creditor for a period of 60 days, time interval in which the debtor was publicly presented at three consecutive fairs and the amount of money owed by him was announced, in order to find a person to pay the creditor and to redeem the debtor's freedom.

For practical reasons, the creditor who could not sell the debtor at an advantageous price that would allow him to cover the debt held, chose to hold him for housework until the amount due was paid¹.

By adopting the Poetelia Papiria Law, the creditors were forbidden the right to sell or kill the debtors, the provisions of the law established that the forced execution must be directed against the debtor's patrimony and not his person.

In this way, the legal premise was created for the implementation and generalization of the execution procedure known as *venditio bonorum*².

This procedure consists in the seizure of the debtor's assets, which is done following the action of sending a *curator bonorum* into possession and its completion with the mass sale of the seized assets³.

Venditio bonorum it had two phases that are found much later in a similar form and in the legal regulation of bankruptcy.

The first phase began with a *missio in bona* which meant the installation of creditors in the debtor's patrimony in order to exercise his supervision and not necessarily to dispossess him⁴.

The purpose of coming into possession (*missio in possessionem*) consisted in preventing the debtor from increasing his insolvency to the detriment of the creditors.

During this stage the interests of the creditors were defended and promoted by a *curator bonorum* who was chosen from among them or could be a stranger. Within 30 days from *missio in bona* or within 15 days, as the patrimony of a bankrupt person was to be liquidated (also named *decoctor* or *fraudator*) or an inheritance, the creditor who came in possession or the *curator bonorum* had the obligation to make publications about the sale of goods. These publications called *proscriptio bonorum* were meant to make the general public aware of the sale of the bankrupt person's property by public auction.

The Praetor, as a magistrate invested with imperium, i.e. with the power to command and, therefore, to intervene in all cases that seemed worthy of protection, indicates by an edict all the phases of the liquidation procedure.

Such prerogatives and duties are found later, in the modern bankruptcy procedure, in the jurisdiction of the court.

¹C. St. Tomulescu, *Manual de drept privat roman*, Litografia invatamantului Press, Bucharest, 1958, p. 142.

²M.N. Costin, A. Miff, *Falimentul. Evolutia institutiei si elementele acesteia*, Lumina Lex Publishing House, Bucharest, p. 9.

³M.N. Costin, A. Miff, *op. cit.*, p. 9.

⁴I.C. Catuneanu, *Curs elementar de drept roman*, 3rd Ed., Cluj-Bucuresti, Cartea Romaneasca S.A. Publishing House, 1927, p. 641.

I.2. The Empire Era

In the epoch of the empire, the forms of forced execution on the debtors' patrimony take place, by allowing the sale of the goods from the bankrupt's patrimony, to be carried out in detail, the procedure called *distractio bonorum*. This new procedure avoids the speculation that is made in the case of the debtor's assets sold en bloc within the *venditio bonorum* procedure.

Distractio bonorum consists in the partial sale, en detail, of the debtor's goods, up to the limit of the claim to which he was obliged to the creditor. What was left remained in the debtor's patrimony, in his full ownership⁵. This procedure gives the debtor the opportunity to recover in the future.

The new procedure allowed the sale of the debtors' assets, but individually and exclusively for the satisfaction of the creditors, within the limits of the receivables held by them. If, following the sale of the entire patrimony, the creditors were not fully satisfied, the debtor was imprisoned in the state prison⁶.

I.3. The Medieval Ages

During the Middle Ages the influence of the Roman Empire manifested itself by preserving the Latin language, transmitting elements of culture, preserving the traditions of the Roman population, which in the field of law manifested in the codification and adaptation to the new conditions of the laws and customs of the Romans⁷.

The bankruptcy institution has regained its repressive character, the bankrupt persons receiving the same treatment as ordinary delinquents, being treated with great severity.

With the development of fairs as an organized form of exchange, the regulations of these activities became a special right called *jus mercatum* in order to protect the interests of traders, and disputes were settled in a special court proceeding by a judge.

The appearance of *merchant corporations* in Italian fortress-cities – Florence, Venice, Genoa, Milan – led to the creation of special registrations in the same branch of trade.

The corporation consisted of merchants and was led by a committee assisted by a council that was initially entitled to rule in disputes between traders and later in commercial disputes between traders and non-traders.

The decisions pronounced by the committees of the mercantile corporations later made up the collections of statutes, among which those from Florence (1312, 1324, 1399), Rome (1317), Verona (1318) and Milan (1396) stood out.

In France, for example, where the institution of bankruptcy was perfected, the Ordinances of King Francis I of 1536 and those of Charles IX of 1560 stated that bankruptcies would be judged "with severity and capitally"⁸.

The provisions on bankrupt persons and bankruptcies of the Trade Ordinance of 1673 were taken over in the French Commercial Code of 1807, which in turn was a source of inspiration for drafting similar codes of other states.

⁵M.N. Costin, A. Miff, *op. cit.*, p. 12.

⁶V. Hanga, *op. cit.* p. 156.

⁷M.N. Costin, A. Miff, *op. cit.*, p. 13.

⁸G. Ripert, R. Roblot, *Traité de droit commercial*, L.G.D.J., Paris, 1990, p. 747, qtd. in R. Bufan, *Tratat practic de insolventa*, Hamangiu Publishing House, Bucharest, 2014, p. 11.

I.4. The Modern Era

After the adoption of the French Commercial Code of 1807, characterized by a rigorous and severe regulation of bankrupt persons and bankruptcy, followed a period of reforms characterized by an improvement of the legal regime applicable to debtors.

The law of May 28, 1838 represented the first reform that led to the attenuation of the provisions of the French Commercial Code, being a victory of the merchant bourgeoisie in this sense whose influence and role had increased socio-economically.

This normative act regulates issues of commercial procedural law and contained provisions regarding bankruptcy, the most important being those regarding the simplification of formalities and the appointment of the syndic judge by the court and not by the creditors⁹.

The law of March 4, 1889 regulated a procedure, called *judicial liquidation*, which was reserved for bona fide debtors who went bankrupt due to incompetence or misfortune. This procedure allowed the debtor to retain the right to manage the patrimony, being assisted by a liquidator.

After the First World War, several decree-laws were adopted establishing that the administrators and managers of the companies that concluded, in bad faith, acts to the detriment of the company were liable to bear the penalty for bankruptcy and by which the right to manage more companies was prohibited.

Decree no. 55-583 of May 20, 1955 regulated a clear distinction between bad faith traders and other debtors-traders who became insolvent. Thus, the judicial liquidation was reorganized under the new name of *judicial regulation* which had as its first purpose the finding of solutions for saving the trader, and less for the liquidation of the goods.

Decree no. 55-603 of 20 May 1955 regulated the legal status of trustees and judicial administrators, undergoing successive changes over time until it was repealed by Law 85-99 of 25 January 1985.

Law 65-563 of July 13, 1967 preserved the procedure of *judicial regulation and liquidation of assets*, establishing the use of an exclusively economic criterion, leaving the court the possibility to choose the applicable procedure.

And, Ordinance no. 67-820 of 23 September 1967 introduced the procedure called *temporary suspension of proceedings*, which aimed to help companies in a difficult financial situation, but which were not irreparably compromised.

II. The evolution of legislation in Romanian law

In Romania, the first bankruptcy regulations were included in the Caragea Code of Muntenia (1818), in Part III, Chapter VIII, entitled "*For borrowing and debt*", and the Calimach Code of Moldavia (1817), in Annex I, entitled "*Order of the contest of creditors*" which had as inspiration the European norms, especially the French Civil Code of 1804 and the Austrian Civil Code of 1811.

The first Romanian bankruptcy law was "*Condica pentru Comerciu*" (The Book of Commerce), from 1840, this representing an adaptation of the French Law of May 28, 1838.

The Romanian Commercial Code of 1887, inspired by the French Commercial Code of 1807 and the Italian Commercial Code of 1882, regulated the institution of bankruptcy, with

⁹R. Bufen, et al, *Tratat practic de insolventa*, Hamangiu Publishing House, Bucharest, 2014, p. 13.

a few exceptions, until the adoption of Law no. 64/1995 regarding the reorganization and judicial liquidation procedure.

In the context of the world economic crisis that took place between 1929-1933, in Romania, in 1932, the *Bankruptcy Liquidation Law* was adopted, which allowed the discharge of bona fide debtors, provided that the partial payment of debts.

Law no. 64/1995 on the procedure of judicial reorganization and liquidation was the first law adopted after the transition of our country to a market economy that regulates judicial reorganization and bankruptcy, this being repealed on the date of entry into force of *Law no. 85/2006 regarding the insolvency procedure*.

The legislation in the field of insolvency has been extended, so that *Law no. 151/2015 on the insolvency of individuals* was adopted, and in what concerns the insolvency of the administrative-territorial units, Government Emergency Ordinance no. 46/2013, approved by Law no. 35/2016 was adopted.

Law no. 85/2006 was repealed by *Law no. 85/2014 on insolvency prevention and insolvency procedures*.

As a result, the institution of insolvency has evolved, so that now, unlike the old bankruptcy legislation, the insolvency legislation regulates not only the insolvency of professionals and territorial administrative units, but also the insolvency of individuals, therefore, in the doctrine, opinions were expressed in the sense of the need to adopt an insolvency code, the provisions of which should be approached in an integrative vision.

Thus, in our legal system, Law no. 151/2015 on the insolvency of individuals comes in support of the over-indebted individual, through the chance to benefit from a fresh start, and financial recovery.

III. The procedures regulated by Law no. 151/2015.

Regarding the insolvency of individuals, two main types of insolvency of individuals are recognized internationally: the Anglo-American model, called *fresh start*, and the continental European version, also known as *deserved fresh start*.

According to the Anglo-American model, almost any individual debtor can benefit from the effects of the law, on the other hand, according to the second procedure, adopted by the majority of European states in matters of insolvency of natural persons, only the debtor who has become unable to pay current debts can benefit, for reasons beyond his control or lack of foresight, provided that he is a debtor in good faith.

Law no. 151/2015 is based on the same concept of the debtor as a natural person in good faith, so that the provisions of the law are not applicable to the debtor in bad faith.

According to Article 1 of the law, the purpose is represented by the establishment of a collective procedure “for the recovery of the financial situation of the natural person debtor”, in good faith, the coverage to the greatest extent possible of his liabilities and the discharge of debts, under the conditions of this normative act.

Compared to the insolvency law of professionals, it can be seen that Law no. 151/2015 deals with the same phenomenon, namely the insolvency of a debtor, but when considering their specific purposes, there is a significant difference.

Thus, while the insolvency proceedings of the professionals aim to cover the debtor's liabilities, with the granting, when possible, of the chance to recover their activity, *the procedure of the insolvency of the natural person has as objective the recovery of the financial situation of the debtor natural person, in good faith, whose obligations do not*

result from the operation by him of an enterprise, covering as much as possible of his liabilities and discharge of residual debts.

The new law on the insolvency of individuals no. 151/2015 regulates three forms of insolvency proceedings: the insolvency proceedings based on a debt repayment plan, the insolvency proceedings by liquidation of assets, and the simplified insolvency proceedings.

Thus, we can observe that between the insolvency of individuals and the insolvency of professionals regulated by Law no. 85/2014 there are certain similarities.

A natural person whose obligations do not result from the operation of an enterprise has at his disposal two great ways of achieving the purpose of the law:

1) ***Insolvency proceedings based on debt repayment plan***, which aims at the financial recovery of the debtor. This procedure is similar to the judicial reorganization procedure, regulated by Law no. 85/2014.

2) ***Judicial insolvency proceedings 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, there is a third one:

3) ***The simplified insolvency procedure***, which applies 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 have no seizable assets or income, the debtor must be above the standard retirement age or and have lost their ability to work completely or at least in half. Given the strict conditions established by law for a natural person debtor to access this form of procedure, we believe that not many individuals will qualify to benefit from this third way of achieving the general purpose of the procedure¹⁰.

According to Article 6 ***the Initiation of the procedure*** of Law no. 151/2015, the insolvent debtor, within the meaning of Article 3 12), may submit to the insolvency commission a request to open insolvency proceedings on the basis of a repayment plan (first form of procedure).

If the debtor considers that his financial situation is **irredeemably compromised**¹¹ and a debt repayment plan cannot be drawn up and implemented, they may directly request the competent court to open insolvency proceedings by liquidation of assets (second form).

If the debtor fulfills the requirements of Article 65 (the total amount of his obligations is at most 10 minimum wages per economy; the debtor has no traceable assets or income; he is over the standard retirement age or has lost all or at least half of his working capacity) he

¹⁰Csabo Bela Nász, *Procedura insolvenței persoanelor fizice*, Universul Juridic Publishin House, Bucharest, 2016, p. 42-43.

¹¹In a draft Government Decision for the approval of the Methodological Norms for the application of the provisions of Law no. 151/2015 on the insolvency proceedings of natural persons, the provisions of Article 2 e) established the following: "*The irredeemably compromised financial situation – is that state characterized by the inferiority of the patrimonial asset to the total value of the due debts, which leads to the impossibility of recovering the debtor's financial situation through a debt repayment plan*".

may submit to the insolvency commission a request for the application of the simplified insolvency procedure, in accordance with Article 66 (third form).

IV. Special rules regarding the transmission of the procedural quality in the insolvency procedure.

And, Ordinance no. 67-820 of 23 September 1967 introduced the procedure called the temporary suspension of proceedings, which aimed to help companies in a difficult financial situation, but which was not irredeemably compromised.

While the quality of creditor in the insolvency procedure can be transmitted legally or conventionally, the quality of debtor can be transmitted as a result of the debtor's death, but only under the conditions established by Law no. 151/2015.

Depending on the moment when the death of the debtor occurs, the natural person whose obligations do not result from the operation of an enterprise, within the meaning of Article 3 of the Civil Code, in Law no. 151/2015, four situations in which the transfer of contractual obligations to successors may take place are regulated and, implicitly, the transfer of the quality of debtor in the insolvency procedure.

- a) the death of the debtor before the opening of an insolvency procedure;
- b) the death of the debtor after the approval or confirmation of a debt repayment plan;
- c) the death of the debtor during the judicial insolvency procedure by liquidation of assets;
- d) the death of the debtor during the simplified insolvency procedure.

It can be observed that the hypothesis in which the death of the debtor occurs after the insolvency commission issues a decision to admit in principle the request to open the insolvency procedure, based on a debt repayment plan, under the conditions of Article 14 (1) a) of Law no. 151/2015, but prior to the plan being approved or confirmed.

According to Article 79 of Law no. 151/2015, in case the natural person debtor who made a request to open the procedure, or to apply an insolvency procedure regulated by Law no. 151/2015 passes away before its resolution, the insolvency commission will issue a decision, by which the application is dismissed, or, as the case may be, the court, taking note of the debtor's death, will order, by final decision, the closing of the file.

As a result, the provision contained in Article 79 provides for two possible situations in which the death of the debtor occurs before the insolvency proceedings are initiated.

The first possible situation is that in which the debtor dies after formulating the request to open the procedure, based on a plan to repay the debts to the insolvency commission, but before the request is analyzed by the commission, in which case the insolvency commission issues a decision by which it withdraws the debtor's request.

After analyzing the request to open the procedure on the basis of a debt repayment plan, the insolvency commission, in case the debtor's death had not occurred, could issue a decision to admit in principle the request to open the insolvency procedure based on repayment plan, or a decision finding that the debtor's financial situation is irredeemably compromised and, by which, after obtaining the debtor's consent, notifies the court for opening the insolvency procedure by liquidation of assets, if the debtor owned traceable

assets and/or incomes. If the commission finds that the debtor meets the conditions for the application of the simplified insolvency procedure, with its consent, it notifies the competent court in order to ascertain the fulfillment of the conditions for the application of the simplified insolvency procedure.

The second possible situation that may arise in the event of the debtor's death before the opening of insolvency proceedings is that in which the court was notified, either by the debtor for the opening of judicial insolvency proceedings by liquidation of assets, or by the insolvency commission, after examining the debtor's request to apply the simplified insolvency procedure and the documents submitted in its support, and considered that the debtor meets the conditions for the application of the simplified procedure, but the debtor died before the court ruled on the notification.

In these hypotheses, the insolvency court will be the one that, taking note of the debtor's death, will order, by final decision, the closing of the case.

In common law, the solution is different. In the event that the party died after the introduction of the application, the trial of the cases is suspended by law, until the introduction of the heirs in the case. The provisions of Article 79 of Law no. 151/2015 are different, however, the legislator providing another solution, namely closing the case if the request to open the insolvency procedure is not resolved.

According to Article 80 of Law no. 151/2015, if the debtor dies after the approval or confirmation of a debt repayment plan, the legal heirs and legatees with universal title may continue its execution, if all creditors agree, in which case the heirs are bound by the obligations assumed by the deceased debtor by the debt repayment plan.

If the reimbursement plan can no longer be executed, the heirs are liable for the debts and tasks of the inheritance within the limits established in Article 1.114 of the Civil Code, the provisions of Article 43 of Law no. 151/2015 applying accordingly.

According to Article 1.114 of the Civil Code, acceptance consolidates the transmission of the inheritance, made by right, on the date of death. The legal heirs and universal legatees, or who have a universal title, are responsible for the debts and tasks of the inheritance only with the goods from the estate patrimony, proportional to the share of each one. Instead, the private legatee is not obliged to bear the debts and burdens of the inheritance. By exception, he is liable for the liability of the inheritance, but only with the asset or assets that form the object of the bequest, if:

- a) the testator expressly ordered in this respect;
- b) the right given by the bequest has as object a universality, such as an inheritance collected by the testator and not yet liquidated, in which case the legatee is liable for the liability of that universality;
- c) the other assets of the inheritance are insufficient for the payment of the debts and tasks of the inheritance.

In the event of alienation of the assets of the inheritance after its opening, the assets entered in the succession patrimony through the effect of subrogation may be affected by the settlement of the debts and burdens of the inheritance.

The norm provided in Article 81 of Law no. 151/2015, establishes the fact that, within 30 days from the date on which they became aware, in any way, of the debtor's death, the insolvency commission is obliged to request the chamber of notaries public in whose constituency the deceased had the last domicile, to make mention in the special register provided by law about the fact that an insolvency procedure is opened regarding it and to issue them a certificate showing whether or not the debtor's inheritance has been debated, and if so, who are the heirs, as well as whether, until the acceptance of the inheritance by at least one of the successors, a curator of the inheritance was appointed or not.

If it is found that the inheritance has not been debated or, as the case may be, accepted, the insolvency commission requests, within 15 days from the issuance of the succession certificate, the chamber of notaries public in whose constituency the deceased had his last domicile or, as the case may be, to the notary public already notified to inform the known successors regarding the fact that an insolvency procedure is opened on the basis of a debt repayment plan and to consider them to exercise their right of succession option.

The notification sent to universal and universally known successors must include, under penalty of nullity:

a) the special term of succession option, provided in Article 81 (6) of Law no. 151/2015¹²;

b) stating that if he does not exercise his right to accept the inheritance within this period of forfeiture, he is presumed to renounce the inheritance;

c) the specification that the deceased had the quality of debtor in an insolvency procedure based on a repayment plan, showing, at the same time, the stage of execution of the plan;

d) specifying that, with the expression of the succession option, he must also express his option regarding the continuation of the execution of the plan or its termination.

The notification sent to the legatee in a private capacity must include, under the sanction of nullity, the information provided in let. a) -c), as well as the situation of the good object of the bequest.

In fulfilling the attributions provided by law, the notary public will collaborate with the administrator of the procedure, whom he can invite to participate in the notarial succession procedure, in order to transmit information related to the stage and effects of the insolvency procedure based on reimbursement plan.

In order to operate this transfer of the quality of debtor in the administrative insolvency procedure, and for the procedure based on repayment plan to continue, it is necessary that all successors who have accepted the inheritance have opted to continue the execution of the repayment plan and all creditors must agree to the aforementioned.

If all the heirs who accepted the succession did not choose to continue the execution of the reimbursement plan or did not express their agreement to continue the procedure with the heirs, all creditors of the deceased, the insolvency proceedings on the basis of a

¹²By way of derogation from Article 1103 of the Civil Code, which provides that the right of succession option is exercised within one year from the date of opening the inheritance, the successors may exercise their right of succession option within 3 months from the date of the notification received from the chamber of notaries public in whose constituency the deceased had his last domicile, or, as the case may be, of the notary public already notified with the existence of succession debate after the deceased who also had the quality of debtor in an insolvency procedure based on a repayment plan.

repayment plan shall be closed, by decision of the insolvency commission, the provisions of Article 33 being applied accordingly¹³.

According to the provisions of Article 82 of Law no. 151/2015, the heirs may propose to the creditors the modification of the debt repayment plan, in the sense of reducing the duration of the execution of the plan. The approval of the new reimbursement plan will be done under the same conditions as the initial plan. Therefore, the only aspect on which creditors can rule, at the request of the deceased debtor's heirs, is to reduce the duration of the repayment plan, excluding any other change in the plan, such as reducing the coverage of receivables.

However, the rule of Article 83 establishes that, if the debt repayment plan, as initially approved, or in the form amended at the proposal of the heirs, is not carried out by the deceased's successors, within 30 days of the cessation of payments, according to the plan or upon becoming aware of the non-compliance with a measure provided in the plan, any of the creditors may request the court to open the insolvency proceedings by liquidation of assets.

In order not to have any discussion regarding the effects of pronouncing a court decision by which the insolvency judicial procedure was opened, by liquidation of assets, in Article 83 (2) of Law no. 151/2015 it is expressly provided that the liquidation procedure is opened in relation to the inheritance, in contradiction with the heirs, being subject to capitalization exclusively the assets of the deceased.

The heirs are required to cover, within the limit of the assets of the inheritance, the receivables included in the table of receivables, in their entirety, including interest and penalties calculated from the date of acceptance of the succession, minus the amounts paid by the deceased debtor and heirs.

The provisions of Article 84 govern the case in which the debtor dies during the insolvency proceedings by liquidation of assets. Thus, if the debtor dies after the opening of the judicial procedure of liquidation insolvency, and all the creditors express their agreement, the procedure continues with the heirs.

As soon as it becomes aware, in any case, that the debtor has died, the court must notify the creditors, asking them to express their option to continue the procedure, within a maximum of 30 days from receipt of the notification. And this time, in order to continue the insolvency proceedings with the heirs of the natural person debtor, the consent of all creditors is required.

If the creditors have chosen to continue the procedure, the court shall proceed according to the provisions of Article 81 of Law no. 151/2015, which shall apply accordingly.

¹³In accordance with the provisions of Article 33 of Law no. 151/2015 „(1) *If the plan has not been approved and if the debtor has not formulated, within the term provided by law, a request for confirmation of the plan, the insolvency commission issues a decision by which it withdraws the debtor's request to open the procedure based on a debt repayment plan.* (2) *If the plan has not been confirmed, the court communicates, ex officio, the final court decision to the insolvency commission, which, taking note of this, issues a decision by which it withdraws the debtor's request to open the procedure on the basis of a debt repayment plan.* (3) *The decision to withdraw the insolvency commission, provided for in (2), shall be communicated to the debtor and the creditors and shall be published immediately in the Bulletin of insolvency proceedings – section «Debtors – natural persons with obligations not arising from the operation of an enterprise».* It can be challenged by the debtor only on grounds of illegality.(4) *The mandate of the administrator of the procedure ceases on the date of the decision to dismiss the insolvency commission.*” (s.n.).

Thus, the court will request the chamber of notaries public in whose constituency the deceased had the last domicile to make a mention in the special register provided by law, that insolvency proceedings are opened against him and issue a certificate stating whether or not the debtor's inheritance has been disputed, and if so, who are the persons who have the quality of heirs, as well as whether, until the acceptance of the inheritance by at least one of the successors, a curator of the succession has been appointed or not.

If it is found that the inheritance has not been debated or, as the case may be, accepted, the court will request, within 15 days from the issuance of the succession certificate, the chamber of notaries public in whose constituency the deceased had his last domicile, or, as the case may be, to the notary public already notified to notify the known successors regarding the fact that an insolvency procedure is opened by liquidation of assets and to make it known that they should exercise their right of inheritance option.

The notification sent to universally known and universally known successors must include, under penalty of nullity:

- a) the special term of succession option, which is 3 months from the date of receipt of the notification;
- b) specifying that, if he does not exercise his right to accept the inheritance within this period of forfeiture, he is presumed to renounce the inheritance;
- c) the specification that the deceased had the quality of debtor in a judicial insolvency procedure by liquidation of assets, also showcasing the stage of the procedure;

The notification sent to the legatee in a private capacity must include, under the sanction of nullity, the information provided in let. a) -c), as well as the situation of the good in the possession of the legatee.

If no heir has accepted the inheritance within the special term of succession option, the court will appoint a special trustee of the inheritance, the provisions of Chapter V, *Insolvency proceedings by liquidating the debtor's assets* applying accordingly.

If by capitalizing the assets of the inheritance all the receivables were covered, the remaining goods or sums of money return to the heirs or, as the case may be, if no heir has accepted the inheritance, they go to the commune, city or, as the case may be, the municipality in whose territorial area the goods were at the date of opening the inheritance proceedings.

The last regulated case is the one from Article 85, regarding the death of the debtor during the simplified insolvency procedure.

Thus, if the debtor dies during the application of the simplified procedure, the insolvency commission, as soon as they become aware of the fact that the death occurred, issues a decision to terminate the application of the insolvency procedure.

After the cessation of the simplified procedure as a result of the debtor's death, the creditors can recover their receivables from the heirs, according to the provisions of Article 1.114 of the Civil Code, in the sense that the heirs are responsible for the debts and tasks of the inheritance only with the goods from the inheritance patrimony.

Conclusions

The regulations contained in Law no. 151/2015 are often rudimentary, and in some cases they are altogether absent.

Law no. 151/2015, although it is easy to criticize given the lack or ambiguity of regulations, it still provides a legislative framework for the debtor, a natural person in good faith, who under this law may request the opening of one of the three forms of procedure.

The emergence of an insolvency law for individuals in Romania was not only expected by the over-indebted but also mandatory, given the reform of insolvency legislation at European level.

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CONSIDERATIONS REGARDING THE LEGISLATION OF SOME ASPECTS REGARDING MARRIAGE WITH IMPACT ON THE FAMILY PATRIMONY IN THE NEW CIVIL CODE AND THE NEW CODE OF CIVIL PROCEDURE

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Abstract

Marriage defined in the Civil Code is the freely consented union between a man and a woman, concluded under the law (art. 259 para. 1 NCC). The conclusion of the marriage, respecting the substantive and formal conditions provided by law, produces a series of effects, in different plans: personal rights and duties or mutual patrimonial between spouses, respectively rights and obligations in relation to minor children resulting from marriage or adopted.

The new Civil Code also regulates the stage prior to the marriage, regarding the engagement, its valid conclusion or its rupture attracting a series of legal consequences, including in patrimonial plan.

At the same time, the dissolution of the marriage through divorce or its annulment or declaration as null attracts, within the limits of the law, a series of patrimonial or non-patrimonial consequences.

Thus, persons involved in an engagement or marriage relationship are recognized in the New Civil Code and the New Code of Civil Procedure, among others, several possible legal actions and specific correlative defenses, with direct or indirect impact in terms of family or pre-family patrimony (in case of engagement). Consequently, the present approach aims to analyze, without exhaustive claims, in a pragmatic manner, of substantive law and procedural law, some of these situations regulated by law, in the hope that such an approach can be useful to both practitioners and law theorists.

Keywords: *marriage, engagement, family patrimony, patrimonial rights and obligations*

Problem analysis

A. As I pointed out, the Civil Code regulates the engagement as a mutual promise to conclude the marriage (art. 266 para. 1 NCC), being obvious the contractual nature of such a relationship, through the prism of an agreement of will in this regard [1]. The effects of the engagement are specific and are provided in art. 266 and 267 NCC: (1) the mutual promise to conclude the marriage; (2) the fiancé who breaks the engagement cannot be forced to conclude the marriage; (3) in case of breaking the engagement, there is an obligation to return the gifts that the fiancés received in consideration of the engagement or, during it, the payment of compensations or coverage of damages.

In this context, it can be observed that the existence of a contractual relationship, respectively its “breaking”, impacts in patrimonial plan the persons who had an engagement relationship. Thus, in case of rupture of the engagement, the gifts that the fiancés received in consideration of the engagement or, during it, for the purpose of marriage are subject to

restitution, except for the ordinary gifts (art. 268 para. 1 NCC). Gifts are returned in kind or, if this is no longer possible, to the extent of enrichment.

In order for the restitution obligation to exist, it is necessary that the engagement does not end with the death of one of the fiancés (art. 268 para. 3 NCC), but in any other way: the consent of the parties, through "fault" or the will of one of the fiancés. We agree with the opinion expressed in the doctrine [2] in the sense that, although the legislator did not expressly provide, there is no obligation of restitution, if the fiancés married each other.

As the legal text does not distinguish, the gifts of engagement and those for marriage made reciprocally by the fiancés or received by a third party, gifts made at the time of the conclusion of the engagement or during it, are subject to restitution.

Gifts are returned in kind or, if this is no longer possible, to the extent of enrichment (art. 268 para. 2 NCC), the refund may be voluntary, and otherwise in court, through an action in progress, procedural quality passive having the former fiancés (persons who received these gifts), and active procedural quality having the third parties who made these gifts in consideration of the engagement or for the purpose of marriage or the fiancé who understood to gratify the other fiancé. The right to action in the restitution of the engagement gifts is prescribed within one year from the rupture of the engagement (art. 270 NCC).

In addition, the legislator regulated in art. 269 NCC a patrimonial liability for the rupture of the engagement by consecrating two cases: (1) the abusive rupture of the engagement and (2) the culpable determination of the rupture of the engagement. In other words, "fault" in breaking up the engagement is relevant.

The compensations considered by art. 269 NCC are the expenses made or contracted for the marriage insofar as they were appropriate to the circumstances, as well as for any other damages caused (art. 269 para. 1 NCC). We are of the opinion that the evaluation of these expenses or damages can be carried out, by mutual agreement, by the former fiancés, meaning that an extrajudicial transaction can take place, which will avoid the initiation of a civil litigation.

If these costs or damages are not settled by agreement of the parties, the interested party shall apply to the court with action in the claims, taking into account the following aspects: (1) active procedural capacity will have the fiancé "innocent" the termination of the engagement, and the passive procedural capacity of the fiancé who abusively broke the engagement or guiltily caused the plaintiff to break the engagement; (3) the plaintiff is obliged (art. 249 NCPC) to prove, under the conditions of common law, the expenses made or contracted for marriage, insofar as they were appropriate to the circumstances or any other damages caused, respectively the fault of the defendant; (4) the guilt of the defendant being a factual situation, is to be proved by any legal means of proof; (4) the culpable rupture of the engagement must be the cause of the alleged damage; (5) the right to action in repairing the damage caused by breaking the engagement is prescribed within one year from the breaking of the engagement (art. 270 NCC).

B. A regulation with a direct impact in terms of family patrimony is found in art. 316 NCC which enshrines the regime of dispositions that seriously endanger the interests of the family. According to this legal text, exceptionally, if one of the spouses concludes legal acts that seriously endanger the interests of the family, the other spouse may request the

guardianship court that, for a certain period, the right to dispose of certain assets may be exercised only with his express consent.

In the specialized doctrine [3] it was stated that this regulation establishes a real "judicial limit" of the right of one of the spouses to dispose of certain goods alone. From the analysis of art. 316 NCC shows that the acts of disposition regarding the assets of the husband are taken into account, which, through its action, seriously endangers the interests of the family.

The establishment of this measure by which the family patrimony is affected is subsumed to the cumulative fulfillment of several conditions: (1) the conclusion of some legal acts by one of the spouses; (2) these legal acts must be capable of seriously endangering the interests of the family. These cumulative conditions are verified by the guardianship court, the serious danger being a factual situation that can be proven by any means of proof.

Considering that art. 316 para. 1 NCC does not distinguish, we consider that the measure can be ordered when the spouse concludes legal acts of disposition both on the common goods and on the own goods, legal acts able to produce the consequence mentioned in the legal text. We also specify that the legal acts of disposition are allowed by law to the spouse in question, but the effect of their completion is likely to seriously endanger the interests of the family.

The "interests of the family" must take into account all the circumstances of the case, the degree of damage, the material conditions of the spouses, the standard of living, etc. , aspects to be proved by the plaintiff spouse by any means of proof.

The measure that can be instituted according to art. 316 NCC has the following features:

- it can be disposed of only exceptionally; the exceptional character must be related, in our opinion, to the nature and impact of the legal acts committed by the spouse, correlated with the serious serious danger to the interests of the family that is ready to occur or has occurred;

- is temporary, given that the legal text expressly provides so; the duration of this measure may be extended, but not exceeding a total of 2 years. Reported to art. 316 para. 1 NCC we are of the opinion that a single measure of maximum 2 years or more consecutive measures of establishment and extension not exceeding 2 years can be ordered. After the end of the 2-year term, the measure allowed by art. 316 NCC is to be abolished by law and if the factual situation requires it and there is interest, an action for finding can be successfully initiated, in compliance with art. 35 NCPC by which to request the competent court to establish the existence of the husband's right to dispose of property (action in positive finding);

- it is provisional, the ordered measure may be modified or lifted, before the fulfillment of the established term, if the factual situation that generated the taking of the change changes. The decision pronounced in the hypothesis provided by art. 316 NCC has res judicata authority as long as the factual situation remains unchanged;

- the legal action requesting the establishment of this measure is prescriptive, considering that the right to action expires within one year, which starts to run from the date when the injured spouse became aware of the existence of the act (art. 316 para. 2 NCC).

From a procedural point of view, the ordered measure has exclusively judicial character, being given in the competence of the guardianship court. Only spouses have

active and passive procedural quality [4]. The decision approving the measure is pronounced following a contradictory contentious procedure and is communicated in order to carry out the real estate or furniture advertising formalities, as the case may be, in order to ensure the opposability towards third parties.

The acts concluded with the non-observance of the final court decision pronounced pursuant to art. 316 NCC are annulable [5], but given the obligation to note it in public registers, the effect of annulling legal acts must be borne only by third parties in bad faith, in the case of movable property or by third parties who concluded the act with only one of the spouses after completing the real estate advertising formalities. Given that the legal text refers to "annulment" it is obvious that the relative nullity is taken into account, meaning that the regime of its invocation is to be applied.

C. Another legal provision, with direct impact, regarding the family real estate patrimony, is the one from art. 321 para. 2 NCC which states that any of the spouses may request the notation in the land book, in accordance with the law, of a building as a family home, even if he is not the owner of the building. Of course, this notation in the land book is intended for opposability to third parties, art. 321 para. 2 being concordant with art. 902 alin. 2 pt. 5 NCC which stipulates that the destination of a family residential building is subject to notation in the land book. The property intended for the family [6] may be a common property or property of one of the spouses.

The enunciated rule imposes a legal limitation of the rights of one of the spouses to dispose alone, by legal acts, regarding the family home, even if the law or the matrimonial regime would have allowed it to do so [7].

These legal limits of disposing of real estate are characterized by the following conditionalities:

- refers to legal acts that have as object a building with the destination of the family home;
- the legal acts affected by this measure are acts of voluntary disposition, *inter vivos*, for a fee or free of charge in respect of a real right or a personal right over the real estate;
- for the validity of the disposition documents, the written consent of the other spouse is required - condition required *ad probationem*; if the consent is refused without a legitimate reason, the other spouse may notify the court of guardianship, so that it authorizes the conclusion of the act (art. 322 para. 4 NCC);
- from a temporary point of view, the solution imposed by art. 322 NCC applies as long as the marriage lasts because once the marriage ends, through the ways allowed by law, the legal concept of "family home" will also end.

Regarding the sanction that intervenes for non-compliance with the provisions of art. 322 para. 1 NCC is incident art. 322 para. 4 NCC which provides that the spouse who did not give his consent [8] at the conclusion of the act may request its annulment within one year [9] from the date on which he became aware of it, but not later than one year [10] from the date of termination of the matrimonial regime. Since a cause of relative nullity is regulated, it can be covered by express or tacit confirmation by the spouse whose consent was not taken into account in the execution of the disposition act.

We are of the opinion that the application of art. 322 para. 1 NCC is not conditioned, obligatorily, by the notation of the common dwelling, in the land book, under the conditions of art. 321 para. 2 NCC because art. 322 para. 5 NCC stipulates that in the absence of

notation of the family home in the land book, the spouse who did not give his consent cannot request the annulment of the deed, but only damages from the other spouse, unless the acquiring third party knew otherwise, the quality of family housing. Consequently, if:

- the family home has been noted in the land book, the spouse whose consent was not taken into account when performing the act of disposition may request the annulment of the act in question;

- the family home has not been noted in the land register, the spouse whose consent was not taken into account when carrying out the act of disposition is no longer entitled to request the annulment of the act in question [11], but can only claim damages, with proof correlative of them.

In the same logic of protection of the family home, art. 322 para. 2 The NCC stipulates that a spouse may not move from the home the goods that furnish or decorate the family home and may not dispose of them without the written consent of the other spouse.

In this case, the special rules of protection concern both the legal acts of disposition and the material acts regarding these movable goods (“cannot dispose” and “cannot move”). These movable property must furnish or decorate the family home. In accordance with art. 322 para. 6 NCC the spouse who has not given his consent to the movement of the movable property may claim damages from the other spouse, and if he has not expressed his agreement on an act of disposition on them, he may request the annulment of the act under the conditions art. 322 para. 5 NCC.

D. An important role, regarding the impact that it can have on the family patrimony, has the exclusive fault in the dissolution of the marriage. Thus, the divorce was regulated in the New Civil Code and in the New Code of Civil Procedure - as a way of dissolving the marriage. If due to good reasons, the relations between the spouses are seriously damaged and the continuation of the marriage is no longer possible, the divorce can be pronounced if the court establishes the fault of one of the spouses in the dissolution of the marriage (art. 379 para. 1 NCC) or divorce may rule, at the request of one of the spouses, after a de facto separation lasting at least 2 years, through the sole fault of the plaintiff spouse, unless the defendant agrees to the divorce, when he decides without mention of the fault of the spouses (art. 379 para. 2 NCC).

Correlation to the regulation of substantial law, in the New Code of Civil Procedure was instituted the procedure of culpable divorce, respectively art. 934 NCPC (fault in the dissolution of the marriage) and art. 935 NCPC (divorce for long de facto separation).

In order to dissolve the marriage through the sole fault of one of the spouses, from a procedural point of view, we must be in one of the following hypotheses:

- the court will pronounce the divorce through the fault of the defendant spouse when, due to good reasons attributable to him, the relations between the spouses are seriously damaged and the continuation of the marriage is no longer possible (art. 934 para. 1 NCPC). This presupposes that the plaintiff spouse filed a divorce application through the sole fault of the defendant spouse, under the conditions of art. 916 et seq. NCPC and if the evidence administered does not show that both spouses are guilty of the dissolution of the marriage (art. 934 para. 2 NCPC corroborated with art. 379 para. 1 NCC); the situation is similar in case the defendant formulates a counterclaim in the divorce process, under the conditions of art. 917 NCPC;

- the court will pronounce the divorce through the exclusive fault of the plaintiff when the spouses are in fact separated for at least 2 years, and the plaintiff filed for divorce, assuming responsibility for the failure of the marriage (art. 935 para. 1 NCPC in conjunction with art. 379 para. 2 NCC).

The retention, as such, in the final court decision to dissolve the marriage, of the exclusive fault, generates a series of consequences in patrimonial plan, under the conditions provided by the New Civil Code.

Thus, the innocent spouse, who suffers a prejudice by dissolving the marriage, can ask the guilty spouse to compensate him, the guardianship court resolving the request by the divorce decision (art. 388 NCC). In other words, the spouse guilty exclusively of the dissolution of the marriage will be obliged, at the request of the other spouse - party in the divorce process - to cover the damage caused by the dissolution of the marriage. By hypothesis, it is necessary to have a divorce application from the common fault of the other spouse (introduced in the main or counterclaim) and to be invested the divorce court with an ancillary claim for compensation. This claim cannot be filed separately separately in the main proceedings, being necessarily ancillary to the divorce claim [12].

In this case, a form of tortious civil liability specific to the relations between the spouses is regulated [13], meaning that the spouse requesting such compensations must prove the fulfillment of the specific conditions of liability: damage, wrongdoing, causation, guilt. The damage to be covered by these compensations can be material or moral, aspect expressly provided by art. 919 para. 1 lit. d NCPC which mentions that the divorce court will also rule on "the compensation claimed for the material or moral damages suffered as a result of the dissolution of the marriage".

At the same time, if the divorce is decided through the sole fault of the defendant spouse, the claimant spouse may benefit from a benefit which compensates, as far as possible, for a significant imbalance which the divorce would cause in the living conditions of the person requires (art. 390 NCC). The compensatory benefit may be granted only if the marriage has lasted at least 20 years and may be established in cash, in the form of a lump sum or a life annuity, or in kind, in the form of usufruct over movable or immovable property which belong to the debtor (art. 392 para. 1 NCC). Under the procedural aspect, art. 919 para. 1 lit. e NCPC stipulates that the divorce court will also rule on the "maintenance obligation or compensatory benefit between the ex-spouses".

The compensatory benefit can be requested only with the dissolution of the marriage, when establishing it, both the resources of the requesting spouse and the means of the other spouse at the time of divorce, the effects that the liquidation has or will have will be taken into account. matrimonial regime, as well as any other foreseeable circumstances that may change them, such as the age and health of the spouses, the contribution to raising minor children that each spouse has had and will have, to carry out an income-producing activity and the like (art. 391 para. 2 NCC).

In accordance with art. 389 para. 2 NCC The divorced spouse is entitled to maintenance if he or she is in need due to an incapacity for work that occurred before or during the marriage. He is also entitled to maintenance when the incapacity arises within one year of the dissolution of the marriage, but only if the incapacity is caused by a circumstance in connection with the marriage. However, when the divorce is pronounced through the sole fault of one of the spouses, he does not enjoy this right of maintenance for

one year from the dissolution of the marriage (art. 389 para. 4 NCC). On the contrary, the innocent spouse will receive an indefinite maintenance pension.

Also, at the dissolution of the marriage, if it is not possible to use the house by both spouses and they do not understand each other, the benefit of the lease can be attributed to one of the spouses, taking into account, in order, the best interests of minor children. dissolution of marriage and the own housing possibilities of ex-spouses (art. 324 para. 1 NCC). In this context, the spouse who has been awarded the benefit of the lease is obliged to pay the other spouse an indemnity to cover the costs of installation in another home, unless the divorce was pronounced through the sole fault of the latter (art. 324 para. 2 NCC) [14].

The Romanian legislator regulated, in art. 328 NCC and the right to compensation, in the sense that the spouse who has actually participated in the other spouse's professional activity may obtain compensation, to the extent of the latter's enrichment [15], if his participation has exceeded the limits of the material support obligation and the obligation to contribute to the expenses of the marriage.

We agree with the opinion expressed in the doctrine [16] in the sense that if the aid provided is limited to the general obligation of mutual support between spouses, no compensation is due according to art. 328 NCC. Consequently, for the granting of compensation, it is necessary that:

- one spouse to effectively participate in the professional activity of the other spouse
- for participating in this activity no remuneration has been claimed or received
- participation in the activity of the other spouse to exceed the limits of the obligation of material support and the obligation to contribute to the expenses of the marriage.

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- participation in the activity of the other spouse to exceed the limits of the obligation of material support and the obligation to contribute to the expenses of the marriage.

CONCLUSIONS

The synthetic analysis of these few rules established by the New Civil Code and the New Code of Civil Procedure, with possible impact on family assets, reveals the importance of knowing them, especially the legal consequences that are activated in case of violation of these legal provisions. The “risk” of the incidence of such legal hypotheses can appear both in the phase prior to the conclusion of the marriage (in the engagement relations), during the marriage, and after its termination, in relation to the reasons and context in which these circumstances occurred.

The regulation of the legal consequences analyzed in this material can be done both amicably, by completing legal transactions or voluntarily executing the obligations imposed by the incident legal texts, and by initiating legal actions that have a certain specificity in terms of object, respectively of the conditions for exercising the civil action.

BIBLIOGRAPHY

[1] See, for the same opinion, E. Florian, *The New Civil Code. Commentary on articles*, CH Beck Publishing House, Bucharest, 2012, p. 265

[2] E. Florian, *The new.....*, p. 269

[3] C.M. Nicolescu, *The New Civil Code. Commentary on articles*, Ed. CH Beck, Bucharest, 2012, pg. 326

[4] We are of the opinion that after the dissolution or annulment of the marriage, art. 316 NCC is no longer applicable, once the quality of husband and the concept of family ceases.

[5] The relative nullity is incidental regarding the dispositions subsequent to the finality of the decision of the guardianship court and does not affect the previous dispositions that were the basis for taking the measure provided by art. 316 NCC

[6] By "family home" is meant a factual situation, namely the location where the spouses actually live, regardless of their legal domicile; the legal domicile may be the same as the family home or may be different.

[7] C.M. Nicolescu, *op.cit.*, g. 334

[8] So only this spouse has an active procedural capacity, following that the process will take place in contradiction with the other spouse.

[9] Special limitation period

[10] Deadline

[11] Which leads to a rejection of the application for annulment as unfounded

[12] In the sense that compensation could also be granted separately, see F-A. Baiaș, *the New Civil Code. Commentary on articles*, CH Beck, Bucharest, 2012, p. 422

[13] F-A. Baiaș, *idem*, p. 421

[14] Which implies that the house was assigned to the innocent husband

[15] This right to compensation is rooted in the principle of unjust enrichment

[16] C.M. Nicolescu, *op.cit.*, p. 348 - conjugal assistance is not a professional benefit

THE IMPACT OF BREXIT ON THE RELATIONSHIP BETWEEN ROMANIA AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND ON THE REGIME OF RECOGNITION OF JUDGMENTS IN MATTERS OF MARITAL STATUS AND FAMILY RELATIONS AND ON THE REGISTRATION OF OFFICIAL DOCUMENTS ISSUED BY THE UNITED KINGDOM ON PERSONAL AND FAMILY STATUS IN ROMANIA

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Abstract

The United Kingdom of Great Britain and Northern Ireland ceased to be a member of the European Union on 20 February 2020. In accordance with the Agreement concluded to regulate its withdrawal, approved by Council Decision (EU) 2020/135 of 30 January 2020, the legislative measures adopted by the European Union in the field of private international law, more specifically, measures aimed at developing the judicial system for cooperation in civil matters in accordance with the current Article 81 of the Treaty on the Functioning of the European Union, they continued being applicable until 31 December 2020 in both the United Kingdom and the Member States for situations relating to the United Kingdom. With the end of this transitional period, the above-mentioned legislative measures, as well as European Union legislation in general, have ceased to have effect as such in the United Kingdom. In this context, it is important to illustrate some of the changes that occurred after December 31, 2021 on the relevant regulatory framework for the recognition in Romania of judgments and official acts issued by the United Kingdom on personal status and family relationships.

Keywords: *Brexit, judgments on personal status and family relations, recognition regime, transition period, official documents on personal status.*

1. General considerations

The free movement of persons within the European Union is one of the fundamental freedoms guaranteed by Community law and one of the main pillars underpinning the construction of the integrated legal system, in particular the area of freedom, security and justice, which is, according to Article 3 of the Treaty on European Union, one of the priority objectives of the European Union. A natural consequence of the exercise of freedom of movement is the establishment of family relationships characterized by the presence of cross-border elements in respect of which there is a need to ensure the continuity and stability of legal situations which have arisen, changed or been terminated in the territory of a Member State within the other Member States.

In this context, *the freedom of establishment* in another Member State of the European Union depends on the possibility of recognizing, in the State of destination, the personal and family status which nationals have acquired in their State of origin. A key role in ensuring a

uniform and predictable legal framework for the status of individuals and family relationships throughout the Community should be the responsibility of the European Union, however, at least so far, the powers to adopt regulations in these areas are reserved almost exclusively to the Member States. One of the main reasons for this being that these regulatory areas are the most difficult to harmonize, as domestic legislation is generally deeply rooted in national social and cultural traditions. However, in exercising the prerogatives conferred by Article 81 TFEU, the European Union has played a major role in adopting specific regulations in matters of judicial cooperation in civil matters, including family law, for situations where legal relations have cross-border implications. The legislation adopted focuses on aspects of private international law, such as jurisdiction, applicable law, recognition and enforcement of judgments given in another Member State of the European Union.

Based on the above considerations, this study aims to briefly review the consequences of the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union on the recognition in Romania of judgments handed down in the United Kingdom on the personal and family status of individuals as well as on the aspects regarding the registration in the civil status documents from Romania, of the official documents issued by the United Kingdom regarding the personal and family status. The issues under analysis are topical, concerning the significant impact of the changes in the legislative framework, regarding which to distinguish between legal situations prior to or concomitant with the transition period and new legal situations, which appeared after 31 December 2020, which comes under the rule of different regulations, due to the fact that, by withdrawing the United Kingdom of Great Britain and Northern Ireland from the EU, it acquired the legal status of a third state to the European Union.

2. Regime for the recognition in Romania of judgments handed down in the United Kingdom on the personal and family status of natural persons

In the matter of the legal regime of the recognition in Romania of the judgments pronounced in the United Kingdom regarding the personal and family status of the natural persons, the provisions of the *Agreement of withdrawal of the United Kingdom from the European Union* are relevant [1], approved by Council Decision (EU) 2020/135 of 30 January 2020 [2], laying down in principle [Article 127 (1)] that during the transitional period (starting on 1 February 2020 and ending on 31 December 2020) Union law continues to apply in both the United Kingdom and the Member States with regard to legal situations relating to the United Kingdom. For the same period of time, as set out in Article 131 of the same Agreement, the Court of Justice of the European Union shall retain jurisdiction to ensure the uniform interpretation and application of European law in proceedings involving situations relating to that State.

In particular, Title VI of the Agreement, dedicated to ongoing judicial cooperation in civil and commercial matters, regulates in detail the framework for the application of European Union law on judicial proceedings initiated until the end of the transitional period, as well as in matters related to the recognition and enforcement of judgments, decisions, authentic instruments, transactions and other judicial agreements. In this respect, Article 67 (2) (b) of the Agreement states that in the United Kingdom, as well as in the Member States in situations involving the United Kingdom, for judgments given in proceedings before the end of the transitional period, as well as for documents drawn up or officially registered as

authentic instruments and agreements concluded before the end of the transitional period *the provisions on recognition and enforcement of Regulation (EU) No 2201/2003* shall apply [3].

Therefore, in relation to the above-mentioned provisions, in the matter of recognition of judgments given in legal proceedings before the end of the transitional period, as well as in respect of documents drawn up or officially registered as authentic instruments and agreements concluded before the end of the same period Regulation (EC) No 2201/2003 continues to apply, both in the United Kingdom and in the Member States, to situations involving the United Kingdom.

On the other hand, due to the fact that the provisions of the regulation cease to be applicable in relation to the United Kingdom from 31 December 2020, the recognition in Romania of decisions on personal status and family relations pronounced in legal proceedings initiated after this date, follows the regime of recognition established by the provisions of Book VII of the Code of Civil Procedure, dedicated to the International Civil Procedure.

Romanian legislation provides for two types of recognition: ***automatic recognition*** and ***conditional recognition*** [4].

The rule is represented by the *automatic recognition*, which, as mentioned in Article 1095 of the Code of Civil Procedure, operates if the following three conditions are met, cumulatively: if the judgment refers to the personal status of the nationals of the State where they were pronounced, or if, being pronounced in a third State, they were first recognized in the nationality of each party or, in the absence of recognition, if they were pronounced on the basis the law determined as applicable according to the Romanian private international law, if they are not contrary to the public order of the Romanian private international law and the right to defense was respected.

Conditional recognition, established by Article 1.096 Code of Civil Procedure, shall apply if the conditions for recognition are cumulatively met. Thus, other decisions than those provided for in Article 1.095 Code of Civil Procedure may be recognized in Romania, provided that the judgment is final in accordance with the law of the State in which it was given, the foreign court which ruled upon it had the necessary jurisdiction to adjudicate the case in question without being based exclusively on the defendant's presence in that State or the existence of the defendant's property in that State, without a direct link to the dispute, and lastly, for there to be reciprocity regarding the effects of foreign judgments between the state of the court that pronounced the judgment and the Romanian State.

An additional condition is imposed if *the judgment was delivered in the absence of the losing party*. In this case, the court which was notified of the application for recognition must verify whether both the document by which the court was notified of the matter in question were communicated to the party in good time, as well as the summons for the term at which the debates on the merits of the case took place. The court must also ascertain whether the party concerned has been given an effective opportunity to defend themselves and to appeal against that judgment. The irregularity regarding the omission of the summons of the party that did not participate in the trial before the foreign court can be invoked only by that party.

Recognition of the judgment may be refused in the following cases: the decision is contrary to the public order of Romanian private international law; the decision pronounced in a matter in which the persons do not freely dispose of their rights was obtained with the

exclusive purpose of evading the cause of the incidence of the applicable law according to the Romanian private international law; the case has been settled between the same parties by a decision, even indefinite, of the Romanian courts or is being tried before them on the date of notification to the foreign court, it is irreconcilable with a decision previously handed down abroad and likely to be recognized in Romania; the Romanian courts had exclusive jurisdiction to try the case; the right to defense was violated; the judgment may be the subject of an appeal in the State in which it was delivered. (Article 1097 Code of Civil Procedure).

In accordance with the above rules, judgments given in the United Kingdom concerning personal status in disputes arising after 31 December 2021, *are automatically recognized in Romania, if the decisions refer to British citizens, or, if they have ruled on the personal status of third-country nationals, only if they have first been recognized in the State of each party, or, in the absence of recognition, they were pronounced on the basis of the law determined as applicable according to the Romanian private international law.* However, in order to enjoy the effect of automatic recognition, such decisions must not be contrary to the public order of Romanian private international law and it is also necessary to respect the right to defense.

All judgments given in the United Kingdom automatically recognized, *produce their effects in Romania from the moment they are pronounced, without the need for any judicial recognition procedure* [5].

For judgments on personal status and family relationships in the United Kingdom which do not meet the conditions for legal recognition, *the rules on the judicial recognition of foreign judgments*, referred to in Article 1096-1097 of the Code of Civil Procedure, shall apply.

In order to better highlight the different legal regime of the recognition in Romania of the judgments pronounced in the United Kingdom in the matter of personal status and family relations, depending on the moment of initiating judicial proceedings, we consider it useful to refer, for example, to a divorce judgment given in the United Kingdom, in respect of which the civil status service is required to enter the appropriate entries on the marriage certificate. As indicated above, the regime applicable to such a judgment is different according to whether the judgment is given in a judicial proceeding initiated before or, as the case may be, after 31 December 2020.

Thus, where the judgment is given in proceedings initiated at the latest during the transitional period, the provisions of Regulation (EC) No 2201/2003 shall apply. To that end, in accordance with Article 37 of the Regulation, the party seeking recognition of the judgment must provide a copy of the judgment which satisfies all the conditions necessary to establish its authenticity and a certificate issued by the court or competent authority of the United Kingdom, following the model set out in Annex I to the Regulation.

Conversely, if the final judgment was initiated in the United Kingdom after the end of the transitional period, recognition of the judgment shall be made either under the conditions of automatic recognition, if the requirements referred to in Article 1095 of the Code of Civil Procedure are met, or by means of a judicial recognition procedure (*exequatur*) under the conditions of Articles 1096 – 1097 Code of Civil Procedure.

It is thus noted that the procedure for the recognition in Romania of judgments given in the United Kingdom after the transitional period becomes more complicated compared to

the uniform and simplified system for the recognition of judgments given in the Member States of the European Union, created by Regulation (EC) No 2201/2003.

3. Regime for the recognition and registration of official documents issued on personal status by the United Kingdom

A significant role in the field of free movement of persons and with a direct impact on the recognition of personal and family status in another Member State of the European Union is also played by Regulation (EU) 1191/2016 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for the presentation of certain official documents in the European Union and amending Regulation (EU) No 1024/2012 [6]. The purpose of the Regulation is to simplify existing administrative procedures relating to the presentation in a Member State of certain official documents issued by the authorities of another Member State in accordance with its national law. Specifically, they are official documents issued by the authorities of a Member State stating one of the following: birth, the fact that a person is alive, death, name, marriage (including marital capacity and marital status), divorce, legal separation or annulment of marriage, registered partnership (including the ability to enter into a registered partnership and registered partnership status), dissolution of a registered partnership, legal separation or annulment of a registered partnership, filiation, adoption, domicile and / or residence or citizenship.

United Kingdom from the European Union does not contain rules dedicated to this regulation regarding the transitional period, however; in the revised Stakeholder Opinion on the withdrawal of the United Kingdom and EU rules in the field of civil justice and private international law published by the European Commission on 27 August 2020 [7], it is specified in point 7.1 that Regulation (EU) 1191/2016 is applicable to public documents issued in the United Kingdom and submitted to the competent authorities of another Member State by 31 December 2020. It should be noted that the application of the Regulation is not conditional on the date of issue of the official document, but on the date on which it is submitted to the competent authorities of another Member State. The Regulation becomes *inapplicable* if such an official document issued by the United Kingdom authorities is presented to the authorities of a Member State of the European Union, including those in Romania, after the end of the transition period, *regardless of the date on which it was issued or its period of validity*.

In accordance with Regulation (EU) 1191/2016 - which as shown above continued to apply until the end of the transitional period - official documents issued in the United Kingdom on personal or family status and their certified copies were exempt of the obligation of legalization and other similar formalities, in order to be registered in Romania. Therefore, the verification by the Romanian authorities of such documents was carried out on the basis of the original documents drawn up in English, stamped and signed by the issuing authority. Each document was accompanied by a standard multilingual form, required by regulation, which included the translation into Romanian. If there was no doubt as to the authenticity of the official document or a certified copy thereof, nor as to the correctness of the translation, the Romanian authorities had the obligation to receive and register the document, considering its content certified, provided that the information included in the multilingual standard form is sufficient for its processing.

After 31 December 2020, Regulation (EU) 1191/2016 also ceased to apply between the Member States of the European Union and the United Kingdom, being replaced by *The Hague Convention of 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents* [8]. Therefore, the official documents issued by the United Kingdom on personal and family status, submitted to the Romanian authorities after 31 December 2021, are to be entered in the Romanian civil status registers by applying the rules of the 1961 Hague Convention which eliminates the formality of diplomatic or consular legalization, by replacing it with the application of the apostille on the public document, in order to certify its authenticity, but not its content.

It should be noted that the procedure for recognition and registration of official documents issued by the United Kingdom and submitted to the Romanian authorities after 31 December 2020, presents a lower level of simplification than that established by Regulation (EU) 1191/2016, but - nevertheless - it could not be said that the rules of recognition under the 1961 Hague Convention would be likely to create significant obstacles to the movement of documents between the United Kingdom and Romania, especially since this conventional regime is already consolidated and applied in relations with all third countries to which Romania is bound by the convention.

Conclusions

Legislative changes after 31 December 2020 on the recognition in Romania of judgments on marital status and family relations in the United Kingdom and civil status documents issued by the United Kingdom, are just one of the aspects that shape the new regime in the relationship between Romania and the United Kingdom in the matter of the personal status and family relations of the citizens of the two states, however, it is useful to know which are the regulations governing legal situations in this matter, born in the transition period and in the post-Brexit period.

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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

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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 Rights 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.

^[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.

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

^[3] The General Assembly of the United Nations, The Universal Declaration of Human Rights, 10 December 1948, Resolution 217 A (III); Universal Declaration of Human Rights was signed by Romania on 14 December 1955.

^[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.

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

[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.

[8] See more, José Manuel Sobrino Heredia in Araceli Mangas Martín (dir.), *Carta de los derechos fundamentales de la Unión Europea*, Fundación BBVA, 2008, p. 108.

[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.

[10] Organization of American States, *American Convention on Human Rights “Pact of San Jose”*, Costa Rica, 22 November 1969, in force since 19 July 1978.

[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.

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 Cançado 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

^[13] For an interesting parallel between the two systems, that of the ECtHR and that of CIADO with regard to the relevant case-law of the right to life, see: Hnitudou Katerina, *Beyond the right to life: the right to live in dignity in the European Convention on Human Rights*, LUP Student Papers, University of Lund, Sweden, 2016, available at <https://lup.lub.lu.se/student-papers/search/publication/8886504>, last accessed on 10 September 2019.

^[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 [...]”

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

^[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.

^[17] See Paraschiv C.S. (2019), *Fişe de procedură penală - pentru admiterea în magistratură şi avocatură*, 4th edition, Hamangiu, Bucharest, pp. 17 and 18.

^[18] See more: Paraschiv C.S.; Teodorescu M.G.; Nicolescu A.S. (2020), *Drept procesual penal. Partea generală. Note de curs*, 2nd edition, Hamangiu, Bucharest, pp. 239-309.

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.

^[19] **Brown, et al. v. Plata, et al.**, 563 U.S. 493 (2011).

^[20] See also <https://verdict.justia.com/2015/10/05/dignity-as-an-indispensable-condition-of-criminal-justice>, last accessed on 27 April 2020.

^[21] Article 11 paragraph 1 of the Code of Criminal Proceedings.

^[22] www.ccr.ro, last accessed on 10 April 20.

^[23] The Constitutional Court of Romania, Decision no. 1576, 7 December 2011, published in the Official Gazette of Romania, Part I, no. 32 of 16 January 2012; see also the Decision of the Constitutional Court no. 841, 2 October 2007, Official Gazette of Romania no. 723 of 25 October 2007.

^[24] K. Zakarias, K. Benke, *Demnitatea umană în jurisprudența instanțelor constituționale din Germania, Ungaria și România*, Buletinul Curții Constituționale, no. 2, 2012, pp. 57-58.

^[25] *Case C-377/98, The Nederland v. The European Parliament and the Council*, EU:C:2001:523, §70-77.

^[26] *Case C-377/98*, EU:C:2001:329, §190.

^[27] See for this, *Explanations relating to the Charter of Fundamental Rights* (OJ C 303), the explanations relating to Article 1.

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*

[28] *“No one shall be subjected to torture or to inhuman or degrading treatment or punishment”*, the European Convention on Human Rights, 4 November 1950, Article 3.

[29] General Assembly of the United Nations, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, The United Nations, Treaties Series, vol. 1465, p. 85.

[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.

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

^[37] *Idem* §59.

^[38] *Case of Bouyid v. Belgium* [MC], 23380/09, 28 September 2015.

^[39] *Idem* §102.

^[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.

^[42] See the ECtHR cases: *Todireasa v. Romania*, no. 35372/04, 3 May 2011; *Gagiu v. Romania*, no. 63258/00, 24 February 2009; *Iacov Stanciu v. Romania*, no. 35972/05, 24 July 2012; *Pavalache v. Romania*, no. 38746/03, 18 October 2011.

^[43] ECtHR, *Florea v. Romania*, no. 37186/03, 14 September 2010.

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]

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

^[44] ECtHR, *Aleksanyan v. Russia*, no. 46468/06, 22 December 2008.

^[45] *Idem* §156-157.

^[46] *Idem* §158.

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.

THE RIGHT TO DISCONNECT - A NECESSARY DEMARCATION BETWEEN PROFESSIONAL AND PRIVATE LIFE

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Abstract

Today, the technology involved in the employment relationship is meant to facilitate daily operations in the exercise of the duties of each employee.

However, technology can also be, indirectly, a tool through which the employee is constrained, being connected to work-related issues at all times. Against this background of the sustained connection with work problems and the overload resulting from overtime, the phenomenon of "burn-out" appears.

For this reason, several European countries have taken measures to regulate this situation and protect employees from requests from the employer even after business hours.

Pioneers in this field of the "right to disconnect" were France and Spain, which adopted, since 2016 and 2017, legislative measures to guarantee the right of employees to disconnect in order to ensure a balance between work and personal life.

Although not yet regulated at national level, the right to disconnect is becoming increasingly important in the employment relationship at the level of employers across Europe, including in our country.

To this end, earlier this year, the European Parliament adopted a Legislative Resolution containing recommendations to the Commission on the right to disconnect.

Keywords: digitization; disconnection; work time; private life; teleworking

1. The right to disconnect. Context and purpose.

According to Eurofound [1] (European Foundation for the Improvement of Working and Living Conditions) "the right to disconnect" refers to the right of a worker to be able to disconnect from work and not to engage in electronic communication related to the place of work, such as e-mails and other messages, during off-duty hours and on holidays or public holidays.

The objective of the right to disconnect is to allow employees to "reconcile" their personal and professional lives, while pursuing the fight against burn-out, which is increasingly taking over the labor market in the context of current technology. In order to avoid the interference of professional and family life, employees must have the possibility not to be in permanent contact with the Employer, respectively not to connect to digital tools or work tasks outside their working hours. , such as during daily, weekly rest, or even during rest leave.

This right applies to all employees, but its necessity has resulted especially for those who work in telework or those who hold a management position, as in these cases there was a difficult delimitation between private life (family life) and the professional one.

Negative trends on the subject of disconnection in the labor market have intensified since the outbreak of the pandemic with COVID-19, as at European level the share of telework has increased by almost 30% with increasing trends in the future [2].

If in 2019 only 0.8% of employees worked from home in Romania, in 2020 the Pandemic generated by COVID -19 forced many employers to adopt teleworking for their employees.

According to the online survey "Living, Working and COVID-19" [3] conducted in April 2020 by Eurofound, 37% of respondents stated that they started working from home during isolation.

The mentioned studies indicate that through telework, people are tempted 2 times more to work over the full time norm, included in employment contracts (even over the 48 hours provided for maximum) as opposed to people working in the office set up by employer.

For these reasons, the need to separate family and professional life has become increasingly clear. In this sense, even if for employees it has been proven that telework provides increased comfort and for employers greater productivity in terms of work performed, this type of activity has slowly led to the absence of a clear "border" between working life and the private one of the employees.

In this regard, the European Parliament itself notes in its Legislative Resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect (2019/2181 (INL)) that, although workers enjoy particular flexibility through the use of the Internet and digital tools, for professional purposes, especially by gaining time with family, this does not only provide benefits for workers as the increasing use of digital tools for professional purposes has led to a need (felt by both employees and employer) to be *"permanently connected", "always online"* which can *„negatively affect workers' fundamental rights and fair working conditions, including fair pay, limited working time, work-life balance, physical health and mental health, safety at work and well-being, as well as equality men and women, due to the disproportionate impact on caring workers, who tend to be women [...]"*[4]

Through the evolution of technology we can now say that employees can work from anywhere, be contacted at any time and respond to employer requests only with an internet connection, including the phone, thus working from home, from home, from any previously agreed locations. with the employer, or even on vacation. Or, this is not the intention to use technology in the employment relationship, but to increase employee productivity and make work easier.

It is true that teleworking, through the technology that is available to every employer / employee can make the employee's activity more accessible at any time, but because of this employees are connected with smartphones and laptops permanently to the professional environment and no longer it creates a delimitation between these two parts of a person's life - the professional and the private.

The right to disconnect, therefore, is more than an avoidance of physical or mental exhaustion of the employee but also a way to ensure mental comfort to the worker who can delimit the private professional, having the right not to engage in electronic communications related to work in his free time (daily / weekly rest period or on rest leave).

2. Regulation of the right to disconnect in European countries:

France is the first state in Europe to have a say in the right to disconnect, being the one that, in 2016, when it adopted Law 2016-1088 [5] (also called "El Khomri" Law), amended the Code Labor [6] establishing the "right to disconnect".

This legislative initiative was based on a judgment of the French Court of Cassation holding that 71% of French employees read work e-mails in the evening or on holiday [7], which is why, since 2001, it has been ruled as *"Employee he has no obligation to agree to work at home or to bring his files and work tools there."* [8]

Article 55 (1) amended Article L. 2242-8 of the French Labor Code by adding a paragraph (7); *"(7) Procedures for the full exercise by the employee of his right to disconnect and the establishment by the company of certain mechanisms for regulating the use of digital instruments to ensure compliance with rest periods and leave, as well as staff and family life. This Charter defines these procedures for the exercise of the right of disconnection and further provides for the implementation, for employees and management staff, of training and awareness-raising activities on the reasonable use of digital tools."* [9]

Thus, companies with at least 50 employees must negotiate with the unions an agreement ("mandatory annual negotiations") setting out the concrete ways to implement the right to disconnect. If no agreement is reached, employers must implement a "right to disconnect" policy that includes training programs to warn employees about the "reasonable" use of IT equipment outside of work hours, and also means of monitoring compliance with the "right to disconnect", including with regard to access to smartphones and work e-mails outside working hours.

If there are not 50 employees at the level of a company, there is no legal obligation presented above. And from the point of view of jurisprudence, in July 2018, the French Court of Cassation awarded compensation of over 60,000 euros to an employee who sued the Company for not being remunerated for the period during which it was required to remain available to its Employer. [10]

Another EU country with legislation on this subject is Spain. Here, employees have the right by law to disconnect digital devices outside working hours, in order to enjoy their free time - rest period and holidays.

Thus, on December 6, 2018, the Law on Data Protection [11] was adopted, which transposed into Spanish legislation the General Regulation for Data Protection (GDPR) of 2016 of the European Union (EU). Here was also introduced art. 88 which provided that workers have the right to disconnect in order to comply with their rest and vacation periods, but also as a way of separating professional life from personal life. Thus, this right was ensured for all types of activities - both office work and for employees who perform telework.

Italy has adopted by Law 81/2017 on "Intelligent Work" (Lavoro Agile or Smart Working) [12] provisions regarding the right to disconnect but only for the situation in which employees perform teleworking, not in general and for office work.

It is thus noted that EU states have laid the foundations for this right to disconnect, which is why, as there is no uniform regulation at Union level yet, the European Parliament earlier this year adopted Legislative Resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect (2019/2181 (INL)), a resolution which also

includes a text proposal for the relevant Directive. In essence, the Parliament also referred to the problem generated by the COVID-19 crisis and the way in which people's professional activity has changed.

In this respect, the importance of digital tools but also of national telework legislation for each Member State is recognized. Based on Eurofound studies, it was found that more than a quarter of workers in the Union started working from home during the period of isolation, compared to 5% before the Pandemic [13].

Precisely for this reason, the right to disconnect is considered a fundamental right, which, in terms of using technology in professional activity is an indispensable element in relation to the new ways of working in the digital age in which we live, to ensure the protection of all workers.

An important consequence of such an initiative is the right to allow workers not to perform work duties, not to reply to e-mails or messages sent for professional purposes outside working hours, ie during daily rest periods, weekly or annual leave, including maternity or other leaves with the guarantee in terms of EU regulation of the absence of negative consequences on the employee's employment relationship, receiving a bonus or other benefits or even on the possibility of professional advancement.

The European Parliament emphasized that in the digital age we live in and in relation to the new ways of working, there should be a greater degree of autonomy, flexibility and freedom of time management [14] so that workers do not have to give up family / personal responsibilities in favor of professional ones.

3. The right to disconnect in Romania

Although at national level there are no provisions implying a right to disconnection of employees, the direction in which the labor legislation is modified in terms of separation of personal and professional life is in accordance with European provisions.

Starting with 2018, when Law 81/2018 on the regulation of telework activity came into force, there is the possibility for the employee to perform work in other places than those organized by the employer, but under a control that the employer has over the employee's activity. Thus, a program is provided in which the employer can verify the employee's activity in an interval established by mutual agreement, but also the concrete ways in which this verification can be performed.

Even if previously telework was not seen as a variant desired by employers in Romania, with the Covid-19 Pandemic, including nationally, telework, based on the agreement of the contracting parties, according to Law no. 81/2018, has undergone temporary changes regarding the execution of the activity in this regime.

In this sense, by Decree 195/2020 on the establishment of the state of emergency by derogation from the provisions of the Law during the state of emergency, employers were able to introduce by unilateral decision [15] telework in areas of activity where this was possible. During the state of alert, by Law 55/2020 the employer may order work at home or in telework, in compliance with the provisions of Law no. 53/2003 - Labor Code, republished and of Law no. 81/2018 on the regulation of telework activity [16].

Also, in addition to telework, the Romanian legislator has quite strict regulations regarding the working time of employees, work performed outside the normal duration of weekly working time being considered additional work, in compliance with certain conditions imposed by Law 53/2003. However, it is found that, due to the use of means of

distance communication, it is increasingly difficult to delimit working time and rest in the context in which in Romania the professional activity begins to migrate to become a component of family life.

Although the legislation seeks to protect the employee against abuse by the employer, no reference is made to a right to disconnect but only to a minimum regulation on the limit of daily working time, and the minimum daily and weekly rest periods that should be observed to protect health and employee safety.

In this respect, and at EU level, Directive 2003/88 / EC on certain aspects of the organization of working time regulates in principle a number of rights concerning the health and safety of workers (such as the definition of working time, minimum daily rest and weekly, etc.) which, indirectly, already aims at a ban on the interference of professional life in private, creating the basis for a right to disconnection at EU level, including Romania.

Thus, the prolongation of the constant use of distance media and technology in the employment relationship, it is expected that legislative initiatives at the national level will undergo clear changes in terms of working time and rest, in order to alignment with European provisions. Although there is no such Directive yet, the legislation of more and more Member States and the case law on this subject have "set the tone" for an initiative in this regard, and there will soon be a general regulation.

4. Conclusions

Although not regulated at national level, the right to disconnect becomes important in the context of an employment relationship governed by technology intervention in the employer-employee relationship, which can be the only obstacle in the slow but safe path of employees to burnout or disturbances. occupational health and safety plan.

The above analysis has shown that employees can now enjoy special provisions at the level of certain European states regarding their right not to respond to the employer's requests outside working hours, without being penalized, or to there are unfavorable consequences in their professional career.

However, following the adoption of the European Parliament's Legislative Resolution of 21 January 2021 containing recommendations to the Commission on the right to disconnect (2019/2181 (INL)) and the subsequent adoption of such a Directive, it is expected to exist at EU level, so implicitly also in Romania, a general applicable framework, regarding the right to disconnect, including regarding its definition and the most careful regulation of the way in which the worker will be able to impose a barrier between professional and private life.

Thus, given the growing share of employees working in telework, delaying such a legislative initiative could have undesirable consequences and perhaps a much clearer concrete mechanism would be needed, including in the context of telework, than the current one through which employees and the employer can implement the general principle of the right to disconnect and stricter rules on how employees can organize their work properly, thus avoiding overtime and reaching physical exhaustion or / and psychic.

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A BRIEF SUBSTANTIAL-PROCEDURAL ANALYSIS ON THE FULFILLMENT OF NON-PATRIMONIAL OBLIGATIONS REGARDING MINORS

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Abstract

The complexity of the various affective and social relationships between members of a family is inevitably transposed in the same complex way in terms of law. The need for this legal field to identify solutions inspired by the practical spirit of the Romans is hit by the fluidity of the principle of the best interests of the child and sometimes by the inefficiency of existing forms in positive law.

The existence of „to do” obligations different from the primary subjective right which aim to support its exercise is a novelty for the general theory of enforcement.

Regardless of the reasons that substantiated the decision of the legislator to create new forms of enforcement for the fulfillment of non-patrimonial obligations regarding minors, either the sincere concern for the effective realization of these specific rights, or the concern to avoid in the future further other convictions on behalf of the European Court of Human Rights, their existence is a scientific evolution of civil procedural law that must be viewed positively.

Keywords: *Minors, enforcement, „to do” obligations, „not to do” obligations, penalties, direct enforcement.*

A Substantial Perspective on Procedural Rules

1.1. *Sedes Materiae*

The procedural provisions regarding the fulfillment of non-patrimonial obligations regarding minors can be found in the Civil Procedure Code, Book V “On enforcement”, Title III “Direct enforcement”, Chapter IV “Execution of other to do obligations or not to do obligations”, Section II, “Execution of court decisions and other enforceable titles regarding minors”, art. 910 - 914. The topography of the texts is important for our study because it clarifies fundamental aspects both on the side of substantive law and on the side of civil procedural law, revealing *ab initio* the legislator's conception in this specific matter in the sense that we are in the presence of relative subjective civil rights (créances), which have correlative „to do” obligations from the category of those with fungible performances as well as the category of those with *intuitu persoane* character¹. Therefore, in order to prepare the

¹In the interwar period, the jurist Francesco Carnelutti [1] expressed the opinion that the entrustment of the minor will be carried out according to the provisions regarding the handover of movable property in the absence of special provisions and to the existing doctrinal opinions that recognized in man not only a person but also a thing as in the case of the contract by which a party undertakes to pose as a model or the breastfeeding contract. This form of enforcement appears to be at first sight an intuitive solution for an uninitiated person, especially where the object of enforcement is an obligation to return the minor by a person holding him unjustly. However, the Court of Cassation ended this perspective in which the man could be assimilated to a thing, ruling by decision

substantial side of the analysis of the fulfillment of non-patrimonial obligations regarding minors in the enforceable titles, we must distinguish between obligations with fungible performance, (also known as obligations that can be fulfilled personally by creditor or by other persons at the expense of the debtor) and which allow as a liberating solution (*solvendae rei*) the forced takeover of the minor by the creditor and between obligations that have a strictly personal character and that can be fulfilled only by voluntary execution. There is often a difficulty in establishing the legal nature of the obligation because the legislator has chosen to use the coercive mechanism of delay penalties [art. 910 para. (3) in conjunction with art. 906 paragraph (2) which is specific to the obligations of an *intuitu persone* character for the „to do” obligations that do not present a strictly personal character. In the following, we will analyze mainly the nature of the obligations that are the object of the forced execution and their source related to the application domain of the special section.².

1.2. Application Domain

Article 910 para. (1) of the Civil Procedure Code begins with an unfortunate expression, with reference to the whole chapter, by establishing the special character of the rules and by expressly indicating the analogy with the general provisions on obligations to do or not to do as a legal principle applicable to the institution. created by law. Subsequently, in an exemplary enumeration, the scope of the provisions is outlined in general terms: (i) the establishment of the minor's residence (home), (ii) the return of the minor by the person holding him without right, (iii) the exercise of the right to have personal connections with the minor, (iv) placement, (iv) other measures regarding minors established by a court decision or other enforceable title. In the present study we will limit our analysis to the situation of establishing his residence and to the exercise by the person who does not live with the minor of the right to have personal connections with him.

1.2.1. The Minor's Residence. The Right to be Home

When the child's home is established in a judicial or conventional way, a subjective, absolute and non-patrimonial primary civil right, component of the right to privacy is protected. However, we know that these subjective non-patrimonial civil rights have an indeterminate passive subject at the time of their birth and that there is a correlative obligation of third parties not to infringe them [3]. This general negative obligation can never be the basis for enforcement. Preventing the *ante factum* of the infringement of a right cannot be pursued by way of enforcement. On the contrary, the enforcement procedure even in the case of the „not to do” obligations correlative to a relative right seeks only the *post factum* removal of the negative consequences created by their non-fulfillment [art. 905 Code of Civil Procedure]. In addition, it is well known that non-binding dispositions of judgments and recognitive clauses of a contract cannot be enforced (*e.g.*: the disposition by which the

no. 5374 of October 7, 1980 that the forced execution regarding minors will be done in the special form for the „to do” obligations provided by art. 612 *et seq.* of the Italian Code of Civil Procedure.

² We cannot admit the opinion according to which in this specific enforcement procedure the object of the enforcement is the child himself [2]. In our opinion, which we cannot develop on this occasion, the object of the forced execution is always represented by the correlative obligation to the creditor's right. We summarize to show that the provisions of art. 622 para. (2) of the Civil Procedure Code ostentatiously suggests this conclusion: "If the debtor does not voluntarily perform his obligation, **this** (s.n.), is carried out by enforcement".

court rules on the main claim in a finding action). At first sight, the operative part of a judgment establishing the minor's residence or the clause by which the parents establish the child's residence does not reveal any obligation which may be the subject of enforcement. However, the situation in which the minor's residence is established is expressly provided for in the scope of the rules on enforcement of enforceable titles regarding minors. In this context, the need arises to know what is the obligation that is the object of enforcement if the aim is to "establish the home of the minor" and what is its source.

In order to identify the obligation that constitutes the object of the forced execution in the case of establishing the minor's dwelling, we must look in advance at the forms established by the legislator through art. 910 para. (2) of the Civil Procedure Code revealed mainly by the content of the summons issued by the bailiff. The legislator has pre-established part of the content of the summons by providing for two requests that may be addressed to the debtor: to allow the other parent (or other person who has this right) to exercise their right to have personal relations with the minor, according to the schedule established by the writ of execution. The first request is applicable if the debtor's obligation includes a fungible performance, and is able to be fulfilled by force by applying the remedy of taking over the minor. The second request is applicable if the debtor's obligation has a strictly personal character and it is not possible to be fulfilled by taking over the minor but only by voluntary execution. If the bailiff is notified of a request for enforcement by which the effective establishment of the minor's residence is requested by virtue of an enforceable title, he shall, by summons, allow the debtor to appear with the minor at his office or in another place to be taken over by the creditor. Thus, from the corroboration of the texts of art. 910 para. (1) and (2) it can be concluded that, in the situation of establishing the minor's home, we are faced with a relative „to do,, obligations that is not strictly personal and incumbent on the person for whom the minor's home has not been established. If the correlative obligation of a subjective non-patrimonial civil right cannot be the object of the forced execution and we admit that in this case there is an obligation to be borne by the person to whom the minor is, we must identify the source of the obligation. Of course, the source of the obligation cannot be identified in the writ of execution. If we look at the provisions of art. 1,165 Civil Code, we note that among the sources of obligations (such as art. 1,100 French Civil Code), the law is listed in addition to legal or unlawful acts and legal facts. The legislative source we tend to turn to is Law 272/2004 on the protection and promotion of children's rights³. The provisions of art. 18 para. (6) of the Law, refer to the "return of the child by the parent who does not live with him" in the context of monitoring of the fulfillment of this obligation by the representatives of the public social assistance service or, as the case may be, of the persons with social assistance attributions. Therefore, Law 272/2004 admits the existence of such an obligation.

Having established the legal nature of the obligation, its implicit nature both in relation to the enforceable title and the legislative source, we must verify which are the cases in which a court decision or a parental agreement establishing the minor's residence can be enforced

In our opinion, when an enforceable title establishes the residence of the minor and at the same time the right of the other parent to have personal ties with him, two rights of claim and two correlative obligations are born. For the resident parent, the right to obtain the

³ Republished in the Official Gazette no. 159 from 05.03.2014.

return of the minor to the established home arises whenever the creditor exceeds the external limits of a person's right to have personal ties with the minor⁴.

It can be seen that these rights of claim and implicit correlative obligations are intended to facilitate the exercise of a subjective primary civil right.

In conclusion, if the effective establishment of the minor's home is requested, we are in the presence of a „to do” obligation with a fungible performance, but an implicit one both from the perspective of the executory title that constitutes the basis of the procedure and from the perspective of its source. For the general theory of enforcement, although justified, even the opinions regarding the enforcement of some obligations provided in the opinion of a court decision constitute a deviation from the sacrosanct rigor with which its disposition is viewed [4]. The admission of the existence of an implicit „to do” obligation, seems to derogate even from the general norms in the matter of forced execution [art. 663 Code of Civil Procedure] which impose the need for a certain claim⁵. If the existence of such a claim cannot be accepted, it is necessary to amend the scope of the special section and to remove from it the measure relating to the establishment of the minor's residence.

1.2.2. Exercising the Right to Have Personal Relations with the Minor

The parent who does not live with the minor but also other persons (e.g., grandparents) have the right to have personal connections with him [art. 400 para. (1), 496 para. (5) of the Civil Code, art. 17 of Law 272/2004]. The content of this subjective civil right is detailed in art. 18 of Law 272/2004 on the protection and promotion of children's rights. The right to have personal connections with the child is realized in accordance with the provisions of art. 18 para. (1) of Law 272/2004 by: (i) meetings of the child with the parent or with the person who according to the law has the right to personal relations with the child; (ii) visiting the child at his or her home, (iii) hosting the child for a specified period of time, with or without supervision of how personal relationships are maintained, depending on the best interests of the child, (iv) correspondence or communication with the child, (v) the transmission of information to the child about the parent or other persons entitled to maintain personal relations with the child, (vi) the transmission by the person to whom the child lives of information concerning the child, including recent photographs, medical or school assessments, (vii) meetings with the child in a neutral place in relation to the child, with or without supervision of the way in which personal relationships are maintained, depending on the best interests of the child. In the doctrine [6], the *sui generis* character of the subjective non-patrimonial primary civil right was emphasized, showing the

⁴ Since the principle of the relativity of the effects of the judgment and the principle of the relativity of the effects of the contract would in most cases prevent the resident parent from enforcing such a judgment or contract against a person other than the other parent, we consider it useful to provide that on the basis of such a court decision or contract, the return of the minor from any person who holds him without right or in breach of the external limits of their right may be requested (e.g.: beyond the established schedule). This solution would exempt the parent at whom the minor's home was established from resorting to the provisions of art. 495 of the Civil Code governing the right of parents to request the return of the child from any person holding him without right.

⁵ However, not only the certainty of the claim is subject to pressure but also its enforceability in situations where the courts, in a majority practice, allow the possibility of enforcement and maintenance obligations in favour of children who will become due during enforcement, without the need for a new enforcement order [5].

interdependence of the parent's right to have personal ties with the minor with that of the minor's right to have personal ties with the parent⁶.

In the case of the right to have personal relations with the minor, based on the provisions of art. 18 para. (3) of Law 272/2004 which provide for the obligation of the person where the child lives to support the maintenance of personal relations with the other parent, the obligations that are subject to enforcement may be observed as „to do” obligations with or without strictly personal character - depending of the manner in which the exercise of the right is provided - expressly provided by law but implicit in relation to the executory title. Thus, if the exercise of the right to have personal relations with the child is done through visits to his home, the parent where he lives has a negative obligation not to impede the exercise of this right but such an obligation is not subject to enforcement but his positive obligation to facilitate the maintenance of the personal relations of the right holder by granting access to his house or by other such means. Such an obligation is strictly personal, and the bailiff will warn the debtor by summons to allow the creditor to exercise his right to have personal relations with the minor. If the exercise of the right to have personal relations with the minor is carried out by temporary accommodation of the child by the other parent, the parent with whom the child resides must facilitate his takeover by the creditor (if this takeover is provided in the title or if not provides otherwise) or to appear with the minor at the residence of the other parent (if this obligation is provided in the writ of execution). In this case, the debtor's obligation to facilitate the taking over or "surrender" of the child is not strictly personal. This obligation may be subject to the forced solution of taking over the minor by the other parent. The right of a person to have personal relations with the minor also gives rise to other obligations of a strictly personal nature in the person of the child, such as: (i) the obligation to provide information concerning the minor, (ii) the obligation to hand over the child correspondence, etc.

Therefore, it is not the negative obligation correlative to the subjective primary civil right to have personal ties with the minor that is the object of the forced execution but the relative obligations of a supportive nature. In our opinion, these „to do” obligations expressly provided by law, but implicitly resulting from the court decision or from the convention of the parties that sometimes present sometimes do not present strictly personal character constitute the real object of the forced execution.

In conclusion, there are subjective primary civil rights for the exercise of which the law implicitly or explicitly provides for the creation of obligations of an auxiliary nature.

Brief Considerations Regarding the Certain, Liquid and Due Nature of the Creditor's Claim

According to the provisions of art. 663 of the Civil Procedure Code in order to "be able to" enforce, the creditor's claim must be certain, liquid and due. The lack of one of these characters represents a reason for rejecting the request for approval of the forced execution [art. 666 para. (5) point 4 of the Civil Procedure Code]. The suspensive term (*dies a quo*) postpones the exigibility of the obligations until its fulfillment. Both in the case of patrimonial maintenance obligations established in the charge of one of the parents and in

⁶ The Italian courts have also ruled on the possibility of imposing a coercive force on the parent's right to have personal relations with the parent with coercive force. In this regard, Cassazione civile, ordinance no. 6471/2020.

favor of the children and in the case of non-patrimonial obligations regarding minors, there are theoretical obstacles regarding the exigibility of the obligations and the possibility of their forced execution. In order to notify the issue of the exigibility of the creditor's claim in such a procedure, it is sufficient to look at the disposition of a court decision establishing a program for visiting the minor such as: "On the first and third weekend of the month". It is obvious that, by formulating a request for enforcement by the creditor, the aim is to achieve the right to have personal connections with the child in the future because *fugit irreparabile tempus*. This future enforceability of the creditor's right is correlated with a future enforceability of the debtor's obligations. In addition to the principle of the best interests of the child which is invoked by the courts to defeat the requirements of art. 663 of the Civil Procedure Code, we can offer another solution starting from the real object of the forced execution. As already mentioned, not the obligation correlative to the primary subjective civil right is the object of forced execution regarding minors but an obligation correlative to a relative right by which the debtor is obliged support the child's personal relations with the other parent or other persons who have this right. If we admit that the exigibility of this right of claim and of the correlative obligation of the debtor is previous to the "exigibility of the primary subjective civil right", then the solution of the courts can be based on elements of substantial law. Therefore, if we admit that the obligation of the resident parent to support the creditor's right to have personal ties in the future is due before the date set for the exercise of the right, the issue of enforceability disappears. Of course, this argument cannot be used in the case of maintenance obligations. Such reasoning, although seemingly difficult to conceive, is a real solution. If we look at the phenomenon of parental alienation from the non-resident parent [7], we notice that it occurs gradually due to the abuse of the resident parent. If the obligation of the parent to whom the minor's residence was established does not always have an obligation to support the right of the other parent to have personal ties with the minor, through parental alienation, the resident parent would not violate any obligation and as such could not be subject no sanction.

In conclusion, we consider that the obligation of the person to whom the minor is to support the creditor's right to have personal connections with him, becomes due at the time the minor's home was established and retains its enforceability until the change of residence or until adulthood.

Brief Considerations Regarding the Summons Issued by the Bailiff

Issuing a summons and communicating it to the debtor in order to fulfill the obligations provided in the writ of execution is a procedural sequence deeply rooted in the general principles of enforcement theory ensuring, mainly, the observance of the right to defense [art. 13, 646 of the Civil Procedure Code]. The communication of the summons is provided by law under the sanction of nullity of execution [art. 667 para. (2) of the Civil Procedure Code].

An important intrinsic element of the summons issued by the bailiff is the term contained therein. If in some cases there are deadlines expressly provided by law [e.g. art. 893, 897 of the Civil Procedure Code], in the special matter that is the subject of this study, there is no express term provided by law. In practice, in the summons addressed to the debtors in order to voluntarily fulfill their obligations to do or not to do according to the general section, a term of 10 days is mentioned in relation to the general provisions of

art. 904 and 905 and 906 para. (1) of the Civil Procedure Code. Compared to the common law character of the mentioned norms, even related to the way of opening the provisions of art. 910 para. (1) of the Civil Procedure Code which provides that: "The provisions of this chapter are also applicable in the case of (...)", it may be argued that: (i) the time limit set by the bailiff for the debtor to appear at the bailiff's office together with the minor for its takeover by the creditor must be within a maximum of 10 days from the communication of the summons together with the approval, (ii) if the enforceable title provides for the creditor's right to have personal ties with the minor, and the debtor's obligation is *intuitu personae* will be considered for him to voluntarily fulfill his obligations within 10 days under the sanction provided in art. 910 para. (3) of the Civil Procedure Code with reference to the provisions of art. 906 of the Civil Procedure Code.

In this context, we consider that, if the performance that is the object of the debtor's obligation is non-fungible, the bailiff will summon the debtor to fulfill his obligation immediately, in various forms of the right to have personal relations with the minor, with the debtor's warning that he is subject to the sanction of penalties if he does not voluntarily fulfill his obligations within 10 days from the communication. If the debtor's obligation is not *intuitu personae* and can be enforced by taking over the minor by the creditor, we consider that the general term of 10 days is not applicable. The special rules in this matter provide that the term is set by the bailiff. Therefore, the term is no longer a legal one but, unilaterally established by the bailiff. Another interpretation generates practical difficulties because, by summons, the bailiff must provide the deadline for the debtor to appear with the minor in order to be taken over by the creditor, and in this case the bailiff should anticipate the date on which he will communicate for to be within 10 days. Depending on the method of communication chosen by the enforcement body, the date of communication of the summons may be unpredictable. Thus, in the case of a postal communication, it is possible that, due to external factors, there may be a considerable delay in the communication of the summons.

Also, if the creditor's right involves taking over of the minor, the term is not immutable. Depending on the particular characteristics of the case, it is possible to impose a new term (e.g: the minor is away in a camp, is hospitalized for tests, etc.). In the context of setting a new deadline, if the parties do not agree, it will be set in the same way unilaterally (but not entirely at its discretion) by the bailiff.

It is well known that, in general, in the enforcement procedure, the term shown in the summons is a term in which the debtor has the possibility to voluntarily perform his obligations. If in the situation where the realization of the creditor's right will not be done by taking over the minor, this character of the term is easier to observe, it does not mean that the term set by the bailiff for taking over the minor by the creditor does not have this character. There is nothing to prevent the debtor from cooperating with the creditor after receiving the summons in order not to require presentation at the executor's premises or elsewhere with the minor.

In conclusion, the term of the summons issued by the bailiff has the following characteristics: (i) it is a term whose implicit purpose is to give the debtor the possibility of voluntary execution of the obligation, (ii) is legally established (established by law) if which does not require the taking over of the minor by the creditor, (iii) is a term which is usually set unilaterally by the bailiff if the debtor's obligation can be fulfilled by taking over the

minor, (iii) is a movable term if the obligation (iv) it is a prohibitive term for the creditor with regard to the introduction of the action for the application of penalties.

The special procedure provides for another important element of the summons if the debtor's obligation is not strictly personal, namely the place where the person whom has the minor must appear with him. These two elements must be analyzed in relation to the characteristics of the obligation that is the object of execution. As a rule, compared to the provisions of art. 910 para. (2) of the Civil Procedure Code, the summoning of the debtor to appear with the minor in order to be taken over by the creditor takes place at the bailiff's headquarters. However, there is a possibility that the bailiff may set another place for the minor to be taken over. Although the text of the law gives the impression that there is a certain power for the bailiff in determining the place where the taking of the minor will take place, this conclusion cannot be accepted. For example, in determining the place where the debtor must appear with the minor, the legal norms will take into account the jurisdiction of the bailiff, and cannot be established outside the constituency of the court of appeal in which he has his office. We also appreciate that the principle of the best interests of the child requires the identification (*ex officio* or at the request of the parties) of a place where the child feels safe and which would reduce the risk of anxiety for him. And in this case, we appreciate that the place chosen by the bailiff for taking over the minor is not immutable and can be changed if the particularities of the case require it. In practice, the issue of respecting the place established by the court for taking over the minor was raised. Thus, if the enforceable title that constitutes the basis of the procedure provided either that the minor will be taken over by the creditor from his home, from school (after the end of classes), or elsewhere or that he be entrusted to the creditor at home to the creditor by the parent where he resides, can the bailiff also determine the place of his taking over at his headquarters or in another place than the one provided in the writ of execution? In our opinion, the executory title must be given as effective as possible, but, depending on the particularities of the case, the executor may establish a different place than the one provided in the executory title.

In conclusion, if the realization of the creditor's rights involves the taking over of the minor, the place provided by the bailiff has the following characteristics: (i) it is usually established unilaterally (but not at discretion) by the bailiff in the best interests of the child compliance with the rules of territorial jurisdiction, (ii) is movable.

Regarding the extrinsic elements of the summons, respectively the annexation of the executory title together with the approval decision, the doctrine is not unitary. One opinion considers that the omission to mention the annex to the enforceable title is intentional [8]. In this case, the principle *specialia generalibus derogant* is used to reach the solution of eliminating the obligation to communicate the summons. Another opinion [9] states that it is necessary for the bailiff to attach the writ of execution to the writ of summons. As far as we are concerned, we show that in none of the specific forms of direct enforcement is the annexation of the writ of execution expressly provided [art. 893, 897, 904, 905 of the Civil Procedure Code]. Also, even in the case of forced movable pursuit, this obligation is not expressly provided [art. 732 of the Civil Procedure Code]. Completion of the special provisions with the general rules is required both in principle and for practical reasons specific to this form of enforcement. We must keep in mind that, in this matter, the court may return to the measures ordered [*e.g.*: art. 403, 497 of the Civil Code]. The bailiff cannot know whether the measures in the writ of execution that constitute the basis for enforcement

have been amended or not, and this issue can be notified by the debtor of the procedure. In order for the bailiff to be informed of a possible change in the measures in the writ of execution, it is necessary for him to receive a copy of the writ of execution. Also, when the legislator wanted to derogate from this practice rooted in the general principles of enforcement, he did so expressly [art. 669, 699 of the Civil Procedure Code]. In practice, we appreciate that the bailiff will always tend towards an interpretation that secures the enforcement procedure in order to avoid any nullities that could be speculated by the debtor.

In our opinion, the provisions of art. 889 of the Civil Procedure Code, which regulates the possibility that, at the request of the creditor, if certain factual conditions are met, the court orders that the forced execution be done immediately and without summons, are not applicable in the special procedure that is the subject of this study, which is structured and staged the procedure. The communication of the summons is a central element of the procedure to which the other stages are indispensable. In our opinion, the stage of applying the penalties cannot be omitted if the debtor does not fulfill his obligations in order to reach directly the actual execution provided by art. 911 para. (1) of the Civil Procedure Code.

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EMBEZZLEMENT - OFFENCE AGAINST PATRIMONY OR OFFENCE IN PUBLIC OFFICE?

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Abstract

Within this scientific article the author will briefly approach some views of the specialized literature which consider, in the light of the new criminal classification, that embezzlement has become, as a result of the intervention of the law, mainly an offence entailing dangerousness, and thus damage would be irrelevant for its actual perpetration. In this frame of mind, we shall also examine the impact of the scientific hypothesis on judicial practice, since it should develop at the same time as doctrinal opinions change.

Keywords: *embezzlement, offence against patrimony, offence in public office, damage, offence entailing social danger, result crime*

1. Introduction

This scientific approach aims to address the dichotomous connection between the two fields of the social relationships safeguarded by the legislator when criminalizing the offence of embezzlement, namely the relationships concerning the patrimony and relationships in public position, by pointing out the general link between the two categories and highlighting some features derived from the juxtaposition of these acts in judicial proceedings.

According to art.295 of the Criminal Code, appropriation, use or trafficking of money, values or any other assets managed or administrated by a public servant, in his own or in another person's benefit, 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 a public office.

Thus, in so far as it concerns the legislator's view when classifying the offence of embezzlement, it is noted that unlike the former criminal law, the current criminal Code place embezzlement into the category of offences in public office. In the Criminal Code of 1968, according to art.215 index 1, Criminal Code, embezzlement was considered as a crime against patrimony.

For the scientific accuracy, we deem necessary to terminologically define a few of the relevant concepts related to our study.

An offence entailing social danger refers to any offence whose immediate result consists of a state of danger for the values safeguarded by the law, without involving a physical change in the environmental reality. In its turn, danger offence is sub-classified in offences involving an abstract danger, when the dangerousness for the protected value is presumed by the law, and offences involving a concrete danger, when the indictment rule requires the production of an actual and express state of danger for the social value protected by the law. The category opposed to danger offences is the one of result offences, whose main feature is that their immediate effect is a physical, material change of the

environmental reality, namely the production of a consequence (material result, injury, damage, etc.)¹

Therefore, according to criminal doctrine, crimes against patrimony are in principle considered as result crimes, since their immediate effect consists of a material loss. Nevertheless, the transfer of embezzlement from the category of crimes against patrimony into the category of offences in public office calls into question the very qualification of the offence as a danger or result crime.

2. Overview of the hypothesis of research and presentation of the personal point of view

Hence, in the specialized literature it is shown that the main legal object of embezzlement concerns the protection of relationships in public position, and adjacent legal object refers to the normal deployment of patrimonial relationships, and with respect to the immediate effect, the offence of embezzlement has an immediate main consequence consisting of a state of danger for the relationships within the public service and an immediate secondary consequence consisting of the loss caused to the institution or to the legal entity with whom the active subject has a professional relationship. The prejudice is represented by the value of the asset in the event of appropriation and may be represented by its wear or lack of use when embezzlement has been committed by use or trafficking.

Since it is no longer a crime against patrimony, proving and determining the amount of the damage does not represent a condition of typicity.²

Even in the light of the doctrine, we consider that although criminalizing the offence no longer protects mainly the social values relating to the safeguard of patrimony, it still continues to embrace the features of a result offence, as other offences belonging to the same class do, such as the abuse in office, foreseen in art. 297 of the Criminal Code.

In this frame of mind, it becomes necessary to demonstrate and determine the amount of the damage. This conclusion is also supported by the analysis of the material side of the objective aspect of the offence.

According to doctrine, embezzlement is an eloquent example of alternative content offence, as the theft committed by a public servant, of moneys, values or other property managed or administrated by them, by using any of the three means set out by the law, constitutes the act criminalized under the provisions of art. 295 of the Criminal Code.

In a decision on rejection of the exception of unconstitutionality against the provisions of art. 308 par.(1) of the Criminal Code with regard to the expression "or within any legal entity" in conjunction with art. 295 par.(1) and art. 298 of the Criminal Code, the constitutional court performed an exhaustive analysis of embezzlement.³

Thus, the Court found that the offence of embezzlement has as a special legal object social relationships within the public service, whose training and performance involve a proper management and administration of movable assets of a legal entity's patrimony, and, as a material object, according to the hypothesis of the indictment rule, money, values or

¹ Florin Streteanu, Daniel Nițu, *Drept penal, Partea Generală (Criminal Law, General Part)*, Volume I, Universul Juridic Publishing, Bucharest, 2014, pages 294-296.

² Cristina Rotaru și colectivul, *Drept penal. Partea specială (Criminal Law. Special Part)*, 3rd Edition, C.H.Beck Publishing, Bucharest, 2019, p. 50.

³ Decision of the Constitutional Court of Romania no.256/2017, published in the Official Journal no.571 of 18 July 2017.

other assets, since it is an offence whose active subject is an individual holding a public position within the meaning of the criminal law. The Court noted the legal entity whose legal interests are protected by the criminalisation of acts contemplated in art. 295 of the Criminal Code is a public authority, a public institution or any other legal entity administering or exploiting public property assets. The material act of the objective side is achieved by the act of appropriation, use or trafficking of money, values or other property, in their own or in a third party's benefit.

"Appropriation" means the removal of a good of the possession or detention of one of the legal entities mentioned above and the transfer of its ownership into the perpetrator's property, so that this latter one may dispose of the good concerned by consuming, using or even alienating it. The "use", as a mean foreseen by the law for achieving the material object of the offence submitted to analysis, consists of the initial dispossession of a legal entity and its use, in the perpetrator's interest, followed by the restoration of the good in the patrimony from which it was removed. „Trafficking", within the meaning of the same indictment rule, refers to the removal of a good from the property of a legal entity and its use by the perpetrator in a speculative manner in order to obtain a gain. The immediate effect consists of creating a state of danger for the social relations with regard to the economic activity of the legal entities concerned, by removing the good constituting the material object of the offence from the patrimony to which it initially belonged and using it on the perpetrator or on another person's behalf. The achievement of the goal considered upon committing the act, namely a gain or reaching a benefit, on their or on another person's behalf, is not relevant for the actual perpetration of the offence of embezzlement, but its substantiality proves that the offence was committed with direct intention.

Thus, appropriation of property, money, values or other assets involves their removal from the patrimony to which they belong and their appropriation by the active subject.

The use means the temporary removal of goods, their exploitation in someone's own personal interest followed by their restitution in the place they were taken away from, and trafficking falls into the temporary removal from the patrimony of an injured party, entrusting it for its use to a third party in order to obtain a gain by the active subject and eventually the restoration of the good into the injured party's patrimony.

Upon the analysis of the objective side of the offence of embezzlement, it follows that any of the two alternative contents of the objective side, appropriation or trafficking, the production of damage constitutes an element of objective typicity of the offence. Thus, even in the manner of use it can be imagined the commission of the offence of embezzlement without causing a material loss, an actual damage (*damnum emergens*), but even in this case it may be conceived a damage for preventing from making a possible benefit unrealized (*lucrum cessans*).

Once this dispute in the area of substantial criminal law cleared up, within criminal proceedings the production of evidence must further reveal both the substantiality of the damage and its extent, in order to ensure a judicious execution of the mechanism of criminal liability. As to the damage, criminal prosecution authorities shall consider this concept both as an actual damage and an unrealized benefit, according to art. 1531 of the Civil Code.

In the same spirit, in the criminal doctrine it was showed that embezzlement may be considered only if the use of the good caused damage to the entity or public institution

taking into account that embezzlement is not an offence entailing danger, but a result offence, as it may not be conceived without causing a result.⁴

Furthermore, in a reference study of the Romanian criminal law⁵, it was shown that the act of taking away a good from the community assets, either by appropriation, use or trafficking causes, as an immediate consequence, the removal of the good of the patrimony to which it belonged, and therefore, the dispossession or deprivation of the community in question of the stolen good. This consequence affects the community assets and thus creates a state of danger for the social relationships safeguarded by the criminalisation of embezzlement. As a consequence of the theft, the community is deprived of the possibility to possess and use the good concerned, which means also causing a possible damage to the community in question, in addition to the value of the goods taken away by appropriation.

On the contrary, it was considered⁶ that the substantiality of the offence of embezzlement may not be affected by the circumstance that by using the good no financially assessable damage was caused, as long as the good was temporarily removed from the patrimony to which it belonged, thereby depriving the lawful owner, legal entity or public institution, of the right to dispose of the property concerned.

Thus, upon the contrastive examination of the former and current specialized literature, it follows an eclectic frame with respect to the integration of the objective side of the offence of embezzlement, as to the substantiality and determination of a material damage.

3. Conclusions

In conclusion, even though doctrine debates do not converge for a unitary solution as to the manner of consummation of the offence of embezzlement, namely as to the need of an actual patrimonial prejudice as a typical feature of the objective side, we consider that even in the new view of the Criminal Code, the offence of embezzlement continues to be subsumed into a material damage caused to the passive subject's patrimony. For this hypothesis advocates call also the provisions of art. 309 of the Criminal Code, which sets out an aggravated version of embezzlement, conditioned upon the production of very serious consequences, which in the light of the provisions of art. 183 of the Criminal Code involves causing a material damage exceeding 2.000.000 RON. Therefore, by admitting that embezzlement results immediately in a damage, the very law contemplates an aggravated version of this offence, so that the act of embezzlement causing a damage exceeding the amount of 2.000.000 RON is more severely punished.

Nevertheless, we admit the hypothesis that in the event of an act of embezzlement committed by use or trafficking, the damage consists of the wear of the good during the time it was removed from the control of the passive subject, or if the material object consists in an amount of money, in the financial gain equivalent to the penalty legal interest which compensates partial loss of the right to use the amounts of money. Consequently, when assessing the loss, criminal prosecution bodies shall calculate both actual damage (*damnum emergens*) and unrealized gain (*lucrum cessans*).

⁴ T.Toader, Drept penal.Parte specială (Criminal Law. Special Part), 3rd Edition, Hamangiu Publishing, Bucharest, 2008, p. 205.

⁵ Vintilă Dongoroz și colectivul, Explicațiile teoretice ale Codului penal român (Theoretical Explanations of Romanian Criminal Code), Volume III, All Beck Publishing, Bucharest, 2003, p.564.

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REFLECTIONS ON MONETARY DAMAGES THAT MAY BE GRANTED PURSUANT TO ARTICLE 388 CIVIL CODE FOR THE REPARATION OF MORAL PREJUDICES CAUSED BY THE DISSOLUTION OF MARRIAGE. ASPECTS OF COMPARATIVE LAW. SPECIFIC COMPARISONS TO FRANCE

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Abstract

This study refers to examining the possibility of applying the provisions of art. 388 Romanian Civil Code and in case of reparation of the moral prejudices caused by the dissolution of marriage and the granting of monetary damages to the spouse who is not at fault for the dissolution of marriage. The civil legislation regulates for the first time this "right to damages" but the legal provisions were inspired by the French regulation which provided for the possibility of granting monetary damages. The examination of the provisions of art. 266 French Civil Code led to the identification of additional requirements which the French legislator expressly provided for compared to the Romanian legislator.

Keywords: moral prejudice, divorce, divorce, monetary damages, no-fault spouse, civil liability

1. General considerations regarding the possibility of granting monetary damages for the moral prejudices caused by the dissolution of marriage

The French Civil Code of 1804 retained the vision of the jurist Jean Domat regarding reparable damages, being regulated in art. 1382,1383 thus outlining the principle of civil liability consisting in repairing all losses and prejudices ("Toutes les pertes et tous les dommages") that were caused by one person to another by their act. [1] Art.1382 in the French Civil Code of 1804 was taken into account by the drafters of the Romanian Civil Code of 1865 becoming art.988 of the Civil Code respectively: "Any act of man, which causes harm to another, obliges the one from whose fault it occurred, to repair it." as a result of which the civil doctrine retained that "...The full reparation of the damage means the removal of all harmful consequences of an illicit and culpable act, whether patrimonial or non-patrimonial, i.e. the full reparation of the prejudice, in order to restore, as far as possible, the situation existing before its occurrence." [2]

The new Civil Code expressly enshrines the principle of full reparation of the prejudice, without distinguishing between the types of prejudices, the principle contained in the provisions of art. 1385 paragraph 1 [3] as well as the principle of reparation in kind in the content of article 1386 paragraph 1. [4] In the matter of family relations for the moral prejudices caused to the no-fault spouse by dissolving the marriage, the legislator provided the possibility of obtaining monetary damages in the content of art. 388 in the Civil Code, taking into account the provisions of art. 373 lit. b in the Civil Code as well as the provisions of art.373 letter c and art.379 par.2 in the Civil Code. The legal doctrine presented that the legislator proceeded for the first time to regulate such a right,

respectively, "the right to damages" [5] distinctly from the compensatory benefit provided for by Article 390 in the Civil Code, representing "... a special application of tortious civil liability provided by art.1357 et seq. of the Civil Code. In other words, it means that the common law in the matter would be tortious civil liability, and the texts on family relations, as a special application, would be guided according to the *specialia generalibus derogant* rule." [6].

Another novelty introduced by the New Civil Code related to the analyzed subject is the consecration of a special title to the protection of non-patrimonial rights, respectively in Book I, Title V "Defense of non-patrimonial rights", which are based on the illicit act causing prejudices, generating tortious civil liability in the common law. In the matter of divorce, the provisions of art. 388 in the Civil Code regulate a form of tortious civil liability specific to relations between spouses as a result of divorce. "[7] The specialized literature states that "prejudice can be both material and moral (for example, the French courts have found that the moral and emotional loneliness of divorce after a long cohabitation constitutes indemnifiable moral prejudice; quoting E.Florian, Family Law, p.134-135)" [8]

The legislative correlation of the provisions of art. 388 in the Civil Code with the provisions of art. 919 para.1 lit. d in the New Code of Civil Procedure confirms that the divorce court will also rule on "material or moral prejudices suffered as a result of the dissolution of marriage". It was noted in the legal doctrine that "all ancillary claims" may be filed with the divorce petition." [9] as a consequence and for obtaining monetary damages for moral prejudices.

Analyzing the legal text, we conclude that the no-fault spouse can request monetary damages for material prejudices caused by the dissolution of marriage but also for the moral prejudices suffered due to the same cause, the cause of the prejudice being the divorce itself. The court can grant monetary damages only to the no-fault spouse, which leads to the assessment conducted by us together with other authors [10] of the fact that the fault as a requirement to engage specific tortious civil liability "...does not constitute separate probation, as it is enough to establish exclusive fault in the dissolution of marriage." [11], the cause of the prejudice being the divorce itself. Regarding the illicit act, a requirement to engage tortious civil liability, it was presented in the doctrine that "the basis for granting moral damages is not only the unlawful act causing prejudices, but also the reward of innocence (lack of fault) of the other spouse¹⁶" in terms of the right to damages. [12] The moral prejudice, an element of reparable prejudice provided as a general requirement to engage civil liability, must result from the dissolution of marriage according to art. 388 in the Civil Code, the legal provision not showing how could this be quantified by the judge. A difficult issue in practice is to establish the causal link between the moral prejudice that is required to be repaired and divorce, an opinion retained in practice and which we agree with [13].

Judicial practice specified that the types of reparable prejudices can be: "...material, moral or even professional and must have occurred through the dissolution of the marriage." [14] and for instance, we have extracted from practice the following moral damages that were repaired by the court based on art.388 in the Civil Code, thus the court granted monetary damages for: "...moral prejudice consisting in the moral and emotional loneliness installed after the divorce, after an 11-year marriage, as well as the damage to her own image in the family and society as a result of her status as a divorced woman." [15]; In another case, the court found that the moral prejudice suffered by the no-fault spouse which

needed to be remedied consisted of: “the emotional trauma suffered by the applicant-plaintiff as a result of the change of status...” the Court finding that “the plaintiff suffered physically and mentally due to the divorce, lost 10 kilograms and went to a psychologist. for which reason the court of judicial review admitted the amount of 20,000 lei „... as damages, corroborated with the public recognition of the defendant's fault in the family relationship breakdown, can cover both the damage caused to them and to the community which they live in.” [16]. The judicial review also stated that there may be moral prejudices suffered that can be repaired “...emotional trauma suffered by the innocent spouse as a result of changing status, the inconveniences created by the proceedings for child custody, the loneliness the spouse finds themselves into after a long marriage, the loss of the parish by the priest, the damage to the image of a politician in the middle of the electoral campaign. [17].

The specialized literature specifies that the judicial review has not yet been finalized “...being in initial stage, we refer to similar considerations and the basis of comparative law (art. 266 in the French Civil Code - source of inspiration on the right to damages of no-fault spouse.)” [18]

Moreover, it is noted that in another opinion, “...that the determination of damages in court is like a lottery”, [19] motivated by the same consideration, namely the non-unitary judicial practice, because „... the High Court of Cassation and Justice has emphasized that judicial practice is not a source of law and that moral damages are assessed according to the facts and evidence, taking into account the particularities of the specific case” [20], so that the judge has a dominant mission in determining the amount of monetary damages owed to the innocent spouse for the reparation of the moral prejudice suffered, fact proved by another judgment “... according to which determining moral prejudices is not based on objective criteria, but only subjective assessments, based on the possibility of the judge knowing the human soul and its reactions.” [21]

Comparing the provisions of art.388 in the Romanian Civil Code with the provisions of art.266 in the French Civil Code we note that the French legal norms have established a mandatory feature that the prejudice whose legal reparation has been requested must meet, namely it must be of particular significance, gravity that the court has the obligation to verify at the time of analyzing the compliance with the legal requirements in order to make possible the application of art.266 in the Civil Code. The Romanian legislator did not provide for such a character of the reparable prejudice but the narrow judicial practice indicates that the courts have mainly adopted this orientation.

The French judicial practice stated that of particular significance are those consequences that go beyond the usual consequences that affect another person in the same situation with the mention that the provisions of art.266 do not refer to repairing exceptional consequences but to repair material or moral prejudice. [22] It was noted that the fact that the husband left his wife after 39 years of marriage in difficult conditions and in order to find a new partner is not a significant consequence of justifying monetary damages for moral prejudice. [23] or the shock suffered by the wife because the other spouse suddenly abandoned the marital home and the declaration of the commencement of the divorce proceedings, accompanied by a feeling of humiliation caused by the husband's infidelity and loss of his duties in the company run by her husband [24]; however, the wife's feeling of betrayal as a consequence of the husband's violence as well as the fact that he illegally

accessed the wife's messaging system can be considered as exceeding what affects any person in the same situation by conferring the right to damages according to art.226 and not according to art.1240 [25]

Regarding the autonomy of the provisions of art.266 in the French Civil Code it is noted that the divorce is not intended to repair a prejudice, damages provided by art.266 give the possibility of repairing the prejudice caused by breaking the marital bond, while the provisions of art.1240 in the French Civil Code offer reparation for the prejudice suffered from any other circumstance; [26] we show that the provisions of art. 1240 in the French Civil Code regulate common law civil liability. The French legal practice retains that regardless of the divorce and its specific sanctions, the spouse who invokes a prejudice suffered without having a causal connection with the conjugal relationship breakdown may request its repair under common law [27] such as: the prejudice suffered as a result of the husband's manipulative behavior leading to the isolation of his wife, distinct from the acts of violence on which the divorce is based [28], distinct prejudices arising from the circumstances which led to the termination of the marriage (abandonment of the wife for a mistress, an offensive and brutal separation with the display of the adulterous relationship in public [29])

Regarding the determination of the amount of damages that can be obtained based on art. 266 in the French Civil Code, it is stated that they do not depend on the resources of the spouses [30]; the assessment of the damage must be made solely on the basis of the prejudice suffered and not based on the resources the spouse at fault has. [31].

Related to the connection with the compensatory benefit regarding the determination of the damages that can be obtained based on art.266 in the French Civil Code, it was established in the French judicial practice that the reparation of the moral prejudice is not taken into account in the assessment of the compensatory benefit. [32]

Regarding the moment when the ancillary claim is filed requesting the granting of monetary damages for the reparation of the moral prejudice from the provisions of art. 266 in the French Civil Code, we conclude that the action for repairing this type of prejudices caused by dissolution of marriage can be filed only with the divorce petition [33].

In the Romanian legal doctrine there was another opinion according to which "... the claim for damages could be formulated within the general limitation period of 3 years, which starts to run from the moment when the spouse who is not at fault for divorce got acquainted with the prejudice caused by it by the spouse at fault.⁸⁸" [34]

The national legislator did not provide for a deadline by which this ancillary claim to be filed, however, as it results from the corroboration of the legal texts mentioned above, but also from the majority opinions expressed in the legal doctrine, we appreciate that it should be filed with the divorce petition.

2. Conclusions

Analyzing the aforementioned legal provisions in relation to the different national judicial practice (according to which sometimes we do not find objective criteria but subjective assessments) we consider that it is necessary for the legislator to take into account the provisions of art.266 in the French Civil Code in the sense that it is necessary an express regulation of the special character that such a prejudice must have in order to be repairable under the law, respectively to be of exceptional significance.

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TELEWORKING AND THE BLURRED BOUNDARY BETWEEN THE EMPLOYEE'S PRIVATE AND PROFESSIONAL LIFE

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Abstract

The concept of “teleworking” used reluctantly by employers until the outbreak of the COVID-19 Pandemic became, after this moment, the solution to protect the health of workers and businesses at the same time. But working most of the times, from home leads to the difficulty in determining the work program and to the interference between the working time and the resting time, with direct consequences on the employees' private life. Research shows that employees who work regularly from home are more than twice as likely to exceed a maximum of 48 hours of work per week, compared to those who work at the employer's premises, while almost 30% of those who work from home declared that they work in their free time every day or several times a week, compared to less than 5% of those who work at the employer's premises.

Keywords: Telework, teleworker, private life, monitoring, the right to disconnect, etc.

Monitoring and the private life of the employee

For several decades and until the regulation of the telework, working from home has been promoted as one of the policies for managing traffic problems, due to its potential to alleviate congestion during peak periods¹, to reduce work-related travel² and to bring other benefits, such as more work autonomy, a better work-private life balance and improved temporal and spatial constraints in daily work. However, telework became mandatory for many employees during the COVID-19 Pandemic. Therefore, the COVID-19 pandemic has rapidly promoted the telework and according to researchers it is possible that, even following the global health emergency, many new teleworkers will continue to work in telework regime, at least partly.

While the authorities adopted isolation measures, the need to make significant use of telework work and the obligation of employers to introduce software systems or platforms to facilitate the safe work of employees at home emerged. Teleworking can lead to the collection of personal data of the employee by the employer, especially for monitoring purposes. Teleworking is not a more permissive alternative to office work, so in the case of telework, the employer sets up tasks, sets deadlines for the employee, meetings are organized through platforms and software such as Zoom. However, there are opinions,

¹ Lachapelle U., Tanguay G.A., Neumark-Gaudet L. Telecommuting and sustainable travel: Reduction of overall travel time, increases in non-motorised travel and congestion relief? Urban Stud. 2017;55(10):2226–2244. doi: 10.1177/0042098017708985.

² Empirical evidence is inconclusive regarding the overall impact of telework on transportation (i.e., substitution or complementary travel) (Hamer et al., 1991; Kim et al., 2015; Melo and de Abreu e Silva, 2017; Mokhtarian et al., 2004; Zhu, 2012, Zhu, 2013).

usually expressed by managers, according to which it is harder to be just as productive when you work from home. However, teleworking should not lead to excessive surveillance of employees, including by video methods.

Recently, after the outbreak of the COVID-19 Pandemic, in the United States, there was an explosion in the use of monitoring software by employers, in order to control their employees who work from home. This intrusive software, known as "spyware", allows the employer to access the employee's browsing history, record keystrokes, but also take screenshots to check if the employee is in front of the computer during working hours. In these situations, productivity seems to be more important than the employee's privacy. Another practice commonly used by employers is to use video conferencing continuously. In reality, employees are video recorded throughout the working day. In addition, SNEEK software is very popular as it allows employees to be photographed every five minutes and photos compiled. In these cases it is obvious the deviation from the main purpose of this software and its transformation into an exclusive system for monitoring employees by employers.

However, the organization of work and its conditions must be achieved through the adoption of non-intrusive measures, as the supervision of workers is regulated at both international and national level. According to Recommendation CM / Rec (2015) 5 of the Committee of Ministers to Member States on the processing of personal data in the context of employment adopted on 1 April 2015, "Use of video surveillance to monitor locations that are part of the most personal area of employees' lives it is not allowed in any situation ". Although this recommendation does not directly address the telework, it can be easily applied in this situation.

Specifically, Principle 15 has the following content: "Information systems and technologies for employee monitoring, including video surveillance.

15.1. The introduction and use of information systems and technologies for the direct and main purpose of monitoring the activity and behavior of employees should not be allowed. If their introduction and use for other legitimate purposes, such as the protection of production, health and safety or the efficient functioning of an organization, has the indirect consequence of the possibility of monitoring the activity of employees, it should be subject to the additional guarantees set out in principle 21, in particular consulting employee representatives.

15.2. Information systems and technologies that indirectly monitor the activities and behavior of employees should be specifically designed and located so as not to undermine their fundamental rights. The use of video surveillance to monitor locations that are part of the most personal area of employees' lives is not permitted under any circumstances.

15.3. In the event of litigation or legal proceedings, employees should be able to obtain copies of any records made, where appropriate and in accordance with national law. The storage of records should be subject to a deadline. "

According to the national law, since the Law no. 190 of 18 July 2018 on measures to implement Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46 / EC (General Data Protection Regulation), came into force, it regulated the processing of personal data in the context of employment relationships (article 5). Thus, if monitoring systems are used by electronic means of communication and / or by means of video surveillance at work, the

processing of personal data of employees, in order to achieve the legitimate interests pursued by the employer, is allowed only if : a) the legitimate interests pursued by the employer are duly justified and prevail over the interests or the rights and freedoms of the data subjects; b) the employer has provided mandatory, complete and explicit prior information to employees; c) the employer consulted the union or, as the case may be, the employees' representatives before the introduction of the monitoring systems; d) other less intrusive forms and ways for achieving the goal pursued by the employer have not previously proved their effectiveness; and e) the duration of storage of personal data is proportional to the purpose of processing, but not more than 30 days, except in situations expressly regulated by law or in duly justified cases. Even if Law no. 190/2018 does not make a direct reference to the development of teleworking, we note, however, that when the law regulates the "workplace" does not limit the concept, not referring to the workplace organized by the employer or the workplace at its headquarters. Therefore, since the law does not distinguish, the provisions of article 5 of Law no.190/2018 must be taken into account by employers when using means of monitoring employees.

Going beyond the non-intrusive nature of monitoring, which must be respected and whereof we talked about in the previous paragraphs, an aspect that should not be neglected is informing employees previously and explicitly implementing monitoring systems, respecting the employee's privacy, especially in the context of Law no. 190/2018 which does not provide exceptions. Therefore, the employer can use employee activity monitoring systems, as long as they comply with the appropriate guarantees, because, as mentioned above, GDPR requires that personal data processing measures respond to a legitimate interest and respect the principles of necessity, transparency, proportionality and provide guarantees for privacy.

Last but not least, we recall Principle 3 of Recommendation CM / Rec (2015) 5 of the Committee of Ministers, according to which respect for human dignity, privacy and the protection of personal data should be protected in the processing of personal data in labour relations, in particular to allow the free development of the employee's personality, as well as to create opportunities for the development of individual and social relationships in the workplace.

PRIVACY AND WORK THROUGH DIGITAL TECHNOLOGIES

The ability to work anytime and anywhere using digital technology has led to increased flexibility for both employers and employees. The trend towards more flexible work was mainly encouraged by employees who wanted to achieve a better work-life balance. However, in the context of an "always on" or "always available" culture, the increasing use of digital technology in the workplace has contributed to blurring the boundaries between work and privacy. In this context, regulations should promote the benefits of telework (for example, a better work-life balance), while protecting employees from its disadvantages (for example, through protection initiatives such as the right to disconnect).

The expansion of the use of digital technologies, such as smartphones, tablets, laptops and desktop computers, to work at home or elsewhere in telework, leads to the rapid transformation of the traditional working model. All this can improve the work-life balance of employees, reduce the time spent traveling to work and increase productivity, but can also result in more hours of work, more labor intensity and interferences between work and home, according to a joint report drafted by the International Labor Organization –

Eurofound³. The report "Working anytime, anywhere, The effects on the world of work" summarizes the research carried out by both organizations in 15 countries, including ten EU Member States (Belgium, France, Finland, Germany, Hungary, Italy, the Netherlands, Spain, Sweden and United Kingdom), as well as Argentina, Brazil, India, Japan and the United States. The study identifies several types of employees who use new technologies to work outside the employer's premises, including employees working in telework. The report highlights a number of positive effects of telework, such as greater working time autonomy leading to greater flexibility in the organization of working time and a reduction in travel time, resulting in a better overall balance between private and professional life as well as higher productivity. It also identifies several disadvantages, such as the tendency to work longer hours and an overlap between working time and personal life - which can lead to high levels of stress. The report makes clear distinctions between teleworkers at home who seem to enjoy a better work-life balance and "highly mobile" workers who are more at risk of adverse health and well-being outcomes. This report shows that the use of modern communication technologies facilitates a better overall balance between work and personal life, but at the same time blurs the boundaries between work and personal life, depending on the job and the characteristics of different occupations. " said Jon Messenger, representative of the International Labor Organization, co-author of the report.

In the current context of the COVID-19 Pandemic and the massive increase in the percentage of teleworking, the previously existing delimitation between working hours and free time is blurred. Studies have found that 20% of people in Europe who worked in an office reported high levels of stress, compared to 40% of people who worked at home. The findings were similar for those who reported sleep disorders. However, positive results were recorded for those who worked in telework on an occasional basis. This method has been found to be beneficial not only for employees but also for employers because it has been found that this type of work can also increase productivity. A sample of data from national studies found that teleworkers had on average about two to four hours more work per week than those who worked in the office. "These are not deep increases, but they are still substantial," said Jon Messenger, a representative of the International Labor Organization.

The report "Working anytime, anywhere, The effects on the world of work" also addressed the issue of isolation from colleagues and the work environment related to the too frequent absence from the office. Messenger said: "This constant work outside the employer's premises seems to have negative valences. One of the disadvantages is specifically this isolation, this disconnection from colleagues and, of course, from the organization and its values." To overcome this problem, he said that many organizations have developed policies that set a maximum number of days a week in which people can work outside the employer's premises. "Two or three days seems like the right thing to do. So, half the time spent in the office and half the time out of the office," he said. "And that helps avoid these isolation and disconnection issues."

The "Always on" culture leads to an increased risk of depression, anxiety and exhaustion, so striking a balance between working time and rest time, by using legal levers seems to be the solution at this time for a more defined definition of the border between privacy and the professional life.

³ The study "Working anytime, anywhere: The effects on the world of work", published at February 15th, 2017 - <https://www.eurofound.europa.eu/publications/report/2017/working-anytime-anywhere-the-effects-on-the-world-of-work>

The right to disconnect

In the context of the COVID-19 pandemic and the rapidly expanding of telework, Members of the European Parliament have drafted a legislative initiative, adopted by 472 votes to 126, with 83 abstentions, calling on the Commission to propose a law to allow those who work digitally to disconnect outside of their work schedule. It is also stated that it should establish minimum requirements for telework and clarify working conditions, hours and rest periods. The increase of digital resources used for the purpose of providing work has led to the birth of the "always on" culture, which has a negative impact on the balance between professional and personal life of employees, said the deputies. Although working from home was essential to protect working relationships and business during the COVID-19 crisis, the combination of many hours of work and higher demands also leads to more cases of anxiety, depression, exhaustion and other problems of mental and physical health.

MEPs consider the "right to disconnect" to be a fundamental right that allows employees to refrain from performing work-related tasks - such as phone calls, e-mails and other digital communications - outside working hours. This includes holidays and other forms of holidays and leisure. Member States are encouraged to take all necessary measures to enable workers to exercise this right, including by concluding collective agreements between the social partners. They should ensure that workers are not subjected to discrimination, criticism, dismissal or other adverse actions by employers. "We cannot abandon the millions of European workers who are exhausted by the pressure of always being available and working longer hours. Now is the time to stand by them and give them what they deserve: the right to disconnect. This is vital to our mental and physical health. It is time to update workers' rights so that they correspond to the new realities of the digital age ", said the rapporteur Alex Agius Saliba (S&D, MT) after the vote. "After months of teleworking, many employees now suffer from negative side effects, such as isolation, fatigue, depression, burnout, muscle or eye disease," Saliba said, adding: "The pressure to always be accessible, always available, is increasing, resulting in unpaid overtime and burnout. "

The right to disconnect refers to a worker's right to be able to disconnect from work and not to engage in work-related electronic communications, such as e-mails or other messages, outside working hours. This concept has developed as a necessity and as a result of the progress of communication technologies and its impact on people's daily lives. The widespread use of smartphones and other digital devices means that being "on call" or "available" has always become a reality in many jobs, as continuous remote access can put pressure on employees to be constantly accessible. Waiting for workers to be available at almost any time for online or mobile communication is now considered potentially dangerous to workers' health. MEPs found that there is currently no European legal framework that directly defines and regulates the right to disconnect. However, the Working Time Directive (2003/88 / EC) ⁴ covers a number of rights indirectly related to similar issues: in particular, the minimum daily and weekly rest periods that are necessary to protect the health and safety of workers. Moreover, the right to disconnect aims at achieving a better work-life balance, which has been the basis of recent European initiatives - for example, Principle 9 (work-life balance) and Principle 10 (healthy, safe working

⁴ <https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex:32003L0088>

environment and well adapted and data protection) from the European Pillar of Social Rights.

France is considered a pioneer in the legal recognition of the right to disconnect. As early as 2013, a national cross-sectoral agreement on quality of life at work encouraged companies to avoid any intrusion into employees' privacy by defining the periods when devices should be switched off or disconnected. This right was taken over starting with 2016 within a normative act, being regulated by article L.2242-17 of the Labour Code. According to this text, the mandatory negotiations on equality between men and women and the quality of life at work - which are to take place only at company level and therefore not systematically - must plan, under specific conditions, "the terms for exercising the right to disconnect by the employees and the configuration by the company of digital instruments, in order to ensure the observance of rest and vacation periods, as well as of personal and family life". France's approach has inspired other EU countries. While some EU countries have a form of disconnection right included in the legislation, in some cases it is present in the policy of many large companies. For example, in Italy, the right to disconnect is provided in Article 19 of Law no. 81/2017, which specifies that the written agreement between the worker and the employer must also regulate the employee's rest periods and indicate the technical and organizational measures taken by the parties to guarantee the employee's right to disconnect from the company's devices.

Beyond the formal and legal recognition of a right to disconnect, there are company-wide initiatives aimed at regulating the possible negative effects of communication technologies on employees' lives. For example, the Orange Telecommunications Group in France signed a collective bargaining agreement at company level on September 27th, 2016. Regarding the digital transformation of the group, this collective bargaining agreement established the right to disconnect for Orange employees. In addition, the banking investment company Natixis and the financial services company Société Générale offer other examples of practices aimed at implementing a right to disconnect in France. In Germany, in 2012, Volkswagen was the first company to implement a company-level "freeze" of e-mails outside business hours. The car manufacturer has set up its internal servers to retain the transmission of emails to individual accounts between 18.15 and 07.00. Many other companies have followed suit.

Conclusions

Digitization has brought many benefits and advantages to employees, including flexibility and reduced travel time, but it has also brought disadvantages. The pressure to be always accessible, always available, is upward and difficult for employees to bear. Also, in most cases, telework brought with it an extended work schedule and not necessarily compensated financially, properly, the boundaries between work and private life becoming blurred, while there is an interpenetration between the two concepts and a negative impact on private life. The consequences concern unpaid overtime, on the one hand, and burnout, on the other.

The COVID-19 pandemic has fundamentally changed the way both employees and companies operate and it is necessary to update the rules to the actual situation in order to restore a balance between private and professional life, without any of the two concepts being affected negatively. Although teleworking has saved countless lives by providing a

limited and safe working environment, many teleworkers now suffer from the negative side effects of teleworking, namely isolation, fatigue, depression, muscle or eye diseases.

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APPROACH OF LEGAL CAPACITY OF THE UNDERAGE PERSON FROM THE PERSPECTIVE OF LABOUR RELATIONS AND TELEWORK

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Abstract

The work capacity recognized for the underage person who is at least 16 years old represents a completion brought by the Labour Code to the legal capacity provided by Civil Code, reflecting the Common Law on the matter, as the Labour Law rules that there is a third variant of the capacity resulting from the legal capacity, i.e. the work capacity creating a part-and-whole relation of the legal capacity. Therefore, the work capacity of the underage person appears as a partial capacity conditional upon the restricted legal capacity, as it becomes full at the age of 16 years.

Subject to Law no. 81/2018 on regulating the telework activity, it is required to analyse the possibility of the underage person having work capacity to carry on activity as telework, using information and communications technology and taking into consideration also the legal frame related to definition, forbiddance and removal of dangerous works for children, which, by their nature or conditions of being carried out are harmful to health, safety or morality of children, being found in Government's Decision no. 867/2009.

Keywords: telework, young person, child, legal capacity, work capacity, consent of parents, emancipation of underage persons

1. EMANCIPATION OF UNDERAGE PERSONS AND ITS LEGISLATIVE EVOLUTION

The development of the natural person and its involvement in social-professional life are obviously marked by the dynamic changes taking place in evolution of contemporary society, a fact which totally justifies the interest of Romanian lawmaker in regulating the institution of underage person emancipation, by adapting the legal provisions to the underage person's need of independence, relative to its evolution and proven degree of maturity, which represents an element of flexibility in legal relationships.

Retroactively considering the institution of emancipation of the underage person, it may be noticed that it originates from the Roman Law, evoked in Law of the Twelve Tables, where "mancipatio" had as purpose the release of a person, of any age, from the power governing the respective person, i.e. the transformation of the respective person from "alieni juris" into "sui juris".

For regulating the Civil Code from 1864, by means of art. 342 of the Code it was established that "An underage person is that person who still did not reach the age of twenty-one years, either male or female" and according to art. 434, „Full age persons are both men or female who reached the age of twenty-one years; at this age, each of them is capable of concluding all documents regarding the civil life, besides the restrictions provided for marriage”.

Because the Civil Code from 1864 established that until the age of 21 years, the underage persons did not have legal capacity, the institution of emancipation became particularly needed.

Within this regulation, starting from the legal provisions found in Chapter III - „About emancipation”, art. 421-433 Civil Code from 1864, the doctrine has defined the emancipation as being a ”solemn act or a legal benefit having as effect the repealing of the power of parents or guardian, conferring the underage person the right of ruling himself/herself as regards personal acts and to administer his/her patrimony within the limits of a restricted capacity” or as ”the judicial means getting the underage person out from the power of parents or guarding and having acknowledged his/her limited legal capacity”.

By means of Decree no. 185/1949 for changing and repealing some provisions related to full age, to capacity on the matter of contracts of employment and emancipation, the institution of emancipation was cancelled, so that the age at which the underage person becomes a person of full age was reduced from the age of 21 years to the age of 18 years, with the mentioning in art. 2 of this normative act that the underage person becomes a person of full age by getting married.

Also, according to art. 4, the age of 21 years is replaced in art. 131, 141 and 434 Civil Code as well as in any other legal provision by the age of 18 years and the age of 18 years is replaced by the age of 16 years, in art. 15, 33, 39 and 64 of Law on contracts of employment.

There was removed also the reference to "emancipation", to "emancipated underage persons" or "curator of emancipated" from Title X, Book I of Civil Code, from art. 93, 149, 326, 355, 440, 450, 687, 747, 749, 815, 915, 1538 and 1836 of Civil Code; art. 45, 495 and 635 from civil procedure as well as from any other legal provision.

As a result of comparatively analysing the old with the current legislation, it may be established the keeping of the need of protection of the underage person as regards his/her capacity of concluding alone judicial acts by whose means he/she exercises civil rights or obtains civil rights, correlatively with assuming and executing the duties resulting from these judicial acts, taking in consideration also the necessity of his/her integration in labour right relationships.

For this purpose, ever since regulations provided by means of Decree no. 31/1954, by means of art. 10 there was provided the possibility of the underage person reaching the age of 16 years to conclude a contract of employment or to enter a collective agricultural household or another cooperative organization without requiring the consent of the parents or guardian.

In exchange, there were two requirements to be met for an underage person of 14-16 years of age to conclude a contract of employment, requiring for this purpose both the prior consent of the parents or guardian as well as the submitting of a medical opinion.

By means of these legal provisions, there was acknowledged the possibility of the underage person of exercising alone his/her rights and consequently of executing his/her duties resulting from the contract of employment and moreover, the underage capacity having restricted capacity had the right, without requiring the consent of the parents or guardian, to deposit amounts within state depositing institutions and to use these deposits according to provisions of the regulations of the depositing institutions.

It may be easily noticed how the lawmaker showed a special attention to involving the underage persons in labour right relationships by expressly regulating a special judicial capacity of the underage person within the field of labour right.

2. THE UNDERAGE PERSON, AS SUBJECT WITHIN LABOUR RIGHT RELATIONSHIPS. QUALITY OF THE UNDERAGE PERSON AS EMPLOYEE AND HIS/HER JUDICIAL CAPACITY

The protection of children and young persons presents also within the national legislation a specific approach, harmonized to international and European legal norms. According to art. 49 of Constitution of Romania, the duty of the public authorities of contributing to free participation of young people in political, social, economic, cultural and sports life of the country has a constitutional value.

Therefore, both by means of constitutional provisions as well as by means of provisions of Labour Code, it is established the minimum age at which the underage persons may become party of a labour relationship. Obviously, it is forbidden the employment of persons below the age of 15 years, according to art. 13, paragraph (3) Labour Code, in line with provisions of art. 49, paragraph (4) of Constitution of Romania, but also with provisions of Convention of Labour International Organization no.138/1973 with regard to minimum age for getting employed, instituting the interdiction of employing persons below 15 years of age, i.e. the age for getting employed cannot be, in any circumstance, below the age at which the mandatory schooling ends.

By means of current regulations, the lawmaker has succeeded in creating a symbiosis between the civil capacity of the person with the two essential components, the use capacity and the legal capacity with the work capacity acknowledged in case of underage persons.

According to doctrine, the legal capacity is granted by considering the discernment of the natural person and exclusively regards his/her civil judicial acts, so that it does not have any connection with the *stricto sensu* judicial facts.

Therefore, according to art. 42 Civil Code, as regards the judicial regime of some acts of the underage person, it is mentioned that the underage person may conclude judicial acts regarding to work, artistic or sports activities or regarding his/her profession, with the consent of the parents or guardian as well as under the observance of the provisions of the special Law, if applicable.

Starting from the legal capacity notion defined by art. 37 Civil Code as being the aptitude of the person to conclude alone civil judicial acts, an aptitude fully obtained upon reaching the age of 18 years, when the person becomes a person of full age, according to art. 38 Civil code, the lawmaker continued the regulation of emancipation of the underage person, by his/her possibility of having acknowledged an anticipated legal capacity.

Although it does not represent a current creation of the lawmaker, as indicated above, this anticipated legal capacity institutes a major derogation from the age at which a person gets full legal capacity, as it allows the underage person who reached the age of 16 years to have it anticipatedly acknowledged his/her judicial capacity.

If, from the perspective of the provisions of the Civil Code, the underage person of 16 years of age has a limited legal capacity, obtained according to art. 41, paragraph (1) Civil Code from the age of 14 years, the judicial acts concluded by this underage person requiring the consent of parents or guardian, as the case may be and in cases provided by Law, with the approval of the guardianship court, within the labour right relationships, the respective

underage person benefits from full work capacity starting at the age of 16 years, allowing the underage person to conclude an individual contract of employment without requiring the consent of the parent or guardian, although there are established limits as regards the activities which may be carried on by the respective underage person.

The existence of these limitations imposed by various normative acts, amount which, we firstly can remember the provisions of art. 13, paragraph (5) of Labour Code – the employment for hard, harmful or dangerous jobs is possible after reaching the age of 18 years - , expressly regulated by Government's Decision no. 600/2007, highlights the intention of the lawmaker to still maintain, in its essence, the restricted legal capacity of the underage person of 16 – 18 years of age.

As it results from provisions of art. 13, paragraph (2) Labour Code, there is distinguished also a restricted work capacity, as regards the underage person of 15 years of age, who may conclude a contract of employment, as employee, with the consent of the parents or legal representatives, for activities suitable to his/her physical development, aptitudes and knowledge, if they do not endanger his/her health, development and professional training.

Therefore, it may be noticed the role of the Romanian lawmaker in ensuring the access of persons having restricted legal capacity obtained starting with the age of 14 years, but under the reserve of observing the interdiction having an imperative character, provided by constitutional norms and under the observance of the interdiction provided by specific legislation according to which the underage persons/persons of at least 15 years of age cannot be employed as employee. This is the reasons why the underage person of at least 15 years of age may obtain the statute as employee with the consent of the parents.

Further, as regards the consent of the parents, it may be noticed that this consent is required as a condition of admitting the underage person within a labour right relationship, i.e. for concluding an individual contract of employment. This consent is temporary and required only until the underage person reaches the age of 16 years.

Although from the perspective of provisions of Civil Code, the underage person of 16 years of age, benefitting from restricted legal capacity, may conclude judicial acts in his/her own, but with the consent of the parents or guardian, as regards the labour right, he/she gets a legal capacity similar to full legal capacity, i.e. he/she obtains the work capacity allowing him/her to conclude an individual contract of employment in his/her own name with all corresponding rights and duties.

By relating also to provisions of Civil Code, it may be established that by means of above remembered art. 42, paragraph (1), the lawmaker has established, without making any distinction as regards the age of the underage person, that he/she may conclude judicial acts on work, artistic or sports activities or related to his/her profession, with the consent of the parents or guardian as well as under the observance of the provisions of the special Law, if applicable.

Subject to this general legislative frame, they are clarifying and very necessary for providing an unitary application of the legal provisions and therefore their harmonization with the international and European legal norms on the matter, the provisions of the Labour Code, as special legislation, for emphasizing the *intuitu personae* character of the individual contract of employment, superseding the intervention of parents in case of concluding an individual contract of employment with natural persons who reached the age of 16 years.

Although the legislation did not provide a definition for the work capacity, it may be drafted based on criteria indicated in Directive 94/33/CE of 22 June 1994 on the protection of young people at work as being the specific capacity of a person materialized in the capacity of concluding a contract of employment taking into consideration the resources of that person and the work related factors, customized in case of young people based on own characteristics of getting from childhood to adult age and the specific risks result from lack of experience, absence of awareness of existing or potential risks or insufficient development of young people.

Karl Marx introduces the concept in chapter 6 of Capital's first volume, defining the work capacity or labour force as the totality of physical and intellectual aptitudes of the body, the living personality of the human, used by human for creating values of a certain kind to be used ”.

Returning to work capacity of the underage person, obtained by the underage person at the age of 16 years, subject to individual contract of employment, as work represents a personal activity, which cannot be carried out by proxy and requires a certain physical and psychical development, the underage person gets a part of full legal capacity, requiring a right of disposal as regards the employment relationships assumed by the underage person.

The *intuitu personae* character of the individual contract of employment as well as the goal of Directive 94/33/CE on the protection of young people at work, according to which a proper work experience may contribute to reaching the goal consisting in preparing the young people for the professional and social life as adult, provided that it pursues the avoidance of any damage, fully justifies the vision of national and international lawmakers in relation to regulating a full work capacity starting at the age of 16 years, which, as it results from above, is born as a partial capacity, even a conditional capacity on restricted legal capacity, as the discernment is the basic component of the legal capacity.

3. TRANSPOSITION OF THE NOTIONS OF "CHILD", "YOUNG PERSON", "ADOLESCENT" IN NATIONAL LEGISLATION AND INTERFERENCE OF THESE NOTION WITH THE "UNDERAGE PERSON" TERM FOR ESTABLISHING THE LABOUR RIGHT RELATIONSHIPS

Making a brief review of the legal provisions at national level, we establish that the various normative acts regulating the conditions and requirements related to employing underage persons do not involve a unitary approach of "child" and "young person" respectively, with reference to specific notion of "underage person", as they more likely contain a sequencing of these terms depending on the object of regulation.

At international level, the UNO Convention on the Rights of the Child establishes by art. 1 that the "child" notion includes every human being below the age of 18 years, representing the judicial characteristic at E.U. level for defining the "child" notion, nevertheless being established that until now this notion was not unitarily regulated and it has not any sole official definition in treaties, legislation or jurisprudence, as this definition varies in E.U. laws.

An example of this is the Directive 94/33/CE on protection of young people at work (Directive on young workers), distinguishing between three types of notions, using the notion of "*young person*" as a generic notion for all persons who are maximum 18 years old, as provided in article 2 paragraph (1) of Directive, as having a contract of employment or an employment relationship, the "*children*" notion referring to any young person who did

not reach the age of 15 years or is still subject to compulsory full-time schooling, imposed by national legislation and "adolescents" notion representing any young person, who is minimum 15 years old and maximum 18 years old, who is no longer subject to compulsory full-time schooling, imposed by national legislation.

In the process of transposing this Directive into national legislation, the Romanian lawmaker has implemented the young person and child notions, as the young person is any person, who is minimum 15 years old and maximum 18 years old, without including also the requirement of being the subject to compulsory full-time schooling, established by Law, which might also include the "adolescent" notion in the view of the Directive, while, also from the perspective of the Romanian lawmaker, a young person, who is minimum 15 years old and maximum 18 years old, who is still subject to compulsory full-time schooling, established by Law is included also in the "child" notion together with any person who did not reach the age of 15 years.

For understanding these legal provisions, it is important to remember also the provisions of the Government's Decision no. 600/2007 on the protection of young people at work, as regards the defining of "child" and "young person" term that comprises the notion of underage person in the view of these legal regulations.

Therefore, "young person" shall mean any person of at least 15 years of age but less than 18 years of age under 18 years of, and "child" shall mean any person of less than 15 years of age or any young person of at least 15 years of age but less than 18 years of age, who is still subject to compulsory full-time schooling, established by Law.

These definitions may become confusing in case of their implementing, taking also into consideration that based on art. 5, paragraph (1) of Government's Decision no. 600/2007 on protection of young people at work, the employment of children is forbidden, derogating also from this rule, by means of the next paragraph of art. 5, allowing the children of at least 16 years of age 16 ani, who are subject to compulsory full-time schooling, to conclude, according to the Law, an individual contract of employment as employee for carrying on light work.

This possibility of concluding an individual contract of employment is allowed also to children reaching the age of 15 years, who are subject to compulsory full-time schooling, but it is inserted the condition of the consent of parents or legal representatives, for carrying on activities suitable for his/her physical development, aptitudes and knowledge in order not to affect the health, development and professional training.

The definition of "light work" contained by Government's Decision no. 600/2007 on protection of young people at work was effectively taken over from Directive 94/33/CE on protection of young people at work, representing *"all work which, on account of the inherent nature of the tasks which it involves and the particular conditions under which they are performed, it is not likely to be harmful to the safety, health or development of children and young people and is not such as to be harmful to their attendance at school, their participation in vocational guidance or training programmes approved by the competent authority or their capacity to benefit from the instruction received"*.

These legal provisions contained by art. 5, paragraph (1) of Government's Decision no. 600/2007 on protection of young people at work complete the provisions of art. 13, paragraph (1) of Labour Code, particularizing the situation of children, who are at least 16 years old, who are subject to compulsory full-time schooling, establishing their possibility of concluding an individual contract of employment, as employee, for carrying on light

work only and under the mandatory observation of art. 9, paragraph (2) of Government's Decision no. 600/2007.

As a result of analysing these legal provisions, may be noticed that the use of "underage person" notion in the context of his/her inclusion in labour right relationships is frequent in practice and doctrine analyses, but at conceptual level, the European and national lawmakers have appealed to notions such as "child" or "young person" with the above-indicated differentiations and definitions.

In fact, there may be noticed that neither Labour Code does not use notions such as "child" or "young person", with reference to natural person only, who may conclude an individual contract of employment starting at the age of 16 years, with the exception of the notion contained in art. 265, paragraph (1), providing that „the employment of underage persons by infringing the legal age conditions or their use to carry on activities infringing the legal provisions concerning the working arrangement of underage persons shall be a criminal offence punishable with a prison term from three months to two years or fine”.

Consequently, we consider that the notions analysed above and introduced by the Romanian lawmaker in Government's Decision no. 600/2007, obviously represent the transposition of Directive 94/33/CE of 22 June 1994 on protection of young people at work, published in Official Journal of European Communities (JOCE) no. L 216/1994.

The need of providing and observing the moral and social protection of the children has favoured also the regulating of a legal protection by means of normative acts adopted at international, European and national level, starting from their inclusion in groups exposed to specific risks for which measures must be taken as regards their safety and health.

The resources of international legislation as regards the situation of the *underage person* and works which may be done by the underage person have been used also in the national legislation by means of regulations having as objective the protection of the underage person employee, his/her encouraging for getting employed, the experimenting and learning depending on his/her development, aptitudes, passions and vales, under the observance of his/her needs to rest, work time, specific of activities and power or capacity of assuming rights and duties corresponding to labour law relationships.

Therefore, by means of Government's Decision no. 867/2009 *on forbidding dangerous works in case of children was ratified the Convention of Labour International Organization no. 182/1999* on forbidding the most severe forms of work in case of children and the immediate action for the purpose of their elimination, adopted within the 87th session of General Conference of Labour International Organization in Geneva on 17 June 1999, establishing the legal frame regarding the defining, forbidding and elimination of the dangerous works for children which, by their nature or conditions in which they are carried out, affect the health, safety and morality of children.

Taking into consideration art. 7 of Government's Decision no. 867/2009 on forbidding the dangerous works in case of children, there was also adopted the Government's Decision no. 75/2015 regulating the situation of underage persons who did not reach the age of 15 years.

The Government's Decision no. 75/2015 on regulating the carrying on paid activities by children, within the cultural, artistic, sports, advertising and modelling field establishes the required conditions so that the children carry on paid activities within the cultural, artistic, sports, advertising and modelling field, based on the contracts concluded between organizer and parents/legal representative of the child or directly with the child, as the case

may be, provided that the child is minimum 14 years old, with the prior approval of parents/legal representative.

Based on art. 3 of Government's Decision no. 75/2015, please find below the paid activities carried out within the fields mentioned in art. 1, which may be carried out by children as:

- a) actor, figurant, singer, musician, dancer, acrobat within cultural, educative or artistic events, such as: theatre, opera, ballet, circus, dance, music or singing contents as well as any other scene contents or activities;
- b) actor, figurant, singer, musician, dancer, acrobat or model for artistic movies, footages, radio or tv recordings or live shows, without or without advertising purposes;
- c) figurant or model for photo shootings, without or without advertising purposes;
- d) figurant or model for fashion shows;
- e) professional athlete within performance sport.

They cannot have the statute as employee, but may carry on paid activities within the artistic, cultural, sports, advertising field based on some contracts concluded between the parents or the legal representatives of the underage person with the contractor and not based on some contracts of employment, starting though at the minimum employment age at which the children may conclude individual contracts of employment, under the observance of provisions of Labour Code.

In conclusion, in the light of the foregoing, within labour right relationships, the natural person may be involved in an individual contract of employment as employee, if the respective person has both use capacity as well as work capacity, representing a part of legal capacity, allowing the underage person to behave as a person having full legal capacity, by directly and totally exercising the rights and duties resulting from such an employment relationship.

4. CARRYING ON LABOUR ACTIVITY AS TELEWORK AS UNDERAGE PERSONS EMPLOYEES

As indicated in provisions of art. 2, lit. a) Law no. 81/2018 on regulating the telework activity, telework represents the form of labour organization by whose means, the employee, regularly and voluntarily, fulfils the job, occupation or professional specific tasks, outside the place of work organized by employer, at least one day per month, using information and communications technology.

Since from the provisions of the normative act regulating the modality of carrying on activity by an employee as telework it does not result an interdiction or limitation of the case in which underage persons carry on activity as telework, it may be considered that also the underage person may have the quality as tele-employee.

Nevertheless, for an underage person having work capacity to carry on activity as tele-employee, the underage person must fulfil the activity specific tasks using the information and communications technology.

Even if, as indicated above, the underage person who reached the age of 16 years may conclude an individual contract of employment based on the work capacity obtained as a result of the age, nevertheless the underage person benefits from a differentiated treatment as regards the carrying on certain activities.

This differentiated treatment is fully justified and caused by the importance and necessity of protecting the underage persons against activities which might harm them and

therefore the Romanian lawmaker has established by means of Government's Decision no. 867/2009 on forbidding dangerous works in case of children a list containing the types of dangerous works for children, classified depending on certain criteria and conditions. iv

Therefore, there are regulated three general categories forbidding the activities or works exposing the children to the action of some agents affecting their safety and health, to the action of some procedures and/or activities affecting their safety and health or to some conditions affecting their safety, health and morality, taking into consideration the criteria provided by art. 3 of Government's Decision no. 867/2009. It is also explicitly forbidden any work/activity that prevents the attendance to any form of education, according to the Law.

Pursuant to art. 9, paragraph (2) of Government's Decision no. 600/2007, it is forbidden to employ young persons for activities which:

- a) *obviously exceed their physical or psychological capacities;*
- b) involve a *harmful exposure to toxic, carcinogenic agents*, causing hereditary genetic modifications, having harmful effect for the foetus during pregnancy or having any other harmful chronic effect on human being;
- c) involves a *harmful exposure to radiations;*
- d) involve *risks of injury*, which cannot be identified or prevented by underage persons, because of their insufficient attention to occupational safety and their lack of experience or training;
- e) endanger their health as a result of *extreme cold or heat or because of noise or vibrations.*

Based on above-mentioned criteria, the employers have the duty of protecting the underage persons against the specific risks related to their safety, health and development, taking into consideration the lack of experience, the fact that they are still under development as well as the capacity of underage persons still in progress as regards the risks awareness.

As well pointed out in the doctrine, "the regulating subject of the two decisions of the Government is partially different. While the Government's Decision no. 600/2007 applies, pursuant to art. 2, to all employers as regards the young employees, the Government's Decision no. 867/2009 applies according to art. 1 paragraph 2 corroborated with art. 2 lit. d) and e) to employers – natural persons, not only to young employees, but – in formal sector – also to persons working on the basis of civil contracts [art. 2 lit. d)] or – in informal sector – even to those working without any contractual form regulated by Law [art. 2 lit. e)]".

Art. 2, lit. d) of Government's Decision no. 867/2009 provides that by *formal sector* it is understood that sector in which the activity or work carried out by a child for judicial or natural persons is based on a contractual form regulated by Law according to the age of the child.

Art. 2, lit. e) of the same normative act provides that by *informal sector* it is understood the sector in which the activity carried out by a child for natural persons is performed without any contractual form regulated by Law, such as: domestic activities, in own household or other households, agricultural activities, street activities: washing windows in intersections, lease of a parking place, distribution of flyers/magazine and other such articles, in the markets, railway stations and harbours, traditional activities: melting of non-ferrous metals, manufacture of bricks and other such articles.

Considering the fact that the decent work, age and capacity appropriate for the underage persons to carry on certain activity may be transposed also in the telework field, it is required to notice that pursuant to art. 8 of Law no. 81/2018, the tele-employer must carry on activity both according to his/her education and training as well as according to the instructions received from the employer, so that he/she does not expose to the danger of injuries or occupational illness or to expose other persons to this danger, as a result of his/her actions or omission during the labour process.

Returning to criteria taken into consideration by Government's Decision no. 867/2009, in item III of Annex no. 1 may be noticed that some of them may interfere with the activity carried out by the underage person as telework, especially in case of works/activities indicated in items 2 - 5, i.e. activities/works exceeding the physical capacity of the child, evaluated by the family doctor, activities/works exceeding the psychological capacity of the child, evaluated by psychologist, reward system work or other works leading to a higher reward in case of an increased work tempo and work within a group of adult employers working based on a rewards system (within the meaning of the ones previously mentioned).

This conclusion is based on the specific of the other activities or works forbidden in case of underage persons, as indicated in items I, II, III item 1, items 6-16 and targeting activities which by their nature cannot be carried out as telework, by using information and communications technology.

Therefore, as regards the physical or psychological capacity of the underage person having work capacity, it may be considered that a work done using information and communications technology, i.e. as telework, requires a prior evaluation made by the employer for the type of activity carried out by the underage person. This evaluation requires an intervention of the family doctor and psychologist.

Although, at theoretical level, the activity carried out as telework may be performed also by underage persons having work capacity, in practice, the employers may face difficulties in case of labour relationships with underage person employees, as they may carry on light activities only, according to their age and physical and moral development and if the assessment of risks connected to the work of underage persons it result that there is a danger related to safety, physical or mental development or health, the employer must propose a free of charge evaluation of their health and capacity before starting the activity.

From analysing the legal provisions, it results that as regards the telework, it was not adapted also to special situations in which it may be used also in case of children and young people, but taking into consideration the dynamics of development of labour relationships using information and communications technology, the legislation will be constantly adapted depending on specifics of activities field involving more and more the use of artificial intelligence, applications and robotics.

CONCLUSIONS

This study represents an analysis of the structure of the work capacity generally belonging to employee and particularly belonging to child or young employee, as these are notions integrated by international, European and national legislation in normative acts allowing the employing of underage persons in labour right relationships and guiding the employers in supporting the rights and providing the required conditions for integrating the underage persons as part of an individual contract of employment.

Therefore, we tried to highlight the fact that the protection of young people at work is ensured by international and European legal norms, carefully transposed into national legislation, but as regards the case in which the underage person employee carry on activities as telework, even if they are not subject to Common Law on the matter, the intervention of the lawmaker in regulating the way in which young people benefit from providing the material, technical and logistic conditions for labour relationships as telework is required.

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PREVENTING ACCESS TO MANDATORY GENERAL EDUCATION (OFFENCE AFFECTING FAMILY RELATIONSHIPS)

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Abstract

The legal protection of the family includes all the social relations that exist in connection with the manifestations of those who have the quality of spouses, parents and children regardless of the fact that the latter come from adoption.

From the perspective of ensuring education and intellectual training, the crime of preventing access to mandatory general education takes into account the family in terms of the relationship between parents and underage child. Education means accessibility to an education system that meets the future aspirations of children and is necessary for social progress. The family has a direct impact on the way children achieve and develop school performance, and mandatory general education is an essential element.

School dropout is a danger, so it is necessary to highlight the role and responsibility of the parent or of the persons to whom a child has been entrusted, according to law, in terms of compliance with the right to education.

With a largely preventive purpose, the Criminal Code includes the criminalization of the offence of preventing the access to mandatory general education as a fact that damages the family relationships as a component of social relations.

Keywords: education, parent, minor, withdrawal, impediment, frequency.

1. General aspects

Human rights are characterized by the manifestation and recognition of the basic conditions for a decent human existence. In this sense, the right to learn ensures and guarantees personal and spiritual development for integration, in all aspects, within social values. The Universal Declaration of Human Rights states that everyone has the right to education (art. 26), and the First Additional Protocol to the Convention for the Protection of Human Rights and Individual Freedoms states that no one may be denied the right to education (art. 2), and the Charter of Fundamental Rights of the European Union (art. 14) strengthens this vocation by highlighting the access to vocational training.

The Romanian Constitution mentions in art. 32 paragraph (1) "The right to education is ensured through mandatory general education, through high school and vocational education, through higher education, as well as through other forms of instruction and improvement."

The right to education aims through its objectives to "the free, integral and harmonious development of the human individuality in the formation of the autonomous personality and in the assumption of a system of values that are necessary for personal fulfillment and development, for the development of entrepreneurship, for active citizen participation in society, for social inclusion and employment within the labor market."

This fundamental right, recognized and constitutionally protected is individualized under the aspect of a legal norm of coercion through the provisions contained in Law no. 1/2011 (as amended by Law no. 56/2019) which shows that general mandatory education frequently refers (currently) to primary, secondary and the first 2 years of upper secondary education. The provisions of art. 487 of the Civil Code emphasize the right of parents regarding the protection of children in conjunction with the duty to take care of their education, teaching and professional training.

The inclusion under the criminal law of a behavior that prevents access to mandatory general education demonstrates on the one hand the constant and determined alignment of our country with the values of the European Union, and on the other hand the positive concern regarding the education of children in family.

The Criminal Code contains, in Title VIII of the Special Part, Chapter II entitled "Crimes against family" which includes the offense of "Preventing access to mandatory general education."

2. LEGAL CONTENT OF THE CRIME

Preventing access to mandatory general education is criminalized by the provisions of art. 380 of the Criminal Code, and the legal content of the deed is the following:

(1) "The parent or person to whom a minor has been legally entrusted and who unjustifiably withdraws or prevents him/her by any means from attending mandatory general education shall be punished by imprisonment from 3 months to one year; or with a fine.

(2) The deed shall not be punished if before the end of the criminal investigation the defendant ensures the resumption of the attendance of the courses by a child.

(3) If, until the conviction is final, the defendant ensures the resumption of attendance by the child, the court shall, as the case may be, postpone the application of the sentence or suspend the execution of the sentence under supervision, even if the conditions provided by law are not met."

3. PREEXISTING CONDITIONS

3.1. The legal object of the crime

The special legal object consists in the protection of the social relations related to the coexistence within the family in terms of the existence and development of the conditions for ensuring the requirements for raising and educating the minor, as well as ensuring his/her access to mandatory general education.

Thus, the legal function of the family is highlighted, which through its constitutional concept (art. 48 of the Romanian Constitution) aims to ensure the upbringing, education and training of children with parents' help.

At the same time, the legal object is the need to educate the minor within the family through school and to guarantee the right to attend mandatory general education courses.

The incrimination corresponds both to an individual interest which consists in capitalizing on the right to education of every person since the minority in order to ensure a more generous future, but also to a general interest in economic development and social progress achieved through human interaction.

The offense of obstructing access to mandatory general education has no material object.

3.2. Subjects of the offence

An active subject can be any person (criminally responsible) who has the quality of "parent or person to whom a minor has been entrusted, according to law" and who by his deeds prevents access (of the minor) to mandatory general education. In accordance with the provisions of art. 488 paragraph (1) letters c) and d) of the Civil Code, the parents have the duty to take all necessary measures for the protection and realization of children's rights, as well as to cooperate with natural and legal persons with responsibilities in the field of vocational education and training the child. Compared to these provisions, there is a circumstance of the active subject of the crime that must be located in a strictly legal relationship with the minor, imposed by a quality related to family relations or legally assimilated with it.

A. Concerning the position of the parent, the offense relates to the notion of parentage, in the narrow sense, as a link of descent between the child and each of his parents without a distinction between father and mother. The notion concerns both the natural (biological) and the civil affiliation resulting from the adoption because in both situations the active subject has the quality of parent.

In the acceptance of the law, by the parent is understood both the father and the mother, and this fact results from the provisions of art. 483 paragraphs (1) and (2) and art. 503 paragraph (1) Civil Code which states that parental authority belongs to and is exercised equally by both parents who also have the responsibility for raising the child. Also, the provisions of art. 35 and 51 of Law no. 272/2004 on the protection and promotion of children's rights expresses the fact that the best interests of the child require the participation of both parents in his upbringing and education, the obligation to enroll the child in school and the obligation to ensure his regular attendance of school.

These obligations are incumbent on the parents, in accordance with the law, both for children from marriage and for those out of wedlock or adopted.

However, there are also situations with a particular character in which the exercise of parental authority rests with a single parent, so that the active subject may be limited to a special circumstance resulting from the following cases:

- a) the death of one of the parents;
- b) forfeiture of a parent's parental rights;
- c) placing a parent under interdiction;
- d) one of the parents is unable for any reason to express his will (e.g. disappearance, impediment to fulfillment of obligations due to illness or other reasons, conviction to a custodial sentence, etc.).

However, it is relevant to prevent access to mandatory general education because the provisions of the Criminal Code make strict reference to the quality of parent that is analyzed according to the legal obligations towards the minor child.

B. In regard to "the person to whom a minor has been entrusted, according to law", the legal provision refers in the first instance to cases in which there is separation in any form of family life between the parents, and there are misunderstandings between them regarding in the exercise of rights or in the performance of parental duties.

In accordance with art. 486 of the Civil Code, the guardianship court, after listening to both parents and taking into account the report on the psychosocial investigation, decides according to the best interests of the child. As a result, the minor may be entrusted to one of the parents, a third person (e.g. grandparents) or a care institution (the latter being residential services, according to art. 123 Civil Code).

Residential services belong to local public administration authorities, being functional components without legal personality (e.g. placement centers that include family-type homes, reception centers for minors, maternal centers, care and assistance centers), and among the organizational responsibilities there is also the provision of professional training for minors. Under these conditions, however, it is not possible to legally retain the criminal liability of the protection institution in relation to the provisions contained in art. 135 Penal Code.

The custody of the minor, according to the law, includes other aspects that replace a relationship between the minor and the parent.

For this purpose, special protection measures for the minor may be instituted, which consist of family placement / services (art. 121-122 Civil Code) or specialized supervision, according to the provisions of Law no. 272/2004.

Adoption (regulated according to art. 451 et seq. of the Civil Code) is a legal operation in the best interests of the child that creates the parentage link between the adopter and the adoptee, as well as family ties between the adoptee and the adopter's relatives. Adoption can be made during the child's minority status until the age of 18 (when he acquires full exercise capacity).

Another situation is the one regarding the guardianship which according to the provisions of art. 110 of the Civil Code is established when both parents are, as the case may be, deceased, unknown, deprived of the exercise of parental rights or the criminal penalty of interdiction of parental rights, placed under judicial interdiction, disappeared or declared dead, as well as in case of which, at the end of the adoption, the court decides that it is in the interest of the minor to establish a guardianship. In all cases, only one natural person (or husband and wife, together) can be the guardian, and in the absence of an appointed guardian, the court may give this task to a relative or a friend of the minor's family (art. 118 Civil Code), and in such case the person in question may have the procedural capacity of active subject as "a person to whom a minor has been entrusted, according to law."

The passive subject of the offence is the child who has the right to follow the mandatory general education courses. In order to clarify the quality of minor, the provisions of art. 38 paragraph (2) of the Civil Code which states that "The person becomes of age at the age of 18." References to anticipated or restricted exercise capacity are not relevant because by the provisions of art. 380 paragraph (1) of the Criminal Code, the individualization is expressly made to a person with legal status of "minor", so that from the point of view of socially dangerous consequences (impeding access to mandatory general education) the ability to conclude in advance in a broad sense or restricted civil legal acts do not remove the quality of passive subject of the crime.

The criminal law uses the term "minor" which under essential respects from the point of view of the right to education and parental obligations overlaps with the term "child-person who has not reached the age of 18 and has not acquired the full capacity of exercise" existing in Law no. 272/2004. However, the distinct use of the term "child" is not

such as to lead to a different qualification of the passive subject of the offence and contributes to a more accentuated individualization of the rights conferred by law.

3.3. Place and time of the crime

The place of the crime does not have significance or significance for its existence.

The time of committing crimes represents the period during which the illicit material acts are executed, and this is the one corresponding to the interval in which the quality of minor person of the passive subject exists.

3.4. The premise situation

The offense of preventing access to mandatory general education presupposes, from the point of view of committing and the quality of active and passive subjects, the pre-existence of a connection in the nature of a family relationship or a civil legal relationship born as a result of a court decision. As a result, the premised situation consists in the existence of a parental relationship or a relationship arising from the custody of the minor of a person according to the law in order to.

4.CONSTITUTIVE CONTENT

4.1.Objective side

4.1.1. Material element. The incriminated action is to prevent access to mandatory general education.

Mandatory general education is currently defined by the provisions of art. 16 and 24 of the National Education Law no. 1/2011 (as amended by Law no. 56/2019) and reads: "Mandatory general education includes primary education, secondary education and the first 2 years of upper secondary education."

The term access, used in the criminal provision, has the generic meaning of opening, possibility or facility and refers to the right to education, constitutionally recognized.

The material element is achieved by any means that individualize the action of withdrawal or prevention of the minor, unjustifiably, to follow the courses of mandatory general education.

Withdrawal involves the removal, abandonment, removal, departure or any voluntary action of the parent or person entrusted with which the minor is in a negative situation of no longer having access to mandatory general education. This fact implies the situation of enrollment and registration of the minor in a form of mandatory education, followed by the suppression of the possibility of attending school courses.

Withdrawal can be made in any form (action / inaction) by which the minor is determined and reaches the circumstance of no longer appearing at the educational institution in whose records he is and attends.

The notion of impediment means a measure or provision prohibiting, constituting an obstacle, an obstacle for stopping the minor from pursuing mandatory general education. Prevention can be achieved by direct means and by indirect methods that can be identified by not enrolling a minor in an educational unit, sending to another locality or in a hard to reach place, lack of information regarding the need for education. Also, the impediment can be achieved through a form of mental or physical pressure consisting of threat, coercion, misleading, and deprivation of liberty.

The impediment must be permanent in terms of continuity or repetitiveness, because the mere neglect of courses is not an element of the objective side of the offense.

In both versions of the material element, the actions must be unjustified or not entitled or legitimate. This aspect is examined by reference to determined, legally provided situations or to causes that remove the unjustified or imputable character of the deed (state of necessity, fortuitous case).

A grounded legal case is the one regarding the withdrawal of students from the preparatory class or first grade, regulated by a Framework Regulation for the organization and functioning of pre-university education units issued by the Ministry of Education and Research.

4.1.2. The following effect is the endangerment of the intellectual development of the child and creation of a state of danger in relation to the intellectual development and his/her education within society.

4.1.3. The causal connection is the report between the material element of the offence and the immediate effect of preventing the access to the mandatory general education.

4.2. The subjective side is characterized by guilt of the direct or indirect intention. The purpose of committing the crime or the mobile phone is not of interest and is not relevant for the existence of the crime.

The act of guilt is not incriminated, a legal provision in this regard being absent.

The direct intention exists when the perpetrator seeks to achieve the socially dangerous pursuit and is fully aware of the obstruction of the minor's access to mandatory general education.

Withdrawal is always the result of a direct intention.

The indirect intention consists in the attitude of the perpetrator who is not interested in the mandatory possibility for the minor to attend school and seeks to perform various occasional or permanent activities (performing unskilled work, begging, etc.). In most cases, indirect intent is characteristic of obstruction as a material element of the crime.

5. FORMS AND MODALITIES OF THE CRIME

The offense is subject to preparatory and attempted acts, but these imperfect forms are not punishable.

The consumption of the offence occurs when there is an unjustified withdrawal or impediment of the minor to attend mandatory general education courses.

Withdrawal involves a single act or a single act by which the crime is committed.

Preventing access can be achieved by a single act or by repeated actions that give the crime the character of continuity. However, the prevention even through repeated actions or inactions has a unique character because on the one hand it cannot be considered that the crime is consumed instantly, and on the other hand the finality is unique, being achieved by stopping access. We appreciate that in this situation there is a natural unit of crime committed through actions or inactions that fall into the unitary composition of the same criminal act.

The manner of committing the offence consists in the actions or inactions of withdrawal or impediment of the minor to follow the courses of mandatory general education.

The crime is likely to be committed in the form of co-authorship because there may be cases in which both parents have committed activities that fall within the scope of the material element of the criminal act. For the existence of a plurality of offenders (possible in the form of instigation or complicity), it must be found, in terms of the objective side, an effective contribution of the active subjects to the same act, and in terms of the subjective side, their willingness to cooperate to prevent access to mandatory general education.

The criminal law has no provisions for aggravating variants of the offence.

6. SANCTIONS AND PROCEDURAL ASPECTS

The punishment provided by art. 380 paragraph (1) Criminal Code is imprisonment from 3 months to one year or a fine.

The provisions of art. 380 paragraph (2) of the Criminal Code contain a particular cause, with an individual character, of withdrawal and impediment of the production of the result which is justified by the general interest of the state to be ensured and concretely realized the right to mandatory general education.

The cause of impunity consists in the real and factual assurance on the part of the perpetrator of the resumption of the attendance of the mandatory school courses by the minor. This manifestation of the positive action must take place before the end of the criminal investigation, and in this respect the criminal code of the perpetrator is mentioned in the Criminal Code.

However, compared to the shown legal norm, there is the possibility for the perpetrator to ensure the resumption of the courses at any time after the crime is committed, before having the quality of defendant or ending the criminal investigation, so that although the deed meets the constitutive elements of the crime, it will not be punished.

The perpetrator's assurance of the minor's resumption of mandatory general education, intervened after the notification of the court and until the final decision of the defendant's conviction remains, has the effect of postponing the application of the sentence or suspending the execution of the sentence under supervision, even if the conditions are not met. for this (art. 380 para. (3) Criminal Code).

The punishment provided by law as a sanction imposed in order to respect the social order and to discourage similar attitudes is imprisonment from 3 months to one year or a fine. The individualization of the punishment is the attribute of the court and in the case of the crime provided by art. 380 paragraph (1) of the Criminal Code must ensure the prevention or repair of negative effects in relation to the education, understanding or perception of the social group to which the perpetrator belongs.

The notification and initiation of the criminal action is carried out *ex officio*.

No judicial precedents have been identified, so it can be considered that the simple incrimination has a minimum preventive character.

7. CONTROVERSIAL ASPECTS

The provisions of art. 380 paragraph (1) of the Criminal Code refer exclusively to and use the term "minor" who in the general sense of criminal law and civil law is a person who has not reached the age of 18 years. The Criminal Code does not contain provisions on cases or a legal consequence regarding the minor who married before the age of 18 and the one who reached the age of 16 and to whom the guardianship court has recognized the full capacity to exercise.

From a civil point of view, the minor in such a situation has the capacity to exercise as an aptitude to conclude civil legal acts alone (art. 37, art. 39 and art. 40 Civil Code).

The fact that under the conditions shown the minor acquires the full capacity to exercise his civil rights raises the question of whether he can still be a passive subject of the crime of preventing access to mandatory general education.

We consider that such a conclusion is not possible because the full exercise capacity confers on the person who has not reached the age of 18 only the possibility to conclude civil legal acts in his own name.

However, the crime in question has as its active subject and material element concerning the objective side "the parent or person to whom a minor has been entrusted, according to the law" and who unjustifiably withdraws or prevents the latter from attending mandatory general education.

The minor, even if he has acquired the full capacity to exercise, retains the right to attend school, and the creation of an obstacle is an element of the crime because the criminal code takes into account the maximum limit of 18 years.

In this respect, it should be noted that the crime does not have as active subject the "spouse" of the minor who marries before reaching the age of 18.

CONCLUSIONS

The crime of preventing access to mandatory general education was instituted with respect for human rights regardless of aptitude, ethnicity, religion, gender or nationality. The right to education is an essential component of education that aims to increase the degree of understanding and effective participation in social life, including vulnerable or marginalized groups.

The inclusion of the crime among those who harm the relations concerning the social coexistence with express reference to the family is justified because the parents are obliged to raise the child taking care (among others) of his/her education, teaching and professional training. Family life is the fundamental element of the child's intellectual development, and in this sense the state has the obligation to ensure an adequate framework involving the responsible participation of parents or persons to whom a minor has been entrusted, according to the law.

The incrimination has a precise character by showing the exact social relations protected, of the active and passive subject, by mentioning the unjustified feature of the actions that constitute the objective side of the crime, as well as by the particular individualization of the sanctions.

The punishment provided by law (in all its aspects) is both a means of coercion and a measure to prevent the commission of similar acts. The reason is to protect family relationships on the merits, to avoid unfortunate consequences, as well as to form a correct, fully understood attitude towards the benefits of access to mandatory general education.

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THEORETICAL AND PRACTICAL ASPECTS REGARDING ON CO-AUTHORED DISPUTES IN COMMITTING CRIMINAL OFFENSES AND CRIMES AGAINST A FAMILY MEMBER OR AGAINST A FAMILY

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Abstract

The new regulations brought by the Criminal Code offer fresh conception on the issue of criminal participation in Romanian criminal law.

Thus, following other European models, the Romanian legislator chose to exclude the author from the sphere of participants, thus using what is called the restrictive concept, given the qualitative differences that exist between the author, on the one hand, and instigator and accomplice, on the other. on the other hand.

At the same time, unlike the regulation from the Criminal Code of 1969, the New Criminal Code chose to explicitly define, the content of art. 46 para. (2) the co-authors, placing them in an uncertain place, however, between the author, to whom he resembles himself by committing the act directly, and participants.

The doctrine and jurisprudence have been given the task of interpreting the legal provisions governing the situation of co-authorship so that over time different opinions have arisen on various issues and at the same time in criminal matters that have embraced one or the other of them.

The institution of criminal participation has particularities, which implicitly determine the appearance of controversies, regarding certain categories of crimes such as those committed through guilt or against a family member.

In the present study, we aimed to analyze these controversies trying to present different opinions and arguments in support of them..

Keywords: *criminal liability, authorship, co-authorship, participation, crimes committed against a family member*

1. Definition. Notion

The criminal code includes in Title II Chap. VI in the General Part the regulation of the institution of criminal participation. Thus, art. 46 - 48 penal Code enumerates and defines the categories of persons who can commit an act provided by the criminal law, dividing them by the author and participants. Unlike the previous Criminal Code, the authors of the New Criminal Code sought to correct the mistake of including the perpetrators in the participants (art. 23 of the previous Penal Code), seeking to divide the two categories from the name of the chapter, the current name being "The author and the participants". Thus, from the way it is entitled Chapter VI of Title II of the Criminal Code, it results that the legislator wanted the perpetrator to no longer be part of the category of participants.

Article 46 para. (2) penal Code defines co-authors as persons who directly commit the same act provided by the criminal law. However, given that the specificity of the direct

action is the perpetrator's own, the logical reasoning would be that both the author and the co-authors have the same legal treatment, so it is necessary to exclude the co-authors from the category of participants. Otherwise, in the above format, there is a discrepancy between the title of the chapter, which excludes only the author from the sphere of participants, and the actual content of the regulation, which emphasizes the identity of traits between co-authors and authors and their common position concerning other participants. in doctrine and practice divergent opinions. [1]

This contradiction between the title of Chapter VI, which practically excludes the author from the category of participants, and the actual regulation from art. 46 penal Code which, at first sight, at least identifies the author with the co-author, has led to problems in the theoretical explanation and practical application of the institution of participation in the light of the New Criminal Code.

The legislator, at the time of drafting the previous Penal Code, considered that as long as the co-perpetrator commits the act by contributing to it directly, in a position identical to that of the perpetrator, it would not be necessary to regulate it independently.

According to the New Penal Code, the perpetrator is no longer provided among the participants in the commission of an act provided by criminal law, compared to his way of directly committing the criminal act, concerning participants, instigators or accomplices, who commit the act through.

Basically, the only notable difference between author and co-author is a quantitative one, not a qualitative one.

The co-authorship appeared in the domestic criminal legislation with the adoption of the Penal Code of 2014. At this moment, art. 46 para. (2) Penal Code in which this form of participation was legally defined for the first time. Until now, the idea of co-authorship has existed but has received only doctrinal definitions such as "that form of participation characterized by a plurality of authors" [2] or "the form of participation in which when committing an act provided by criminal law two or more persons directly contributed, based on a common will".

The doctrine was drafted conditions for checking co-authorships both objective and subjective.

Therefore, the first condition is the one regarding the factual unity provided by the criminal law committed by the co-perpetrators. The condition is objective and presupposes, in essence, that all the co-perpetrators contribute directly to the execution of the same act provided by the criminal law.

The second condition identified is also objective and consists of the existence of a plurality of persons who directly commit the deed. The second condition describes, in practice, the quantitative difference between the notion of author and that of co-author.

Thus, in the judicial practice, it was noted that there is co-authorship in committing the crime of theft provided by art. 228 penal Code if the offenders have jointly carried out the act of taking the movable property from the possession or detention of another, to unjustly appropriate it. [3]

There is also co-authorship in the case of the one who, being always with the first defendant at the time when theft, immediately received the stolen property from the victim's pocket, so as not to be found on the defendant. [4]

A special situation is identified in the case of continuous crimes, where the co-perpetrator can be performed at any time during the commission of the act, by successive

joining, the co-perpetrators can even be substituted [5]. The example, in this case, consists of committing a crime of deprivation of liberty provided by art. 205 of the Penal Code, crime with consumption duration, in which case the co-perpetrator no. 1 acts for several days, and the co-author no. 2 acts during the others, if the existence of the other conditions for retaining this form of participation is verified between the two.

In the case of continued offenses, the co-perpetrators may commit together all the acts of the criminality rule or even only some of them, the latter case does not affect the form of participation. Thus, by way of example, the crime of theft as provided by art. 228 penal Code in a continuous form, consisting of three successive material acts, if one of the co-authors participated in committing only one of the material acts, and the others in committing all material acts, if the first of them knew the intention of the others to commit the act continuously.

A third condition identified by the doctrine is subjective and consists of the fact that all co-authors act with the same form of guilt, be it intent or guilt.

The problem that arises in verifying the fulfillment of this condition exists concerning offenses committed through a fault.

In a first opinion, it was argued that the offenses are not compatible with this form of participation because in their case it is not possible to verify, due to the subjective side, the relationship between the co-perpetrators. To retain co-authorship, at least one of the co-authors must be aware that he is associating with the others to commit the acts provided by the criminal law, or, in case of guilt, in the absence of such a subjective link, all will answer as perpetrators for committing the deed [6].

The contrary opinion expressed by the doctrine promotes the thesis according to which, if we are in the situation of an act committed through fault, simultaneously or successively, by several persons, all these persons can be considered as co-perpetrators of the act of guilt, because only through the direct contribution of each of these, the criminally relevant result was produced [7].

Recent majority doctrine and practice have shifted to this second view. In the judicial practice, it was held that there is the criminal liability of the two drivers for committing the crime of culpable homicide, motivating "the activity of each of the two defendants, who, through fault, have not properly fulfilled their obligations as of drivers participating in traffic, has causal value, contributing, along with the activity of the other defendant to the production of the socially dangerous result. The court also notes that the two defendants contributed equally to the production of this result, and will determine the degree of guilt of each in a proportion of 50%." [8]

The detention of the co-perpetrator in the case of this type of crime has an impact in terms of the solution on the civil side, the co-perpetrators being jointly and severally liable to the civil party to cover the damage suffered by the latter.

Another category of crimes that has given rise to controversies regarding the retention of co-authorship is represented by premeditated crimes.

However, recent doctrine and practice unreservedly allow the commission of premeditated acts in the form of co-authorship. In the motivation of this opinion is used the text argument regarding the regulation from the content of art. 50 para. (2) of the Penal Code, according to which "the circumstances regarding the deed affect the author and the participants only insofar as they knew or foresaw them". To detain co-authorship in the case of these offenses, it is necessary to retain the intention in committing the initial act

concerning all defendants and their guilt with the worse result produced. Thus, in judicial practice, the defendants were sentenced for co-perpetration to beatings or injuries causing death, a deed provided by art. 195 of the Penal Code, committed in co-authorship, holding that they wanted to apply a correction to the victim motivated by the fact that the latter had applied a blow to a relative of the defendants.[9]

Another problem in the case of this condition is how participation in the form of co-authorship can be retained in the case of crimes with a specific purpose, where it was found that it is sufficient that at least one of them pursued the purpose of the criminalization rule.

In contrast to the situation of co-authorship, but with particular importance to this form of criminal participation, there is the institution of concurrent guilt, which is simply the situation where the result is produced as a result of competition from actions or inactions of several persons, authors concerned. In the Romanian judicial practice, the notion of concurrent fault is identified, mainly in the case of traffic accidents, being a notion that is used in the process of individualizing the damages due by the author of the accident to his victim. Thus, in judicial practice [10], it was held that establishing the fault of the carrier in the occurrence of the railway accident does not remove the fault of the company that carried out the capital repair on the freight wagon [11], "and concerning the causes of the railway accident of 31 May 1998, the courts found the fault of the railway and of the company that carried out the capital repair on the wagon involved in the event".

In another case decision [12], it was held that in the case of culpable homicide, "the evidence administered resulted in a concurrent fault of the two defendants in the road accident, and the percentage share of 70% and 30% respectively were properly proportioned, taking into account the fact that the first defendant's maneuver initiated the causal and conditional chain that ended with the death of the victim and the bodily injury of two other victims."

In the case of concurrent guilt, in criminal matters, those responsible remain perpetrators of the crime, acting directly in its commission according to art. 46 para. (1) of the Penal Code, and on the civil side they will be liable in proportion to the degree of fault in the production of the result.

2. International Regulations

Examining various foreign criminal laws in Europe, we notice that some states define the perpetrator from a restrictive position, and others from an extinctive position.

Thus, the Spanish Penal Code, in the content of Title II called "Persons criminally responsible for crimes and offenses" provides in art. 28 definitions of authors "Authors are persons who perform an act personally, together or through another person who uses it as a tool", continuing with the regulation of complicity in the following. Although there is no notion of co-author in Spanish criminal law, from the economy of the text of art. 28 we can deduce the idea according to which the Spanish legislator recognizes, without expressly regulating, the case of the co-authors, by the notion of accomplishing "together" the deed.

From the research of the Belgian Penal Code, we notice that its seventh chapter is called "On the participation of several persons in the same crime or offense", only that the text of Article 66, similar to the Spanish model, does not explicitly include the notion of "co-perpetrator" but uses the formula "Those who committed the crime or the crime ..." from where we can interpret that even in the absence of express provisions as in the case of

the Romanian Penal Code, this form of participation will be retained if the conditions of co-authorship are retained.

The Austrian Penal Code, on the other hand, is identified by the fact that in general, it does not contain provisions on the perpetrator or participants in the commission of a criminal act, so it is the practice to individualize punishments according to how each person participates in the commission of the deed.

The French Penal Code defines the author in the content of art. 121-4 as "the person who commits the incriminated deeds, tries to commit a crime or, in the cases provided by law, a crime". Thus, it is noted that even the French code under the influence of which is the Romanian law regardless of the branch, does not include express provisions on co-authorship as a form of participation, but implicitly accepts the existence of this form of participation.

However, German law, in the context of art. 25 para. (2), refers to co-perpetrators, defining them as those persons who "jointly commit a crime".

The last two mentioned states are identified, together with Romania, in the category of states in which the problem of the regulation of the perpetrator of the crime is treated extensively.

3. Interpretations of legal norms

In doctrine and practice, certain categories of offenses have been identified for which co-authorship is not possible.

Certain categories of offenses are identified, which by their nature and since they fall into the category of offenses committed in person, cannot be retained as being committed in co-authorship. This is the case of crimes against the fighting capacity of the armed forces, regulated in Title XI of the Penal Code.

As an example of these crimes, those contained in the cap. I impose the quality of military of the active subject, and mainly, the action or inaction that constitutes the material element of the deed provided by the criminal law is materialized in violation or non-fulfillment of strictly personal duties of the military in question, so that these facts in co-authorship.

With these aspects, the doctrine [13] concluded in the sense that the mentioned crimes are committed mostly in their person, given the fact that each soldier, by the acts committed, violates the duties.

Thus, in the case of single-author offenses, given that the typical action can only be performed by a single perpetrator, participation is not possible in the form of co-authorship. In this case, we mention as an example the false testimony (art. 273 penal Code), the murder or injury of the newborn committed by the mother (art. 200 penal Code), or desertion (art. 414 C. pen.).

However, the doctrine [14] also outlined the opinion that false testimony can be committed in co-authorship when the deed was committed by several experts who are appointed to carry out work in question by deciding that in the expert report. to insert false statements. The same author considers that the false testimony can be retained as co-authored in the situation where the false translation or interpretation is made by several interpreters who decide together to present untrue facts or circumstances, such as the situation in which they translate a document together. to which they decide by common agreement to insert untrue statements.

The same is the situation in the case of omissive offenses that cannot be committed in co-authorship as their material element presume the non-fulfillment of an obligation imposed by personal law, as is the case of non-denunciation (art. 266 C. pen.) Or omission of notification (art. . 267 C. pen.).

If, in this case, several persons have the respective obligation, and they remain in passivity, the crime will be retained against them as being committed individually, by one author, and not its commissioning in the form of co-authorship.

In the doctrine, there is also the opinion according to which if the obligation falls on a collegial body, and several persons composing that body have remained in passivity, the members of that body will answer as co-perpetrators of the deed [15].

Co-authorship, as a form of a plurality of offenders, involves the commission of one or more acts provided by criminal law by two or more persons, but it is necessary to retain a common will of the perpetrators to commit the act provided by criminal law [16].

We appreciate that the form of co-authorship is that form of participation in which all the general conditions of participation are met, and, also, the co-authors together carry out acts of direct execution in a narrow sense.

The very idea of the common will, defined by the doctrine as consisting of two elements - an objective aspect consisting in committing together the deed provided by criminal law, respectively a subjective aspect represented by the cooperation of offenders in committing the act - was the starting point of the controversies identified in the present study. Thus, in terms of subjective connection as a condition for retaining participation in general and co-authorship in particular, the doctrine identified the two opinions in the sense of the possibility only of the intention to characterize co-authorship or, conversely, retention of co-authorship in any form of guilt, described by art. 16 penal Code.

Thus, if in the case of intention there are no differences of opinion in the sense of retaining the co-authorship, being necessary to verify the conditions regarding the participation of two or more persons, the existence of a subjective connection, committing the same act provided by criminal law, etc., and in the case of improper participation in the form of intent - fault this possibility is confirmed even by the regulation of improper participation defined by art. 52 para. (1) penal Code, controversies arise regarding co-authorship through fault.

In the case of culpable offenses, those who claim the impossibility of retaining co-authorship motivate in the sense of the lack of the intellectual element, in the practical sense the impossibility of the existence of psychic cooperation between the participants in the crime, conscious and voluntary cooperation between them.

Thus, by the penal decision no. 54 / A / 2014 pronounced on February 26, 2014, the Oradea Court of Appeal, held that "In the case of culpable offenses, they cannot be committed in co-authorship, because they do not imply intent or understanding between the defendants.

In this way, if it is alleged that several people have committed the crime of culpable homicide concerning the same victim, each defendant is the perpetrator of the crime of guilt. In other words, it is necessary that everyone's activity can lead alone to the consequences of the deed, respectively in this case to the death of the patient."

Although the Court's decision has as its object an enforcement appeal, the Court analyzes the legality and validity of the judgment under consideration, upholding the idea of the impossibility of retaining co-authorship as to the nature of the offense. Thus, the Court

specified that in the case of culpable offenses, it is impossible that between the two defendants who acted together in the execution of the medical act, there is an agreement regarding the commission of the deed. The aspect of retaining the co-authorship is, in this case, an important element in establishing the obligations generated by the civil side of the case, in terms of joint and several liabilities, in case of retaining participation in this form, respectively proportional to the seriousness of the fault of each of the two.

In motivating the opinion that in the case brought before the trial the culpable homicide is the result of each of the two defendants, who acted as doctors, the Court held that the two doctors (anesthetist and obstetrician) worked as a team, defendant S.R.L. performing the cesarean section to the detriment of natural birth, which led to the retention of his guilt in the death of the victim and which represented the *verbum regens* of the crime of culpable homicide, according to the Prosecutor's Office, and the defendant TV, as an anesthetist determined to perform partial anesthesia of the patient. Thus, the Court's judgment has as its starting point the interpretation according to which the perpetrators acting through guilt are perpetrators of distinct crimes and a concurrent fault will be retained in the commission of the deed provided by the criminal law.

About the crimes committed against a family member, the crime of killing or injuring the newborn by the mother is particularized, in terms of participation, in terms of the impossibility of retaining the co-authorship in committing it.

Thus, the doctrine is unanimous in the sense that the author of this deed provided by the criminal law can be only the natural mother or carrier (surrogate) of the newborn child, the deed being committed by an exclusive, qualified author. Against this circumstance, co-authorship is not possible, and persons who directly commit specific acts of killing or injuring the fetus will be investigated for other crimes, with their relationship with the injured person, such as domestic violence (if they have the quality family member concerning the newborn), personal injury, murder, etc.

Regarding the category of crimes against the family, the crime of incest (art. 377 of the Penal Code), which is characterized as a bilateral crime in which the participants have the quality of qualified perpetrators, is of interest under the aspect of the investigation of the subjects of the deed provided by the criminal law [art. 17], direct relatives, brothers or sisters, it being necessary for the perpetrators to be of different sexes.

Compared to these characteristics of the deed, it can be concluded that the co-authorship cannot be retained in its case given the fact that, naturally, the deed is committed by two persons, representing each perpetrator, being a case of a natural plurality of offenders. This form of plurality is determined by the very nature of the deed, which can only be committed by the contribution of two or more persons. Given the need for the participation of several persons in the commission of the act, this form of participation was also called the necessary plurality.

Similar to the analysis of the incest crime, the crime of bigamy (art. 376 Penal Code) is retained as also committed in the situation of natural plurality, being a bilateral crime.

4. Conclusions

Criminal participation is a subject in which divergent views have been born in practice and doctrine. This institution is important because it is a real cause of aggravation of criminal liability that can take the form of a general binding circumstance, according to

art. 77 lit. a) and d) Penal Code or even an aggravating circumstantial element, as is the case of art. 218 para. (3) lit. f) or art. 219 lit. f) Penal Code.

Compared to the current regulation, criminal participation can be defined as the situation in which an act provided by the criminal law was committed by a larger number of persons, who participated in various forms, but who acted based on a common will, where, as a rule, at least two committed the act intentionally.

The Romanian Penal Code expressly regulates participation in the form of co-authorship, unlike other European legislation, so that the judicial body has only the task of verifying the fulfillment of the conditions regarding the detention of co-authorship in the case deduced from the investigation.

Compared to the research of the aspects of comparative law, we believe that the Romanian legislator, based on art. 63 of the Constitution, regulated completely and explicitly each form of participation.

We consider that, as the regulated institution is, the problems that may arise and which are determined more by the order of placement of the institutions in the code and by the marginal name of the articles, do not raise special practical implications. Thus, compared to the present opinions in the doctrine, compared to the controversy regarding the qualification of the co-author as a participant or as a species closer to the perpetrator, we do not consider that the co-author's classification in the sphere of participants impacts the decisions taken regarding that participant. The punishment is made according to art. 49, based on the principle of equalization.

At the same time, regarding the issue of detaining co-authorship in the case of culpable crimes, we consider that, as the current jurisprudence has been oriented, in the situation of verifying the link (even theoretical) between the action or inaction of the two participants, the judicial body may retain the deed, aspects that make a difference on the civil side. In such a case, concerning the participation of the two in the commission of the criminal act, the civil party may request and obtain in full from any of the convicts the compensations to which the latter were obliged, in the realm of joint and several civil obligations.

Regarding the analysis of the category of crimes committed against a family member or the family, we conclude in the sense that these categories include a significant number of crimes characterized by particularities regarding participation, being a species of crimes that require increased attention from the judicial bodies that establish the form of participation so that although the other participants who contribute directly cannot be co-authored, they can be criminally liable, as is the case of the crime provided by art. 200 Penal Code as perpetrators for another crime with a similar material element that does not impose the conditions regarding the qualification of the active subject.

We appreciate the maintenance of the theoretical but also the practical interest of delimiting the co-authorship from the form of participation of the concomitant complicity, thus preserving the opinion according to which both the actual execution acts and the acts which, although not part of what we define as *verbum regens*, are assimilated to the actual enforcement acts and we consider that the form in which the institution of co-authorship is regulated helps to shape the differentiation between these two ways of participation.

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CURRENT CONSIDERATIONS REGARDING THE LEGAL REGIME OF CONTRIBUTIONS CONSISTING OF COMMON PROPERTY OF THE SPOUSES WHEN SETTING UP COMPANIES, ASSOCIATIONS OR FOUNDATIONS

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Abstract

This research aims to analyze the provisions regarding the possibility regulated by the current Civil Code to be able to bring as contribution a common good of the spouses to the establishment of a company, association or foundation.

In this sense, in the first part we will mainly analyze the provisions regarding the legal community regime and we will also analyze the scope of the notion of "common goods" of the spouses. The second part will have as main objective the continuation of the analysis on the types of companies where the contribution of a common good is possible as well as the types of regulated contributions in the corporate matter according to the legal regime prescribed by the current Civil Code.

In carrying out this research, the legal provisions in force were analyzed, as well as the opinions of the specialists transposed in the existing specialized doctrine in the field.

Keywords: *contribution, legal communities regime, common good, associate and society.*

1. Particularities of the legal community regime and of the notion of "common goods" in view of the provisions of 348 C. civ.

The possibility of the spouses to participate in the establishment of a company by contributing a common good is currently regulated by art. 348 and 349 of the Civil Code [1]. As it results from the content of art. 348 of the Civil Code, "*common goods may be the subject of a contribution to society, associations or foundations under the law.*" Therefore, from the interpretation of the cited provisions, it results indirectly that, in order to contribute as a common good, it is necessary to have a valid marriage, the spouses to be under the matrimonial regime of the legal community of goods and last but not least, the good / the goods brought as a contribution to the establishment of the company, association or foundation are their common goods.

Regarding the validity of the marriage, the future spouses must meet the substantive and formal conditions provided by the law. Thus, regarding to the substantive conditions, the provisions regarding the minimum age, consent, non-existence of a marriage previously concluded by one of the spouses, non-existence of natural kinship, civil kinship, guardianship, alienation or mental weakness will be taken into account [2]. Referring to the formalities before and after the marriage, compliance with the provisions on mutual communication of health status, compliance with the solemnity and publicity of the marriage, as well as compliance with the rules specific to its celebration [3]. Failure to meet the legal conditions will result in absolute or relative nullity of the marriage [4].

Regarding the matrimonial regime, art. 312 of the Civil Code, stipulates that “*future spouses may choose as a matrimonial regime: the legal community, the separation of property or the conventional community [5]*”. Regarding the application of the regime, “*between spouses, the chosen matrimonial regime produces effects only from the day of concluding the marriage. In relation to third parties, the matrimonial regime is opposable from the date of fulfillment of the publicity formalities provided by the law excepting the situation in which the third parties have known this fact in other way*”. In accordance with art. 329 Civil Code, it is specified that “*the choice of a matrimonial regime other than that of the legal community is made by concluding a matrimonial agreement*”. Therefore, for the choice of another matrimonial regime it is necessary that before or after the conclusion of the marriage, the spouses conclude a matrimonial agreement by which, using the freedom conferred by the legislator, they establish, by their agreement, their own matrimonial regime or modify, during the marriage, the matrimonial regime under which they married [6].

The regime of the legal community is regulated in art. 339-359 of the Civil Code and represents the rule in the matter of matrimonial regimes, as it will be applied whenever the spouses have not chosen through a matrimonial agreement the choice of another matrimonial regime. Analyzing the legal implications of the legal community, we note that, in essence, it seeks to ensure equal treatment between spouses both in terms of the acquisition of common property and in terms of their administration, use and disposal, giving them equal powers over property. Regarding the latter aspect, the current legislation proposes three systems for the management of common goods, namely: parallel management (concurrent), joint management (co-management) and exclusive management [7].

Parallel (concurrent) management allows each of the spouses the possibility to manage the community of property alone, in the sense that he will be able to conclude on his own legal acts related to the common property by virtue of his own powers. Therefore, it falls within the scope of parallel management: the conclusion of acts of conservation, use (without changing the destination of goods), administration, transmission of ordinary gifts [8] or the conclusion of acts of acquisition of common goods [9].

Along with the parallel management, the joint management (co-management) of the assets is also regulated, through which for certain categories of assets the valid conclusion of the legal acts related to them requires the consent of both spouses. In this category we find: acts of alienation and encumbrance of real estate, acts of disposition for consideration regarding goods subject to forms of advertising, free acts between living on movable property, change of destination of a common good and last but not least the contribution of an asset to the formation of a company, association or foundation. If one of the spouses concludes the legal act without the consent of the other spouse, the act will be struck by relative nullity according to art. 347 Civil Code.

The third mechanism is that of exclusive management. In this case, the conclusion of legal acts on common property may be performed only by one of the spouses for reasons related to the personal nature of the act or property to which it refers [10].

Returning to the provisions provided in art. 348 of the Civil Code, we are going to mainly analyze the scope of the notion of “*common goods*”. By the phrase “*goods*” we will consider the corporal or intangible things that can be the object of a patrimonial right [11]. Regarding the common goods, art. 339 of the Civil Code, establishes the fact that “*they will constitute common goods, the goods acquired during the regime of the legal community by*

any of the spouses, being from the date of acquisition, common goods in disintegration [12]". But in order to be able to determine concretely the scope of the notion of "common goods" it is necessary to refer to the provisions of art. 340 of the Civil Code, which regulates the own property of each spouse. Consequently, they will be their own property: property acquired by legal inheritance, bequest or donation (provided that the disposer has not provided that they are considered common), property for personal use, property intended for the exercise of a profession of one of the spouses (if they are not elements of a goodwill that is part of the community of goods), the intellectual property rights over its creations and the distinctive signs it has registered, the goods acquired as a prize or reward (scientific or literary manuscripts, sketches and artistic projects, inventions and other such goods), insurance indemnity and compensation for any material or non-material damage to one of the spouses, property, sums of money or any value which replaces one's own property and their exchange but also the fruits of their own goods. Also included in the category of common goods and income from work, the amounts of money as a pension under social insurance and other amounts due under an intellectual property right, regardless of the date of acquisition, but only if the claim on their collection becomes due during the community but also the movable property acquired before marriage for which no inventory has been drawn up [13].

In conclusion, all movable, immovable, tangible, intangible assets that are not own property and that are acquired, either before marriage (in the exceptional situations provided by law), or after the conclusion of the marriage until the modification or termination of the legal community regime [14].

We must also remember that, according to the final thesis of art. 339 of the Civil Code, all the common goods of the spouses will be held in disrepair by them. In this sense, we will take into account the provisions of art. 667-669 of the Civil Code, which regulates the common property in disrepair, as a modality of the property right. Thus, *"there is property in disrepair when, by the effect of the law or by virtue of a legal act, the property right belongs simultaneously to several persons without any of them being the holder of a certain share of the property right over the common good or goods. If the common property in disrepair is born by the effect of the law, it is subject to the provisions of that law which are supplemented, accordingly, with those concerning the regime of the legal community. However, where the source of the demolished property is a legal act, the provisions relating to the regime of the legal community shall apply accordingly"* [15].

2. The actual legal regime of the contributions of the common goods in relation to the provisions of the Civil Code, of the Law 31/1990 on commercial companies and of the Government Ordinance 26/2000 on associations and foundations.

As can be seen, the previous section of the study focused on the analysis of the provisions on marriage validity, the legal community regime but also on the scope of qualification of common goods that may be the subject to a contribution to the establishment of a company, association or foundation. Going further in the analysis, we will interfere with the general provisions of the Civil Code with the special provisions that regulate types of society and that allow the contribution of a common good.

First of all, we will analyze from the perspective of the Civil Code the provisions regarding the company contract. In this regard, we will consider the simple company [16]

(which may or may not have legal personality) as well as the joint venture that has no legal personality.

According to art.1881 of the Civil Code, through the company contract *“two or more persons undertake each other to cooperate for the development of an activity and to contribute to it through financial contributions, in goods, in specific knowledge or services, in order to share the benefits or make use of the resulting economy [17]”*.

Regarding the general regime of contributions, art. 1883 of the Civil Code, establishes that *“in the case of a company with legal personality, the contributions enter the patrimony of the company, and in the case of a company without legal personality, the contributions become the co-ownership of the partners, unless they expressly agreed that they will pass into their common use. In the case of the contribution of real estate or, as the case may be, of other real estate rights, the contract is concluded in an authentic form. The transfer of the rights over the contributed goods is subject to the forms of publicity provided by law. If the entry of the right in the advertising registers was made before the date of incorporation of the company, the transfer of rights is, in all cases, affected by the condition of acquiring legal personality [18]”*.

In addition to the companies regulated in the Civil Code, Law 31/1990 on commercial companies regulates five types of companies to which the spouses have the possibility to contribute any common good [19].

In the recent specialized doctrine, the *“contribution”* has been qualified as an act of disposition, by which the associate transfers the property right, another real right or a right of use over an asset of his in the patrimony of the company [20]. Also in the specialized doctrine it was appreciated that the notion of contribution has a legal and an etymological meaning. From a legal point of view, contribution means the obligation that each partner assumes to bring to society a certain good, a patrimonial value. Within the limit of the contribution, the associate becomes a debtor of the company, and after its full payment becomes a creditor of it. From an etymological point of view, the notion of contribution designates the very good brought to society by the partner [21]. The contribution can be in cash, in kind and in industry.

The cash contribution has as object a sum of money that the associate undertakes to transmit to the company. As sums of money are indispensable for the beginning of any economic activity, cash contributions are mandatory for the incorporation of companies regardless of their form [22].

The contribution in kind has as object certain immovable, movable tangible or intangible goods [23]. They are admitted to all forms of company and are achieved by transferring the appropriate rights and effectively handing over the goods to the company [24]. If the contribution concerns a real estate or movable tangible property, the relationship between the partner and the company is assimilated to that between the seller and the buyer [25]. If the good that is the subject of the in-kind contribution has been brought to the use of the company, the doctrine considers that the relations between the partner and the company are governed by the rules regarding the lease. In-kind contributions may also consist of receivables, trademarks, patents, bills of exchange or other securities.

The contribution in the industry consists in the work or activity that the associate promises to carry out in the company, considering his competence and qualification. Benefits in work or services may not constitute a contribution to the formation or increase of the share capital. Contribution to benefits is allowed only to members of the general

partnership (partnership) and limited partners of the limited partnership who in exchange for this contribution have the right to participate in the sharing of benefits and social assets, while remaining obliged to participate at a loss.

Apart from the sphere of companies, the common goods can also be brought as a contribution to the establishment of an association or foundation. Thus, the associations and foundations established according to the law are *"legal persons of private law without patrimonial purpose"*. The association is *"the subject of private law consisting of three or more persons who, on the basis of an agreement, share and without right of restitution their material contribution, knowledge or contribution to work for activities in the general interest, of certain communities or, as the case may be, in their personal non-patrimonial interest"*. Regarding the regime of contributions to the establishment of the association, it is provided that *"the patrimonial asset consists of the contribution in kind and / or money of the members, in case of contribution in kind, consisting of real estate, the authentic form of the statute is mandatory [26]"*.

The Foundation is *"the subject-matter of law established by one or more persons who, on the basis of a legal act between the living or the cause of death, constitute a patrimony permanently and irrevocably affected by the achievement of a general interest or, as the case may be, of some communities. As in the case of the association, O.G 26/2000 establishes that the initial patrimony of the foundation, in case of contribution in kind, consisting of real estate, the authentic form of the statute is mandatory"*.

Continuing the analysis, we consider it necessary to make an important clarification, in the sense that spouses have the possibility to set up either a partnership between them and then the issue of joint contribution will essentially aim to determine the participation of each in the formation of the partnership. And the second possibility is that in which one of the spouses will bring as a contribution a common good to the establishment of a company together with other third parties. In this case, according to art. 349 para. (1) of the Civil Code, neither spouse may alone, without the written consent of the other spouse, dispose of the common property as a contribution to a company or for the acquisition of shares or, as the case may be, shares. In the case of companies the shares of which are traded on a regulated market [27], the spouse who has not given his written consent to the use of the common property may claim only damages from the other spouse, without prejudice to the rights acquired by third parties.

First of all, we observe an exception established at the level of the management of the goods, since in this case of the contributions of the common goods a derogation from the parallel management is established, by applying the competing one (regardless of the nature of the movable / immovable property). by requiring the written consent of the other spouse at the time of bringing the property as a contribution. We appreciate that in this case the spouses do not have the possibility to derogate from this provision and the lack of consent or expression in a form other than the written one - will attract the sanction of relative nullity [28]. In this case, the right to an action for annulment of the act is subject to the extinctive prescription, within 3 years, which will run from the date on which the husband who did not give his consent knew the conclusion of the act [29]. The possibility of the action for relative nullity of the spouse who has not expressed his consent in writing is not open to companies whose shares are traded on a regulated market, in this sense, the only remedy will be the possibility to claim damages. from the other husband.

When we analyze the provisions of art. 349 of the Civil Code, we must consider two hypotheses: Who will have the quality of associate? And who will own the shares or shares obtained as a result of the contribution made? The answer in this case can be found in paragraphs (2) and (3) of the same article. Consequently, although the contribution of a common good is made in the society, in the first hypothesis only the shot that contributed the good will have the quality of associate in the society. In this sense, he will be able to exercise alone the rights deriving from this quality and can carry out the transfer of the shares or, as the case may be, of the shares held. The text considers rights such as: the right to information, the right to vote, the right to participate in the general assembly as well as other rights provided by law. As for the right to dividends, it will belong to both spouses as common goods because the securities obtained in exchange for contributions will also have the regime of common goods of both spouses and not own property of the spouse who is associated.

Equally, there is the possibility for the other spouse to become an associate in the company, if he has expressed his will in this regard. In this case, each of the spouses has the status of partner for the shares or shares awarded in exchange for half the value of the property, if, by convention, the spouses have not stipulated other shares. The social shares or the shares belonging to each of the spouses are their own property. In this case, an ad-hoc division of the common goods brought as a contribution will operate, each spouse becomes an associate for his share (half of the value of the good) or other value established by the parties [30].

3. Conclusions

The go-off of this research was an important topic and constantly present in practice. As it is at the confluence of the application of several provisions in different areas of the law, the need to rigorously and coherently combine the provisions to be applied must respect the predictability and security of pre-existing legal relations and those that will arise.

It is a concrete social reality that, from the moment of forming a family, spouses have the possibility to participate either in their own name in economic activities, or together by setting up a company. At the heart of these hypotheses, the issue under discussion focused on the situation of common goods that can be brought as a contribution and especially what is the legal regime of the benefits obtained based on the contribution of the common good brought to society.

As can be seen, from the content of the analysis, art. 348 and 349 of the Civil Code, establish concretely both who will have the quality of associate in the company and what will be the legal regime of the securities obtained from the contribution of the common good. Thus, the proposed solutions are naturally combined with the special provisions of both companies and associations and foundations.

Moreover, in the old regulation there were a number of controversies regarding the possibility of spouses to bring in a common good, controversies mainly due to the lack of an equal, concrete vision and in accordance with the special provisions regulated in matters of interest of this issue. A result of this new, coherent vision is given by the concrete application in the current jurisprudence of the provisions provided by art. 348 and 349 of the Civil Code.

Bibliographical references

[1] Civil Code of 2009 (Law no. 287/2009), with subsequent amendments and updates, published in the Official Gazette. 505 of 15.07.2011. Regarding the application in time of the law, art. 34 of law 71/2011 for the implementation of law 287/2011, provides that the provisions of art. 345-350 of the Civil Code are also applicable to marriages in existence on the date of entry into force of the Civil Code, if the act or legal fact regarding a common good occurred after that date.

[2] See in this respect, the provisions of art. 271-278 of the Civil Code. In order to complete the information regarding the substantive conditions necessary for the conclusion of the marriage, see also the paper, Moloman, B.D. (2015). The new civil code. Book II, about the family. Articles 258-534. Comments, explanations and jurisprudence. Universul Juridic Publishing House, Bucharest, pp. 85-101.

[3] To consult art. 279-292 Civil Code.

[4] See art. 293-306 Civil Code, see also Nicolae, I. (2014). Family law in a national context and in private international law relations. Hamangiu Publishing House, Bucharest, pp. 47-59.

[5] It is necessary to distinguish between the primary regime and the matrimonial regime. While the primary regime is unique and includes only imperative legal norms, the matrimonial regime can be chosen by the spouses and made up in accordance with the law.

[6] In order to consult and develop the issue dedicated to the matrimonial convention, see also Lupașcu, D. (2013). The matrimonial convention, published in journal "Pandectele Romane", no. 7.

[7] Regarding the own goods, according to art. 342 of the Civil Code, the legal regime is materialized in the right of each of the spouses to use, administer and dispose of his property freely.

[8] Regarding the usual gifts, we will take into account the provisions of art. 1011 para. (4) of the Civil Code, which establish that tangible movable property with a value of up to 25,000 lei may be the subject of a manual gift, except in cases provided by law. The manual gift is validly concluded by the agreement of wills of the parties, accompanied by the tradition of the good.

[9] See art. 345-346 of the Civil Code. Regarding the acts of use, we will consider those legal acts that can be concluded regarding the common goods that involve the material use of the good. In the category of conservation acts, we will distinguish those acts that aim to prevent the loss of a patrimonial value. See also Boroi, G., Anghelescu, C. (2012). Civil law course. The general part. 2nd edition revised and added, Hamangiu Publishing House, Bucharest, pp.116-118.

[10] For example, in this case we consider the situation of the will which is an essentially personal act of the disposer. See also Lupașcu, D., Crăciunescu, C.M. (2012) Family law, 2nd edition, Universul Juridic Publishing House, Bucharest, p. 165.

[11] See art. 535 Civil Code.

[12] The quality of the common good does not have to be proved by establishing a relative and not an absolute presumption (which can be overturned by the interested party).

[13] Emese, F. (2016). Family Law. The marriage. Matrimonial regimes. Affiliation. 5th Edition, C.H. Beck Publishing House, Bucharest, pp.196-202.

[14] As a rule, the matrimonial property regime of the community of property is terminated by the change of regime, the termination of the marriage by the death of one of

the spouses, the declaration of nullity or annulment of the marriage or the dissolution of the marriage. At the end of the legal community of property, the matrimonial regime will be liquidated, which involves taking over each spouse's own property, sharing common property and regularizing debts.

[15] Bîrsan, C. (2015). Civil law. Main real rights. 2nd edition revised and added, Hamangiu Publishing House, Bucharest, pp. 235-236.

[16] According to art. 1893 of the Civil Code, de facto societies are assimilated to simple societies.

[17] Terzea, V. (2014). The new civil code annotated with doctrine and jurisprudence. Vol. II, 2nd Edition, Universul Juridic Publishing House, Bucharest, pp.933-934.

[18] The legal regime of the contributions in the case of the company is established according to art. 1894-1899 of the Civil Code, and in the case of the joint venture according to art. 1952 C. civ.

[19] See art. 2 of law 31/1990.

[20] Baias, F. (Coord.). (2014). The new civil code, Commentary on articles art. 1-2564, C.H. Beck Publishing House, Bucharest, p. 2044.

[21] Cărpenaru, S. (2016). Romanian Commercial Law Treaty, 5th Edition, updated, Universul Juridic Publishing House, Bucharest, p. 133.

[22] See art. 16 para. (1) of Law 31/1990 on companies.

[23] Angheni, S. (2014). Commercial law. Professionals -Traders, C.H. Beck Publishing House, Bucharest, p. 85.

[24] The contribution may consist in the transfer to the company of the ownership of the good or only of the right of use. Unless otherwise stipulated, the goods become the property of the company. It is understood that if it has been agreed to transfer the property right, the property will enter the company's patrimony, the partner no longer having any right over it.

[25] Unless otherwise stipulated, the assets constituted as a contribution to the company become its property from the moment it is registered in the trade register. See also Piperea, G., David, S., Cărpenaru, S. (2014). Company Law, Commentary on Articles, Edition 5, C.H. Beck Publishing House, Bucharest, p. 235.

[26] Article 6 lit. (f) of Government Ordinance no. 26/2000 on associations and foundations.

[27] According to art. 3 point 60 of Law 126/2018 on markets in financial instruments - regulated market - multilateral system, operated and/or managed by a market operator, which ensures or facilitates the reunification, within the system and in accordance with the non-discretionary rules of regulated market, multiple interests in the sale and purchase of financial instruments of third parties, in a way that leads to the conclusion of contracts with financial instruments admitted to trading on the basis of its rules and/or systems and that is authorized and operates regularly and in accordance with Title III;

[28] According to art. 347 Civil Code.

[29] See art. 2529 para. (2) Civil Code.

[30] Avram, M. (2016). Civil law. The family. 2nd Edition, Hamangiu Publishing House, Bucharest, p. 317.

EUROPEAN BEST PRACTICES AND THEIR IMPORTANCE IN CONSOLIDATING THE ROMANIAN LEGISLATION IN THE MATTER OF DOMESTIC VIOLENCE

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Abstract

The paper revises current legal provisions concerning family violence in Romania, outlining its main improvements, as well as incomplete or unharmonized procedures. These perfectible legal and procedural aspects are discussed on the background of European best practices, with a particular focus on Norway, taken as a desirable standard. The conclusions of the paper summarize the steps to be taken towards harmonization and improvement of current legal practices and procedures in Romania, outlining the benefits of adopting compatible Norwegian patterns.

Keywords: *Romania, Norway, domestic violence legislation, procedural improvements*

1. Introduction

This paper is part of a larger research project, namely my PhD thesis with the title *Aspects of improving legal procedures in the matter of family violence* in Romania.

Several contextual elements, among which the current situation, generated by the Covid-19 pandemics, the financial problems it triggers, isolation within the family, difficult communication with the responsible institutions, all intensify the phenomenon of domestic violence and bring it to front, as an interdisciplinary issue to be researched.

Considering the Romanian legal framework, I start from the premises that our current procedures have to be improved and, although some steps have been taken, in both civil and criminal matters, there is still a long way to follow in order to develop efficient instruments for the prevention, management and sanctioning of domestic violence.

Among the first actions to be implemented, I list the reviewing of other European states experience, especially those who are recognized as low violence societies, in terms of identifying their legal grounds and their procedural elements in condemning domestic violence, as well as managing its roots and consequences in everyday life.

Thus, the present paper responds to this objective, by briefly comparing the Romanian and Norwegian legal systems concerning family violence, to the extent to which I had access to the Norwegian laws, and then outlining the Norwegian best practices which would create a positive difference if adopted in the Romanian legal framework.

2. Brief comparative study on Romania and Norway's approach to domestic violence

2.1. Overview

Romania has experienced domestic violence, on a wide scale, as a social phenomenon, long before there existed a legal framework for its identification and fighting against it ([1], [2]). The growth of the phenomenon was due to multiple factors, from which we may quote:

- Traditional education, including religious beliefs, which nurture the supremacy of men over women, in families (he was seen as the head of the family and, for a long period, before women emancipation – which, in some social layers, never happened – the only money earner in the house) - ([3],[4],[5],[6]). Of course, these premises lead to a gendered education of children, girls being seen as less “valuable” than their male brothers;
- Financial and occupational status, which is generally lower, in the case of women, as compared to their partner ([7],[8])
- Social pressure: the feeling of guilt, or personal failure, in case of a divorce, the fault which is almost exclusively attributed to women, in both their families and in society, as a whole ([9],[10] – they research this issue in wealthy and well-positioned families, where violence is denied for the sake of keeping the appearances);
- The lack of legal means to make use of in case of domestic violence ([11]).

The large social acceptability of these abuses and the tendency to hide them, rather than to complain about them, did not put pressure on the legislator in the sense of shaping and consolidating a legal framework directed towards identifying and punishing such events. External factors, as Romania’s joining the EU in 2007, which created the natural need to align and harmonize laws and procedures, as well as civil society initiatives, lead to recognizing the need to create a coherent legal and social framework to deal with domestic violence.

Currently, despite the existence of dedicated legislation, Romania records the highest rate of femicide in Europe – 4.3 murders/million inhabitants caused by the partner (Eurostat, 2020). These elements support our claim to improve the legal framework and the legal procedures concerning family violence, by reviewing firstly the current situation and then, in comparison to Norway, one of the most developed countries in Europe and perceived as the safest, by making recommendations for the adoption of best practices concerning the management of family violence situations.

In **Norway**, the low rate of family violence (1392 cases in 2018, according to Life in Norway, as compared with 23830 cases in 2019, in Romania, according to the National Agency for the Equality of Chances – considering the difference in population, still the declared rate in Romania, which is just a fraction of the real domestic violence, is about **four times higher!**) is explained by the traits of the Norwegian society, which promotes gender equality, has a low level of unemployment, an easy access to education and a relatively homogenous distribution of income between husbands/ partners ([12]).

However, starting in the 70s, Norway has shown an increased attention to the phenomenon of domestic violence, having presently 46 care centers for the victims of domestic violence, at the national level (Krisesenter statistics, 2019).

In November 2016, the Norwegian Government has adopted the newest action plan for fighting against domestic violence (2017-2021) in which four ministries are involved: The Ministry of Children and Equality of Chances, the Ministry of Health and Care Services, Ministry of Justice and Public Safety, and the Ministry of Education and Research.

The conclusions of previous action plans have shown that preventive measures are not sufficiently highlighted, and present measures are not enough efficient and focused (Norwegian Equality and Anti-Discrimination Ombudsman, 2016). Also, there is a concern that police intervention is late because the SARA system (an evaluation tool for the

imminent risk, in case of domestic violence, developed in the '90s) is not properly implemented.

2.2. Legal foundation

In **Romania**, domestic violence is regulated by both civil special laws, and the Criminal Code. The special laws with which the courts operate are:

- **Law 202/2002** concerning the equality of chances and treatment between men and women;
- **Law 217/2003** for preventing and fighting against domestic violence – which introduces the issuing of the protection order by the court;
- **Law 211/2004** regarding some measures for assuring the protection of the victims of offences;
- **Government decision 49/2011** for approving the methodological framework for the intervention in multidisciplinary teams and networks in case of family violence and violence against children;
- **Law 30/2016** for ratifying the Council of Europe Convention for preventing and fighting against violence against women and domestic violence;
- **Law 174/2018** for modifying and completing **Law 217/2003**, which introduces the provisional protection order, which can be issued directly by the police on a maximum period of five days, when the gravity and celerity criteria provided by law are met;
- **Law 106/2020** for modifying and completing **Law 217/2003**, which enlarges the notion of domestic violence, by including cybernetic violence, as well as new duties of state institutions regarding the fighting against domestic violence;
- **The Order of the Minister of Labor and Social Justice 2525/2018** for approving the procedure of emergency intervention in the cases of domestic violence;
- **The Criminal Code of Romania:**

➤ **article 177: Family member**

Here, we have to note that the definition of the family member is more restrictive than in Law 217/2003, amended by Law 174/2018, in the sense that:

- article 5, letter a) includes husbands of brothers and sisters, which are not mentioned in the Criminal Code;
- article 5, letter b) includes former spouses, brothers, parents and children from former relationships of husband/ wife, whereas the Criminal Code mentions, in letter b) of article 177, only 'husband' (not even wife...);
- article 5, letter c), removes the condition of cohabitation, in case of civil partnerships – in order for an aggression to be considered domestic violence, former spouses should not cohabit at the moment of the aggression, or to have cohabited in the past.

Thus, we may notice that inadvertences of this kind create inconsistencies in the current practice of the courts, since two contradictory laws, on some aspects, are simultaneously in place.

➤ **Article 199: Family violence**

Here, we have to note that, in the view of the Romanian Criminal Code, family violence is an aggravating circumstance of other types of violence (defined in articles 188, 189 and 193-195), in case these are committed against a family member.

Also, in case physical aggression against a family member, criminal prosecution may be started *ex officio*. The reconciliation of the parts removes criminal liability.

These very days, the Romanian Chamber of Deputies has voted a modification of the Criminal Code which cancels this provision, that reconciliation removes liability, considered to be an artifice to avoid responsibility, the aggressor presumably forcing the abused women to withdraw her complaint and thus escape any legal sanction.

In Romania there is, as well, in place a national strategy for promoting equality of chances between men and women and fighting against domestic violence, as well as an operational plan for its implementation.

It may be seen, from this brief enumeration, that there are quite many legal texts, some contradictory, regulating domestic violence (not to mention that **Law 217/2003** was amended several times), which may lead to a concurrence of norms, and create confusion and inconsistency in the practice of the courts.

In **Norway**, things tend to be simpler. There are no special civil laws dealing with domestic violence, which is entirely described in the Criminal Code, articles 57 (Protection Orders), 168 (Breaking the Protection Order), 282 (Family Violence) and 283 (Aggravated Family Violence). Starting from 1st of January 2016, domestic violence, framed as ‘violence in close relationships’ is a specific offence in Norway. It may be seen, by reading Article 282, that it includes the notion of family member, in detail, an unification which would be beneficial also for the Romanian Criminal Code, and it doesn’t refer to other articles, regarding other types of violence, family violence being discussed in itself, which puts a greater emphasis on the matter, as compared with the Romanian Code.

Previously, by the amendment of the Criminal Code in 1988, aggression and physical harm against a present or former spouse became an offence, criminal prosecution, in this case, being started *ex officio*, or following the complaint of the victim.

3. The management of family violence cases and the adoption of Norwegian best practices

In **Romania**, the same concurrence of norms which exists in the legal framework extends over the procedures and responsibilities for managing the real situations of domestic violence. For instance, a victim may call 112, the national emergency number, and ask for the intervention of the police. Alternatively, the victim may ask for the help of one of the 42 intervention teams, established in all counties of Romania and in the capital, who are subordinated to local authorities and consist of social workers, NGO representatives, medical staff, local police, priests, etc, and who should intervene in no more than 90 minutes after the call. They may assist the victim in calling 112, if the situation is severe, provide legal advice, direct the victim towards a shelter, etc. Clearly, responsibilities are overlapping, because these teams, which are more complex, and, at least theoretically, better trained to handle the situation, do not have the legal power to take actions against the aggressor and, if the situation is serious, they can be, in their turn, exposed (in case of consumption of alcohol, or drugs, or extreme violence). Practically, coordination among team members is difficult, which leads to loss of time, and ultimately the police is still the

only one to take action. The activity of these teams would better be directed towards preventive activities, or counseling the victim, once the criminal side of the matter is settled.

In theory, there exists an integrated system, SIRMES, which should centralize the data from the call center dedicated to the victims of domestic violence, and the findings of the 42 intervention teams. In practice, responsible state institutions are not connected to the system, which makes it impracticable. Such national databases should be projected in a way in which they are accessible by courts of justice, National Institute of Legal Medicine, police departments, etc., for obtaining accurate, real time data.

Presently, Romania has a Guide for the management of domestic violence situations, elaborated with a Norwegian Grant, in 2017, by the National Institute of Magistracy and the The prosecutor's office of the High Court of Cassation and Justice, dedicated to the information of judges and prosecutors in providing solutions to cases of family violence.

As of 2018, in Romania there were 60 centers, across the countries, for sheltering the victims of domestic abuse. However, there are six counties with no such a center, where practically the victims do not have where to go, not to mention that none of these shelters is open 24 hours a day, when many aggressions may take place in the evening (considering the alcohol consumption), or during the night.

Again, procedures are functional at the strategy level, but the real life situation is far from being settled.

In **Norway**, efforts are also made to improve prevention, in cases of domestic violence. However, relapses are by far better managed. Starting with 2013, aggressors wear electronic bracelets, which allow their monitoring and signal potential breaks of protection orders. Thus, they are reintegrated in the social and professional environment, which helps their recovery, and are not kept in prison, on the expense of the state.

Also, starting with 2004, victims have mobile alarms, on their phones, and they can announce much rapidly the police, in case of domestic attack.

In order to evaluate the need for best practices implementation, we make a succinct SWOT analysis of the Romanian situation, considering the general framework of the phenomenon. The relevant aspects of this analysis are outlined in **Table 1** below:

Table 1. SWOT analysis of the general framework of domestic violence in Romania

STRENGTHS	OPPORTUNITIES
● Updating and improving the legal framework and the case management - Introducing provisional protection order - Enlarging the sphere of domestic violence - Enhanced sanctions for breaking the protection order ● Improvement of case management: - Multidisciplinary intervention teams - Increase in the number of shelters	● The pressure to align to EU legislation in the field ● The initiatives of NGOs, some of which become legal proposals ● Social and mentality evolution

WEAKNESSES	THREATS
● Poor identification of the real extend of the phenomenon ● Insufficient prevention and measures to protect the victims ● Ineffective monitoring of the observing of protection orders ● Good strategies still ‘on paper’ – initiatives which are not operational	● Slow progress in understanding the phenomenon in rural areas/ poor or poorly educated social layers ● Lack of adequate financial means ● Lack of proper training of social workers/ police/ justice

In **Norway**, according to a NFsK (Scandinavian Research Council for Criminology) 2017 report, it was proposed that shelters are not subordinated to the municipalities any more, but funded directly by the state, which would give them more stability and autonomy in dealing with domestic violence situation. In **Romania**, where the only non-stop such shelter in Bucharest was recently closed, because the municipality lacked money, it would be of extreme importance to exist a state-supported fund for the protection measures dedicated to the victims of domestic violence, as well as adopting the Norwegian proposal as a best practice.

Also, regarding the weakness I identified as insufficient monitoring of observing the protection orders, we may also implement electronic bracelets, for which there is the legal framework, but we lack the practical implementation.

Conclusions

Our analysis revealed that, during the last 20 years, the legal framework in Romania have benefited of well received amendments. However, there are still vulnerabilities, some of which may be removed by implementing best practices from other European countries, Norway, that we analyzed, serving as an example.

Problems as underfunding and lack of training may be solved with the help of Norwegian grants, many of these being dedicated to social issues, as family violence, and by partnerships with the civil society, NGOs, etc.

We have suggested, as examples, some best practices from Norway which may be implemented in the Romanian system, setting as a future research objective the analysis of the feasibility of their implementation and impact studies of their success.

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PARENTAL LEAVE AND WORK-LIFE BALANCE. EVOLUTION, CHALLENGES AND PERSPECTIVES

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Abstract

Parental leave can be an effective tool in balancing work and family life, but in order to achieve this goal, its legal construction should be adapted to the new social and technological challenges. This study aims to examine and analyse the parental leave regulations adopted at European Union and national levels, as well as how they respond to the challenges faced by the workers with family responsibilities. The study ends with closing remarks and a list of de lege ferenda proposals.

Keywords: *work-life balance, parental leave, fertility rates.*

1. Preliminary considerations

Work and family represent two main areas of the human existence, with major implications on the population's welfare as well as economic growth. As such, they are thoroughly legally protected at international, European and national levels (e.g., art. 16 and art. 23 of the Universal Declaration of Human Rights of 1948; art. 6 and art. 10 of the International Covenant on Economic, Social and Cultural Rights of 1966; art. 1 and art. 16 of the European Social Charter, revised, of 1965; art. 9 and art. 15 of the Charter of Fundamental Rights of the European Union of 2009 etc.).

However, the socio-economic, demographic, as well as technological changes of the last three decades have revealed that, in the absence of the effective protection measures, more and more workers are confronted with a conflict between their professional and family lives.

The conflict between the professional life and the family one negatively impacts not only the family and the professional organizations, but the society, as a whole, by generating an acute demographic decline, a stagnation of women's labour force participation rates and an increase in the dependency rate. The most concerning phenomenon is represented by the demographic decline [1], registered both at a national level (a decrease in natality from 2.89 in 1970 to 1.77 in 2019), as well as at the European Union level (a decrease in natality from 2.35 in 1970 to 1.53 in 2019).

A major role in stimulating natality, women's labour force participation rates and obtaining work-life balance is played by the parental leave. However, in order to obtain such results, the rethinking of the system and manner of its application in the context of the new social and technological challenges is necessary.

This study aims to examine the regulations on parental leave, adopted at the European Union and national levels, as well as the ways in which they respond to the challenges faced by the workers with family responsibilities.

2. The regulation on the parental leave at the European Union level

The parental leave was firstly introduced in 1996, by way of Directive 96/34/CE [2], which provided, within Clause no. 1, that “This agreement lays down minimum requirements designed to facilitate the reconciliation of parental and professional responsibilities for working parents”. This directive laid down the workers’, both male and female, individual right to a parental leave, based on the birth or adoption of a child, in order to give them the possibility to care for that child, over a period of at least three months, up to a determined age of maximum eight years old.

Afterwards, respectively in 2006-2007, the European Commission consulted the European social partners with respect to manners of enhancing the work-life balance, which led to the 2009 signing, by the European social partners, of a new agreement on the parental leave. This agreement was applied through Directive 2010/18/EU [3].

The changes brought by this directive consisted of: (i) an increase in the minimum period of parental leave, from three to four months; (ii) an implementation of the rule that at least one of the aforementioned four months should be granted to the parents on a non-transferrable basis, in order to encourage equality between the two parents with respect to the parental leave; (iii) establishing the Member States’ obligation and/or the social partners’ obligation to ensure the possibility of the workers who return from parental leave to request changes to their working hours and/or patterns for a set period of time (without, however, the correlative employers’ obligation to accept such demands).

The main purpose of this directive was to encourage workers who have children to share family responsibilities and ensure a work-life balance. As such, the right to parental leave was conceived as an individual right and not as a family related one, in the sense that each parent is allocated a certain period of time to raise the child, period which is not transferrable to the other parent [4].

Although this directive aimed to improve work-life balance, the results noticed on the labour market were not spectacular. According to Eurostat figures [5], the following were noticed: (i) in 2010, the date of adoption of the Directive 2010/18/EU, the employment rate of women (aged between 20-64) was of 61.2%, as opposed to 74.5% in the case of men, the difference amounting to 13.3%; (ii) in 2015, the rate of employment among women (aged between 20-64) was of 63.3%, as opposed to 74.9% in the case of men, the difference amounting to 11.6% - percentage which was maintained in 2018 and slightly increased in 2019 (11.7%).

Given the persistence of the gap between the male and female employment rates, the European Commission noted that “the gender employment gap in the labour market is most acute for parents and people with other caring responsibilities”, due to the fact that, in principle, women are much more likely to assume the role of informal carers for children, elderly or dependent relatives than men. The main cause identified by the Commission was the inadequate work-life balance policy, which translates into the insufficiency of the provisions of the Directive 2010/18/EU in this field.

The deficiencies of Directive 2010/18/EU become more obvious, as this normative act covered only a part of the problems faced by the workers with family responsibilities. The most important deficiencies of Directive 2010/18/EU are: (i) the way the parental leave is conceived; (ii) not covering the most important types of family leave, such as paternity leave or leave to take care of ill or dependent relative; (iii) insufficient incentives for men to

take leave to care for children and/or dependent relatives; (iv) limited possibilities to make use of flexible working arrangements.

Under these circumstances, in 2017, the European Commission launched the Proposal for a directive on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, which was adopted by the European Parliament and the Council of the European Union and became Directive 2019/1158/UE [6]. This directive repeals Directive 2010/18/EU starting with August 2nd, 2022, date up to which the Member States are to transpose its provisions.

This directive is of great importance for the enhancement of work-life balance, since: (i) it improves the provisions on parental leave, by providing the rule according to which at least two of the four months are to be granted to parents on a non-transferable basis; (ii) it introduces the paternity leave (of ten working days) and the carers' leave (of five working days per year, having as purpose the caring after a relative or a person who leaves in the same household as the worker and is in need of caring or significant support due to serious medical issues); (iii) provides the rights of workers with children of up to a certain age, of at least eight years, as well as of the carers, to request flexible working arrangements for caring purposes (flexible working hours or reduced schedule, as well as the possibility to work from home or in telework regime), as well as the correlative employers' obligation to take into consideration such requests and to reply within a reasonable period of time, given their own necessities, as well as the ones of the envisaged workers); (iv) provides the interdiction to dismiss, as well as any preparations for dismissing workers on the grounds that they have applied for, or have taken, leave or that they exercised the right to request flexible working arrangements.

Although the new directive on parental leave significantly enhances the legal framework on work-life balance, we consider that certain changes would prove useful, such as the increase in the duration of the parental leave, or, at least, maintaining the phrase "of at least 4 months", as well as the setting out of some rules regarding the amount of the leave indemnity, which could have as a starting point including the provisions of Directive 92/58/EEC [7], in the sense of granting an adequate compensation which guarantees an income at least equivalent to the one that the envisaged workers would receive in the case of interruption of activity for health related issues.

At a national level, all Member States offer the workers paid parental leave, but the total duration, transferability (if it can be split between the parents and in what way), the child's maximum age limit, as well as the amount of the indemnity vary from state to state. Additionally, some Member States have adopted innovative solutions which can contribute to the improvement of work-life balance [8], such as: (i) instituting partial leaves: the working parents can request the reduction of the working time (*e.g.*, Belgium, Denmark, Finland, France, Germany, Luxembourg, Netherlands); (ii) exercising the leave in one or several blocks of time: the working parents can benefit, in one or several blocks of time, from the parental leave days, until the child reaches a specified age (*e.g.*, Greece, Denmark, Italy, Sweden); (iii) instituting flexible working schedules: working parents can request a flexible working schedule (*e.g.*, Austria, Belgium); (iv) the possibility for the working parents to work from home or remotely (*e.g.*, Bulgaria, Netherlands); (v) the prolongation of the leave duration in case of multiple pregnancies (*e.g.*, Belgium, Croatia, France, Italy, Netherlands, Poland, Sweden). Another important aspect revealed by the analysed studies consists in the fact that, at the EU level, there are regulations on flexible arrangements in 24

Member States (under various forms, previously mentioned, as examples). There are only three states which have not regulated such facilities (Romania, Cyprus and Estonia).

3. The regulation on parental leave at the national level

In Romania, in order to obtain work-life balance, the workers were recognized the right to parental leave, right which is accompanied by guarantees regarding the stability of the work relationships.

The conditions for granting parental leave are regulated by G.E.O. no. 111/2010 [9], normative act, which is applicable to all persons who, for at least 12 months over the 2 years prior to the date of the child's birth obtained income from salaries and assimilated to such, independent activities, income from intellectual property rights, income from agricultural, forestry and pisciculture, subject to tax income (hereinafter the "**workers**") [10]. The conditions and the characteristics of this type of leave are detailed below.

2.1. The beneficiaries and the duration of the leave

Art. 2 and art. 8 of the G.E.O. no. 111/2010, recognize the right to parental leave to workers with children of up to 2 years, respectively 3 years in cases of children with disabilities, as well as the right to a monthly indemnity. The beneficiaries of this right are natural parents (either of them) as well as other assimilated persons (respectively the guardian, the adopter, the person who was entrusted with the adoption of the child or who has the child in foster care or emergency foster care, apart from the professional maternal assistant who may benefit from these rights only when it comes to their own children).

With respect to the granting period, art. 25 para. (1) of G.E.O. no 111/2010 provides that the employer is obliged to approve the parental leave and the granting period is established through agreement with the envisaged worker.

The right to parental leave is granted on a non-transferable basis if both persons within the family fulfil the granting conditions, as follows: (a) at least a month out of the total duration of the parental leave is allocated to one of the persons who did not request the exercise of this right; (b) in case that the person mentioned under letter (a) does not request the exercise of the right which he/she is entitled to, the other parent cannot benefit from the right to parental leave by replacing him/her, but he/she can, however, choose to request unpaid leave or, if the case, to realize income subject to taxation (art. 2 and art. 11). Considering the new EU regulation, it is mandatory for the non-transferable period of the leave to be increased to 2 months.

In the case of the death of the parent who fulfilled the conditions to benefit from the leave and the monthly indemnity, respectively the insertion incentive, the surviving parent has the right to benefit, at request, of the rights provided by G.E.O. no, 111/2010, as follows: (a) the rights of the deceased parent, in case that he does not fulfil the conditions provided by the law; (b) the rights provided by the law, if he/she fulfils the granting conditions (art. 8 para. 4).

2.2. The leave indemnity

The amount of the monthly leave indemnity is of 85% of the average net income realized over the past 12 months of the 2 years prior to the birth of the child. The minimum amount of the monthly indemnity cannot be lower than the amount resulting from applying

a coefficient of multiplication of 2.5 to the value of the social reference indicator (RON 1,250) and the maximum amount may not exceed RON 8,500.

The amount of the monthly indemnity is increased by the sum resulting from applying a multiplication coefficient of 2.5 to the value of the social reference indicator for each child born from a pregnancy with twins, triplets and other multiples, beginning with the second child resulted from such a birth.

2.3. The insertion incentive

The persons who, during the period in which are entitled to benefit from the parental leave, obtain income subject to taxation, have a right to an insertion incentive amounting to 50% of the minimum amount of the indemnity leave (more exactly RON 650). For the persons who obtain income subject to taxation with at least 60 days prior to the child turns 2 years, respectively 3 years in case of a disabled child, the insertion incentive is granted as follows: (i) until the child reaches 3 years of age; (ii) until the disabled child reaches 4 years of age.

In the context of budget deficit and lack of labour force, the Romanian Government adopted G.E.O. no. 26/2021 [11] by way of which the insertion incentive was increased for the parents who restart the professional activity earlier. As such, the insertion incentive is to be granted as follows: (i) an amount of RON 1,500, payable until the child reaches 2 years of age, respectively 3 years of age in the case of a child with disabilities, if the entitled persons return to work before the child turns 6 months, respectively 1 year in cases of children with disabilities; (ii) an amount of RON 650 if the entitled persons return to work after the child turns 6 months, respectively 1 year in cases of children with disabilities. Regarding persons who have finalized the parental leave and return to work, they will benefit from the insertion incentive of RON 650, after the child reaches 2 years of age, respectively 3 years of age in cases of children with disabilities, until the child reaches 3 years of age, respectively 4 years of age in cases of children with disabilities.

This change is to enter into force along with the entering into force of the Government ruling by way of which the methodological norms will be approved and, according to its preamble, the measure will impact approx. 34,000 people who might choose to return to work.

In our opinion, in spite of the fact that the purpose which was taken into consideration when issuing this change is salutary, it will not be able to achieve it, seeing how, on one hand, the increase of the incentive does not answer the need for flexibility and on the other hand, the increase is insignificant and limits the granting period to the date upon which the child reaches 2 years of age, respectively 3 years of age in cases of children with disabilities. Additionally, there are some inconsistencies which could cause problems in practice, such as the duration of granting of these incentives, respectively: (i) on one hand, art. 7 para. (1) letter a) sets out that the RON 1,500 incentive will be granted until the child reaches 2 years of age, respectively 3 years of age in cases of children with disabilities and, on the other hand, art. 17 para. (1) letter a) provides that the right to an insertion incentive ceases as of the following day to the one on which the child reaches 3 years of age, respectively 4 years in cases of children with disabilities; (ii) art. 7 para. (1) letter b) does not mention expressly the period of granting of the RON 650 incentive, which is subject to various interpretations [this can be determined only by an extensive interpretation of art. 7

para. (2), respectively until the child reaches the age of 3 years, respectively 4 years in the case of the child with disabilities].

2.4. The situation of multiple pregnancies

The leave and the monthly indemnity, as well as the insertion incentive, are to be recognized for each birth or adoption. The duration of the granted leave is correspondingly extended in case of overlapping situations which could trigger this right, but only one indemnity is granted. Over the overlap period, the amount of the monthly indemnity is increased by the sum resulting from applying a multiplication coefficient of 2.5 to the value of the social reference indicator, for each child, starting with the second one.

2.5. Rights related to the employment agreement

The beneficiaries of the parental leave have some rights related to the employment agreement, respectively: (i) maintaining the rights acquired or in the process of being acquired; (ii) returning to the same job upon the cease of the parental leave; (iii) the interdiction of being dismissed.

A. Maintaining the rights acquired or in the process of being acquired

The granting of the parental leave results in the suspension of the individual labour agreement, according to art. 51 para. (1) letter a) of the Labour Code [12] and, consequently, in the suspension of the work performance and the salary payments [art. 49 para. (2) of the Labour Code]. However, during the suspension period, other rights and obligations of the parties may continue to exist, if they are provided by special laws, collective bargaining agreements or internal regulations [art. 49 para. (3) of the Labour Code]

Additionally, art. 16 para. (3) of G.E.O. no. 111/2010 provides certain rights which the beneficiary may receive over the leave period, without suspending the payment of the indemnity, respectively: (i) the right to receive various amounts provided by the law, the collective bargaining agreement or the individual labour agreement, granted over the parental leave period, others than the ones resulting from the undertaking of an activity during the leave; (ii) the right to receive indemnities as a town councilman or county councilman, irrespective of their amounts; (iii) the right to obtain, over a calendar year, income subject to taxation, by undertaking an activity over the leave period, if their net amount does not exceed 5 times the minimum amount of the leave indemnity.

At the same time, the period of leave represents a period assimilated to the contribution period in order to establish the social insurance rights, as well as seniority in work and specialization and is to be taken into consideration when establishing the rights granted with respect to such (art. 22). As such, the workers who return from leave benefit, for example, from salary increases, supplementary days of leave, promotions if the seniority represents a determining factor in granting these rights.

B. Returning to the same job upon the cease of the parental leave

According to art. 10 para. (8) of Law no. 202/2002 [13], upon the cease of the parental leave, the worker has the right to return to the same job or an equivalent one, with equivalent conditions and, to benefit, as well, from any enhancement of the working conditions which he/she would have been entitled to during the absence. Additionally, upon returning to work, the worker is entitled to a professional reintegration program, with the duration provided by the internal regulation, but no less than 5 working days.

C. The interdiction of being dismissed

According to art. 60 para. (1) letter d) of the Labour Code and art. 25 para. (2) of G.E.O. no. 111/2010 it is forbidden for the employer to order termination of employment for: (i) the worker who is in parental leave to care for a child of up to 2 years, respectively 3 years in cases of children with disabilities; (ii) the worker who is during the insertion incentive payment period. The interdiction is extended, once, by 6 months, after the definitive return of the worker in the unit. However, the interdiction does not apply in case of dismissal for reasons that occur as a result of judicial reorganization or bankruptcy of the employer, under the conditions provided by the law.

In this case as well, G.E.O. no 26/2021 brings a major change which is in the disadvantage of the workers, by eliminating the interdiction of dismissal over the 6-month period after the definitive return of the worker in the unit. Therefore, in our opinion, the amendments brought by G.E.O. no. 26/2021 do not correspond to the objectives set out by its preamble, as their legal construction is evidently in the advantage of the state and of the employer and in the disadvantage of the workers with family responsibilities.

A comparison between the provisions of the national legislation and those of the Directive 2019/1158/EU reveals that: (i) the interdiction of dismissal does not extend over the preliminary steps to dismiss workers on the grounds that they requested or benefited from parental leave; (ii) the right of workers with children of up to a certain age, of at least 8 years, as well as of carers, to request flexible work forms, with the purpose of caring is not recognized and no protection is granted to them against dismissal. We hope that the accumulated experience during the pandemic with respect to the performance of work from home or in telework regime will contribute to a more open attitude from the political decision-making bodies and the employers toward flexible working arrangements, as well as the implementation of clear and coherent measures.

4. Conclusions and *de lege ferenda* proposals

The parental leave may represent an effective instrument in obtaining work-life balance, but in order to achieve this goal, we consider that its legal construction should be adapted to the new social and technological challenges.

Under these circumstances, given the elements revealed by the regulations of the EU Member States, and to ensure the conformity with the Directive 2019/1158/EU (which must be transposed before August 2nd, 2022), we consider that the completion and amendment of the current legislation is necessary, by:

- making parental leave more flexible and responsive to the needs of workers and employers, by granting the possibility to exercise parental leave in fractions (working parents should be able to benefit from days off for parental leave in one or several blocks of time and/or through the reduction of the working schedule, until the child reaches a specified age);
- increasing the maximum limit of the child's age up to which the parental leave can be exercised;
- regulating certain aspects regarding the period after the restarting of the activity, in accordance with the Directive 2019/1158/EU, such as: (i) the possibility to reduce the working hours; (ii) the possibility to adopt a flexible working schedule; (iii) the possibility to work remotely; (iv) the right to vocational training etc.;

- instituting the interdiction of dismissal and of all preparations for the dismissal of workers, on the grounds that they have applied for, or have taken, leave or exercised their right to request flexible working arrangements;
- aligning art. 10 para. (8) of the Law no. 202/2002 to the provisions of the Directive 2019/1158/EU, respectively to expressly provide that the offering of an equivalent position or similar shall take place only subsidiarily if the filling of the previous position is no longer possible.

Additionally, given the imminent entering into force of the provisions of G.E.O. no. 26/2021, normative act which contains significant irregularities and reduces the legal protection of parents who are on parental leave, we consider that it should be repealed and that the parental leave should be reconsidered in accordance with the above. The only provision of this normative act which brings an enhancement and can be maintained refers to the introduction of a new period assimilated to contribution period, respectively the one during which the persons benefited from the monthly benefit provided by art. XI and art. XV of G.E.O. no. 30/2020 and/or the provisions of art. 3 of G.E.O. no. 132/2020 (*i.e.*, the monthly unemployment benefit and/or the short-time working allowance - *Kurzerbeit*).

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ON FAMILY PROTECTION AND TESTAMENTARY FREEDOM IN THE COMMON LAW TRADITION

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Abstract

During the past century, legal systems belonging to the Common Law tradition abandoned their unfettered attachment to testamentary freedom in favour of a seemingly novel restriction. Instead of borrowing the Civilian forced share or the Scots Law legitim, said legislations sought to protect the family and dependants of the deceased by expanding the latter's duty to provide maintenance beyond death. Such a solution proved to be conceptually far enough from the Civilian solution so that it would not threaten its relationship with testamentary freedom. New Zealand was the first country to adopt such a form of family protection, which later inspired similar reforms in Canada, Australia and English Law. The present paper argues that, far from being a novel doctrine, the Common Law system of family protection builds upon some perennial answers given millennia ago within the Roman law of succession. Moreover, the drafters behind the New Zealand reform were possibly oblivious to this fact.

Keywords: *maintenance, family protection, testamentary freedom, hereditary reserve, forced heirship.*

Introduction

Legal systems belonging to the Common Law tradition are generally known for their reticent approach to restricting testamentary freedom. Following the example set by New Zealand, several Common Law jurisdictions chose to limit the testator's power to disinherit through an extension of his duty to provide maintenance and support to his family and dependants, in a manner not dissimilar to the Civilian hereditary reserve under its *pars bonorum* model. In other words, Anglo-American legal systems are apparently reverse-engineering the Civilian forced share at a time when the latter tradition is looking to suppress it. For this reason, this paper argues that, far from being a novel approach, the Common Law answer to restricted testation builds upon certain perennial doctrines belonging to the Roman law of succession. Thus, our study is divided as following: *the development of testamentary freedom in English law (§2), the doctrine of extending the maintenance obligation beyond death (§3) and the Roman legal patterns of the Common Law doctrine of restricted testation (§4).*

A Brief History of Testamentary Freedom in English Law

Even though it no longer enjoys its past plenitude, testamentary freedom has always been a defining feature of the English law of succession. However, this principle came to govern said field not by deliberate choice, but rather by accident. Essentially, the history of testamentary freedom in English law can be summarized in two key moments: an initial restriction occurred in the Middle Ages, which were later lifted amid colonial expansion.

Owing to its customary nature, one cannot know for certain if the Anglo-Saxon law acknowledged a forced share for the deceased's children [1]. Instead, the Norman conquest set in motion a number of developments that influenced this field: the *inter vivos* alienation of real property was restrained during the 12th Century, providing the primogeniture with a 'reasonable portion' of the father's estate [2]. This rule was subsequently replaced with a restraint on the *mortis causa* alienation of real property [2]. Nevertheless, the Statute of Wills 1540 restored full testamentary freedom over immovables.

On the subject of personal property, however, testamentary freedom gradually came under the restraints of the tripartite principle: the estate was to be divided into three equal parts, two of which were meant for the widow and the children respectively, whilst the third could be disposed of freely by the testator; in practice, however, the third part usually went to the Church [1]. Mentioned in the Magna Carta (1215) at §26, such a rule was meant to secure 'reasonable parts' of the estate in the benefit of the testator's widow and children, which could claim their rights through a specific legal action, known as *de rationabili parte bonorum* [3], counterpart to the Roman *querela inofficiosi testamenti*.

At the end of the 14th Century, the children's legitim fell in disuse in most English counties [1], apart from a few cases which were repealed much later: York and Wales (well into the 17th Century) and London (1724) [4]. Testamentary freedom was restored in the field of personal property through the Wills Act 1837, but the tripartite rule survived in the field of intestacy until 1856 [1]. Some authors explained this development through the popular support enjoyed by testamentary freedom, itself based upon superstitions related to those who died without a will and, later, on the artificial nature of the rules governing intestate succession [5].

On one hand, the Medieval restraints were consigned to oblivion as English authors were quick to embrace the principle of unrestricted testamentary freedom [1]. On the other hand, authors familiar with the Civilian legal tradition were astonished to discover the utter absence of family protection measures [6]. All explanations tend to fall within the following four categories:

(a) *Colonial expansion*. Max Weber argued that only Roman law during its classical period had experienced a similar level of testamentary freedom to that enjoyed by English law, drawing comparisons between the British and Roman empires: the latter encouraged disinheritance as a means to support the colonization of conquered territories, yet testamentary freedom had outlived its purpose when this process came to an end [7]. Other authors emphasized England's commercial prowess and the spread of individualist values during Pax Britannica [3]. Truth be told, the London custom was abolished precisely because it discouraged traders from settling in the City [8].

(b) *Case law*. Certain authors have explained England's unrestrained testamentary freedom as a solution to the divergence between common law courts and their ecclesiastical counterparts, for they shared jurisdiction over said field [2].

(c) *Sociology and Economics*. Certain authors underlined the sociological and economic dimension, for the English legitim came into being as a means to support 'daughters and younger sons' owing to a combination of circumstances including the Norman military tenures and the system of primogeniture, both of which have fallen into disuse prior to the abolition of said custom [9].

(d) *Religion*. Another explanation would be the prevailing influence of the Church. There may have been a connection between the rite of death-bed confession including

testamentary bequests and the fact that, more often than not, the dead's part went to the Church [1]. Thus, the renowned English attachment to wills may have been actively encouraged by priests through the so-called 'horror of intestacy' [1].

Nevertheless, unrestrained testamentary freedom was criticized as 'an accidental fruit of feudalism' [10], for 'law is sometimes the outcome of what we must call accidents' [11]. In truth, Blackstone argued that 'perhaps it had not been amiss if the parent had been bound to leave [his children] at least a necessary subsistence' [4].

Expanding the Maintenance Obligation Beyond Death

The English law of succession returned to a system of restricted testation as the age of colonialism came to a close, under similar circumstances to its Roman counterpart in ancient times [7]. The fact that such a change first occurred in the eldest British dominions – i.e., New Zealand, Australia and Canada – only serves as a confirmation of this; since family protection against testamentary freedom discouraged the movement of colonial settlers, these measures helped strengthen these fledgling societies [12].

However, the aforementioned restriction was deliberately portrayed as different from the Civilian doctrine of forced heirship or its Scottish counterpart [13]. The lawmakers of New Zealand had been remarkably hostile to the notion of a Civilian-inspired reform: the first two bills introduced on this matter were rejected precisely because they set to carve out a fixed share of the deceased's estate [13]. The rejection came as this Scottish-inspired system would 'reward the undeserving and give widows capital that could be used to support a subsequent husband' [14]. A third bill had done away with the forced share, leaving the matter in the hands of the courts, yet lawmakers were so unfavorable to testamentary restraints that said compromise was rejected as well [14]. A fourth bill built upon this solution and managed to gather enough support, being passed as the Testator's Family Maintenance Act 1900.

In essence, the New Zealand answer to restricted testation acknowledged that dependants ought to enjoy a form of legal protection not only during the lifetime of the person who supports them or in the event of intestacy, but also against unjust testamentary provisions [13]. In similar fashion to the mechanism behind *querela inofficiosi testamenti*, the aforementioned statutory intervention granted courts a discretionary power to provide the necessary maintenance against the testator's instructions: whenever the surviving spouse or children of the deceased did not benefit from adequate support under the latter's testamentary bequests, judges were free to interfere [13]. However, this reform was criticized as antithetical to the popular support enjoyed by testamentary freedom: it would appear that the uncertainty arguably generated by the aforementioned reform may have encouraged around a tenth of the entire New Zealand population to turn to trusts as a means to avoid the testamentary devolution of estates [14].

Now borrowed into the legal systems of England and Wales, Australia, and Canada, this kind of restraints always benefits the surviving spouse and the children of the deceased. Still, most jurisdictions have expanded this protection to other categories of dependants. In New Zealand, protection is afforded to the civil union or de facto partner of the deceased, as well as the latter's grandchildren, stepchildren or parents [15]. In Australia, some states protect the former spouse and 'a person with whom the deceased person was living in a close personal relationship' [16] or the 'registered caring partner of the deceased', as well as stepchildren and their partners, grandchildren and even 'a member of the household of

which the deceased was also a member' [17]. In Canada, the range of eligible persons differs from one state to another: e.g., British Columbia only affords protection to the surviving spouse and the children of the deceased [18]; Ontario uses the notion of 'dependants' to include the spouse, parents, children, grandchildren and siblings of the deceased [19]; Alberta afford protection to any member of the deceased's family [20]. In England and Wales, eligible persons include the civil union or de facto partner of the deceased, a former spouse, any person who 'was treated by the deceased as a child of the family', as well as any person who 'was being maintained, either wholly or partly, by the deceased' [21]. In the United States, the protection afforded by the Uniform Probate Code tends to concern only the surviving spouse [22], yet it may also benefit the children of the deceased [23].

This kind of testamentary restraint generally follows the same pattern across the aforementioned Common Law jurisdictions: each of these legal systems has acknowledged a judicial power to alter testamentary provisions whenever the testator failed to provide adequate maintenance to certain persons. In the case of England and Wales, the lawmaker distinguished between the necessities of eligible persons through the concept of 'reasonable financial provision'. Thus, the surviving spouse and the civil partner of the deceased are entitled to 'such financial provision as it would be reasonable in all the circumstances [...] to receive, whether or not that provision is required for his or her maintenance' [24]. However, any other eligible person would only be entitled to 'such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance' [25].

Recent case law [26] emphasized that 'a need for maintenance was a necessary but not sufficient condition for a successful claim', and the financial provision should not be limited to subsistence, nor should it cover all that the claimant ought to have [27]. In said case, the United Kingdom Supreme Court restored the original order (i.e., the £50,000 award) and conversely quashed the appellate decision (i.e., to increase the award to £143,000), owing not only to the intention expressed by the testatrix but also to the estrangement between mother and daughter [26]. In other words, the aforementioned case appears to uphold the view that the constraints of family protection stand as an exception to the rule of testamentary freedom.

The Roman Legal Patterns of the Common Law Doctrine

The parallels between the Common Law and Roman doctrines of restricted testation go well beyond certain similarities in the historical circumstances which have led to their adoption. Even if the testamentary restraints set down in New Zealand and subsequently borrowed to England, Canada and Australia were not inspired by Civilian legal thought, as emphasized at the time [13], their doctrines have arguably arrived at similar results to their common denominator, specifically the Roman law of succession.

A common feature may be found in the goals of said doctrines. In the case of the Common Law answer, its aims were twofold: on one hand, testators ought to provide adequate support to those closest to them [13]; on the other hand, dependants should not burden state services instead of the deceased person's estate [14]. Since family protection forms the central focus of the Anglo-American system of restricted testation, such reform was rooted in a moral duty incumbent on the testator. In Roman law, such a duty acquired a legal dimension (*vinculum iuris*) both between the living, through the alimentary obligation

(*alimenta*), as well as *mortis causa*, through the doctrine of *officium pietatis*; whenever the testator failed to fulfill the duty of *pietas*, his family was entitled to a legal action called *querela inofficiosi testamenti*.

Apart from obvious similarities between the doctrine of family maintenance and its Roman antecedent [13], a precedent existed in Medieval English law: a writ, called *de rationabili parte bonorum*, roughly translated as ‘of the reasonable parts of the goods’. Similar to how the *querela* ensured the widow and children were entitled to some subsistence, the writ was connected to the reasonable parts owed to the same dependants. In fact, Blackstone admitted said custom may have been ‘derived from the Roman law of successions’, but only ‘earlier than the time of Justinian’ [4]. Since the New Zealand approach claims novelty in relation to its Roman and Scots counterparts, it stands to reason that the drafters of the corresponding statute were oblivious of the fact that their bill built upon an ancient English writ and its possibly Roman roots. It should be said that the Common Law answer to restricted testation may have benefited from a certain grasp of legal history instead of arriving at the same results by accident.

Conclusion

At the beginning of the 20th Century, the Common Law tradition found itself at a crossroads. Deliberately or not, its fledgling system of restricted testation follows in the footsteps of the seemingly perennial answers given in Ancient Rome to (at least) similar questions. It would stand to reason that, whilst the Civilian legal tradition is nowadays seeking to suppress the forced share, its Anglo-American counterpart appears to have found some merit in reconstructing its equivalents, albeit under a decidedly different conception and terminology. Nevertheless, any such effort may benefit from a combination of the historical and comparative legal methods.

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THE CHILD'S RIGHT TO A NAME

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Abstract

The article conducts a detailed examination of the child's right to a name as an expression of the minor child's right to establish and preserve his or her identity. The scope of the approach is a complex one that depicts both incidental and national European regulations. While the Civil Code represents the seat of the common law matter, the Law no. 272/2004 on the protection and promotion of the rights of the child establishes a series of measures that must be taken so that the right of the child to a name is realized and thus, is guaranteed to all children without any discrimination. At the same time, taking into account the dynamics of society in an evolutionary context, attention was paid to cases and situations requiring a name change, this study being a useful tool for legal professionals, child protection authorities, students from the faculties in the field, parents, as well as any other practitioners or organizations whose purpose is to ensure the legal protection of the rights of the child.

Keywords: *right to a name, child's name, surname, forename, change of name, child's rights.*

Conceptual delimitations

Human rights are those freedoms, immunities and benefits established in accordance with contemporary values, which any human being is entitled to claim from the society in which he/she lives. Therefore, human rights can be defined as prerogatives governed by rules that a person has in relations with individuals and the State. Establishing and preserving the identity of the natural person is a fundamental right provided and protected by law.

The child's right to establish and preserve his/her identity is enshrined in the provisions of art. 9 of the Law no. 272/2004 on the protection and promotion of the rights of the child. In its exercise, the child's right to establish and preserve his or her identity has proved to be a complex right consisting of three attributes or prerogatives:

- The child's right to a name;
- The child's right to citizenship; and,
- The child's right to know his/her parents and to be cared for, raised and educated by them.

Defined by the scholarly literature [1] as "*that attribute of identification of the natural person which consists in his/her right to be individualized, in the family and in society, by words established, under the law, with this meaning*", the name, in the broad meaning of the term - designating the surname and forename of the person, is the bearer of several characteristics: legality, strictly personal character, unity, universality, imprescriptibility, inalienability and *erga omnes* opposability. These sequences of the name ensure, in terms of the right to a name, the certainty of acquiring an identity and establishing the acquired identity. The subjective right to a name confers on the holder the prerogatives of bearing, using the acquired name, the right to request correction, rectification of errors or mistakes in

the documents containing the name, as well as to oppose the use of his/her name by other persons [2].

The name is regulated in the Civil Code in force [3], by general provisions and in the Government Ordinance no. 41/2003 on the acquisition and administrative change of the names of natural persons [4], as a special normative act. The Civil Code plays the role of common law in this matter [5]. As far as we are concerned in this study, we show that the child's name and its particularities are also disjoint by the Law no. 272/2004 on the protection and promotion of the rights of the child [6].

It should be noted in context that, according to art. 2575 of the Civil Code, the person's name is governed by his/her national law. However, the determination of the child's name at birth is governed, at choice, either by the law of the state of which both the parents and the child have common citizenship, or by the law of the state where the child was born and lives from birth. The protection against the acts of violation of the right to name, committed in Romania, is ensured according to the Romanian law by specific triggers.

In the matter of incident European norms, art. 8 of the European Convention on Human Rights states that *"Everyone has the right to respect for his/her private and family life, his/her home and his/her correspondence. The interference of a public authority in the exercise of this right is allowed only insofar as it is provided by law and constitutes, in a democratic society, a necessary measure for national security, public safety, economic well-being of the country, defence of order and prevention of criminal facts, protection of the health, morals, rights and freedoms of others"*. Examining this provision, we note that it does not contain explicit provisions on the right to a name. However, in case law, the European Court has ruled that the name, as an attribute of identification of the person and highlighting a particular family connection, falls within the scope of the notion of personal privacy protected by this text. The fact that the State and society as a whole are interested in regulating the right to a name cannot lead to another conclusion, because, in this matter, public interests must be harmoniously combined with personal interests [7].

The child's right to a name is characterized by the correlative obligation to bear the surname and forename acquired in accordance with the law. The pseudonym and nickname are not part of the name structure. The pseudonym is the name that a person chooses to individualize in society, while the nickname is given to him/her by other people [8].

To the extent that the violation of the child's right to a name creates damage to the holder, he/she or his/her legal representatives may refer to the court an action for damages based on the principles of tortious civil liability. The solutions given in such cases are diversified, from the granting of civil damages representing moral damages, to the recourse to some non-patrimonial means - an obligation to do.

In the light of the above, we conclude that the right to a name is an absolute, personal, non-patrimonial subjective civil right that is recognized to the child.

Examining the legal provisions regarding the name, we find that there is a difference of vision regarding the moment of birth of the child's right to a name - a first guideline shows that it arises *through the birth of the child*, and in the other guideline it was noted that this right arises *immediately after registration of the birth of the child*. As there is a temporary gap between the birth of the child and the registration of the birth, the subject is not without controversy.

Our opinion is in the sense that the child's right to name arises with the birth of the child, because, by birth, the person manifests himself/herself in law as an individual *holding*

rights and obligations in legal relations and as a *subject* of legal relations, the person being *endowed* with rights and obligations. In fact, we can say that, by birth, the civil capacity of the child itself is established, and it is necessary to emphasize that the child who was born but whose birth was not registered in the vital records for various reasons also has civil capacity.

An additional proof that this conclusion is correct is the principle *infans conceptus pro nato habetur, quotiens de eius commodis agitur* (the conceived child is considered born whenever it is in his/her interests).

2 The child's right to a name provided by the Law no. 18/1990 for the ratification of the Convention on the Rights of the Child

The United Nations (UN) Convention on the Rights of the Child was adopted by the United Nations General Assembly on November 20th, 1989. Until then, children's rights were included in the broader human rights framework enshrined in the Universal Declaration of Human Rights.

The Convention on the Rights of the Child ratified by Romania by the Law no. 18/1990, republished, establishes by art. 7 para. 1 the following: "*the child is registered immediately after his/her birth and has, by birth, the right to a name*".

At the same time, the Convention stipulates that States Parties shall ensure that the application of the right of the child to the establishment and preservation of identity complies with their national laws and the obligations they have assumed under applicable international instruments, in particular in the event of non-compliance that would have the effect of declaring the child stateless. We thus assume that through international regulation an obligation of result is imposed on states.

Examining the provisions of the Convention, we note that by art. 8 states have an obligation to respect the child's right to preserve his or her identity, including citizenship, name and family relations, as recognized by law, without any unlawful interference, while emphasizing that if a child is illegally deprived of all or part of the constituent elements of his/her identity, States Parties shall ensure appropriate assistance and protection so that his/her identity can be restored as soon as possible.

Closely related to the ratification of the Convention, an important step taken by our country in this regard was the adoption of the Law no. 272/2004 on the protection and promotion of the rights of the child.

3 The child's right to a name provided by the Law no. 272/2004 on the protection and promotion of the rights of the child

The right to identity is a complex right, to the assurance of which contributes a set of legal institutions that regulate the quality of legal subject of the person, in close connection with his/her belonging to a certain state, as well as with the individualization of the person in society, by name, nationality, domicile, marital status, etc. [9].

The seat of the analysed law matter is represented by the provisions of art. 9 para. 2 of the Law no. 272/2004 which expressly states the right of the child to a name.

The beneficiaries of the child's right to a name are:

- children of Romanian citizens located on the territory of Romania;
- children of Romanian citizens abroad;
- stateless children on the territory of Romania;

- children who request or benefit from a form of protection under the conditions of the legal regulations regarding the status and regime of refugees in Romania; and,
- children of foreign citizens on the territory of Romania, in emergency situations found, under the conditions of the Law no. 272/2004, by the competent Romanian public authorities.

Respect and guarantee of the child's right to a name, as part of the child's right to establish and preserve his or her identity, shall be carried out in accordance with the following principles:

- respect and promotion with priority of the child's best interests;
- equal opportunities and non-discrimination;
- making parents responsible for exercising their rights and fulfilling their parental obligations;
- the primacy of parental responsibility for observing and guaranteeing the rights of the child;
- decentralization of child protection services, multisectoral intervention and partnership between public institutions and authorized private bodies;
- ensuring individualized and personalized care for each child;
- respect for the dignity of the child;
- listening to the child's opinion and considering it, while taking into account his or her age and degree of maturity;
- ensuring stability and continuity in the care, upbringing and education of the child, taking into account his or her ethnic, religious, cultural and linguistic background, in the event of a protection measure;
- speed in making any decision regarding the child;
- ensuring protection against abuse, neglect, exploitation and any form of violence against children; and,
- the interpretation of each legal norm regarding the rights of the child in correlation with all regulations in this matter.

The prohibition of any form of discrimination in the exercise of civil rights represents in the modern world, at least on a theoretical level, a self-evident, implicit principle.

The right of the child to a name is guaranteed to all children without any discrimination, irrespective of race, skin colour, sex, language, religion, political or other opinion, irrespective of nationality, ethnicity or social origin, material situation, degree and type of deficiencies, birth status or acquired status, difficulties in training and development or otherwise of the child, parents or other legal representatives or any other distinction.

The analysis of para. 2 of art. 9 of the Law no. 272/2004 shows that the rise of the child's right to a name takes place *with the registration of the child's birth*, the legislator also establishing that, naturally, the parents choose the child's surname and forename, under the law.

In the following, we will systematically present and analyse the legal provisions regarding the establishment of the child's name, retaining in this sense the provisions of art. 9 - 16 of the Law no. 272/2004.

The first situation is that *a child is found to be illegally deprived of the constitutive elements of his/her identity or of some of them*, meaning that public institutions and authorities are obliged to take all necessary steps as a matter of urgency to restore the identity of the child.

In order to achieve the child's right to the establishment and preservation of his/her identity, the health units that have in their structure new-born and/or paediatric departments have the obligation to hire a social worker or, as the case may be, to appoint a person with social assistance duties.

In order to *establish the identity of the child abandoned in health facilities or found* or of his/her parents, the competent police departments and public services for the registration of persons have the obligation to designate one or more responsible persons to carry out, quickly, the steps which are their responsibility, according to the law, for the registration of the child's birth and to transmit the identification data to the Directorate-General for social assistance and child protection or, as the case may be, to the Public Social Assistance Department.

The designated persons from these structures have the obligation to carry out the steps to establish the identity of the parents of the abandoned children in the health units, in the situation when they have been identified and have not drawn up the birth certificate.

The medical certificate confirming the birth, both for the child born alive and for the child born dead, is drawn up within 24 hours of birth. The responsibility for fulfilling the obligation to issue the medical certificate confirming the birth in time belongs to the physician who assisted or ascertained the birth and to the physician head of department.

When the birth took place outside the health units, the family physician with the office registered in the territorial area where the birth took place is obliged, at the request of any person, within 24 hours, to ascertain the birth of the child, after which to draw up and to issue the medical certificate confirming the birth of the child, even if the mother is not on the list of their office.

Where *the child is abandoned by the mother in the maternity department*, the medical unit has the obligation to notify by telephone and in writing the Directorate-General for Social Assistance and Child Protection and the police, within 24 hours of the mother's disappearance. Within 5 days from this notification, a report on the child's abandonment shall be drawn up, signed by the representative of the Directorate-General for Social Assistance and Child Protection, the representative of the police and the representative of the maternity; when the child's health condition allows the discharge, based on the records of proceedings, the Directorate-General for Social Assistance and Child Protection will establish the measure of emergency placement for the child.

Within 30 days of drawing up the report, the police are obliged to carry out specific checks on the mother's identity and to communicate the result of these checks to the Directorate-General for Social Assistance and Child Protection.

If the mother is identified, the Directorate-General for Social Assistance and Child Protection will provide her counselling and support in order to carry out the steps related to the delivery of the child's birth certificate.

If, following the checks carried out by the police, it is not possible to identify the mother, the Directorate-General for Social Assistance and Child Protection shall forward to the Public Social Assistance Department in whose administrative-territorial area the birth took place the file containing the medical certificate confirming the birth, the records of proceedings, the injunction of the emergency placement and the notice of response of the police with the result of the checks.

Within 5 days from the receipt of this documentation, the Public Social Assistance Department has the obligation to obtain the order to establish the surname and forename of

the child, in accordance with the provisions of the Law no. 119/1996 on vital records, republished, with subsequent amendments and completions, and to make the birth registration declaration to the competent civil registry department.

Within 24 hours from the registration of the child's birth, the Public Social Assistance Department has the obligation to send to the Directorate-General for Social Assistance and Child Protection the deed of registration of the child's birth.

In the case of *the child abandoned by the parents in other health units, whose birth has not been registered*, the obligation to carry out the steps provided by law for registering the birth of the child rests with the Public Social Assistance Department in whose administrative-territorial area the child was abandoned, in compliance with the procedure provided by law.

In the case of *the child found in the family or in a public place*, as well as of the one left by the parents in other health units, whose birth has not been registered, the obligation to carry out the steps provided by law for registering the child's birth rests with the Public Assistance Service Department in whose administrative-territorial area the child was found or left.

Laws stipulate that the forensic expertise required for the registration of the child's birth is free of charge.

The methodology for fulfilling the obligations of local public administration authorities, institutions and professionals involved in the prevention and intervention in cases of children at risk or abandoned in health facilities / departments / obstetrics-gynaecology and neonatology specialty departments / other health facilities that provide medical services for children are approved by Government decision, at the proposal of the Ministry of Labour, Family, Social Protection and the Elderly, in collaboration with the Ministry of Regional Development and Public Administration and the Ministry of Health.

Health facilities, social protection units, residential care services, entities without legal personality, other legal entities, as well as natural persons who admit or receive pregnant women or children who do not have documents on the basis of which they can be established identity are obliged to notify, within 24 hours, in writing, the local public administration authority in whose area they have their headquarters or, as the case may be, domicile, in order to establish their identity, as well as the Directorate-General for Social Assistance and Child Protection to which they belong, for the purpose of registration.

In the event that *a person takes a child to care for him or her or temporarily protect him/her*, until a protection measure is established under the law, the person has the obligation to support the child and, within 48 hours, to notify the public local administration authority in whose territorial area they have their headquarters or domicile, for the elaboration of the necessary formalities.

Therefore, given the above, we can conclude that the Law no. 272/2004 establishes a series of measures that must be taken so that the child's right to a name is fulfilled in any situation and thus is guaranteed.

4 The child's right to a name provided by the Civil Code

The name, as an attribute of identification of the natural person, is regulated by art. 82 - 85 of the Civil Code. The right of any person to the name established or acquired under the law is guaranteed by the provisions of art. 82 of the Civil Code [10].

According to art. 83 of the Civil Code, from a structural point of view, the name is made up of the surname and the forename(s) of the natural person. The same provision is found in art. 1 of the Government Ordinance no. 41/2003 on the acquisition and administrative change of the names of natural persons.

The *surname* is that component of the name that indicates the connection of the natural person with a certain family and therefore individualizes him/her first of all in the society, distinguishing him/her, as a rule, from the members of another family. The *forename* serves to individualize a natural person, especially in relationships with other members of the family to which he/she belongs, but also in relationships with other people who have the same surname [11].

The doctrine [12] noted that the name, as a non-patrimonial personal right, has the following legal characteristics:

- *legality* – the surname is recognized, as an aptitude, by law, and the conditions of acquisition, modification or change are established by law;
- *equality* – the legal regime of the natural person is the same, equal for all people, irrespective of race, nationality, ethnic origin, religion, sex or other such criteria;
- *inalienability* – the natural person cannot give up the surname and cannot alienate it;
- *intangibility* – no natural person may be deprived of the use or exercise of the right to a surname; any restrictions may intervene only in the cases and under the conditions provided by law;
- *universality* – all people have the right to a surname and the man is individualized by his/her name wherever he/she is, in space and time (according to art. 82 of the Civil Code – “Everyone has the right to a surname established or acquired, under the law”);
- *imprescriptibility* – as long as the surname is not used, the right to the surname is not extinguished by extinctive prescription; also, no matter how long one uses a surname, the mere fact of possession of that surname cannot lead to the acquisition of the surname; it follows that the surname cannot be acquired by usufruct (acquisitive prescription);
- *personality* – the right to a surname has a strictly personal character; it is not liable to exercise by representation; and,
- *obligation* – every person has not only the right but also the obligation to bear a surname.

The forename has the same legal characteristics as the last surname, but only when it is associated with the latter.

The Civil Code regulates in art. 449 the situation of the name of the child from the marriage, and art. 450 of the Civil Code regulates the situation of the name of the child out of wedlock. Art. 473 of the Civil Code regulates the situation of the name of the adopted child.

Regarding the name of the child from the marriage, the doctrine [13] noted that if the parents have a shared surname during the marriage, according to art. 449 para. 1 of the Civil Code, the child from the marriage will have the shared surname of his/her parents.

If the married parents do not have a shared surname, they may, by mutual agreement, establish for the child either the surname of one of them or their reunited surnames, a surname which shall be declared, at birth, to the Local Public Community Service of Personal Records, according to art. 449 para. 2 of the Civil Code.

In the event that the parents do not agree on the child's surname, the guardianship court decides upon. They shall immediately communicate the final decision to the civil registry

department where the birth was registered, in accordance with the provisions of art. 449 para. 3 of the Civil Code.

The evoked provisions regulate the surname of the child in the marriage. We reiterate that the surname of an individual includes the surname and forename. The forename is established, on the date of birth registration, on the basis of the birth declaration with the consent of the parents, and in case there are misunderstandings between them, the guardianship court will decide upon.

The cancelation or dissolution of the parents' marriage has no effect on the child's surname or forename.

Regarding the name of the child out of wedlock, the doctrine [14] held that based on art. 450 para. 1 of the Civil Code, the child takes the surname of the one of the parents to whom the filiation was first established.

By parentage (filiation) is meant the relationship of lineage between a child and each of his/her parents. Parentage is of two kinds: towards the mother (motherhood) and towards the father (fatherhood). This is natural parentage. Filiation can also be established by adoption, when it is called civil parentage.

Therefore, if the child's parentage has not been established (for example in the case of a child found or abandoned), his/her surname and forename are established by order of the mayor of the township, town, city, or district of the city of Bucharest in whose territorial area the child was found.

If the parentage was subsequently established with respect to the other parent, the child may take the surname of the latter or the reunited surnames of the parents, in both cases, with the consent of the parents. The new surname of the child is declared by both parents, together, at the civil registry department where the birth was registered. However, if the parents do not agree on the surname, the guardianship court will decide upon, which will immediately communicate the final decision to the Local Public Community Service of Personal Records where the birth was registered, in accordance with the provisions of art. 450 para. 2, thesis II, of the Civil Code.

If the child has been established parentage with both parents at the same time, the child will take the surname of one of the parents or their reunited surnames. In the absence of parental consent, the guardianship court will decide upon.

The action for approving the bearing of the surname is a personal action - non-patrimonial, being, for this reason, imprescriptible [15].

The child shall retain the surname established according to the above distinctions, as long as his/her marital status remains the same or as long as he/she does not request the administrative change of the surname [16].

The *administrative change of the name* is possible. By change of the surname or forename is meant the replacement, upon request, of the surname/forename with another surname/forename by administrative decision.

The change of the minor child's surname can be applied for at the same time with the change of the parents' surname or separately, for good reasons.

The change of the minor child's forename can be applied for at any time.

The procedure for the change of the name is initiated by an application filed for this purpose. For the minor child, the application is filed by the parents or, failing that, by the guardian, with the consent of the guardianship court.

In accordance with art. 4 para. 2 of the Government Ordinance no. 41/2003 on the acquisition and administrative change of the names of natural persons, are considered as well-founded the application for name change in the following cases:

- when the name consists of indecent, ridiculous expressions or transformed by translation or otherwise;
- where the concerned person has used, in the exercise of his/her profession, the name which he/she wishes to obtain, proving that it is known and that he/she is known in society under that name;
- when, due to the inattention of the civil registry officers or due to the ignorance of the relevant legal regulations, incorrect entries were made in the civil registers or civil records certificates with erroneous names were issued, based on which other deeds were issued;
- when the concerned person has a surname or forename consisting of several words, usually reunited, and wishes to change it;
- when the concerned person bears a surname of foreign origin and requests to bear a Romanian name;
- when the person has changed his/her name of foreign origin into a Romanian name, administratively, and wants to resume the name acquired at birth;
- when the parents have changed their surname administratively and the children ask to have a surname shared with that of their parents;
- where the concerned person requests to bear a surname shared with the other members of the family, a surname which has been acquired as a result of adoption, the preservation of the surname acquired upon marriage, the establishment of parentage or changes of surname previously approved by administrative means;
- when the spouses have agreed on the occasion of the conclusion of the marriage to bear the reunited surnames and both request its change by administrative means, opting for the surname acquired at birth by one of them or for each to resume the name they had before the marriage;
- where the concerned person proves that he/she was recognized by the parent after the birth registration, but, as he/she has not applied to the court for approval on bearing his/her surname during his/her lifetime, there is no other possibility of obtaining the parent's surname than by administrative means;
- when the forename is specific to the opposite sex;
- when the person has been approved to change the sex by a final and irrevocable court decision and requests to bear an appropriate forename, presenting a forensic certificate confirming his/her sex; and,
- other such duly justified cases.

In accordance with the provisions of para. 3 of the same article, applications to change the name shall also be considered justified in the following cases:

- when the concerned person has adopted minor children and wishes them to have other forenames;
- when the marriage has been terminated by the death or judicial declaration of the death of one of the spouses, and the surviving spouse requests to resume the surname borne before the marriage, or to the surname acquired at birth;
- when, following a divorce, a former spouse resumes the surname previously borne and which comes from another marriage, also dissolved by divorce, and wishes to bear the surname acquired at birth;

- when, following the termination of the marriage by the death or judicial declaration of the death of one of the spouses, the other spouse remarries and, as a result of the dissolution of that marriage, he/she wishes to bear the surname acquired at birth;
- when the former spouse wishes to bear the surname he/she had during marriage, in order to have a surname shared with the children entrusted for upbringing and education, with the consent of the former spouse, given in authentic form;
- when the parents have divorced and the children entrusted for upbringing and education to one of the parents, who resumed the surname borne before the marriage, ask to bear his/her surname;
- when the adoption of a married person who has minor children has taken place and after the adoption, the concerned person resumes the surname borne before the adoption; and,
- when one of the spouses, upon the conclusion of the marriage, took the surname of the other spouse, a surname which he/she acquired by adoption, and after the conclusion of the marriage the adoption dissolution takes place.

In view of the above, we are entitled to conclude that the provisions of the Civil Code represent the seat of the common law matter regarding the child's right to a name, as an exponent of the child's best interest.

5 Conclusions

In order to identify the natural person, certain means and attributes are necessary. In private law, the main means of identification of the natural person are: name, domicile and marital status. The name allows the recognition of the natural person and his/her designation, the domicile indicates the place where he/she can be found, and the marital status establishes the legal identity of the respective natural person.

The means of identification of the child are non-patrimonial rights and present their specific characteristics: they are opposable *erga omnes*, inalienable, imperceptible, imprescriptible, they belong to any natural person, they are not susceptible to exercise by representation [17].

The name, as an attribute of identification of the natural person, is regulated by art. 82-85 of the Civil Code. The right of any person to the name established or acquired under the law is guaranteed by art. 82 of the Civil Code. The Law no. 272/2004 establishes a series of measures that must be taken so that the child's right to a name is achieved and thus is guaranteed.

In terms of protection of this fundamental right of the child, we note that this activity is carried out, first of all, by the child's family, or, as the case may be, by the extended or substitute family, the child's legal representative or the institutions with duties in this field.

Closely related to the child's right to a name, which achieves his/her identity, is recognized on the one hand, the child's right to know his/her parents and to be cared for, raised and educated by them, and on the other hand, the child's right to preserve family relationships, to know their relatives and to hold personal relationships with them.

Closely related to the person of the bearer, we can strongly state that the child's right to name voices the child's right to his/her personality and individuality being respected.

A true guide in the legal characterization of the child's right to a name, this article presents a detailed examination of this institution, deepening knowledge in this segment.

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Section C

ASSESSMENT OF THE LEASE AGREEMENTS' ENFORCEABILITY DEPENDING ON THE FORM OF LEGAL INSURANCE FOR THE FAMILY'S HOUSE

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Abstract

*Changes brought to the Civil Code through provisions of art. 1798 is therefore establishing **the enforceable feature of lease agreements** even when they are concluded under private signature under sine qua non condition to be registered with fiscal authorities, consecrating their status exclusively as enforceable title for **rent payment** on terms, in the amount and way of payment established in the agreement, the lawmaker showing (!) that the same status is also applied to lease agreements concluded in authentic form which also represent enforceable titles for rent payment.*

Therefore, lease agreements' enforceability envisaged by these provisions are applied to: (i) exclusively for the rent, (ii) it regards both authentic agreements and those concluded under private signature, noting that although theoretically enforceability can derive from the authentic title, this fact however does not offer de plano enforceability because the general norm establishes enforceability only to the document authenticated by the public notary that recognizes a firm, liquid and due debt. Consequently, the essence of enforceability will be extracted not only from the conclusion form of the document but also from the authentic document wording – so that the lease to constitute enforceable title at least in theory and also with regards to other contractual obligations envisaged by this feature.

Keywords: lease agreement, rent, enforceable title, debt, family house

LITERAL GENESIS

We notice that from historical point of view, apparition and use of the lease agreement is highly connected to the **contract's development** but also to **social relations and migration**, this contract being used for *temporary transmission and use of some goods*, required both for domestic use (house), or development of professional activities, having both same age and almost same frequency with first contracts used by mankind, namely the exchange contract and sale agreement.

In Roman law, lease agreement has been known as *locatio-conductio-rei* – goods rental, *operarum* - services agreement (provision of services), *operis faciendi* - employment rental agreement for determined works[1]ⁱ.

In antiquity, Roman law adjusted to private social-economical frame is recognised on our country's present territory, then in middle Ages on the land of Romanian lands to notice own approaches and terms used for lease operation: "*najmeala*" [2]ⁱ or "*possession*" [3]ⁱⁱ. So, Calimachi Code (1817) is for the first time regulating the institution of lease, ruling the "possession giving and taking", then immediately after through Caragea Code (1818) to update the approach, the law maker approaching the lease within the chapter called "About rental or lease". Not long after, the lawmaker of the first Romanian Civil Code in 1864 will structure the institution, coming back to the roman notion of the lease agreement and by

time the institution bears several visions and changes (*from recognition exclusively of goods rental to a new lease trichotomy: lease and houses rental*) in order to mirror evolutions and development of social-human and economical relations from the Romanian society.

In either of these rulings the lease agreement's enforceability problem has not been put, neither its enforceability and its limits except for the matter designated for the enforcement of executory titles (debts' execution, debtor's removal etc) which is applicable to all contracts with this feature. Till now....

THE SOURCE OF ENFORCEABILITY

As we have previously stated, in case of rent payment contractual obligation infringement, the lessor had at his/her disposal, among others, the possibility to request mainly in kind execution of contractual obligation of rent payment[4]ⁱ, but in order to facilitate the rights' re-balance for the good faith lessor, the new Civil Code will make available to this one a special procedure through which the lessor's due diligence for covering contractual damage is easier (for recovering the rent fee), at the same time removing formulars costs, filing and supporting the claim of the lessor against tenant, exempting the lessor for trial costs but also sparing his time, stress and other wasted resources – the lawmaker offering a simple route by direct approach of the executor in order to enforce the rent payment – provided that the lease agreement is concluded in certain legal forms as its sole condition, about which we are going to discuss herewith.

Changes brought to the Civil Code under provisions of art. 1798 are therefore proving the **enforceability of the lease agreements** even when they are concluded as a document under private signature under *sine qua non* condition to be registered with fiscal authorities, making their executory title as regards terms, quantity and ways established in the agreement exclusively for **rent payment**, the law maker showing (!) that this statute is applied also to those lease agreements concluded in authentic form that also are executory titles for the rent payment[5].

FIRST CONCLUSION

Thus, we must show from the beginning that lease agreements enforceability envisaged by these norms is applied (i) exclusively to the rent, (ii) regards both contracts concluded in authentic form and those documents under private signature.

If authentic contracts are governed by Public notaries law and for notaries activity no. 36/1995 in respect of issuance conditions, lease agreements concluded as documents under private signature show the fact that their enforceability is obtained by registration with central fiscal authority under the National Agency for Fiscal Administration from the place where lessor is registered as tax payer or where it has fiscal domicile, respectively where the property is located – in case of non-resident persons- the proof for this legal condition of enforceability, respectively registration, being given by the copy after the application form including the number and date of the registration to fiscal body or copy after the application form accompanied by electronic confirmation message in case it is electronically submitted.

Without defining the task (publicity-oposability, advertising-establishment, statistic evidence, contributors' evidence etc), the law maker established the obligation of the competent fiscal central body to "organize" the evidence of lease agreements by their registration with the lease agreements Register, within 5 days since the request application [6]ⁱ.

However, we have to keep in mind that provisions of art.4 par.3 from Law no. 297/2018[7] ⁱ according to which “*Documents under private signature that, according to the law, are validly concluded and are executory, can be enforced only if they are registered in the Register.*” are not applied to authentic lease agreements, opinion that finds also jurisprudential basis- courts noting that in cases having as their object the approval of forced execution “*authentic document is not subject to real estate advertising formalities imposed by art.4 par.3 from law no. 297/2018*”, because such a publicity is not required if, according to art.101 par.1 from the Notaries Law and their notarial activity no. 36/1995

“*Authentic notarial document is full proof, in front of any person, until this is declared as a false, in respect to those found in person by that one who authenticated the document, according to the law.*” [8] ⁱ

As regards lease agreements concluded before the 1st of October 2011, noting that the procedural law is of immediate application, courts have established that, in lack of contrary transitory provisions, based upon art. 725 Civil procedural Code, lease agreements concluded under the two forms stated by law before the new Civil Code apparition “*represent executory title, based on which creditor has the possibility to direct execute, without any other formality*” [9].

QUESTION ?

This first conclusion rises a question whose importance is not insignificant at all. Was it necessary the regulation in this article that consecrates the enforceability of lease agreements concluded as document under private signature and enforceability of the lease agreements concluded in authentic form?

Genesis of the question comes from regulation of art. 101 from the Law no. 36/1995 of Public notaries and notaries’ activity according to which: “(1) *The document authenticated by the public notary that ascertains a definite and liquid debt has the power of an executorial title on its due date. If the original document is missing its duplicate can be the executory title or its legalized copy after the copy from the notary’s archive.*” – wording that existed before the changes to the Civil Code on this subject.

Are we assisting to an error of judicial logic because apparently the lease concluded through authentic agreement is *ope legis* executory or are we assisting to an apparent consolidation through repeatability of this executory force that certifies enforceability exclusively on the aspect of execution of rent payment obligation following that the other obligations (handing over the property, evacuation etc) to be referred to common law, the interested party having the right to ask the court mainly the forced execution in kind for the contractual obligation of rent payment.

In order to clarify things, we support this concern with the norms of common law itself that state through art. 632 of the Civil Code par.1 “*Forced execution can be applied only based upon an executory title*”, art 638 Civil Procedure Code regarding other executory titles, transposing special provisions of art. 101 from law no. 36/1995 into the general norm show that “(1) *There are also **executory titles** and can be executed: 2. **Authentic documents**, when stated by law;*”

The legal blur that took to the question if notary authentic document is executory is eloquent, as provisions of art. 101 from the Law no. 36/1995 of the public notaries and notarial activities regarding any of the contractual obligations state or if through changes brought by art. 1798 Civil Code (special norm for forced execution versus Law no. 36/1995 special norm exclusively regarding notary procedures and activity) clarification of such a

concern has been followed limiting the executory force of notary authentic document exclusively when the rent payment obligation for lease agreements is enforced?

In order to have a legal grounded answer, we must appeal to provisions of art. 639 Civil Procedure Code par.1 regarding authentic documents according to which “*The document authenticated by public notary that ascertains a firm, liquid and due debt is an executory title. If the original is missing, executory title can be its duplicate or legalized copy after the copy from the notary’s archive.*”

THE SECOND CONCLUSION

We notice that, the authentic document feature does not offer *de plano* enforceability because the general norm gives enforceability only to the authenticated document by the public notary that ascertains a firm, liquid and due debt- special norm on the aspect of forced execution versus Law no. 36/1996 of Public notaries and notarial activity that is first applied!

Enforceability derives from the authentic title, but the born debt as we could see, must be **firm, liquid and due**, therefore, the essence of enforceability will be extracted not only from the document form but also from the authentic document wording – so that the lease agreement can be at least in theory executory title for a certain obligation. We shall revert to this one.

Coming back to almost decennial art. 1798 Civil Code, the law maker wished to offer *de plano, ope legis* enforceability to the lease agreement concluded in authentic form exclusively for the obligation of *rent payment* (art. 1798), as well as to lease agreement concluded under private signature.

From here we draw two other partial conclusions: on one hand **the limit of lease enforceability consists of rent** – that represents the size of executory title that can be *ope legis* enforced - because *ubi lex non distinguit, nec nos distinguere debemus*. If the rent represents the limit of enforceability for the assumed obligations through the lease agreement, the subsequent conclusion would be that **accessories of this obligation as well as related sanctions for breaking the contract**: interests and penalties for the rent, *returning the leased properties*, evacuation of tenant as well as any other assumed contractual obligations through authentic notary document - **are enforceable exclusively on the field of the new Civil Procedure Code** having a judicial feature, being required a Court decision or on the field of some special norms stated by Civil Code (art. 1809 NCC regarding executory character of the lease on determined period as concerns handing over of the goods obligation; art. 1816 NCC, regarding the executory character of the lease for undetermined period regarding the returning of the goods in certain conditions, as well as art. 1831-1832 NCC from the lease of houses field) exceed such a provision disposed by art. 1798 Civil Code.

We must keep in mind that this benefit of the enforceability of the rent based upon provisions of art. 1798 Civil Code can cease if the landlord is asking for the cancellation of the agreement because of non-payment of rent, based or not upon a previously agreed commissoria lex, assumption in which the payment for use shall be based upon exclusively on tort law, given the fact that the lease agreement has been cancelled, following to benefit of recognition and enforcement of the claimed right exclusively on common law of a court decision basis for the enforcement, which will assume a previous checking in order to catch the enforceability of the invoked obligation.

Therefore, even though the document is concluded in the two legal forms stated by the law besides which in force procedures have been applied, and the landlord claims are resulting from the non-payment of the rent, they are losing this feature in the assumption that the lease agreement is cancelled for the obligations born after the cancellation has been activated/announced.

COMING BACK

Are the above shown contractual obligations (accessories to rent payment obligation, obligation to return the leased goods etc) if they note a *firm, liquid and due debt* and they are included *in an authenticated notarial document* representing an executory title (according to art. 662 Civil Procedure Code) direct subject to forced execution by the judicial executor[10]?

QUESTION?

In other words, is the lease agreement concluded in authentic form finding a **firm, liquid and due debt** – so that it can become (on common law and not on special norms of art. 1798 Civil Code) executory title as per art. 663 Civil Procedure Code according to which “*Forced execution cannot be done but only if the debt is firm, liquid and due*”?

We are partially finding out the answer within the provisions of art.663 Civil Procedure Code that state in par.2 that “*The debt is **firm** when its undoubtful existence results from the executory title itself*”, and the most jurisprudence retained that the verification of civil contractual liability conditions are fulfilled is necessary: “Even the legal document is authenticated by the public notary, this aspect itself is not of nature to take the limitation of power of executory title above all situations that can derive from non-fulfilment of such a legal document....for the assumption of non- fulfilment n.n. the creditor has available a common law action” [11]ⁱ

Conditions are cumulative, and simple debunk of the first one determine us to reflect over **the second partial conclusion: 1.** We are noting that the authentic document feature does not offer de plano enforceability; **2-** enforceability has the source in the title of authentic document of the contract but the born debt must be **firm, liquid and due** – **wording of contractual clauses becoming essential when the law does not offer de plano enforceability** as it happens for *the rent payment* in the famous art. 1798 Civil Code.

WHAT WAYS SHOULD BE FOLLOWED IN ORDER TO ENTER AGAIN IN POSSESSION ?

We do not have simple derogatory procedures of forced execution neither for the landlord to re-enter into possession over the rented property because the execution court **has legal background in order to reject the request** for admission of forced execution **with the motivation that there is not a firm debt** for the handing over obligation because invoking an executory title – in the present case, the notarial authenticated document represents only a **necessary condition**, without being also sufficient for the ignition of forced execution procedure, because also in this case *the forced execution cannot be done but only when the debt is firm, liquid and due*.

Vision becomes very difficult when the rented house represents family's house, respectively joint home of spouses, real protected regime but only under condition of writing down in the Land Book of this regime. In this case, according to art.322 Civil Code, „without written consent of the other spouse, none of spouses, even though he/she is

exclusive landlord, cannot dispose over the rights over the family's house and neither can be concluded documents through which its use would be affected".

Neither recognised sanction given by the lawmaker for the cancellation of the lease agreement at the request of the non-consenting spouse on the conclusion of the document has the nature to ground the meeting of the three constitutive elements that are the basis for the executory character of the handing over of the rented goods obligation.

CONCLUSIONS

The New Civil Code is regulating the executory title of the lease agreement character, in express conditions and limitations stated by the law that cannot be extended in non regulated hypothesis of contractual infringement in the matter of lease agreement because avoidance of a trial for hypothesis when the landlord does not take advantage of such a title, it seems, is not envisaged by the lawmaker who claims as necessary the correlation of provisions of the new Civil Code with those of the new Civil Procedure Code in respect of evacuation, although the utility to avoid a trial in such assumptions as previously described is more than visible.

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FAMILY PROHIBITIONS IN THE FIELD OF COMPANY ADMINISTRATION REGULATED BY LAW NO. 31/1990 AND THE CIVIL CODE

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Abstract

The administrator, in general, has full decision-making power for all management operations. However, certain legal acts of disposition, of a special importance for the patrimony of the company in which the administrator or his family members may be involved, can be concluded only with the approval of the general assembly of the associates. At the same time, whenever there is a conflict of interest between the administrator and the company, the administrator must act only in its favor and not in its own interest or in the interest of a family member. Law no. 31/190 establishes two interdictions, which we called family, in the context in which in a certain operation, the administrator would have interests contrary to the company, being involved his husband, a relative or a relative up to to grade IV inclusive. The two prohibitions are also regulated in the Civil Code under the generic title "contradictions of interests".

Keywords: administrator, management, relative or brother-in-law up to and including grade IV.

1. Introductory considerations

The administration of the company presupposes first of all the fulfillment of some internal management operations, acts imposed by the normal development of the company's activity and by the purpose for which the company was established. In this sense, art. 70 paragraph 1 generically provides, for all types of companies, "administrators may perform all operations required to carry out the object of activity of the company, except for the restrictions set out in the articles of association.

The legal provision is resumed with strict reference to the collective management bodies of the joint stock company. Thus, in the unitary management system of the joint stock company, the board of directors is responsible for the internal management of the company. According to art. 142 para. 1 "The Board of Directors is in charge of fulfilling all the necessary and useful acts for the realization of the object of activity of the company, except for those reserved by law for the general meeting of shareholders". Therefore, the internal management attribution is a collective one, it belongs to the whole council as a body. In its turn, the board of directors, in exercising the management power of the company, must respect the competences expressly recognized by law to the general meeting. In the dualistic system of administration of the joint stock company, the attribution of internal management of the company belongs to the directorate, as a collective body. Thus, according to art. 153 ¹ (1) the directorate "fulfills the necessary and useful acts for the accomplishment of the object of activity of the company, except for those reserved by law in charge of the supervisory board and of the general meeting of shareholders".

From the above, it results that the administrator / member of the management has full decision-making power for all management operations, except for the acts assigned by law to other bodies of the company and those prohibited by the articles of association. However, certain legal acts of disposition, of a special importance for the patrimony of the company in which the administrator or his family members may be involved, can be concluded only with the approval of the general assembly of the associates.

At the same time, in the management activity of the company, the administrator must pursue the social interest, refraining from certain acts or operations contrary to this interest, in which he or the family members are directly involved. Thus, whenever there is a conflict of interest between the administrator and the company, the administrator must act only in its favor and not in its own interest or in the interest of a family member.

Law no. 31/190 establishes two "family" prohibitions in the context in which in a certain operation, the administrator would have interests contrary to the company, being involved his husband, a relative or a relative up to and including degree IV, outlining the generic obligation of loyalty to society. The two prohibitions are also regulated in the Civil Code under the generic title "contradictions of interests".

2. Family ban limited to the conclusion of certain legal acts

In joint stock companies, according to art. 150 of the law no. 31/1990, paragraphs 1 and 2 „unless otherwise provided by the articles of association, ... under the sanction of nullity, the administrator will be able in his own name, to alienate, respectively to acquire, goods to or from the company, having a value of more than 10% of the value of the company's net assets only after obtaining the approval of the extraordinary general meeting of shareholders. The provisions of par. (1) shall also apply to rental or leasing operations ". The text applies accordingly to the members of the board of directors, respectively to the members of the supervisory board in the dualist management system, as it results from art. 153² alin. 6 / art. 153⁸ alin. 3 referred to in art. 150. Also, the interdiction also concerns the directors from the unitary management system (art. 152 related to art. 150), under the conditions of delegating the management of the joint stock company to one or more directors.

When observing the same formalities and under the same sanction, the persons "close" to the administrator (his spouse, a relative or a relative up to and including degree IV) are bound, in case they alienate or acquire goods from or to the company. The same penalties are subject to documents concluded by the company in question with a civil or commercial company in which one of the aforementioned persons is a director or director or holds, alone or together, a share of at least 20% of the value of the subscribed capital. Except where one of those companies is a subsidiary of the other. Thus, according to art. 150 paragraph 4 "the provisions of this article are also applicable to operations in which one of the parties is the husband of the administrator or a relative or brother-in-law, up to and including the fourth degree; also, if the operation is concluded with a civil or commercial company in which one of the aforementioned persons is an administrator or director or holds, alone or together, a share of at least 20% of the value of the subscribed share capital, unless one of the respective companies is the subsidiary of the other. "

As it results from the analyzed text, for transactions of a higher value, the administrator / director / member of the board of directors or the supervisory board needs the endorsement of extraordinary general meetings of shareholders. Thus, for the conclusion of legal acts

regarding the transfer of ownership of goods, including renting or leasing between the administrator, the administrator's spouse or a relative or relative, up to and including the fourth degree, his and the company, if the goods in question have a value greater than 10% of the value of the company's net assets, the prior approval of the extraordinary general meeting is required. The 10% percentage is calculated by reporting the financial statement approved for the financial year preceding the one in which the operation takes place, or as the case may be, at the value of the subscribed share capital, but only if the financial statement has not been presented and approved. provide ar. 150 para.3.

The approval must be prior and come from the extraordinary general meeting, under the conditions of quorum and majority imposed by the law of companies for this meeting (respectively those provided by art. 115 of the law). Such an act, concluded by the administrator in the absence of approval, is expressly sanctioned by the legal text mentioned with nullity.

The law establishes as a sanction the lack of approval of the extraordinary general assembly, the nullity of the act thus concluded, without distinguishing, however, whether it is about absolute nullity or relative nullity. And if these acts or operations would result in damage to the company, they are to be covered by the administrators concerned, under tortious civil liability.

It was stated¹ that the incidental sanction in the absence of approval is absolute nullity, given the imperative nature of the legal provision. We appreciate that, only in appearance, the provisions of art. 150 are mandatory, public order. We consider, first of all, the purpose of the regulation, to protect the shareholders from the consequences of possible decisions with a major impact on the company's patrimony that could be taken by the directors, without consulting the shareholders. And secondly, the fact that the beneficiary of a measure established by law exclusively in his favor can waive such a favor, the shareholders being able to derogate from the legal provisions mentioned by a clause in the constitutive act. Therefore, as provided by the text of the law itself ("unless otherwise provided by the articles of association), the articles of association may derogate from the obligation of approval.

Although we have reservations about such an imperative nature of the regulation, however, in relation to the wording of the text "under the sanction of nullity", and the public interest of any protected society, we believe that the legislator had in view the sanction of absolute nullity. In our opinion, the act being null and void, it is considered that it was never concluded and, consequently, the liability for damages cannot be contractual, but only tort.

However, the doctrine² pointed out that such a sanction can be covered, by the decision of the general meeting of shareholders, taken on the basis of a report of the auditors which explains the reasons for which the approval was not previously obtained. In other words, there is a subsequent ratification of the operation by the meeting, and therefore it would be unfair for the act to be considered invalid as long as the shareholders agree to ratify it. If, however, such an operation carried out without the endorsement of general meetings has led

¹ C. Micu – Organizing the administration of joint stock companies. The unitary system, in the R.R.D.A. no. 2/2007, p.69..

² S. D. Cărpănu, S. David, C. Predoiu, Gh. Piperea – *op. cit.*, p.464; M.G. Sabău –The obligation to approve the general meetings of the shareholders in the matter of renting some assets of the company, in the Commercial Law no. 1/2004, p.70.

to the misappropriation of the company's assets, even the criminal liability of the administrator may be involved.

With general applicability for any legal person, the family interdiction finds its regulation in the principle provision of art. 215 para. Of the Civil Code, as an aspect of the contradiction of interests. However, compared to the regulation of Law no. 31/1990, the Civil Code also establishes the express sanction of the relative nullity of the acts concluded in violation of the interdiction: "The legal act concluded in fraud of the interests of the legal person by a member of then, the husband, his ascendants or descendants, the collateral relatives or his relatives, up to and including the fourth degree, had any interest in concluding that act and whether the other party knew or should have known this".

2. Family ban limited to business opportunity

Another case in which the prohibition finds its applicability, is limited to the business opportunity, in other words, the directors must not use the business opportunities of the company in personal interest, otherwise, being liable for the damages caused to it. Thus, according to art. 144³ paragraphs 1 and 2 "the director who has in a certain operation, directly or indirectly, interests contrary to the interests of the company must notify the other directors, censors or internal auditors about this and not take part in any deliberation regarding this operation. The administrator has the same obligation if, in a certain operation, he knows that his spouse, relatives or relatives-in-law up to and including the fourth degree are interested". The administrator who violates the mentioned provisions, pursuant to art. 144³ paragraph 4 "is liable for damages resulting from the company".

The same obligation and responsibility remains with regard to the members of the board of directors and the supervisory board of the dual system, as well as the directors of the unitary management system of the joint stock company, which is why in the following we consider the broad meaning of the notion of director.

The loyalty obligation is imposed not only when there is a direct contrary interest of the administrator in the operation that would be concluded by the company, but also when those interested are his spouse, relative or brother-in-law up to and including the fourth degree. Although the law does not provide, there must be an interest in these persons contrary to the interest of the company, of which the administrator was aware. Therefore, for the application of art. 144³ of the law and the liability of the administrator for the violation of the obligation of loyalty, it is necessary that the interest of the administrator or of his relatives be contrary to the interest of the company; in the absence of any conflict of interest, the text shall not apply.

However, the law neither defines nor exemplifies what is meant by the expression "contrary interest", so that the existence and extent of possible contrary interests must be established in each concrete case. In general, operations and contracts with the company are considered, in which the administrators, the spouse, the relatives, the relatives up to the fourth degree or another company controlled by them have opposite interests. For example, it is forbidden for the administrator under the sanction of assuming the patrimonial responsibility towards the company, the use of the company's credit in his interest, for granting loans, granting financial advantages, on the occasion of or after the conclusion of the company with him of delivery of goods, services. services or execution of works; guaranteeing any loans granted to the administrator; guaranteeing the execution by the administrator of any personal obligation towards third parties (art. 144⁴ paragraph 1 of Law

no. 31/1990). Also, lending operations in favor of the spouse, relatives or relatives-in-law up to and including grade IV of the administrator or in favor of a commercial or civil company in which they have interests are prohibited (art. 144⁴ para. 2). Exceptionally, lending operations are admitted in favor of the administrator, the spouse, relatives and relatives up to the fourth degree or in favor of a commercial or civil company in which they have interests in the case of operations whose cumulative due value is less than the equivalent in lei of the amount of 5,000 Euro and if the operation is concluded by the company in the conditions of the current exercise of its activity and the clauses of the operation are not more favorable to the previously mentioned persons, than those that the company usually practices in relation to third parties.

In these cases, the prohibition presupposes that the administrator notifies the other directors, censors or internal auditors of this conflict of interest, and refrains from any deliberation regarding the operation in question. It is forbidden not only the exercise of the administrator's voting right, but also his / her own participation in the deliberations, because otherwise, he / she could influence in his / her favor or that of the relatives, the solution to be adopted.

As an exception, an administrator may participate in the deliberation regarding certain operations in which he personally, the spouse, relatives or relatives up to and including grade IV have contrary interests, without being held liable for non-compliance with the obligation of loyalty. Two situations are considered by law, provided that the provisions of the articles of association do not provide otherwise, namely, the situation in which the object of the vote is the offer for subscription to the administrator or the other persons mentioned, of shares or obligations of the company; and the situation of granting by the administrator or of mentioned persons a loan or the establishment of a guarantee in favor of the company (art. 144³ par. 3)³. The regulated operations do not fall within the hypothesis of the conflict of interests between the company and the administrator, but on the contrary, the company is favored by subscribing shares and bonds or by granting / guaranteeing by the administrator some loans to the company.

The family interdiction regarding the participation in the deliberation of the administrator does not apply when the object of the vote is unconventional acts (decisions of the board of directors fixing the president's remuneration or approving a merger project, etc.) and not operations and conventions. generating a contradiction of interests.

According to art. 144³(4), the director who does not inform the other directors and intervenes in the deliberation regarding operations in which he or those close to him have a contrary interest, "is responsible for the damages that resulted for the company", as a result of his intervention. In this case, the legislator expressly provided as a sanction for violating the legal provision, the commitment of the personal liability of the administrator towards the company.

Thus, the sanction of non-compliance with the family interdiction inscribed in art. 144³ is not the absolute nullity of the concluded act or the nullity of the decision of the board of

³ According to art. 144³ (3), „the interdictions established in par. 1 and 2, regarding the participation, deliberation and voting of the administrators, are not applicable if the object of the vote is: a) offering for subscription to the administrator or the other mentioned persons, shares or obligations of the company; b) the granting by the administrator or of the mentioned persons of a loan or the establishment of a guarantee in favor of the company”.

directors adopted by the participation of the administrator, but the personal responsibility of the administrator towards the company. The solution is justified on two grounds. In principle, the provisions of art. 144³ (4) of the law expressly stipulates that the sanction for not abstaining from voting of the administrator in relation to an operation, in contradiction of interests with the company, is the responsibility for the damages caused to the company, and not the annulment of the decision adopted in these conditions. At the same time, as decided in practice⁴, the law restricts the possibility of contesting the decisions of the general assembly or of the collective management bodies on grounds of legality, not of opportunity, and the phrase "interests contrary to the interests of society" referred to in the analyzed text, without concretizing in any way, is circumscribed sphere of opportunity, limited to an important business decision. Therefore, the patrimonial liability of the administrator for the damages caused to the company in the context of the conflict of interests, excludes the nullity of the adopted decision.

As a cause of exoneration from liability, if the administrator proves that regardless of his intervention the vote would have been the same, such liability can no longer subsist. Also, in order to engage the responsibility of the administrator in the hypothesis regulated by art. 144³ (2), for the participation in deliberations regarding operations in which persons close to him are interested, it is necessary to prove the knowledge by the administrator of the contrary interest of these persons. Otherwise, as the director is in good faith, he cannot be held liable for any damages caused to the company.

In the case of a breach of a legal obligation, the administrator is liable to the company for the damages caused. The action in tortious civil liability (the action in damages) is promoted by the general assembly or by the minority shareholders, under the conditions of art. 155 and art. 155¹ of the law. At the same time, his revocation from office may be ordered as a sanction.

The family interdiction is regulated as an aspect of the contradiction of interests by art. 210 (2) C.civ. „When the person who is part of the administrative bodies of the legal person or one of the persons provided in par. (1) - the spouse, his ascendants or descendants, his collateral relatives or his relatives, up to and including the fourth degree, have an interest in a matter subject to the decision of these bodies, must notify the legal person and not take part in any deliberation on this. Otherwise, he shall be liable for damages caused to the legal person if the required majority could not have been obtained without his vote. "

At the same time, the administrator can also be criminally liable for the crime provided by art. 275 para. 1 of the law if it violates, through interposed persons or by simulated acts, the provisions of art. 144³.⁵

⁴ Dec. no. 2283/12 June 2007, of I.C.C.J., sec. com., in B.C. no. 1/2008, pp. 28-29. In this case, the court held that "the majority shareholder of SC T SA Timisoara had to abstain from voting on the transfer of its own debt, being also the debtor of the defendant, does not entail the annulment of the general meeting but the sanction of civil liability for damages to society." In the sense that the sanction of liability does not exclude the possibility of obtaining the annulment of the decision that is contrary to the interests of the company, see Dec. 4619/29 November 2003 of the Î.C.C.J., sec. com., in R.D.C. no. 4/2005, p. 164 and Dec. no. 1134 / 14 March 2007 of Î.C.C.J., com. section in B.J. 2007, op. cit., pp. 463-465..

⁵ „The administrator is punished with imprisonment from one month to one year or with a fine who: 1. violates, even through interposed persons or by simulated acts, the provisions of art. 144³".

4. Conclusions

We appreciate that the two family interdictions are circumscribed and outline the obligation of loyalty of the administrator. In the Romanian doctrine, loyalty was defined as "the duty of the administrator to exercise his duties exclusively in the interest of the company he manages". Thus, according to the obligation of loyalty, whenever there is a conflict of interest between the administrator and the company (similar to the provision of art. 215 of the Civil Code entitled contradiction of interests), the administrator must act only in its favor and not in the interest of his family: , a relative or a relative thereof up to and including the fourth degree. The obligation must be respected in any situation, and a possible breach of it entitles the company to damages.

Although family interdictions are regulated within the joint stock company, and refer to the board of directors, it is obvious that they concern the sole director, but also the members of the board of directors and the supervisory board from the dualistic management system of the joint stock company, as well as any administrator of a commercial company. Moreover, the obligation of loyalty is also bound by the director of the company, as provided by the norm of sending art. 152 paragraph 1. With the regulation of this obligation of loyalty in the Civil Code in the form of "contradiction of interests", we can say that family prohibitions are applicable in the administration of any legal entity and concern the legal representative of any legal subject with legal personality.

THE JOINT TENANCY OVER PROPERTY

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Abstract

According to the provisions of the current Civil Code, the common property can take two forms: the tenants in common (co-ownership) and the joint tenancy (joint ownership). Given the practical problems that may arise in connection with the joint property, in this paper we will focus exclusively on this form of common property.

Keywords: *common property; the legal community regime; joint tenancy; the property of the spouses.*

Introductory considerations

The right of private property represents, according to the provisions of Article 555 of the Civil Code, the right of the holder to own, use and dispose of an asset exclusively, absolutely and perpetually, within the limits established by law. Attributes that are inextricably linked to the notion of the right of private property give this main real right the characteristic of being "the most complete real right", in the sense that the right of private property is the only right that confers on its holder cumulatively the possession, use and disposition of a good [1]. The prerogatives of the property right are exercised by the right holder in an absolute, exclusive and perpetual way, within the limits established by law. The starting point of this article is the exclusive character of the right of private property because, in principle, by virtue of the exclusive character, the holder of the right of private property is entitled to exercise all the attributes of his right alone. However, in certain situations, the exclusive nature of the right to private property may suffer some "infringement", in the sense that two or more persons jointly exercise the prerogatives of the right. One of the exceptions provided by law refers to the situation of common property, when the private property right has two or more title holders. Being a form of common property, in the case of joint tenancy, as well, the exclusive character of the right of private property is affected, in other words the co-owners in tenancy exercise together the attributes of their right and need mutual agreement in order to enjoy the fullness of their property.

The sources of the joint tenancy

Joint tenancy represents, according to the legal provisions, that form of shared ownership which is characterized by the fact that the holders did not specify the share that belongs to each of them from the property title, this being undivided, the property right not being divided, as well as the goods that are part of the common property right [2]. The most common example of joint tenancy is the joint property of the spouses, which includes all the property acquired during the marriage, within the matrimonial regime of the legal community or, as the case may be, the matrimonial regime of the conventional community¹. Joint tenancy will not arise in the situation where the future spouses choose as their

¹ Article 312 of the Civil Code: „future spouses can choose as a matrimonial regime: legal community, separation of property or conventional community”.

matrimonial regime the separation of assets because in this situation, according to the legal provisions², the goods acquired by each spouse in their own name are the object of exclusive property and in case the spouses acquire together one or more goods, they will be the object of a common property on shares³, so that the joint tenancy will not be applicable.

The legal definition of joint tenancy is provided by the provisions of the Civil Code, which, in Article 667, regulates the fact that „*joint tenancy is when, by the effect of the law or by virtue of a legal act, the right of ownership belongs to several persons at the same time without any of them being the holder of a certain share of the right of ownership over the common good or goods*”. From the definition of the contemporary legislator regarding joint tenancy, the sources of this form of common property can be deduced, joint tenancy being able to arise from the law or the will of the parties expressed by a legal act. Consequently, depending on its sources, joint tenancy may arise as an effect of the law or as an effect of the agreement of the parties. By the provisions of Article 668 of the Civil Code⁴ the rules that apply to the property in disrepair are established according to its source, respectively: if joint tenancy is born by the effect of the law, it will be subject to the provisions of that law, which are complemented, accordingly, with those regarding the legal community regime, and in the event that the source of joint tenancy is a legal act, the provisions concerning the regime of the legal community apply accordingly.

Exercising joint tenancy

In principle, joint tenancy right is endowed, like the right of private property, with all the attributes that outline the legal content of the right, with the sole specification that the spouses exercise the prerogatives of property together, according to the legal provisions governing the legal community. Thus, in order to establish in a concrete way the manner in which joint tenancy is exercised, it is necessary to analyze the provisions of the Civil Code regarding the matrimonial regime of the community to which the provisions of Article 668 of the Civil Code refer.

In general, the relations between the spouses are based on their full equality in the decisions they take regarding the common patrimony, which consists of all the goods acquired during the marriage, if they have chosen the legal community regime as their matrimonial regime. Obviously those goods which although acquired during marriage, are subject to the provisions Article 340 of the Civil Code will be exempted from the rules that we will set out below⁵ which determine which property is their own, so that they do not fall into the category of common property even if they are acquired by the spouses during the

² Article 360 of the Civil Code: “each of the spouses is the sole owner of the property acquired before the conclusion of the marriage, as well as of the property he acquires in his own name after this date.”

³ Article 362 of the Civil Code: „the goods acquired together by the spouses belong to them in tenancy in common, under the conditions of the law”.

⁴ Article 668 of the Civil Code:

⁵ Article 340 of the Civil Code: “**Personal assets.** They are not common goods, but the own goods of each spouse in part: a) goods acquired by legal inheritance, bequest or donation, unless the provider has expressly provided that they will be common; b) goods for personal use; c) goods intended for the exercise of the profession of one of the spouses, if they are not elements of a goodwill that is part of the community of goods; d) intellectual property rights over his creations and the distinctive signs they have registered; e) goods acquired as a prize or reward, scientific or literary manuscripts, sketches and artistic projects, projects of inventions and other such goods; f) the insurance indemnity and compensation for any material or non-material damage to one of the spouses; g) goods, sums of money or any value that replaces one's own good, as well as the good acquired in exchange for them; h) the fruits of one's own goods.

marriage and even in the event that the spouses would have chosen the legal community regime. The provisions of Article 35 of the Family Code, repealed as a result of the entry into force of the current Civil Code, established the manner of exercising the attributes of the common property right in joint ownership. According to the mentioned legal provision, "any of the spouses, exercising these rights alone, is considered to have the consent of the other spouse". Hence the presumption of mutual tacit mandate, which facilitated the administration and management together by the spouses of their common property, namely that any of the spouses exercised prerogatives over the common property.

The legal provisions in force distinguish between the various operations that the spouses choose to carry out with regard to jointly owned property. Thus, according to the provisions of Article 345 of the Civil Code, regarding the acts of conservation, administration and use, certain rules are established that must be observed by the spouses in the proper exercise of jointly owned property.

The evoked legal provisions have partially taken over the regulation of Article 35 of the Family Code and give expression to the presumption of mutual tacit mandate as long as each of the spouses has the right to use the common good alone, without the consent of the other spouse, just as they may conclude acts of conservation, acts of administration or acts of acquisition of goods in joint tenancy alone [3]. When there is a question of changing the destination of the common good, the law stipulates that the agreement of the parties is necessary. We consider that this solution is necessary considering the consequences that occur in the patrimonial mass that is made up of the totality of the common goods. It should therefore be noted that certain limitations of this presumption are imposed, requiring the consent of the spouses if the destination of the common property is to be changed, as well as in the case of the application of the new Article 322 of the Civil Code, regarding the regime of some legal acts regarding the family home [4].

Regarding the modification of the rules regarding the reciprocal tacit mandate, it was reported in the specialized literature that the presumption of the reciprocal tacit mandate was waived, thus moving from the mechanism of collective management (or co-management) to the mechanism of parallel management according to which the consent of the spouse concluding the act is not only necessary but also sufficient for the validity of the act [5].

Any spouse who administers or uses a common good can do so alone, without the consent of the other spouse. This is in contrast to the old regulation, contained in Article 35 of the Family Code, according to which any of the spouses could exercise the acts of administration or use of the common property, alone, assuming that he has the consent of the other spouse. It was a relative presumption of mutual tacit mandate between spouses. At present, this thesis of the presumption of mutual tacit mandate has been waived, recognizing the right of any spouse to make acts of administration, conservation, use of the common good without the consent of the other spouse. We have thus moved from the mechanism of collective management (or co-management), which involves concluding an act only with the consent of both spouses, to the mechanism of parallel management, regulated by the Belgian Civil Code, which involves the possibility of concluding an act by either spouse, or by the other, being sufficient for the validity of the act the consent of the spouse concluding the act, and not the consent of both spouses.

With regard to the "powers" which each spouse has over the conclusion of acts governed by the provisions of Article 345 of the Civil Code; it is necessary to specify that the norms adopted by the legislator in the analyzed matter do not include a definition of

them, but we find the definition of these categories of acts in the matter that regularly analyze tenancy in common over property⁶, so that the rules on ordinary co-ownership also apply to joint tenancy; as there are no specific rules for joint tenancy, we consider that their analysis is not required in this article.

We consider that according to the provisions of Article 345 (4) of the Civil Code, the acts of administration, use and conservation, but also the acts of acquisition of common goods can be done by a single spouse; without having the consent of the other spouse with the observance of a limit, namely the absence of any prejudice regarding the spouse who did not consent to the conclusion/commission of the act. We make this statement because, according to the legal provision we referred to earlier, the spouse who did not consent to the conclusion of the deed may claim damages from the other spouse if their interests related to the community of property were harmed; bona fide third parties are protected, this being the reason why the injured spouse can only claim damages, without the possibility of requesting a more vigorous sanction, such as the failure to apply the act, as co-owners who have not consented to the conclusion of an act of administration or disposition may do so.

With regard to the dispositions, considering the legal consequences they produce, it is necessary to analyze the requirements of the law established in this matter and implicitly the possibility of a spouse to conclude such an act alone, without the consent of the other spouse. Thus, according to the provisions of Article 345 (2), each of the spouses may conclude alone acts of acquisition of common property. Given the silence of the law, we believe that this rule must be applied to both movable and immovable property.

Unlike the acquisition of common property which can be made by a single spouse, in respect of all acts of alienation or encumbrance with real charges of immovable property or movable property subject to publicity formalities. Regarding the promises of alienation, considering that they are not translatable of property but only give rise to an obligation to make, the doctrine considered that these promises do not presuppose the agreement of will of both spouses [6].

On this issue, there were also courts that ruled against the opinion established in the literature, an opinion that we share was pronounced differently in particular. Thus, the courts held that „Although it is true that a sales pre-contract is not a transfer of ownership, the parties only agreeing to conclude the sale-purchase contract in the future, however, given the consequences of concluding the pre-contract of sale with respect to the parties' assets, Article 35 (2) of the Family Code must be interpreted as meaning that, in order to conclude it in a valid form, it is necessary to express the express will of both spouses, otherwise the spouse who did not express his consent may request the annulment of the act on this ground. One of the energetic consequences of concluding a pre-sale-purchase contract is precisely the possibility of the court, in resolving an action such as the one formulated by the plaintiff, to be able to supplement the consent of the promising-seller and thus to pronounce a decision to take the place of a sale-purchase contract, with the main effect of the exit of the good from the community of goods of the spouses. Specifically, if the action were considered admissible, a transfer of ownership of a property would be concluded through the court, although one of the spouses did not express their consent in this regard, thus violating the provisions of Article 35 (2) of the Family Code, an

⁶ In this regard, see Article 640, 641 of the Civil Code.

interpretation which cannot be accepted."⁷. Although the sentence is pronounced under the rule of the legislation provided by the Family Code, the issue of law still exists in the current regulation.

In our opinion, in a possible modification and completion of the provisions of the Civil Code, this issue of law should also be taken into account, which, in essence, when it comes to concluding a precontract of sale in which one spouse would have the status of promising seller, however, the consent of the other spouse should not be required, because this hypothesis does not fall within the provisions of Article 346 of the Civil Code, the promise of sale not having a translational character of property.

As can be seen, the joint tenancy over property of spouses can raise certain practical issues because this form of common property is regulated in principle, without containing broad and clear regulations.

Without wishing to criticize the regulation of the Civil Code, however, we consider that the intervention of the legislator would be an opportune one and would resolve many controversial or interpretable issues.

SANCTIONS APPLICABLE IN CASE OF NON-COMPLIANCE WITH LEGAL PROVISIONS IN THE MATTER OF JOINT TENANCY

Regarding the sanctions that intervene in the matter of joint tenancy over property, we find very big differences from the other form of common property, the tenancy in common. As stated above, in the cases provided for in Article 345 (4) of the Civil Code, the spouse who has not consented to the conclusion of the act may claim damages from the other spouse, if their personal interests related to the community of goods have been harmed; bona fide third parties are protected.

With regard to the sanction that intervenes in case of non-compliance with the provisions of Article 346 of the Civil Code, this will be the relative nullity, the act being, in the regulation of the law, subject to being annulled.

We consider that the differentiation established by the legislator regarding the forms of common property are not justified. If the sanctions indicated above intervene in the case of joint tenancy of property, in the matter of regular tenancy in common the sanction established by the legislator for non-compliance with the rules applicable to administrative acts and dispositions is the lack of applicability⁸, and not nullity.

We do not find the justification for these differentiation, reason for which we militate for a uniformization of the regulated sanctions regarding the non-observance of the rules established in the matter of joint tenancy of property on the one hand and of tenancy in common. We consider that the regulation of these sanctions differently can be seen as an inconsistency of the drafters of the Civil Code, the rules applicable to joint tenancy of property being regulated in Book I and the rules applicable to ordinary co-ownership being

⁷ The Bucharest Tribunal, Fourth Civil Chamber, decision no. 1821R given on 28.06.2011. The sentence was consulted at the web address: <https://legeaz.net/spete-civil-2/antecontract-bun-imobil-soti-1821-2011> in data de 18.04.2021.

⁸ Article 642 of the Civil Code: „(1) Alegal acts made in breach of the rules laid down in Article 641 are unenforceable against the co-owner who did not consent, expressly or tacitly, to the conclusion of the deed. (2) The injured co-owner is recognized the right to, before the division, to exercise the actions of the possessor against the third party who would have entered into possession of the common good following the conclusion of the deed. In this case, the restitution of the possession of the good will be made for the benefit of all the co-owners, with damages, if necessary, in charge of those who participated in the conclusion of the deed.

regulated in Book III of the same Code. In order to establish different sanctions, we consider that the situations must be different, this being the main argument for which we fight this differentiation in regulation.

CONCLUSIONS

As we have shown in the present study, the issue of joint tenancy is topical and may involve certain practical issues that doctrine and practice see differently. The patrimonial mass formed by the common goods presupposes very important aspects both from the perspective of the substantive law, but also from the perspective of the procedural law; In a future paper, we want to address this issue of the possibility of the creditors of one of the spouses to pursue the patrimonial mass of the common goods, but also the possibility of the common creditors to pursue the personal patrimony of one of the spouses.

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CRITERIA FOR DETERMINING THE AMOUNT OF THE MAINTENANCE OBLIGATION GRANTED BY THE CHILD'S PARENT

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Abstract

The maintenance obligation is the contribution to which the parent is obliged to his minor or adult child until the completion of studies. The maintenance obligation does not constitute a faculty, but a legal obligation which, in case of non-compliance, may attract sanctions, including criminal ones. This obligation imposed by the legislator on the parents is a joint and several obligation, so that whenever one of the parents refuses to fulfill his maintenance obligation or does not do so in an amount sufficient to ensure the standard of living of the minor, the parent where the minor lives, as far as possible, will be indirectly obliged to bear the difference. Although established by law, the legislator does not stipulate the criteria that the court takes into account in determining the amount of the maintenance obligation, these being applied by the court according to the particularities of each case, taking into account, first of all, the financial means held by the debtor parent to provide the maintenance obligation and the needs of the dependent child.

Keywords: debtor, contribution, maintenance obligation, child needs, standards of living, mutual agreement

GENERAL ASPECTS

The maintenance pension is that contribution (usually monthly) that the parent gives to the child who does not live with him in order to raise and educate him. The maintenance obligation is a legal one, the parents having the obligation to provide maintenance to the minor child, ensuring the necessities of life, as well as his education, teaching and professional training, according to the provisions of art. 499 par. (1) Civil Code. It is desirable that the determination of the amount of the maintenance obligation be made by mutual agreement by the parents, but there are many situations in which the parents invest the court with such a request. In the following we will analyze the criteria that, as a rule, the court takes into account when determining the amount of maintenance and the shortcomings of legal provisions, which often cause the court to grant a much too small amount in relation to the child's needs.

In this approach, we will take into account the relevant legal texts, respectively:

-art.527 Civil code., (1) Only the one who has the means to pay it or has the possibility to acquire these means can be obliged to maintenance. (2) When establishing the means of the one who owes the maintenance, his income and goods shall be taken into account, as well as the possibilities for their realization; its other obligations will also be taken into account;

-according to art. 529 of the Civil Code, "(1) The maintenance is due according to the need of the one who requests it and to the means of the one who is to pay it. (2) When the maintenance is due by the parent, it is established up to a quarter of his monthly net income

for a child, a third for 2 children and a half for 3 or more children. (3) The amount of maintenance due to children, together with maintenance due to other persons, according to the law, may not exceed half of the net monthly income of the obligor.

-according to the provisions of art. 530 of the Civil Code, (1) The maintenance obligation is executed in kind, by ensuring the necessities of living and, as the case may be, of the expenses for education, teaching and professional training. (2) If the maintenance obligation is not performed voluntarily, in kind, the guardianship court shall order its execution by paying a maintenance pension, established in money. (3) The maintenance pension may be established in the form of a fixed amount or in a percentage of the net monthly income of the debtor. The provisions of art. 529 para. (2) and (3) remain applicable;

-according to art. 531 of the Civil Code, (1) If there is a change in the means of the maintenance provider and the need of the recipient, the guardianship court may, depending on the circumstances, increase or decrease the maintenance pension or decide to terminate its payment. (2) The maintenance pension established in a fixed amount shall be indexed by right, quarterly, according to the inflation rate”;

-according to the provisions of art.533 of the Civil Code, (1) The maintenance pension is paid in periodic installments, at the terms agreed by the parties or, in the absence of their agreement, at those established by court decision. (2) Even if the maintenance creditor has died in the period corresponding to an installment, the maintenance is due in full for that period. (3) The parties may also agree or, if there are good reasons, the guardianship court may decide that the maintenance be carried out by the advance payment of a lump sum to cover the maintenance needs of the person entitled for a longer period or for the entire period. the period during which the maintenance is due, to the extent that the maintenance debtor has the necessary means to cover this obligation”.

The obligation of maintenance of the minor by his parents includes the expenses to which they are obliged towards their child, entering in this sphere both the expenses necessary for living, respectively, food, clothing, medicines, etc., but also the provision of education, teaching and professional training [1]. The notion of need in which the minor finds himself (and which the legislator presumes in this matter, the party not having to demonstrate the state of need of the minor) is assessed by particular criteria - relative and not by generally objective criteria, in the sense that a child should be cared for in a routine, daily, effective manner and in relation to the material and social condition of the parents and their needs [2].

The maintenance obligation of the parent towards the child subsists until the child reaches the age of majority, therefore, until reaching the age of 18. However, according to art. 499 para. (1) - (3) Civil Code, the father and the mother are obliged, jointly and severally, to provide maintenance for their minor child, ensuring the necessities of life, as well as his education, teaching and professional training; if the minor has an income of his own that is not sufficient, the parents have the obligation to ensure the necessary conditions for his upbringing, education and professional training; the parents are obliged to support the child who has reached the age of majority, if he is continuing his studies, until their completion, but not exceeding the age of 26 years.

From the analysis of the above legal provision, it results that the law presupposes the state of need in which the dependents are, the incapacity for work existing even when it comes from social causes, such as the continuation of studies by children. Of course, in

order for the court to order the maintenance of the child even after reaching the age of 18, he must prove the continuation of studies or, in case the court orders the granting of the maintenance pension during the period when the child is a minor, establishing the amount until the child completes his studies, the maintenance debtor has the right to cease the maintenance after completing the age of 18 or at the end of the child's studies (for example, the child enrolled in a college, but after 1 year gives up it). Of course, if the debtor does not have proof that the child has stopped studying, he will have to ask the court to stop the maintenance pension.

The maintenance obligation is joint and several between the parents, who jointly and severally have the obligation to ensure the maintenance of the minor child, which means that if one of the parents is not able to provide maintenance for the minor, the other parent must provide full maintenance. Given that both parents are debtors of the maintenance, it is not fair for only one of them to provide this maintenance, so it is necessary to establish a reasonable monthly amount to be determined by the parent who does not live with the maintenance creditor (the child).

PERFORMANCE IN NATURE OR BY EQUIVALENT OF THE MAINTENANCE OBLIGATION

The provisions of art.530 C.civ. establishes the rule, in relation to which the maintenance obligation is performed in kind. However, the maintenance obligation is performed in kind by the parent who lives with the minor, making it more difficult for the parent who does not live with the minor to provide maintenance in kind, given that, in most cases, the parent who does not actually live with the minor has a schedule to visit him (usually on weekends) and the benefit in kind is more difficult to achieve. Thus, in this one of the courts they establish the execution of the maintenance obligation by equivalent, that is, in the form of a fixed amount established by mutual agreement of the parties or a percentage related to the net income of the parent obliged to it. In terms of the amount of the maintenance pension, it is up to a quarter of the parent's net monthly income owed to him for a child, a third for 2 children and a half for 3 or more children, without the amount of the maintenance obligation can exceed half of the parent's income. Of course, there are also situations in which the amount of the maintenance obligation is established by mutual agreement by the parents, so that it can be above the limits established by the legal provisions.

Unfortunately, the criteria that the court has when determining the amount of the maintenance obligation relate only to the income earned by the debtor parent, not to the needs of the child, which often exceed the amount of the established pension. However, in the absence of certain income of the debtor parent, even if the court set an amount proportional to the child's needs, in the absence of declared income, the enforcement of the maintenance obligation could not be performed if the parent obliged to pay it did not voluntarily perform the obligation. Therefore, the income earned by the parent is the criterion used by the court in determining the maintenance obligation. However, the solution is different when the parent achieves incomes clearly higher than the child's needs, in which case the legal amount established by the legislator will not always apply, but, depending on the child's needs, the court may establish it under the ceiling established by art. 529 C.civ.

A common problem in court practice is the determination of the amount of alimony when the parent does not make legal income, although living requires very large amounts,

the expenses made by the parent can not be proven by any income. In this context, in the absence of an agreement of the parent in order to establish a reasonable maintenance pension, the courts, in most cases, establish the amount of the maintenance pension in relation to the minimum wage in Romania. However, this can be an unfair criterion in the context in which, for example, there are children of the same parent who, being in another state, receive a maintenance pension whose amount is much higher than that established by Romanian courts for children born in Romania. Thus, there were case decisions by which the court established the amount of the maintenance obligation at the minimum income in Romania, given that the defendant occasionally visits Romania, having the citizenship of the Canadian state [3].

Such a solution is at least debatable considering the fact that the two minors lived in Romania with their mother, a Romanian citizen and were occasionally visited by their father who had financial resources that allowed them a very good standard of living but which were not declared. Of course, the court does not have the power to verify the source of income of parents in relation to the standard of living of minors, but it seems unfair that after marriage, children are supported financially only by the mother, and the father contributes a small amount to raising and educating them.

On the other hand, there were courts that ruled against the above. Thus, the court held that, although there was no evidence that *“the defendant had a job or a steady income in Germany, where he proved that he resided, provided that he did not see a state of illness which to make him incapable of work, the court considered that he is fit for work, which is why he can be presumed to have an income, considering that otherwise it would not explain how he ensures his own existence in Germany. in this case, even in the absence of any evidence of income and its possibility of realization, the court set the amount of maintenance at the amount requested by the applicant, being a minimum contribution, relative to the level of income in Germany. Thus, according to the address of the Directorate of International Law and Judicial Cooperation, starting with 01.01.2015, the minimum wage in Germany for certain professional categories is 8.5 euro / hour. Accessing the website mentioned in the address, it was found that this minimum wage is the gross, for professions for which no higher or specialized education is required, the gross monthly salary for a working week reaching 1,473 euros, which represents 6,612, 88 lei, at the euro / lei exchange rate from the date of pronouncement, respectively 4.4894 lei. Therefore, in accordance with the provisions of art. 529 para. (2) Civil Code, which establishes that when the maintenance is due by the parent it is established up to a quarter of the realized income if the maintenance is due for a child, which means a maximum value of 368.25 euro / 1653.22 lei , in relation to the minimum income in Germany, the court found that the applicant's application falls within this ceiling established by law ”*[4].

In the same sense, other courts have ruled, ruling that *“the request to establish the maintenance pension in relation to the minimum wage in Romania has no justification, as the appellant is resident in Spain, where he lives and still maintains since 2002. The possibilities of the appellant to obtain the means necessary for the payment of the maintenance pension, relative to the place where he actually lives, are determined by the latter element, so that normally the reference to the minimum wage paid must be made at the level in the country where the maintenance debtor actually resides permanently. Taking into account the above considerations, the court finds that the minimum wage in Spain is 655 euros (equivalent to approximately 2903 lei, the euro-leu exchange rate of 30.10.2015*

the date of application being 4.4322 lei / 1 euro), thus that the total maintenance pension to which the appellant may be obliged is the equivalent of 1451 lei. The court took into account the provisions of art. 529 para. (2) Civil Code [5].”

We appreciate that the latter solution is the one that comes closest to a fair solution. Moreover, we appreciate that such a situation corresponds to the best interests of the child. Indeed, it is difficult to determine the amount of the maintenance obligation when the maintenance debtor does not earn income in Romania, but if he is a resident of another state [6], the minimum amount per economy should be set at the level of the state of residence, and not at the level of the minimum wage in Romania.

JURISDICTION OF THE COURT TO RESOLVE THE CLAIM FOR PAYMENT OF MAINTENANCE

Regarding the material competence to solve the request, it belongs to the Court by reference to the provisions of art. 94 point 1 letter a) CPC., The material competence being the same even in the situation where the payment of the maintenance pension is accessory to the divorce, considering that the request for dissolution of the marriage is within the competence of the court of first instance according to art.915 CPC. With regard to territorial jurisdiction, it belongs to the court in whose district the plaintiff creditor resides, in the requests regarding the maintenance obligation[7], including those regarding the state allowances for children (art. 113 par. (1) point 2 CPC); the text takes into account the situation in which the request is made by the maintenance creditor and has as its object the increase or establishment of the maintenance obligation, not when the request is made by the debtor of the obligation and would have as its object the cessation or decrease [8]; the text also applies whenever the application is made in the main proceedings, since if it is formulated, for example, as an ancillary claim in the marriage application, jurisdiction will be determined by reference to the principal claim. subject to divorce [9].

CONCLUSIONS

As we mentioned in the first part of the article, domestic law has shortcomings in establishing on the basis of objective criteria the amount of maintenance owed to the debtor parent to his child, judicial practice trying to outline different views on the specific criteria that should be taken into account when determining the contribution to the child in need. We notice that there are different opinions in judicial practice regarding the income to which the court should refer when establishing the maintenance obligation for the parent who does not earn income in Romania but is a resident of another state. Thus, some courts consider that the net income from Romania should be taken into account, other courts, on the contrary, consider that the maintenance pension must be set at the minimum income provided in the state where the parent is resident.

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JURISPRUDENCE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION ON THE PROTECTION OF THE CONSUMER'S FAMILY HOME

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Abstract

The CJEU underlines the need to pay special attention/give a certain protection to situations involving the foreclosure of the property subject to the mortgage encumbering the loan agreement, when the property is the consumer's family home. Thus, under European Union law, the right to housing is a fundamental right guaranteed by Article 7 of the EU Charter of Fundamental Rights, which must be taken into account by national courts in the application of Directive 93/13. The Court also emphasizes that the loss of the family home is not only likely to seriously affect the rights of consumers, but also puts the consumer's family in a particularly fragile situation. That is why it is important for the competent national court to have it at its disposal interim measures, allowing the court to suspend or prevent an illegal foreclosure procedure on the consumer's family home, when the ordering of such measures proves necessary in order to guarantee the effective protection pursued by Directive 93/13.

Keywords: family home, consumer, foreclosure, real estate mortgage, unfair terms.

1. Context

The issue of consumer protection of the family home has been raised in the questions referred to the CJEU by the various national courts, in the context of the obligation for Member States to comply with the rights conferred on consumers by the provisions of Directive 93/13 – the unfair terms directive – in the context of credit agreements concluded between professionals and consumers. Asked to answer several questions on consumer protection under credit agreements; if a real right of guarantee (mortgage) *over the consumer's family home* has been established in order to guarantee the credit, ***in its judgments, the CJEU emphasized the need to pay particular attention to the fact that the property subject to the foreclosure procedure is immovable property which constitutes the consumer's family home.***

2. The importance of protecting the family home of consumers

The Kusionova judgment remains definitive in this respect¹, resolution that fully reveals the importance given by the CJEU to the protection of the consumer's family home. In the recitals of the Kusionova judgment, the Luxembourg Court reiterates that, under Union law, the right to housing is a fundamental right guaranteed by Article 7 of the EU Charter of Fundamental Rights², which must be taken into account by national courts in the application of Directive 93/13. The Court also emphasizes that the loss of the family home is not only likely to seriously affect the rights of consumers, but also puts the family of the

¹ ECLI:EU:C:2014:2189

² Article 7 of the Charter provides that "Everyone has the right to respect for his private and family life, his home and his correspondence".

consumer concerned in a particularly fragile situation.³ Moreover, the Court reinforces these assertions with the case law of the European Court of Human Rights which has ruled, on the one hand, that the loss of a home is one of the most serious violations of the right to respect for one's home and, on the other hand, that any person at risk of being the victim of such interference must, in principle, be able to request an examination of the *proportionality of such a measure*.⁴ Specifically, with regard to the consequences of the eviction of the consumer and his family from the dwelling which constitutes their principal residence, the Court reminds us that it is important that the competent national court must have *interim measures in place to allow it to suspend or prevent an illegal foreclosure procedure* where the provision of such measures proves necessary to ensure the effective protection pursued by Directive 93/13.⁵

The most relevant judgments handed down by the CJEU in resolving prejudicial issues related to the unfair nature of certain terms in consumer credit and mortgage agreements on the consumer's family home are: the Kusionova, Morcillo and Garcia⁶, and the Kuhar Judgments⁷. In the following we will follow the reasoning of the CJEU in the answers provided to the national courts in the three cases under analysis, starting from their common premise, the conclusion by consumers of credit agreements secured by a mortgage encumbering the consumer's family home. The questions referred to the CJEU are different, but they essentially concern the foreclosure procedure which concerns the consumer's family home.

In the Kusionova case, the Luxembourg Court is requested, through preliminary questions, to determine whether, in the light of Articles 38 and 47 of the Charter of Fundamental Rights of the European Union, The provisions of Directive 93/13 must be interpreted as opposing the national legislation which allows for the recovery of a claim based on possible unfair contractual terms, by extrajudicial foreclosure of the guarantee encumbering the real estate – the family home of the consumer. In other words, the referring court wishes to know whether the terms of the contract for the establishment of the guarantee, relating to the extrajudicial execution of the mortgage encumbering the consumer's family home, is unfair.

In the Morcillo and Garcia cases⁸, by the two questions referred to the CJEU, the national court asks whether Article 7 (1) of Directive 93/13⁹ in conjunction with Article 47 of the Charter must be interpreted as opposing a foreclosure system which provides that the foreclosure procedure cannot be suspended by the court of first instance, which may at most award compensation for the damage suffered by the consumer, provided that the *consumer*, as the debtor pursued, *cannot appeal the decision rejecting his opposition to such enforcement*, while the professional, as the pursuing creditor, can exercise this appeal

³ Order of the President of the Court Sánchez Morcillo and Abril García, EU:C:2014:1388, section 11.

⁴ European Court of Human Rights, McCann v. The United Kingdom, no. 19009/04, § 50, European Court of Human Rights 2008, and Rousk v. Sweden, no. 27183/04, § 137.

⁵ The Aziz Judgment, EU:C:2013:164, section 59.

⁶ ECLI:EU:C:2014:2099

⁷ ECLI:EU:C:2019:537

⁸ Judgment of the Court (First Chamber) C-169/14, EU:C:2014:2099.

⁹ According to Article 7 (1) of the Directive: „Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.”

against the decision terminating the proceedings or by which an unfair term is declared inapplicable (absolutely null).¹⁰

In the *Kuhar* case¹¹ the referring court asks the CJEU to determine whether Directive 93/13 must be interpreted in the light of the principle of effectiveness in the sense that it precludes national rules on the basis of which the national court is notified of an application for enforcement; of a mortgage contract concluded between a professional and a consumer in the form of a notarial deed constituting an enforceable title, does not order, either at the consumer's request or *ex officio*, the possibility to examine if the terms contained in such an act are not unfair; for the purposes of this Directive, and on this basis to suspend the requested foreclosure.¹²

From the judgments in which the answers of the national courts are given, it can be observed, first of all, that the reasoning of the Court is identical, to a certain extent, in all three resolutions, following that, later, the arguments should be differentiated according to the concrete situation of each case, respectively to the particularities of each national procedural system (Slovak procedural law, Spanish procedural law, Slovenian procedural law).

Thus, as regards the common arguments used in constructing its reasoning, the Court refers, first, to a basic rule derived from its settled case-law, namely, that the system of protection implemented by Directive 93/13 is based on the idea that a consumer is in a situation inferior to that of a seller or supplier in terms of both bargaining power and the level of information, situation which determines them to adhere to the conditions previously drafted by the seller or supplier, without being able to exert an influence on their content.¹³

He then points out that, in view of such a situation of inferiority, Article 6 (1) of that directive provides that an unfair term does not create obligations for the consumer. It is an imperative provision which seeks to replace the formal balance established by the contract between the rights and obligations of the co-contractors by a real balance in order to restore equality between them.¹⁴

In that context, *the national court is required to examine, ex officio, the unfairness of a contractual term* falling within the scope of that directive and thereby to remedy the imbalance between the consumer and the professional as soon as it has the necessary *de facto* and *de jure* elements for this purpose.¹⁵

Continuing its reasoning, the Court states that as regards the performance of guarantees accompanying consumer loan agreements, Directive 93/13 does not contain any reference to

¹⁰ This reference for a preliminary ruling concerned the interpretation of Article 7 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts and Article 47 of the Charter of Fundamental Rights of the European Union.

¹¹ Judgment of June 26, 2019, *Kuhar*, C-407/18, EU:C:2019:537.

¹² In other words, the referring court asks whether it is up to the court to which an application is submitted for the enforcement of a mortgage agreement, when it finds that it contains an unfair term, to prohibit, *ex officio where possible*, the implementation of such a term from this stage of the procedure or if such a decision is subject to the judgment of the court of first instance, referred to the consumer in a separate procedure.

¹³ See the *Pohotovost'* Judgment, EU:C:2014:101, section 39, The *Kásler* and *Káslerné Rábai* Judgment, C-26/13, EU:C:2014:282, section 39, The *Banco Español de Crédito* Judgment, C-618/10, EU:C:2012:349, section 40, as well as the *Sánchez Morcillo* and *Abril García* Judgment, C-169/14, EU:C:2014:2099, section 22.

¹⁴ The *Banco Español de Crédito* Judgment, C-618/10, EU:C:2012:349, section 40, The *Aziz* Judgment, EU:C:2013:164, section 46 and the *Barclays Bank* Judgment, EU:C:2014:279, section 34.

¹⁵ The *Aziz* Judgment, EU:C:2013:164, section 46, and The *Barclays Bank* Judgment, EU:C:2014:279, section 34.

the enforcement of guarantees. In this case, it is emphasized that, according to its settled case-law¹⁶, In the absence of harmonization in national law of national enforcement mechanisms, it is for the legal order of each Member State to lay down such rules, in accordance with the principle of procedural autonomy, provided that the principle of equivalence is observed¹⁷ as well as the principle of effectiveness.¹⁸ With regard to compliance with the principle of effectiveness, the Court recalls that, according to its case-law, any case in which an issue arises as to whether an internal procedural provision makes it impossible or excessively difficult to apply Union law must be considered *in the light of the aforementioned provision* in the proceedings as a whole, the way in which it is conducted and its particularities before the various national courts.¹⁹ In addition, the specific nature of national proceedings between professionals and consumers cannot constitute an element capable of affecting the legal protection of consumers under the provisions of Directive 93/13.²⁰

From this point on, the arguments used are different, adapted, as mentioned above, to the particularities of each national procedural system, as well as to the preliminary questions.

3. The Kusionova judgment

Thus, in the Kusionova judgment in interim, the Court states that in the present case it is necessary to *analyse the extent to which the application of the protection afforded by the Unfair Terms Directive would be practically impossible or excessively difficult*.

Continuing with this analysis, the Court reiterates that, in order to protect the rights conferred on consumers by Directive 93/13, the Member States have an obligation, inter alia, under Article 7 (1) of that directive, *to take protective measures so as to prevent the continued use of terms regarded as unfair*.²¹ To this end, the judicial and administrative authorities of the Member States must have adequate and effective means at their disposal. More specifically, according to the Court's settled case-law on the principle of sincere cooperation²², Member States must ensure that *sanctions* applicable to infringements of Union law are *effective, proportionate and dissuasive*.²³ Referring to *the effective and dissuasive nature of sanctions*, the Court notes that, in the present case, on the one hand, during the out-of-court enforcement of a security, the competent national court has the

¹⁶ The Aziz Judgment, C-415/11, EU:C:2013:164, section 50 and the cited case-law, Hotărârea Pohotovost' Judgment, EU:C:2014:101, section 46, Hotărârea Mostaza Claro Judgment, C-168/05, EU:C:2006:675, section 24, The Asturcom Telecomunicaciones Judgment, C-40/08, EU:C:2009:615, section 38 and The Barclays Bank Judgment, EU:C:2014:279, section 37.

¹⁷ Compliance with this principle presupposes that those legal rules are no less favorable than those applicable to similar situations subject to national law.

¹⁸ Compliance with the principle of effectiveness presupposes that those legal rules do not make it practically impossible or excessively difficult to exercise the rights conferred by European Union law.

¹⁹ The Asociación de Consumidores Independientes de Castilla y León Judgment, C-413/12, EU:C:2013:800, section 34 and the cited case-law.

²⁰ The Banco Español de Crédito Judgment, C-618/10, EU:C:2012:349, punctul 55 and the cited case-law, as well as the Aziz Judgment, EU:C:2013:164, section 62.

²¹ Article 7 (1) of the Directive reflects, in particular as regards unfair contract terms, the general right to an effective remedy against infringements of the rights and freedoms guaranteed by Union law, as enshrined in Article 47 of the EU Charter of Fundamental Rights.

²² The principle is currently enshrined in Article 4 (3) TEU.

²³ The LCL Le Crédit Lyonnais Judgment, C-565/12, EU:C:2014:190, section 44 and the cited case-law.

possibility of adopting any interim measure prohibiting the continuation of the execution of such a forced sale, and, on the other hand, national law currently allows the court, in the event of a challenge to the validity of the guarantee term, to declare the sale null and void, which would put the consumer, retroactively, in a situation almost similar to their original situation.

Analyzing *the proportionality of the sanction*, the Luxembourg Court points out in its recitals, as I mentioned in the introduction to the study, the particular importance to be attached to the fact that the property subject to the out-of-court enforcement procedure is immovable property which constitutes the consumer's family home. The Court shall pay particular attention to the consequences of evicting the consumer and his family from the dwelling which constitutes their principal residence. In this regard, reiterates its case law from the Aziz judgment, stressing the need for interim measures to be available to the competent national court, allowing the suspension or prevention of an illegal foreclosure procedure, when such measures are required, in order to ensure the effective protection pursued by Directive 93/13.²⁴ Subject to the verifications to be carried out by the referring court, the case before the Court shows that the competent national court may adopt any interim measure prohibiting the continuation of such a forced sale, and this is able to be an appropriate and effective means of preventing the continued application of unfair terms.

Finally, the Court will hold that the provisions of Directive 93/13 must be interpreted as not precluding national legislation which allows the recovery of a claim based on possibly unfair contractual terms, by the out-of-court enforcement of a guarantee encumbering the consumer's family home, insofar as that regulation does not make it practically impossible or excessively difficult to defend the consumer's rights under that directive, which must be verified by the referring court.

4. The Morcillo and Garcia judgment

In the judgment of Morcillo and Garcia, after presenting the common arguments that lead to the need to verify compliance with the two principles, the principle of equivalence and the principle of effectiveness.

Referring to the observance of the principle of effectiveness, in the case under analysis, the Intermediate Court will make some necessary preliminary clarifications. Thus:

a) it is found that according to the Spanish national rules of procedure, **a foreclosure proceeding relating to immovable property which satisfies an essential need of a consumer, namely to have a home**, it can be initiated by a seller or supplier under a notarial deed with enforceability, *even without this act having been the subject of jurisdictional review intended to verify the possible unfair nature of one or more terms of this act*. Such a privilege granted to the professional makes it all the more necessary for the consumer to be able to enjoy effective judicial protection in his capacity as the pursued debtor.

b) With regard to the control exercised in this respect by the enforcement court, the Court finds that the current provisions do not oblige that court to examine *ex officio* the possible unfair nature of the contractual terms which form the basis of the request, this control being optional.

²⁴ The Aziz Judgment, EU:C:2013:164, section 59.

c) it follows that in the event of rejection of the consumer's opposition to the foreclosure of his immovable property, **the Spanish procedural system exposes the consumer or even his family to the risk of losing their home as a result of their foreclosure**, provided that the executing court may, *at most*, carry out a rapid examination of the validity of the contractual terms on which the seller's or supplier's request is based. The protection which the consumer, in his capacity as the debtor pursued, could possibly benefit from a judicial review carried out in a substantive procedure initiated in parallel with the enforcement procedure is not likely to remove this risk, as, if such an inspection would lead to the finding of an unfair term, the consumer will not obtain compensation in kind for his damage, which would restore him to the situation prior to the execution of the mortgaged property, but, at best, they would obtain a compensatory allowance. However, this simple nature of compensation for any repair granted to the consumer only gives him incomplete and insufficient protection. It is neither an appropriate nor an effective means within the meaning of Article 7 (1) of Directive 93/13, in order to put an end to the use of the term, considered unfair, of the authentic instrument comprising the establishment of a mortgage on the immovable property upon which its enforcement is based.²⁵

d) it is noted that Spanish legal rules recognize that the professional, as the pursuing creditor, has the right to appeal against the decision ordering the cessation of enforcement or the decision declaring an unfair term inapplicable, but does not instead allow the consumer to exercise a right of appeal against decisions rejecting the opposition to enforcement. Consequently, it is clear that the conduct of the opposition proceedings before the national court places the consumer, in his capacity as the pursued debtor, *in a position of inferiority to the seller or supplier*, in its capacity as the pursuing creditor, as regards the judicial protection of the rights which may be exercised under Directive 93/13 against the use of unfair terms.

In those circumstances, the Court states that the procedural system at issue in the main proceedings jeopardizes the attainment of the objective pursued by Directive 93/13. Thus, **this imbalance between the procedural means** made available to the consumer, on the one hand, and to the professional, on the other, only exacerbates the existing imbalance between the contractors.

In the light of all those considerations, the Luxembourg Court will finally rule that Article 7 (1) of Directive 93/13 in conjunction with Article 47 of the Charter, must be interpreted as opposing a foreclosure system which provides that a foreclosure procedure cannot be suspended by the court of first instance, (it may, in its final decision, at most grant compensation for the damage suffered by the consumer), in so far as the latter, as the debtor pursued, cannot appeal the decision rejecting his opposition to that enforcement, while the professional, the pursuing creditor, can exercise this appeal against the decision by which the procedure is terminated or by which an unfair term is declared inapplicable.

5. The Kuhar judgment

One of the most recent judgments in which the CJEU emphasizes the need to pay special attention to the issue of forced execution of consumers' family homes is the Kuhar

²⁵ The Aziz Judgment, EU:C:2013:164, section 60.

judgment.²⁶ In order to answer the question referred by the Slovak national court in the present case, the CJEU reiterates the reasoning which is constantly known and used in its case-law.

Continuing its reasoning, the Court emphasizes that it must be ascertained whether the national procedural regime in question affects the effectiveness of the protection afforded to consumers by Directive 93/13. In carrying out that examination, the Court first sets out the characteristics of the enforcement procedure in Slovenian law, as they appear from the submission made by the referring court. Thus:

a) the court in charge of the forced execution of a mortgage credit contract, concluded in the form of a direct enforceable notarial deed, cannot refuse that forced execution due to the presence, in the contract in question, of an unfair term, whereas this court must unconditionally comply with the content of an enforceable title, without being able to assess the legality of its content;

b) in principle, the suspension of enforcement is not possible, even provisionally, except in the case of the introduction of a substantive procedure, initiated by the debtor, as a consumer, seeking the finding of the nullity of an unfair contractual term;

c) this suspension of enforcement, pending the adoption of a final decision on the merits, is authorized only exceptionally and is subject to strict legal conditions relating to the demonstration of irreparable or difficult to repair damage, which excludes the damage related to enforcement itself, which, in practice, makes this suspension almost impossible;

d) the creditor has the right to ask the debtor to provide a guarantee if he requests the suspension of enforcement and

e) the debtor against whom enforcement proceedings have been opened cannot obtain free legal aid, so he must bear the significant costs of representation through a lawyer.

In the light of those features of the procedural system of enforcement in Slovenian law, the Court will, in principle, find that such a system is likely to undermine the effectiveness of the protection pursued by Directive 93/13. Thus, as the CJEU has already established, effective protection of the rights conferred on consumers by this Directive can be guaranteed only on condition that the national procedural system allows, in the context of the payment order procedure or in the order for payment enforcement procedure, an *ex officio* control of the potentially unfair nature of the terms contained in the contract in question.²⁷

Thus, in view of the fact that the court notified with the application for enforcement cannot suspend enforcement on the ground that the mortgage contract is affected by an unfair term, it is probable that the foreclosure of the consumer's family home will be completed before the decision of the court of first instance is pronounced, declaring, as the case may be, the nullity of the aforementioned term. In those circumstances, even if such a decision were to be taken on the merits in favor of the consumer, they will not, for that reason, benefit from a *posteriori* protection in the form of pecuniary reparation, so that such protection is incomplete and insufficient, **all the more so if the foreclosure targeted the home of this consumer and his family, who would thus be permanently lost.** Such a

²⁶ Judgment of June 26, 2019, *Kuhar*, C-407/18, EU:C:2019:537.

²⁷ The *Finanmadrid EFC* Judgment, C-49/14, EU:C:2016:98, section 46, *precum* as well as the *Profi Credit Polska* Judgment, C-176/17, EU:C:2018:711, section 44.

posteriori protection is therefore neither an adequate nor an effective means of preventing the continued use of an unfair term, contrary to the objective pursued by Article 7 (1) of Directive 93/13..²⁸

The Court's final answer will be that Directive 93/13 must be interpreted, in the light of the principle of effectiveness, in the sense that it precludes national legislation under which the national court notified with an application for enforcement of a mortgage loan agreement concluded between a professional and a consumer in the form of a notarial deed directly enforceable does not have, either at the request of the consumer or *ex officio*, the possibility of examining whether the terms contained in such an act are unfair within the meaning of that directive and, on that basis, of suspending the enforcement requested.

Conclusions

Since Directive 93/13 on unfair terms in consumer contracts does not contain specific rules of procedure, the Luxembourg Court has emphasized that its objectives can only be achieved if national procedural rules contribute to their achievement and do not pose unjustified obstacles to consumers who benefit from the protection afforded by the Directive. In the absence of harmonization of procedural rules in an instrument of European Union law, the Court recognizes the *procedural autonomy* of the Member States, but also emphasizes their responsibility to ensure the effective protection of the rights deriving from the Directive. In this respect, the CJEU has established that, in so far as the procedural rules of the Member States affect the application of the rights provided for in the Unfair Terms Directive, these procedural rules must respect ***the principles of equivalence and effectiveness***. In particular, it must be ascertained by the national court whether the national procedural regime – in this case the enforcement procedure – affects the effectiveness of the protection afforded to consumers by Directive 93/13, that is, if the procedural system does not make it practically impossible or excessively difficult to defend the rights conferred on the consumer by this Directive, paying particular attention to the situation in which the immovable property which is the subject of enforcement is the consumer's family home.

²⁸ The Banco Popular Español and Banco de Valencia Ordinance, C-537/12 and C-116/13, EU:C:2013:759, sections 56 and 57 and the cited case-law.

THE DIVISIONS OF THE PATRIMONY AND FAMILY HERITAGE

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Abstract

The division of the patrimony presents a special importance, both from a theoretical perspective, but especially from a practical one. The present study aims at an analysis of what the division of the patrimonial and the “family heritage” implies in the current legislative regulation.

Keywords: *patrimony of affection, divisions of the patrimony, family assets*

Notion and legal characteristics of property

*Any individual or legal person is the owner of a heritage that includes all the rights and debts that can be valued in money and belong to it.*¹

Throughout history, there have been several theories about heritage, namely: the classical theory, which originated in French law and which enshrined the idea of the uniqueness of heritage, the theory of heritage, which comes from German law and, finally, the modern theory, which is a combination of the other two theories.

The new Civil Code regulates in the provisions of art. 31 - 33 the content of the notion of patrimony, as well as its legal characters. Until the appearance of the new Civil Code, more precisely of the variant with the modifications brought by Law no. 71/2011, in the national legislation there was no definition of the patrimony.

From the perspective of the legal characters of the patrimony, the doctrine² ruled: the character of legal universality of the patrimony, the personality of the patrimony, the inalienability of the patrimony, the uniqueness of the patrimony and the divisibility of the patrimony.

Universality character of the patrimony (legal universality): implies its existence independent of the will of the patrimony holder. The legal character of the legal universality of the patrimony distinguishes it from the *de facto* universalities, due to the existence of the passive side³.

The factual universality is defined by the legislator in the provisions of art. 541 of the new Civil code, according to which *a factual universality is the set of assets that belong to the same person and have a common destination established by its will or by law.*

¹ Art. 31 alin.1 din Legea nr. 287/2009 privind Codul civil, publicată în Monitorul Oficial al României, Partea I, nr. 11 din 24 iulie 2009, modificată prin Legea nr. 71/2011 și rectificată în Monitorul Oficial al României, Partea I, nr. 427 din 17 iunie 2011 și în Monitorul Oficial al României, Partea I, nr. 489 din 8 iulie 2011;

² Oglindă, B. Dreptul afacerilor. Teoria generală. Contractul, Editura Universul Juridic, București, 2012, p. 120;

³ Chelaru, E. Comentariu (la art. 31), în Noul Cod civil. Comentariu pe articole, (coordonatori Fl. Baiaș, E. Chelaru, R. Constantinovici, I. Macovei), Editura C.H. Beck, București, 2012, p. 35;

Universality is actually a set of assets, a group of elements, a "collection of objects" whose union is based on a simple link fact, according to the will of the holder heritage, but not considered to be independent and no passive own.

Unlike the legal universality, within the factual universality, assets are not distinct from universality, so that, by alienating them, universality disappears from the patrimony. This universality is characterized by the fact that it has only one element, the active one, lacking, in all cases, the passive element of the mass of goods.⁴

It has been said that the universalities are in fact sub-patrimonies, which differ from them in that the active-passive relationship does not work within them; but they are not small autonomous patrimonies, isolated and independent. Their importance is evident in the case of sale-purchase, pledge, seizure, etc., when universality is viewed as a whole, not in pieces or fragments. It is in fact the nature of universality to have movable goods in its composition; also that its identity is due to a single management, and the goods are treated as fungible⁵.

A heritage mass is regarded as *universitas iuris*, not as *universitas facti*. However, rigorously, only true universal heritage is a legal (*universum ius*, *universitas iuris*), and the patrimonial masses are only parts of the whole, even if each one maintains a specific unit determined by a certain degree of generality, by the purpose of which it is affected and by the special legal regime⁶.

Since the distinction between legal universality and *de facto* universality is of particular importance from the perspective of the division of the patrimonial mass, we appreciate that it is important to emphasize the elements that differentiate the two universals:

- patrimony / patrimonial mass, as legal universality, is an intellectual universality that includes only rights and obligations;
- the patrimony / patrimonial mass, as universality in fact, is a material universality that includes only assets;
- in order to have a legal universality, an express legal provision is needed; it cannot exist outside the will of the legislator, which overlaps with the will of the person;
- universality can in fact be created by the simple will of the person, independent of the will of the legislator⁷.

The personality of the heritage resides from the regulation of art. 31 para. (1) new Civil code and consists in the fact that any person (natural or legal) has a patrimony, this being closely related to the quality of subject of law. In the case of individuals, the patrimony is a given, it accompanies the person all his life. There is no patrimony without the owner.⁸

A person can not exist independently of heritage, whereas everyone has rights and obligations. If the individual, it is anticipated civil capacity usage, ie from conception, under the conditions established in article 36 of Civil code.

⁴ Lulă, I. Unele probleme privind noțiunea de patrimoniu, în Dreptul nr. 1/1998, p. 15;

⁵ Ungureanu, O., Munteanu, C. Eseu asupra clasificării bunurilor în dreptul civil, Editura Universul Juridic, București, 2010, p. 156;

⁶ Stoica, V. Drept civil. Drepturile reale principale, Editura C.H. Beck, București, 2009, p. 7.

⁷ Țândăreanu, N. http://www.inm-lex.ro/fisiere/d_1214/Patrimoniu.pdf

⁸ Bîrsan, C. Drept civil. Drepturi reale principale în reglementarea noului Cod civil, Editura Hamangiu, București, 2013, p.10;

A legal person may inherit even before obtaining legal personality. The provisions of art. 205 para. 3 of Civil code, grants to the future legal person, a capacity of anticipated use and limited to the acquisition of the right and the assumption of the necessary obligations for it to be validly established⁹.

Inalienability of patrimony is a direct consequence of the fact that the existence of the patrimony is strictly related to the existence of the person to whom it belongs. The holder may transmit his entire patrimony, as legal universality, only through legal acts *mortis causa*. During his life, a person can conclude legal acts only regarding certain obligations and rights, having the possibility to alienate one or more individually determined assets.

Uniqueness of the heritage. A person - natural or legal - subject to law can have only one patrimony. This legal character of the patrimony was taken from the classical theory and is based on the uniqueness of the person¹⁰. A person does not have several patrimonies, but several patrimonial masses, which are the result of the patrimonial divisibility. The patrimonial mass has a temporary existence determined by the purpose for which it is affected¹¹.

The divisibility of heritage. According to the provisions of art. 31 paragraph 2 of Civil code, the patrimony can be the object of a division or an affectation only in the cases and conditions provided by law. This theory of the new Civil Code arose from the modern needs to divide the unique patrimony into several masses of rights and obligations regarded as universality, the division being allowed only in the cases and under the conditions provided by law¹².

The division of the patrimony

We ask ourselves the following question: *What conceptual delimitations exist between division and affectation?*

The doctrine¹³ considered that the divisibility of the patrimony must be understood as a "*legal technique of grouping certain rights and obligations with economic value in distinct masses within the same patrimony, each mass benefiting from its own legal regime*". The uniqueness of the patrimony is not affected by means of these legal provisions, but its divisible character is enshrined, although in the doctrine opinions were also expressed according to which the New Civil Code abandons the idea of the uniqueness of the patrimony¹⁴.

Regarding the regulation of the patrimony of affectation, the provisions of the Civil code converge with the provisions of the Government Emergency Ordinance no. 44/2008 on the carrying out of economic activities by authorized natural persons, individual enterprises and family enterprises, with subsequent amendments and completions, which defines, for the first time, **the patrimony of affectation** as *patrimonial mass within the patrimony of the entrepreneur, representing the totality of affected rights and obligations*,

⁹ Angheni, S. Drept comercial. Profesioniștii-comercianți, Editura C.H. Beck, București, p. 121-122;

¹⁰ http://www.inm-lex.ro/fisiere/d_1214/Patrimoniu.pdf

¹¹ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2578407

¹² http://www.inm-lex.ro/fisiere/d_1214/Patrimoniu.pdf

¹³ Cochior, L. Patrimoniul de afectatiune al profesionistilor persoane fizice, Revista "Curierul Judiciar", Nr. 5/2015, pag. 253

¹⁴ a se vedea Piperea, Gh. Fractionarea patrimoniului si segregarea creditorilor, 08.12.2011 | JURIDICE.ro

*by written declaration or, as the case may be, by the incorporation agreement or by an act additional to it, the exercise of an economic activity*¹⁵.

The patrimony of affectation, as a “fraction of universality”, is a legal universality that contains rights and obligations related by the purpose of their affectation, created by the exclusive will of the holder of the general patrimony and recognized by law¹⁶.

In the opinion of the renowned Professor Valeriu Stoica, *the division of the patrimony and the affectation of the patrimony, although they would be two different notions, are in fact, are two perspectives on the same phenomenon. Affectation is the purpose of division, and division is the means, the result of this affectation*¹⁷.

This opinion was nuanced in a manner that the division is not always the basis, as a means, the affectation, ie the person's intention to affect a part of his patrimony to a certain purpose. By way of example, the mass of the common property and the mass of the natural person's own property is based on division, but it has its source in law in the absence of a matrimonial convention and not in the person's will to place a certain good in a patrimonial mass or in another as in the case of individual professional patrimony in relation to the rest of the patrimonial mass (the other patrimonial mass)¹⁸.

At the time of the adoption of the new Civil Code (2009), the doctrine admitted that there is no contradiction between the idea of unity of the person and the patrimony and the idea of divisibility of the patrimony. "Indeed, although divided into several masses of rights and obligations with economic content, the patrimony remains unitary. The patrimonial masses regulated by art. 31 para. (3) of Civil code are the result of this division. Following the division, a person does not have several patrimonies, but several patrimonial masses, called patrimonies of affectation only to highlight the way in which they were taken over in the modern theory of patrimony, both elements of the personalist theory and elements of the theory of the patrimony of affectation”¹⁹.

The patrimonial division can be presented in several forms.

Thus, a form of patrimony fragmentation can be the patrimonial affectation.

The patrimony of affectation, as a “fraction of universality”, is a legal universality that contains rights and obligations related by the purpose of their affectation, created by the exclusive will of the holder of the general patrimony and recognized by law. Such affectations are **the fiduciary patrimonial masses, the patrimonial masses assigned to the exercise of an authorized profession and other patrimonies determined according to the law**, to which the text of art. 31 para. 3 of the Civil code.

Trust has the effect of dividing the patrimony and is defined by the legislator in the text of art. 773 of the Civil code as *the legal operation by which one or more constituents transfer real rights, rights of claim, guarantees or other patrimonial rights or a set of such rights, present or future, to one or more trustees exercising them for a specific purpose, in for the benefit of one or more beneficiaries. These rights constitute an autonomous patrimonial mass, distinct from the other rights and obligations from the patrimonies of the trustees*.

¹⁵ Art. 2 lit. J din OUG nr. 44/2008 modificată prin art. I pct. 3 din Legea nr. 182/2016 - publicată la 19 octombrie 2016, în vigoare de la 17 ianuarie 2017

¹⁶ <https://www.juridice.ro/353902/patrimoniul-de-afectatiune-instrument-in-derularea-afacerilor.html>

¹⁷ Prelegere din 08 Septembrie 2011, www.inm-lex.ro

¹⁸ http://www.inm-lex.ro/fisiere/d_1214/Patrimoniu.pdf

¹⁹ Stoica, V. Drept civil. Drepturile reale principale, Ed. C.H. Beck, București, 2009, p. 9-10

Therefore, the object of the trust contract is the transfer of some rights or a set of present or future patrimonial rights. The rights are transferred from the patrimony of the founder to the patrimony of the fiduciary, but these, together with the obligations that will be born in connection with their administration will constitute an autonomous fiduciary mass, **a patrimony of affectation**, according to the provisions of art. 31 in conjunction with art. 786 of the Civil code, without, however, a confusion with the fiduciary's patrimony.

Only certain categories of creditors can pursue the assets of the fiduciary patrimony.

Thus, the holders of receivables born in connection with these goods, can follow the goods from the fiduciary patrimonial mass, but not the other goods from the fiduciary patrimony. Another category of creditors that can pursue the fiduciary patrimonial masses is that of the creditors of the founder who have a real guarantee on the goods, whose opposability is acquired according to the law, prior to the conclusion of the trust contract. Last but not least, the assets of the fiduciary patrimony can be pursued by the other creditors of the founder in the event that the fiduciary contract was terminated or became unenforceable, with retroactive effect, but only on the basis of the final court decision to terminate the contract. For the damages caused by the acts of conservation or administration of the fiduciary patrimonial mass, the fiduciary is responsible only with the other rights included in his patrimony²⁰.

The text of art. 2324 para. 3 of the Civil Code establishes the rule according to which *the creditors whose claims were born in connection with a certain division of the patrimony, authorized by law, must first pursue the goods that are the object of that patrimonial mass. If these are not sufficient to satisfy the receivables, the other assets of the debtor can be pursued*. From this rule, there is an exception, namely the one regulated by par. 4 of the same text of law. Thus, *the assets that are the object of a division of the patrimony affected to the exercise of a profession authorized by law can be pursued only by the creditors whose claims were born in connection with the respective profession. These creditors will not be able to pursue the debtor's other assets*.

If there are creditors whose claims arose in connection with the professional patrimony, they cannot extend their pursuit over other assets. Even personal creditors cannot extend their pursuit of professional patrimony.

In fiscal matters²¹, regarding the patrimony of affectation, in the section that regulates the taking over of the fiscal obligation, the legislator provided that *the individual who carries out a liberal profession or exercises an economic activity independently in one of the forms provided by Government Emergency Ordinance no. 44/2008 regarding the development of economic activities by authorized natural persons, individual enterprises and family enterprises, approved with modifications and completions by Law no. 182/2016, with the subsequent amendments and completions, is responsible for the fiscal obligations due as a result of the exercise of the profession or activity with the goods from the affected patrimony. If these are not sufficient for the recovery of tax receivables, the other assets of the debtor can be pursued*²².

²⁰ http://www.inm-lex.ro/fisiere/d_1214/Patrimoniu.pdf

²¹ Legea nr. 207/2015 publicată în M.O. 547 din 23 iulie 2015

²² Idem, art. 23 alin.3, modificat prin art. I pct. 8 din Legea nr. 295/2020, în vigoare de la 24 decembrie 2020

The division of the patrimony can be the effect of the patrimonial division that consists in a legal or conventional imperceptibility²³.

All assets that are, according to the law, inalienable, also are imperceptible²⁴. The goods that are affected by the exercise of a profession are imperceptible by law, as it results from the text of art. 407 of Civil Procedure Code.

Conventional imperceptibility is established by imperceptibility clauses, generically regulated by the provisions of art. 2329 Civil Code. The conditions established by the text of the law for the validity of the inalienability clauses apply accordingly to the clauses stipulating the imperceptibility of a good. In order to be enforceable against third parties, the clauses must be entered in the registers of movable or, as the case may be, immovable advertising.

Finally, the division of the patrimony can be the effect of the patrimonial division that consists in a community of goods, as it is the legal or conventional community of goods of the spouses, on which the spouses are co-owners.

Family heritage

The phrase "*family heritage*" is found in other countries' legislation, enacted as a separate institution.

According to the provisions of art. 414 of the Civil Code of Québec, *Marriage entails the establishment of a family patrimony consisting of certain property of the spouses regardless of which of them holds a right of ownership in that property*²⁵.

Family patrimony was added to the Québec Civil Code in 1989 to put an end to certain inequities, especially in cases where couples have opted for a property separation regime. One of the arguments of this regulation was that, traditionally, the man had the role of family supporter, while the wife used to stay at home, take care of the family and take care of the children. Often, the wife was economically dependent on her husband. At the end of the marriage, the wife was financially vulnerable and was harmed because all the property was owned by her husband. Due to this inequality, the concept of family patrimony was established. Family patrimony rules thus seek to encourage economic equality between spouses.

By this regulation, at the dissolution of the marriage through divorce, the law imposes an equal division of the value of the goods that make up the family patrimony. As the rules governing family patrimony apply to all spouses, future spouses may not waive, by convention, their rights over family patrimony through a marriage contract or any other means.

The rules of family patrimony apply to all legally married couples, regardless of the date of marriage, the matrimonial regime, the marriage contract and regardless of whether or not children are born from the marriage. The law only protects the institution of marriage, so those couples who are not married are not required to adhere to a matrimonial regime and do not have to establish a family estate.

Family patrimony includes property used by the spouses during the marriage, such as: family residence where the couple lives, second home - a cottage or villa used by the

²³ <https://www.juridice.ro/178161/fractionarea-patrimoniului-si-segregarea-creditorilor.html>

²⁴ Art. 2329 alin.2 Cod civ.

²⁵ <https://familylawyer.zone/family-patrimony/>

couple, all furniture decorating the family home and second home, used cars and cars family, family savings, etc.

According to the provisions of the current Romanian Civil Code, the patrimony of married persons is divided into several patrimonial masses with different legal regimes. Their patrimony will thus consist of two patrimonial masses: the mass of common goods, which consists of the goods acquired by any of the spouses during the marriage, regardless of the matrimonial regime they chose (legal community, separation of goods or conventional community) and the mass of own goods. In the case of separation of property, the property that each spouse acquires in his own name after the conclusion of the marriage is excepted, these being his exclusive property. However, the difference given by the chosen matrimonial regime concerns only the form of the community of goods: the common property demolished in the case of the legal community and the conventional community or the common property on shares in the case of the separation of goods.

According to provisions of art. 327, art. 339 and art. 340 of the Civil code, there are some partial or temporary imperceptibility in the matter of the matrimonial regime. The personal creditors of one of the spouses cannot pursue the common property of the spouses unless the sharing has been provoked..

Prenuptial or matrimonial contracts that create contractual matrimonial regimes (as opposed to the legal matrimonial regime of the community presumed by the property of the spouses), were determined by the pressure of traders who, having businesses involving a large number of stakeholders, are interested their patrimonies of professional affectation sheltered by a division or a judicial seizure that would block the business²⁶.

References to "family property" can also be found in the provisions of art. 727 of Civil Procedure Code. The personal or household goods indispensable to the life of the debtor and his family and the objects of worship may not be forcibly pursued, unless they are more of the same kind. Also, the food necessary for the debtor and his family for 3 months cannot be executed by the creditors, and if the debtor deals exclusively with agriculture, the food necessary until the new harvest, the animals destined to obtain the means of subsistence and the fodder necessary for these animals. until the new harvest. Letters, photographs and personal or family pictures and the like, the fuel needed by the debtor and his family counted for 3 winter months cannot be traced.

Last but not least, the provisions of art. 351 - 353 Civil Code regulates the regime of common debts of spouses, who are liable with common property for obligations arising in connection with the preservation, administration or acquisition of common property and for obligations they have contracted together.

Conclusions

When drafting the new Civil Code, the legislator gave due importance to the notion of patrimony and the division of the patrimonial mass. From a legislative perspective, there is a constant concern to harmonize and adapt the rules to the reality of legal relations.

From the provisions of art. 258 para. 2-3 Civil Code results that the family has the right to protection from society and the state, the latter being obliged to support, through economic and social measures, the conclusion of marriage, as well as the development and consolidation of the family.

²⁶ <https://www.juridice.ro/178161/fractionarea-patrimoniului-si-segregarea-creditorilor.html>

"*Family property*" enjoys a legal protection regime in the NCC system similar to that organized by other states in the European Union. Once noted in the land book as such, the family home is no longer in the ordinary legal circuit and can no longer be sold or capitalized in the classic, normal forms of enforcement. According to the provisions of art. 321 of the Civil Code, „*the family home is the common home of the spouses or, failing that, the home of the husband where the children are. Any of the spouses can request the notation in the land book of a building as a family home, even if he is not the owner of the building.*”

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THE PURPOSE OF WORKS OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW CONCERNING CHILD PROTECTION. INTERNATIONAL JUDICIAL AND ADMINISTRATIVE COOPERATION. CONSEQUENCES ON THE RELEVANT EUROPEAN REGULATIONS

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Abstract

State governments have the obligation to take all measures to make sure that all children in their countries enjoy the rights recognized by international Conventions. All decisions made by parents or by States must primarily take into account the respect and protection of the child's best interests. States must see to the protection and care of children by their parents or, if necessary, by other persons. People and institutions responsible for the protection and care of children have the obligation to carry out their duties properly.

*The relevant international and European legislation confirms the importance and need to protect children in international situations, with a common goal worldwide, of establishing common provisions to facilitate and harmonize the implementation of normative acts governing the status and protection of children. **The 1924 Geneva Declaration on Children's Rights** summarizes for the first time the provisions on children's rights, ideas later approved by the General Assembly of the League of Nations under the title of the **Book of Child Welfare**. Children must be provided the necessary means for their material and spiritual development, they must be fed, cared for and in case of danger they must be the first to receive care. Here are several principles enunciated at the beginning of the XX century, principles that are entirely included in the more recent regulations, addressing the basic needs of children everywhere and the obligation of parents and of the State to follow and respect them.*

Keywords: *child protection, child superior interest, child rights*

The Hague Conference on Private International Law is an international organization whose purpose is to codify and unify international legal relations of private law. The area of interest is comprehensive and relates to issues of applicable law, jurisdiction of the courts, recognition of judgments and civil status documents, child protection and international adoptions. In carrying out its mission, the Conference aims at negotiating and drafting conventions in various areas of private law in order to promote administrative cooperation in the field of private law and to develop legal instruments to meet the needs of people all over the world.[1]

At present, the organization has 78 members, and between 1954-2015, it adopted a significant number of conventions, protocols and principles regarding civil procedure, matters in the field of family law, child protection and international child abduction, the law applicable to international commercial contracts, conflict of jurisdiction, recognition and

enforcement of judgments in matters of succession or in the field of international cooperation on migration.

In general, conventions in the field of family law encourage the use of alternative methods to settle international family disputes, and the works of conferences in the field have emphasized the importance of obtaining freely agreed solutions in international family law.[2]

The 1980 Hague Convention on the Civil Aspects of International Child Abduction aims at securing the prompt return of children wrongfully removed to or retained in any Contracting State, and at ensuring that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.[3] The objective of the 1980 Hague Convention is to protect children internationally against the harmful effects of their wrongful removal or unlawful retaining, given the fact that the States have the obligation to protect the best interests of the child. The provisions of the Convention apply to any child who lives in a Contracting State at the time of violation of his rights and who is no more than 16 years old. [4]

In Romania, in accordance with the law on the application of the Convention provisions, the Ministry of Justice is the central authority competent to fulfill the obligations established by the Convention on Civil Aspects of International Child Abduction, and cooperates with the central authorities of other States, parties to the Convention. [5] The part played by central authorities is important and it involves working together and cooperating to ensure the development of effective mechanisms for the return of children, for locating the child who is unlawfully retained or removed, for taking temporary measures to prevent dangers to the child, ensuring the voluntary return of the child or facilitating an amiable solution, exchanging information regarding the child's social status, initiating judicial or administrative proceedings to return the child or organizing the right to visit, obtaining judicial/legal assistance and the representation of a lawyer.

Both the 1980 Hague Convention, and the law on the application of the Convention on the Civil Aspects of International Child Abduction encourage the amiable settlement of family disputes as specified in Art. 7 of the Hague Convention, that “*Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention. In particular, either directly or through any intermediary, they shall take all appropriate measures: ... c) to secure the voluntary return of the child or to bring about an amicable resolution...*” and the law implementing the Convention must specify that the Romanian central authority may seek an amicable settlement of the conflict or propose to the parties to resort to mediation.[6]

Considering the importance of using alternative methods to settle disputes in the field of international child abduction, a good practice guide has been developed for governments and central authorities designated under the 1980 Hague Convention, as well as for judges, lawyers, mediators, parties to cross-border family disputes and other concerned parties.[7]

We note that the provisions included in the best practice guidelines, prepared with the purpose to ensure the operation of the 1980 Hague Convention are not binding on the Contracting States, but they support the revision and improvement of the existing practices in the Contracting States in the scope of the Convention, and they are meant to provide consultancy only.[8]

The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and

Measures for the Protection of Children [9] was adopted taking into account the need to improve the protection of children in international situations by avoiding conflicts between the legal systems of the contracting States. Taking into account *the 1989 UN Convention on Children's Rights* and the fact that the best interests of the child have priority, the Convention unifies the rules applicable to the establishment of jurisdiction, applicable law, recognition, enforcement and cooperation in matters of parental responsibility and of measures to protect children.[10] The practical guide on the application of this Convention, prepared by the Permanent Bureau of the Hague Conference on Private International Law emphasizes that the normative act responds to a real and global need concerning children's protection. Statistics have shown that the number of vulnerable children worldwide subjected to mental and physical trauma by precisely those who should love and protect them, respectively by their parents/guardians, is very high. The work of the Permanent Bureau highlights countless cases of abused children, which could be simplified by the application of the 1996 Convention.

The 1996 Convention intends to *improve the protection of children in international situations and, to this end, seeks to avoid conflicts between different legal systems in relation to the measures taken for the protection of children.*" [11] The specific objectives of the Convention are set to determine the Contracting State whose competent authorities may take measures to protect the person or property of the child, to determine the law applicable by the authorities in the exercise of their competence, to determine the law applicable to parental responsibility, to ensure the recognition and enforcement of protection measures in all Contracting States. In order to achieve these objectives, it is important that the competent authorities cooperate and facilitate communication among each other. The Contracting States are bound by the Convention to appoint the central authority that will carry out the obligations set by the normative act. The Permanent Bureau of the Hague Conference on Private International Law centralizes all the identification data of the central authorities communicated by the Contracting States, and will provide them to those who are concerned on the official website.

According to the provisions of art. 30 and 31 of the Convention, the central authorities *have the obligation to cooperate with each other and to promote cooperation between the competent authorities of their States in order to achieve the objectives of the Convention, and to take appropriate measures to provide information on their own legislation, as well as the services available in the field of child protection.*

The rules established by the Convention concern measures for the protection of the child, namely: assignment, exercise and restriction of total or partial parental responsibility and its delegation, the right of custody, including the right to care for the child, and the right to decide on the child's place of residence, the right to visit, including the right to take the child for a specified period to a place other than his or her habitual residence, guardianship, curatorship and similar institutions, placement of the child in a foster family, in a form of institutionalized protection, supervision by the public authorities of the child's protection, administration, conservation or orders concerning the child's property.

There are certain measures that have been excluded from the scope of the convention, namely: establishing or challenging parentage, decisions on adoption, preparatory measures for adoption, cancellation or revocation of adoption, name and first name of the child, obtaining full capacity of exercise, obligations of support, bequests/inheritance, social

security, public measures in the field of education or health, measures taken as a result of offenses committed by the child, decisions on the right to asylum and immigration.

The provisions of the Convention apply to measures of protection taken in a Contracting State after the enforcement of the Convention in that State, and apply to all children from birth until they are 18. If the other two Hague Conventions of 1980 and 1993 demanded that a child should be residing in a Contracting State, the 1996 Hague Convention no longer includes that condition to fall within its scope. We have in mind the fact that refugee children, children taken to various places at international level or those whose residence cannot be established, fall under the 1996 Convention. If emergency and/or provisional measures are taken based on the rules laid down in this Convention, the advantage is that they will be recognized and enforceable in all the Contracting States in accordance with the provisions of the Convention. If the protection measure is taken by an authority whose competence is not based on the criteria of the Convention, the protection measures cannot be recognized and enforced based on the Convention.[12]

The Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance in order to promote an accessible, quick and cost-effective cooperation, fair and adapted to the various aspects, encourages the use of alternative dispute settlement methods, namely the Contracting States have the obligation to provide in their domestic law for effective enforcement judgments making the object of this Convention, namely the use of mediation, conciliation or other similar means to ensure voluntary enforcement. [13]

At European Union level, it is appreciated that the principles of the 2007 Hague Convention are intended to establish a global system of administrative and judicial cooperation in its scope.[14] This approach integrates the principles of the European Union in the sense of creating a common judicial area based on the principle of mutual recognition of judgments, thus allowing the Union to approve the Convention and the Member States to undertake their obligations based on the Convention. Following the adoption of this Convention, the Council of the European Union adopted Regulation No. 4/2009 on competence, applicable law, recognition and enforcement of judgments and cooperation on support obligations in view of achieving the objective of maintaining and developing an area of freedom, security and justice within which the free movement of persons may be ensured. The regulation takes into account both the provisions of the 2007 Hague Convention and the Protocol on the Law Applicable to Support Obligations - the 2007 Hague Protocol; therefore, the creditor of the obligation of support should be enabled to easily obtain a decision in a Member State that would be enforceable in another Member State, without having previously completed any other formality. The scope of this regulation covers all forms of support obligations arising from family, kinship, marriage or alliance relations. The Regulation ensures the recognition and enforcement of court settlements and authentic instruments without affecting the right to challenge these instruments before a court in the Member State of origin.[15]

In correlation with the aforementioned international provisions, at European level, the provisions of the *EC Regulation no. 2201/2003 of the Council concerning the jurisdiction, the recognition and enforcement of judgments in matrimonial matters and in parental responsibility matters* are applicable. In the matter of parental responsibility, the normative act standardizes the procedures applicable both in matrimonial actions, and in the matter of parental responsibility, divorce and with regard to child protection measures. Agreements

between the parties resulting from the conduct of alternative dispute resolution procedures are also recognized and enforceable. The normative act establishes mechanisms to render efficient the agreements obtained following mediation in matrimonial and parental responsibility matters. The issue of the international abduction of children falls within the exclusive external competence of the European Union, considering the adoption of Council Regulation 2201/2003. The Brussels II a Regulation introduces much stricter rules than the 1980 Hague Convention on the Abduction of Children by one of the Parents. The regulation applies in civil matters to cases concerning divorce, legal separation and annulment of marriage, assignment, exercise, delegation, total or partial withdrawal of parental responsibility, and it regulates all aspects related to jurisdiction, procedure before the court, jurisdiction of the court in cases of child abduction, child return, recognition and enforcement of court decisions, provision of interim and precautionary measures, etc.

As regards the relationship with other normative acts, respectively, the Hague Convention of October 19, 1996 on competence, applicable law, recognition, enforcement and cooperation in matters of parental responsibility and child protection measures, the Regulation applies if the child has his habitual residence in the territory of a Member State and in respect of the recognition of a judgment given by the competent court in a Member State in the territory of another Member State even if the child's habitual residence is in a non-member State which is a party to the 1996 Hague Convention. The European normative act does not prejudice the international Conventions in the field, which continue to produce their effects in matters not regulated by this regulation. We refer to the Hague Convention of October 5, 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents and the Law Applicable to the Protection of Minors, the Luxembourg Convention of September 8, 1967 on the **Recognition and Enforcement of Judgments in Matrimonial Matters**, the Hague Convention of June 1, 1970 on the Recognition of Divorces and Legal Separations, the European Convention of May 20, 1980 on the Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, and the Hague Convention of October 25, 1980 on the Civil Aspects of International Child Abduction.

The protection of children's rights according to the regulations of the Hague Conferences and in relation to the European regulations in the field supposes, first of all, a tight and efficient cooperation and collaboration between the authorities of the States involved in the appreciation and pursuit of the children's highest interest. The preventive measures taken by the Contracting States through their competent authorities will be limited to the pursuit of the best interests of the child, the protection of his person and property. The child must be provided with the most favorable environment for development and growth, and if this cannot be achieved in his family of origin, the State has the obligation to adopt child protection mechanisms and to take all necessary measures to respect the fundamental rights that are recognized to the child at international level.

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FAMILY AND FAMILY HERITAGE IN ROMAN LAW

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Abstract

In Roman law, for a long time the concept of family and that of patrimony were found in a symbiotic relationship. Both the family and the patrimony were configured as forms of the expression of power. In fact, dominion was the nucleus around which all the creative reforms of a stable system of law revolved. The stability of the Roman system of law is confirmed by the succession of centuries, which only confirms its immutability. This article seeks the vitality of an elastic and dynamic legal system permanently connected to the pulse of society, the requirements of practice and social values. And the primordial value legally recognized by the Romans was power; both the collective and the individual power. The pre-eminence of dominion, as we shall see, is reflected both in the edification of the legal regime of property and in the regulation of family relations. However, starting with classical law, the two notions begin to gradually detach from the framework value (mastery) and through the uninterrupted creative effort of the praetors to acquire its own physiognomy, appearing over the centuries as essential independent values.

Keywords: family patrimony, Roman family, parental power, dominion.

1. Introduction

The family and the family patrimony can be the object of a common study because for a long time, in Roman law, they were found in a symbiotic relationship. Both the family and the patrimony were configured as forms of the expression of power. In fact, domination was the nucleus around which all the creative reforms of a stable system of law revolved. The stability of the Roman system of law is confirmed by the succession of centuries, which only confirms its immutability. The statement does not intend to emphasize the status of the Roman nation as a unbridled armed power. Certainly, history has dedicated thousands of pages to the military force through which the Romans shaped the map of the world. However, this article aims at the vitality of an elastic and dynamic legal system permanently connected to the pulse of society, to the requirements of practice and to social values. And the primordial value legally recognized by the Romans was power; both the collective and the individual power. The pre-eminence of dominion, as we shall see, is reflected both in the edification of the legal regime of property and in the regulation of family relations.

1.1. Family property

Not infrequently, it has been erroneously stated that the very individualistic spirit of the Romans was reflected from the beginning in the legal regime of private property. The reality is that the Romans did not even know the concept of private property until the era of Royalty. In the first centuries of the existence of the Roman people, the only recognized forms of property were the collective property of the gens and the family property; or it reflects an extraordinary spirit of community, not of individuality [1]. Indeed, in the Gentile era, the land was considered the main resource of society and the well-being of the whole

community depended directly on the collective effort made by all members towards its capitalization. The fact that individual welfare was an effect of collective well-being also denotes the slacker position that the power given by individual domination or the pecuniary value of the land occupied among the priorities of the Roman gentile society.

The Romans named the collective property of the gens *fundus* (large property, the land fund of the whole society). But in addition to these vast agricultural lands of the community, even before the appearance of the law of the XII tables, the Romans admitted a new form of property: family property. Known as the *heredium*, family ownership was the piece of land needed by a family to build a house and ensure its survival [2]. Family property cannot be seen as a form of private property, but only as a (more) restricted possession, exercised by all persons living in that house. This type of property was not only inalienable, but indivisible. The only way to transfer family property was by inheritance [3]. But not even by inheritance did the property cease to be family property, the civil heirs continuing, in co-ownership, the dominion exercised by the *pater familias*.

Only after the founding of the Roman state were other forms of property consecrated, such as the collective property of the state and the *quiritary* property (as the first form of private property). Later, in classical law, by procedural means, the praetors created the *praetorian* property, the *provincial* property and the *pilgrim* property, following that in the postlaslic Roman law the legal regime of the property was unified and thus a unique form of property was born (*proprietas* or *dominium*)[4]. However, the latter forms of ownership will not be the subject of this study.

1.2. The concept of family

In ancient times, the Romans defined the family as the totality of goods and persons under the power of the same master (*pater familias*). It is observed from the very beginning how the very concept of family is dependent on the idea of a person's power or authority; of it's *pater familias*. Depending on the person or object on which it is exercised, this power may be renamed. Thus: the power of the husband over the woman was called *manus*, the power of the father over the descendants was called *patria potestas*, that of the master over the slaves *dominica potestas* and that of the master over other goods besides slaves, *dominium* [1]. There is even a type of power that the buyer exercises over the son sold by the *pater familias*, known as the *mancipium*. For a long time, the rights that *pater familias* had over family members could be confused with the rights of the owner over his property. More precisely, in the old era, just as the owner's right over his property had an absolute character, so the *pater familias* could dispose of the fate of those under his power of his own free will, including the right to life and death over them.

2. The Roman family

As we said, the word family did not have for the Romans the meaning known today, *famulus* evoking the relationship of obedience between the head of the family and all the persons and goods over which he exercised control. Outside the dominion, the family lacked legal recognition. In this sense, it is necessary to mention the fact that in Roman law there were two types of kinship ties: cognation and agnation. Cognation designated blood kinship and for a long time did not produce any legal effect. It was simply a natural blood bond that brought its holders no patrimonial benefit and no civil recognition. Agnation, on the other hand, was the only type of kinship recognized by ancient Roman civil law. That is why the

agnates were called civil relatives (relatives recognized by law). It is very interesting that what in the eyes of the law qualified them as agnates was precisely the enslavement relationship in which they found themselves towards the same *pater familias*. Therefore, all those and only those who were under the authority of the head of the family were agnates. From this point of view, they were called *alieni iuris*, ie persons under the power of a *sui iuris*. By *sui iuris* was meant any novel master in his house, not subject to any power, independently, regardless of whether or not he was of puberty [5]. Therefore, the subject of dominion was an *alieni iuris* person, while the one who had the right to exercise control over others was called a *sui iuris* person [6]. This distinction was of particular importance in the legal field because only *sui iuris* persons had the competence to conclude a legal act in their own name, while *alieni iuris* persons did not have full legal competence or patrimony. The legal implications were among the most diverse, from civil liability (contractual and tort) to the reconfiguration of the legal system so as to correspond to the requirements of the development of the exchange economy.

Only through this special way of organizing the family as an orbit around the power of the head of the family is the true individualistic character of the Roman people observed [1].

2.1. Parental authority (*patria potestas*)

The absolute symbol of power, *patria potestas*, denoted the dominion that *pater familias* exercised over their descendants, except for grandchildren in daughters (who were usually under the power of their fathers). We allot it this significance because *patria potestas* had both an unlimited character and a perpetual character, the head of the family being able to dispose of the person and the goods of his descendants as he wished. Getting out of the power of the *pater familias* was done either naturally (as a rule) or artificially. The natural abolition of parental power was achieved exclusively through death; either of his or of the descendant, the age of the latter having no relevance.

The artificial ways out of *pater's* rule were emancipation, adoption, marriage or those extreme situations in which the head of the family lost an element of personality due to his own insolvencies and thus his parental authority was withdrawn.

Those left under the power of the father were deprived of any trace of decision-making power, the *pater familias* being able to freely dispose of their lives. From this point of view, the distinction between descendants and slaves was negligible, as the father could equally sell, abandon and even kill them. For this very reason, classical law enshrined the idea that such a legal simulacrum as the equivalence of family status between a descendant and a slave (who, in fact, did not even have the legal status of a person, but goods) can no longer be accepted. As a result, by imposing sanctions on heads of households who abused their power over their descendants, *patria potestas* lost its unlimited character. Such limitations of parental power were: the punishment of the head of the family who had abused his descendant with the obligation of emancipation, the deportation of the heads of families who killed their sons and the ban on the sale of descendants [7]. With regard to the restriction, the prohibition on the sale of children did not harm fathers' right to exploit their children's labor force, the only novelty being the legal form that such an act could take. Specifically, starting with this era, fathers could only rent the services of their sons. From the category of rights on the life of the descendant specific to the old era, the only one that did not bear any restrictions was the right of abandonment of the newborn descendant [8].

Classical law brought not only restrictions on the rights of the descendant, but also on the rights that heads of households had over the property of those under their power. Thus, if in ancient times *alieni iuris* could not own property, in classical law it was accepted that they could, by way of exception, own for themselves, although they are not *sui iuris* persons, goods such as *peculi* obtained from the army, the one earned from certain professions (for example lawyer or clerk in the imperial court) or those received from the mother or relatives on the maternal line.

2.2. Creating and abolishing parental power

With regard to the temporal boundaries of parental power, the Romans had regulated both acts by which its establishment or abolition could be achieved exclusively, and acts that could serve both purposes. From the first category we mention legitimation and adrogation, respectively emancipation. The second category included marriage and adoption.

Legitimation was the act by which the natural child was assimilated to the legitimate child, thus entering under the legal authority of his father. The institution of identification was created late and had the role of a bandage designed to alleviate the injustices arising from the ungrateful legal status of children born out of wedlock. Indeed, for a long time, naturally free children (born within *de facto* unions, considered immoral in the old law) were considered strangers by their father and thus had no inheritance vocation or other patrimonial rights. Being only acquainted with their fathers, they did not benefit from the advantages of a legal relationship specific to parentage. Under the direct influence of the Christian church specific to the imperial era, their legal condition begins to be a real concern, gradually recognizing a right to receive food from their fathers but also a restricted inheritance vocation (in the sense that in the absence of legal heirs, they could come to the natural father's inheritance, in order to collect, in competition with their mother, a share of 1/6 of the succession table or a share of 1/12 in the hypothesis that there were also legitimate children) [5].

However, the most relevant defense of the interests of natural children was the institution of legitimation. The creation of parental power by way of legitimation could be achieved through the subsequent marriage of the parents, through imperial rescript or by oblation to the curia.

Legitimation by subsequent marriage of the parents demanded the cumulative fulfillment of certain conditions, such as: the parents had *connubium* at the time of conceiving the child, the conclusion of a contract meant to strengthen the intention to turn the common-law marriage into a civil marriage and the consent of the child concerned (if the child was over 14 years old). The legitimation by imperial rescript was used in those cases in which the subsequent marriage of the parents had become impossible for reasons such as the death of one of them or even another marriage. In order to operate, legitimation by imperial rescript implied, in addition to the first two conditions stated above, the condition of the non-existence of other legitimate descendants of the father [9]. Unlike the first two forms of legitimation, the one by oblation to the curia had as main effect the creation of an agnatic relationship only with the natural father, not with his whole family, the natural children acquiring, implicitly, inheritance vocation only in relation to him.

Adrogation was the act by which a *sui iuris* person, by his own will, decided to come under the authority of another *sui iuris* person who thus became his *pater familias*. In

general, such an act was justified in political interests because, in the absence of such reasons, to voluntarily adopt the status of *alieni iuris* would have the connotation of a legal self-flagellation.

By the emancipation of the son of the family was meant the act of his exit from the power of the *pater familias*. Not to be confused with an expulsion of the son from the family, emancipation led to the abolition of the civil kinship between the emancipated and the family of origin, in relation to which he lost (in ancient times) his inheritance rights. The emancipated gained in return all the advantages deriving from the newly acquired status of *sui iuris* person.

The institution of adoption arose in the realm of promoting the domestic cult and designated the act by which an *alieni iuris* person was transferred from the power of one *pater familias* to the power of another *pater familias*. Simultaneously with the loss of agnatic relations with the family of origin, as a result of the adoption, the adoptee became agnate with the adopter's family. Adoption thus served both the purpose of establishing a new dominion and the extinction of a pre-existing parental power. However, the emphasis was on creating a new parental power, adoption being an act that emanated the role of the Roman man in society. The Roman man who failed to occupy a patriarchal position was not only doomed not to find peace in the realm of immortality, but was also subject to public reproach for failing to fulfill his primary obligation to society, namely that to contribute to the perpetuation of Roman names and family worship [2].

Roman marriage was defined as that bond which creates between the two spouses not only a perfect community of material goods, but also a total submission of the woman to the divine right of her husband and the worship of his ancestors. The man was therefore regarded as a priest of the home. Moreover, the power exercised by the husband over the wife was called *manus* and thus, from the perspective of the matrimonial regime, the Romans distinguished between: marriage with *manus* and marriage without *manus*. Through the marriage with *manus*, the woman passed under the power of her husband, who from a legal point of view does not become her husband, but a true *pater familias*. As an effect of marriage *sine manu*, however, the woman remained under the power of the father from the family of origin, being considered in the eyes of the law a stranger both to her husband and to her own children resulting from that marriage. For this reason, we state that, depending on the form in which it was concluded, marriage could be both a way of establishing parental power and a way of abolishing it.

2.3. About the transmission of the family patrimony

As we said, the only way to transfer family property was by inheritance. But even this was not admitted from the beginning. The reason why in the Gentile era the Romans did not know the concept of transmitting the patrimony *mortis causa* was precisely the synonymy in which the idea of power of the individual and the size of his patrimony were, or they strongly believed that power is not an asset that can be transmitted from one person to another, but individually created value; therefore it was natural that the right of the deceased should be extinguished at once with his personality. With the founding of the Romanian state, however, they had to adapt the principles of a bygone era to new social realities and thus regulate the transmission of heritage by inheritance. The three Roman inheritance systems (legal succession, testamentary succession and inheritance deferred against the will) precisely mirror the oscillations of family relationships on the scale of social values.

The legal succession (*ab intestat*) was based on the need to protect family property and later on private property. The only ones worthy of perpetuating the family cult and mastering the family patrimony were those heirs civilly related to *de cujus*, so the agnates. For this reason, the only basis for the inheritance vocation, as provided in the Law of the Twelve Tables, was civil kinship. In order not to contradict the principles related to power, it was considered that a new right was created for the civil heirs, one of co-ownership of the deceased's property, and that their inheritance rights are not based on the transmission of a patrimony, but the perpetuation of family worship [10]. The consequence of the law was the exclusion from the inheritance of cognates (blood brothers) who were not at the same time agnates, which led to many inequities towards relatives such as emancipated sons or the sons resulted from *sine manus* marriages.

The unfair effects of the provisions of the Law of the Twelve Tables in matters of inheritance were later remedied by the praetors, who by procedural means, reformed the entire system of succession. More precisely, referring to the principles of equity and good faith, by granting a right of legal action based on the possession of the successor goods (*bonorum possessio*), they modified the old inheritance system and created four new categories of Praetorian heirs: *bonorum possessio unde liberi*, *bonorum possessio unde legitimi*, *bonorum possessio unde cognati* and *bonorum possessio unde vir et uxor* [11]. Although the agnates continued to have priority, the praetors took the first step in protecting blood kinship, a step that triggered the imperial reforms by which the inheritance foundation was overthrown, the sole basis of the succession vocation becoming, under Emperor Justinian, blood kinship.

The testamentary inheritance was also depicted as a testimony of the power exercised by the *pater familias* even after death, as by will he could dispose of his estate as he wished, even having the freedom to favor by establishing one or more heirs, to the detriment of others - who would have had the quality of successors according to the legal inheritance system. In addition, the legal provisions adopted in testamentary matters reflect both the promotion of the family as a fundamental value of Roman society and the tendency of its legal protection. Examples of such legal measures are the provisions of obsolete laws, which provided for two special conditions that heirs were required to meet in order to fulfill their inheritance rights, namely to be married and have offsprings [12].

The disinheritance (inheritance deferred against the will) initially expressed the amplitude of parental power, since for a long time the author of the will had absolute to disinherit whom he considered appropriate. However, towards the end of the republic the heirs received a special protection against unfounded disinheritances, through the legal action called *querela inofficiosi testamenti* [13]. Starting from the concept of *officium*, which designated the legal obligation to love your family, those who consider that they were unjustly or abusively disinherited, could attack in court the will that included the disinheritance clause, seeking its annulment. If they proved before the court of centumvirs that they did not give objective reasons to the testator to disinherit them, the will was declared an *inofficiosi* one, ie a will drawn up in violation of the duty to love his family, and therefore declared null and void. The reason for the annulment of the will was the lack of legal competence to conclude an act of the testator, as only a person lacking discernment can disinherit family members in the absence of serious and objective reasons.

2.4. The status of women inside of the Roman family

It is notorious that Roman society was by definition a patriarchal one. However, the legal status of women and their special condition have evolved simultaneously with their role in social life. Thus, in ancient times women were either under the power of their father or husband, or were placed under guardianship after the death of their heads of families, because the perception of Roman society regarding them was that they did not have enough discernment to manage a patrimony [14]. The inferiority of women was reflected both in the matter of marriage and in terms of inheritance.

Regarding marriage, we have already debated how in ancient times this institution was seen as a total submission of women to the divine right of their husbands and the worship of his ancestors. At that time, the *with manus* marriage constituted the rule, which reflected the subordination of the woman, as opposed to a *sine manus* marriage, which was more like a cohabitation and therefore suggested a certain freedom of the woman in relation to her husband. Specific to the old era is the fact that the conclusion of marriages did not require the consent of the bride and groom (especially the woman), the consent of the heads of households being sufficient. The dissolution of the marriage with manus could be achieved either by a divorce agreement or by the unilateral act of repudiation available only to the man. In addition, regardless of the cause of the dissolution of the marriage, under the sanction of falling into infamy, women were forbidden to remarry before the expiration of a period of so-called mourning of at least 10 months [6]. Although infamy attracted not only the loss of social status, but also that of Roman citizenship or even freedom, the Romans of ancient times considered it a well-deserved sanction commensurable with tarnishing the image of the ex-husband (attracted by such a quick subsequent marriage).

Classical and imperial law generalizes *sine manus* marriages, which leads to the reconfiguration of the image, role and importance of women in society. In the light of new conceptions, the consent of the bride and groom, including the wife, becomes a significant condition for the valid conclusion of the marriage. At the same time, the unilateral dissolution of the *sine manus* marriage could be achieved by either spouse, because in the absence of the exercise of manus power, the two spouses were not in a legal relationship of subordination, but of equality.

However, the distinction between the two types of marriage was mainly reflected in matters of inheritance. Thus, in ancient times, women married with manus lost all patrimonial rights in the family of origin (to which they were considered foreigners). As they came under the power of their husbands, in the vision of the Law of the Twelve Tables they became daughters of the spouses and sisters of their own children and acquired a succession vocation accordingly [12]. Symmetrically, those married without manus kept their civil kinship with the family of origin, being instead foreign to their spouses and children, which meant that there were no legal relations of inheritance between them. At the same time, given that women were included among the *de facto* incapables, after the death of their head of household (either father or husband), they were placed under guardianship. Thus, even in cases where women had a inheritance vocation, they did not benefit from the freedom to dispose of the patrimony inherited without *auctoritatis tutoris* (the approval of their legal guardians). Moreover, their right to inherit was subject to a value threshold. Thus, they had the competence to inherit only within the limit of a succession asset of 100,000 aces [12]. Given that for a long time the Romans put the sign of equality between property and the power held by a person in the community, the possibility of a woman to

have a wider wealth than perhaps the average men in the community was something that a deeply patriarchal society could not indulge in. Finally, unlike the disinheritance of sons (extremely legally protected) which involved strict rules, the disinheritance of women without regard for formal conditions did not attract the nullity of the will, they can be disinherited in shoal, without even being nominated.

The status of women has an ascending slope in the classical and post-classical eras, these epochs being characterized by the reformation of the entire legal system. Through the reforms of the praetors and later through the reforms of the emperors, a certain tendency to protect women can be noticed. Specifically, the praetors carry out a series of procedural reforms through which married women (without manus) acquire an inheritance vocation in relation to their spouses and children. As the praetors did not have legislative powers, but only judicial ones, they could not reclassify the civil connection between them and the *cujus*, but granted them a right of legal action by which to capitalize some rights of inheritance. The basis on which these legal actions were admitted in court was the quality of good faith holders that the woman had with regard to the patrimony that is the object of the succession. As these lawsuits were won, their inheritance vocation became widespread, *sine manus* married women constituting an independent category of heirs. Although the path set by the praetors was a clear signal of the legal protection of women's property rights, the limitation of their powers meant that they were placed in the inheritance hierarchy following collaterals. But, with the establishment of the empire, the emperors took over the intentions of the praetors and finalized them in an imperative form. Thus, in the time of Emperor Augustus, *ingenui* women (born free) who had at least 3 children as well as those freed-mothers (former slaves) of at least 4 children were granted *ius liberorum*, which meant the right to be removed from guardianship. The emperor considered that women who proved to be able to take care of the well-being of their children were certainly able to manage their wealth on their own [1]. Then, Emperor Hadrian ruled that the mothers of children resulting from a *sine manus* marriage must take precedence over the inheritance of their children and thus be able to remove collaterals from the inheritance order. In addition, the limit on the 100,000 aces estate that women could acquire falls into disuse.

It is also worth mentioning that women having the quality of descendants (including the wife married with manus), ascendants or collaterals benefited under the same conditions as male heirs from the right to issue a *querella inofficiosi testamenti*. Finally, Emperor Justinian decided that all women should benefit from *ius liberorum*, regardless of the number of children had, which meant eliminating the difference between the legal competence of a man and that of a woman and thus the status of Roman women evolved from that of holders of the obligation of total submission to men, on an equal footing with them.

3. Conclusion

In the introduction to this article, we presented the symbiotic relationship in which the concept of family and patrimony were and how they revolved around the idea of power, a word that defined the Roman people. But if we follow the millennial evolution of the Roman law system we can see how, over time, the sign of equivalence between these three notions has turned into another sign of punctuation, namely the dot. Dominion. Heritage. Family. Three independent values, legally protected at the highest level, starting with the reforms of the praetors carried out procedurally and concluding with the imperial normative acts. By

constantly adapting to the requirements of practice, their initial consubstantiality metamorphosed over time into individuality and thus the importance of family relationships increased in population with diminishing the relevance of the idea of domination, surpassing in the hierarchy of Roman values the dominion of patriarchal power.

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THE ORIGIN OF MARRIAGE IN NATURAL LAW ACCORDING TO ULPIAN

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Abstract

The definition of natural law was transmitted to us from classical Roman law according to Ulpian. The text containing this definition was written under the influence of Greek ideas. However, this text, which has a legal character, provides for a law that applies only to humans. As for the marriage between a man and a woman, referred to as having its origin in natural law, it lies on the basis of statements by the same Roman jurist: he claims that the offspring are born to belong to the Republic, too. Also, both natural and positive law state the existence of mutual support obligations between parents and their children. The Romanian Civil Code stipulates the marriage between a man and a woman. As revealed in the present paper, the foundation of this provision of the Romanian Civil Code can be found in the classical Roman law according to Ulpian (D. 1.1.1.3), as well as in the text of the Emperor Justinian (I. 1.2. pr.).

Keywords: *ius naturale, matrimonium, ius gentium, ius civile*

1. Definition of Natural Law according to Ulpian, D. 1.1.1.3

In the present paper I will present some aspects related to the definition of natural law (*ius naturale*), which also includes references to marriage as an institution that has its origin in natural law:

ULP., D. 1.1.1.3

Ius naturale est, quod natura omnia animalia docuit: nam ius istud non humani generis proprium, sed omnium animalium, quae in terra, quae in mari nascuntur, avium quoque commune est. hinc descendit maris atque feminae coniunctio, quam nos matrimonium appellamus, hinc liberorum procreatio, hinc educatio: videmus etenim cetera quoque animalia, feras etiam istius iuris peritia censer[1].

a) The Problem of Interpolations in the Text

a1. The Text Is Interpolated

Manthe reveals some possible influences on Ulpian's text of D. 1.1.1.3, first recalling that von Lübtow removed this paragraph as he considered it "byzantine"[2]. Wagner considers the tripartition *ius naturale – ius gentium – ius civile* as postclassical[3].

a2. The Text Is Classic

In current specialised literature, Kaser considers that Ulpian could also have written this sentence that phrases the definition of natural law (*ius naturale*)[4].

b) The Influence on the Phrasing of the Definition

Winkel remarks on how in the definition of natural law one could find an echo of Theophrastus' theory, while in the definition of the law of nations an influence of Chrysippus is likely. The author assumes that the entire bipartite distinction between *ius*

naturale and *ius gentium* would have been influenced by the controversy in the field of legal order between Peripatetics and Stoics[5].

According to Manthe, Winkel identified in the source D. 1.1.1.3 a compromise between Stoicism and Peripatetics, while Nörr considers that the environment that influenced Ulpian's thinking is the Neopythagorean and Neoplatonic. Manthe makes it clear that he does not adhere to any of the views presented above, and the intellectual kinship should be sought elsewhere; the author implicitly rejects the idea of interpolation of the text to which von Lübtow referred[6].

Commenting on the passage in Teoph. 1. 2 pr., Knütel considers that the statement concerning all animals – *ius naturale est, quod natura omnia animalia docuit* – is influenced by the Presocratic theory. Thus, the author quotes Cicero, who mentions Pythagoras and Empedocles. He then states that Theophilus' thinking reflects an influence of Plato[7].

c) The Application of Natural Law

c1. Humans and Animals

Kaser considers that the fact that in D. 1.1.1.3 examples are also given from the animal kingdom is due to Greek influence, and this does not mean that the text is interpolated[8]. Ziegler also refers to the Greek origin of these ideas[9]. Another author, Spruit, reveals that *ius naturale* is the law learned from nature by all beings[10]. Wacke translates the phrase *quod natura omnia animalia docuit* thus: "what nature instinctively gave to all beings-and animals"[11]. Behrends considers that the source D. 1.1.1.3 reveals a biological natural law[12]. However, it refers only to humans and animals, not to all organisms. Kränzlein notes that Ulpian's special view of natural law (*ius naturale*), which concerns all animals, was not accepted among his contemporaries [13].

c2. Only Humans

As Kaser reveals, there are authors in the specialised literature who denied that Ulpian could have mentioned examples from the animal kingdom in the text preserved in D. 1.1.1.3[14].

However, as Kaser states, the formulation *ius naturale est, quod natura omnia animalia docuit*, etc. in Ulpian's text D. 1.1.1.3, which is classical and is also assumed by Justinian's compilers, presents a law that does not apply to animals as well [15].

d) The Legal Character

In the specialised literature, several authors have stated the legal character of Ulpian's text preserved in Justinian's *Digest* 1.1.1.3.

With regard to the final part of the previous paragraph, D. 1.1.1.2, Kaser considers that, by making a distinction between *ius naturale*, *ius gentium* and *ius civile*, it can be inferred that Ulpian understands parts of the legal order, therefore law in the "objective" sense. However, in the introduction of his institutional work, Ulpian follows only a didactic purpose, that of presenting elements of the legal order to beginners[16].

Ziegler reveals that, in the Roman tradition, the Greek thought of a natural law, applied to all beings, known until the Emperor Justinian's time, was preserved. However, the author continues, in Romans D. 1.1.1.3 had no practical significance[17].

Ziegler notes and supports Kaser's view that from the beginning natural law (*ius naturale*) was not a concept of a legal system, since it has no legal dogmatic criteria as its foundation[18]. Ziegler notes that, in his work, Kaser again points out that the natural law to the Romans is not a source of law, but rather that *ius naturale* is a normative factor and a reason for legal culture[19]. *Ius naturale* comes from nature and therefore has mainly an extralegal origin. Certainly, Ulpian had no intention to introduce the concept in the legal system in D. 1.1.1.3[20].

In view of what has been revealed above by different authors, it could be stated that D. 1.1.1.3 is not positive law, but can be considered as having legal character.

2. Marriage between a Man and a Woman

2.1. Explanation for Rearing the Offspring

In another fragment preserved in Justinian's *Digest*, from the same classical Roman jurist Ulpian, Catalano emphasizes that offspring is not only born to be part of their family, but also to belong to the Republic:

ULP. D. 37. 9. 1. 15

[...] *partus enim iste alendus est, qui et si non tantum parenti, cuius esse dicitur, verum etiam rei publicae nascitur*[21].

Wacke interprets paragraph D. 1.1.1.3 in the sense of the self-preservation instinct: offspring is reared for the purpose of the conservation of species[22].

2.2. Obligations to Supporting Each Other between Parents and Children

In the Middle Ages, canon law supplemented Roman law, and glossators and commentators interpreted the statements from *Corpus iuris civilis*. Thus, according to Baldus and other authors, the obligation of parents to support children would be based on natural law (*ius naturale*, D. 1.1.1.3), while the corresponding obligation of children towards their parents would derive from the law of nations (*ius gentium*). But, as Peter reveals with reference to Krause's work, this interpretation remains questionable, since in the *Codex* of Justinian 6.61.8.4 d, it is stated that *propter naturam et leges* children are obliged to support parents[23], i.e. both according to natural law and positive law.

3. Conclusion

The example of Roman law can draw some landmarks in a period when the traditional family is subject to various attacks. In the current Romanian Civil Code, in article 259, paragraph 1, marriage is considered the union between a man and a woman: "marriage is the freely consented union between a man and a woman, concluded under the law"[24]. As revealed in the present paper, the foundation of this provision can be found in the classical Roman law at Ulpian (D. 1.1.1.3), as well as in the text of *Institutes* of Justinian (I. 1.2. pr.). One can, therefore, emphasize a natural continuity of the Romanian law on the Romanistic tradition and the importance of this undeniable link for the Romanian legal culture.

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birds as well. Out of this comes the union of man and woman which we call marriage, and the procreation of children, and their rearing. So we can see that the other animals, wild beasts included, are rightly understood to be acquainted with this law". T. Sâmbrian (2002), *Digestele lui Iustinian. Prima carte*, traducere, Editura Universitaria, Craiova, pp. 28-29: "Drept natural este cel cu care natura a învățat toate viețuitoarele. Căci acest drept nu este propriu numai neamului omenesc, ci este comun tuturor animalelor care se nasc fie pe pământ, fie în mare și de asemenea, păsărilor. De aici descinde uniunea bărbatului cu femeia, pe care noi o numim căsătorie, de aici procrearea copiilor și de aici educația (lor); căci vedem, că și celelalte animale, inclusiv sălbatice se consideră că au cunoștința acestui drept". See the similar fragment in *Institutiones Iustiniani* 1. 2 pr.: *Ius naturale est, quod natura omnia animalia docuit. nam ius istud non humani generis proprium est, sed omnium animalium, quae in caelo, quae in terra, quae in mari nascuntur. hinc descendit maris atque feminae coniunctio, quam nos matrimonium appellamus, hinc liberorum procreatio et educatio: videmus etenim cetera quoque animalia istius iuris peritia censer.* VI. Hanga, M. D. Bob (2009), *Instituțiile lui Iustinian*, traducere și note, Universul Juridic, București, p. 29 and 31: "Dreptul natural este dreptul pe care toate ființele l-au deprins de la natură, căci acest drept nu este specific neamului omenesc, ci este comun tuturor animalelor care se nasc pe uscat, în mare precum și păsărilor. De aici decurge uniunea bărbatului cu femeia, pe care noi o numim căsătorie, zămislirea copiilor și educarea (lor). În fapt, vedem că și celelalte animale sunt socotite a cunoaște acest drept".

[2] Manthe, U. (1997). Beiträge zur Entwicklung des antiken Gerechtigkeitsbegriffes II: Stoische Würdigkeit und die iuris praecepta Ulpian. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, 114, p. 16: "Ulrich von Lübtow hat diesen Satz als 'typische Blüte der Kategoriensucht des byzantinischen Scholastizismus' (note 47: v. Lübtow, De iustitia et iure, SZ 66 (1948) 458ff., 478 = Ges. Schriften I 1 (1989) 73ff., 92.) verworfen".

[3] Wagner, H. (1991). Review of *Lineamenti di storia del diritto romano*, 2nd edition, edited by M. Talamanca. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, 108, p. 426: "Die Trichotomie *ius naturale* – *ius gentium* – *ius civile* (D. 1, 1, 1, 3. 4; S. 512) halte ich nach wie vor für nachklassisch".

[4] Kaser, M. (1986). "Ius publicum" und "ius privatum". Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, 103, p. 14: "Dennoch kann Ulpian auch diesen Satz geschrieben haben; entspricht doch gerade seiner Auffassung die Reihenfolge fortschreitend enger werdender Begriffe: *ius naturale* als Recht, das für alle Lebewesen (note 41: Daß für das *ius naturale* sogar Beispiele aus dem Tierreich genannt werden (D. 1. 1. 1. 3 = I. 1. 2 pr.), wollte man dem Ulpian absprechen, vgl. die Lit. im Ind., ferner Albertario, St. giur. 5 (1937 aus 1924) 279ff. mit weiteren Hinweisen; zuletzt H. Wagner, Studien zur allgemeinen Rechtslehre des Gaius (1978) 135ff. Aber diese Textkritik beruht auf einem Mißverständnis; s. die Abh. o. A. 40 a. E. Zur griechischen Grundlage dieser Anschauung s. Castelli, St. Perozzi (1925) 53ff.; sie steht der Echtheit des Ulpianentexts nicht entgegen.), *ius gentium* als solches, das für alle Menschen, und *ius civile*, das nur für die römischen Bürger bestimmt ist".

[5] Winkel, L. (1988). Die stoische o„ke...wsij-Lehre und Ulpian's Definition der Gerechtigkeit. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, 105, p. 678: "Weiter haben wir zwar schon einige Stellen zitiert, wo Ulpian möglicherweise mit der stoischen Lehre in Beziehung gestanden hat; gesichert ist ein stoischer Einfluß auf die ulpianische Gerechtigkeitsdefinition damit noch nicht. Dieser ergibt sich jedenfalls nicht aus Ulpian's

Definition des *ius naturale*. – D. 1. 1. 1. 3 Ulpianus libro primo institutionum *lus naturale est, quod natura omnia animalia docuit: nam ius istud non humani generis proprium, sed omnium animalium, quae in terra, quae in mari nascuntur, avium quoque commune est*. – Hier könnte man eher einen Widerhall der Lehre Theophrasts beobachten, weil das Recht hier alle Lebewesen umfaßt. In der ulpianischen Definition des *ius gentium* heißt es aber – D. 1. 1. 1. 4 *lus gentium est, quo gentes humanae utuntur. Quod a naturali recedere facile intellegere licet, quia illud omnibus animalibus, hoc solis hominibus inter se commune sit*. – Hier ist Einfluß der Stoa wahrscheinlich. Ist es jetzt wirklich zu gewagt zu unterstellen, daß die ganze Zweiteilung *ius naturale/ius gentium* in der Lehre der römischen Juristen eine Art Kompromiß war in der Streitfrage um den Bereich der Rechtsordnung zwischen dem Peripatos und der Stoa? Das *ius gentium* regelt ja nur die menschlichen Beziehungen, genau wie Chrysippos lehrte. Hier liegen noch viele offene Fragen”. See also Cannata, C. A. (1996). Review of *Ars boni et aequi. Festschrift für Wolfgang Waldstein zum 65. Geburtstag*, edited by M. J. Schermaier and Z. Végh. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, 113, p. 626: “L. C. Winkel, Einige Bemerkungen über *ius naturale* und *ius gentium* (p. 443–449. L'autore ribadisce e rimedita la sua tesi (vedi già SZ 105, 1988, 669 ss.) circa l'origine nel pensiero della scuola peripatetica della definizione di *ius naturale* come *ius quod natura omnia animalia docuit*, che compare in Ulp. D. 1, 1, 1, 3 (cfr. Cic. rep. 3, 19), mentre alla tradizione stoica appartiene la concezione del *ius gentium*, definita nel § 4 dello stesso testo ulpiano (cfr. Cic. fin. 3, 20, 67)”.

[6] Manthe, U. (1997). Beiträge zur Entwicklung des antiken Gerechtigkeitsbegriffes II: Stoische Würdigkeit und die iuris praecepta Ulpianus, cit., p. 16: “Winkel dagegen sah in der Stelle einen Kompromiß zwischen Stoa und Peripatos (note 48: Winkel, Die stoische o.,ke...wsij-Lehre und Ulpianus Definition der Gerechtigkeit, SZ 105 (1988) 678, ähnlich Pohlenz, Stoa I 263. Die große Distanz Ulpianus zur Stoa wird deutlich, wenn man zum Vergleich Stellen heranzieht, in welchen römische Juristen stoische Lehren ohne jeden redaktionellen Eingriff übernommen haben, so etwa Pomp. 31 ad Sab. D. 41, 3, 30 pr. und Chrys. fr. phys. 1013 SVF II p. 302,17–23, fr. mor. 160 SVF III p. 38, 7–10 (*populus* und *legio* als Sachen und Objekte des Privatrechts!)). Nörr ordnete den Gedanken eher dem neupythagoreischen und neuplatonischen Umfeld zu (note 49: Nörr, Anz. ANRW II 36.1, SZ 106 (1989) 726f.; Anz. ANRW. II 36.2, SZ 107 (1990) 679; Bretone (o. Anm. 46) 232.). Vielleicht darf man die geistige Verwandtschaft Ulpianus andernorts suchen”. For von Lübtow's statement, see *supra* n. 2.

[7] Knütel, R. (1996). Review of *Corpus Iuris Civilis: Tekst en Vertaling*, Band 1: Institutiones – Instituten, Band 2: Digesta I–X – Digesten 1 – 10. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, 113, pp. 450–451: “*Censeri* kann auch die Bedeutung haben, daß jemand eingeschätzt, eingeordnet, d. h. einer einheitlichen Klasse zugeschrieben oder zugewiesen wird. In diesem Sinne formuliert Theophilus die uns interessierende Aussage Ἰδμεν γὰρ οὐ μόνον ἐννόμους ἐῖν καὶ τὰ λοιπὰ ζῷα ὑπὸ τῶν τιμῶν τοῦτον τὸν νόμον ἐναγεγραμμένα: Denn wir sehen, daß nicht nur die Menschen, sondern auch die übrigen Lebewesen denen zugeschrieben werden (ἐναγεγραμμένα), die dieses Gesetz achten. — Es gehören also nicht nur die Menschen, sondern auch die übrigen Tiere zu der Gruppe, deren Angehörige sich von der Kenntnis des Naturrechts leiten lassen. Daß dieser Sinn gemeint ist, ergibt sich aus dem Zusammenhang mit dem Eingangssatz: *lus naturale est, quod natura omnia animalia docuit* sowie daraus, daß dahinter die vorsokratische Lehre steht, von der Cicero, De re publ. 3,11,19 berichtet: *Pythagoras et*

Empedocles unam omnium animalium condicionem iuris esse denuntiant. Es steht auch nicht entgegen, daß der Schlußsatz *videmus etenim rell.* bei diesem Verständnis von *censeri* in gewisser Weise nur eine Wiederholung des Vorgehenden ist. Er appelliert an die Evidenz. Es ist bemerkenswert, daß bei Theophilus der Gedanke dahin weitergeführt wird, daß diese evidenten naturrechtlichen Verhaltensweisen auf dem Drang beruhen, an der Unsterblichkeit teilzuhaben, ein Gedanke, der auf Plato zurückgeht. Daß alldas inzwischen wieder ganz aktuell geworden ist, kommt etwa in den neuen §§ 90 a BGB, § 285 a ABGB zum Ausdruck“. See also Modrzejewski, J. (1976). „Aut nascuntur aut fiunt“: Les schémas antiques des sources de l’esclavage. *Bullettino dell’Istituto di Diritto Romano* “Vittorio Scialoja”, 79, p. 14: “Pour Ulpian, au contraire, il existe, à côté d’un droit propre à chaque peuple et d’un *ius gentium* commun à tous les hommes, un droit naturel commun aux hommes et ... aux animaux (note 40: Ulp., D. 1, 1, 1, 3.). L’idée remonte, pense-t-on, aux pythagoriciens; on la retrouve dans le *Contre Aristogiton* du Ps.-Démosthène (25, 65-66); elle était en vogue à l’Académie après la mort de Platon; Cicéron l’a recueillie dans son *De re publica* (3, 19) et elle finit, sans doute par l’intermédiaire de la rhétorique, à refaire surface dans l’œuvre d’Ulpian”.

[8] See *supra* n. 4, Kaser, M. (1986). “*Ius publicum*” und “*Ius privatum*”, cit., p. 14.

[9] Ziegler, K. H. (1987). Review of *POLEMOS DIKAIOS und Bellum Iustum. Versuch einer Ideengeschichte*, by S. Clavadetscher-Thürlemann. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, 104, p. 712: “Auf den ersten Blick verwunderlich ist die Untergliederung des Abschnitts über die Kriegsgegner in Unterabschnitte über ‘Menschen’ (17ff.) und ‘Tiere’ (46ff.), verständlich nur, wenn man die Spekulationen griechischer Philosophen über ein Menschen und Tieren gemeinsames Recht mit in die Betrachtung einbezieht (note 5: In der römischen Tradition hat sich der griechische Gedanke eines alle Lebewesen verbindenden natürlichen Rechts bekanntlich bis zu Justinians Digesten erhalten. Vgl. Ulpian D. 1, 1, 1, 3: *Ius naturale est, quod natura omnia animalia docuit* etc. Praktische Bedeutung hatte dieses philosophische Versatzstück freilich bei den praktisch denkenden Römern erst recht nicht.)”.

[10] Spruit, J. E. (1995). Nocturne. Eine Auslegung von Alfenus D. 9,2,52,1 aus soziologischer Sicht. *Tijdschrift voor Rechtsgeschiedenis*, 63, p. 256 n. 36: “[...] das *Ius naturale* – das Recht, das, wie Ulp. D. 1,1,1,3 behauptet, die Natur allen Lebewesen beigebracht hat –”.

[11] Wacke, A. (1989), Notwehr und Notstand bei der aquilischen Haftung. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, 106, p. 475: “*Ius naturale* ist nach Ulpian D. 1, 1, 1, 3 ‘was die Natur allen Lebewesen – auch den Tieren – instinkthaft mitgegeben hat’ (*quod natura omnia animalia docuit*). Dazu rechnet Ulpian ausdrücklich die Paarung und Nachkommensaufzucht. Dieses Recht zur Reproduktion der eigenen Gattung zum Zwecke ihrer Arterhaltung impliziert auch das natürliche Recht zur Selbstverteidigung: Der Selbsterhaltungstrieb – ein Naturrecht”.

[12] Behrends, O. (1990). *Anthropologie juridique de la jurisprudence classique romaine*. *Revue historique de droit français et étranger* (68), p. 344: “La tradition juridique, on le sait, part d’un *Ius naturale* biologique, c’est-à-dire d’un *Ius* garanti uniquement par la nature elle-même (note 25: *Ulpianus libro 1 institutionum* D. 1, 1, 1, 3: [...] La dernière phrase veut dire qu’on évalue les animaux selon le degré où ils obéissent à leurs instincts.)”.

[13] Kränzlein, A. (1995). Review of *Statut personnel et liens de famille dans les droits de l’Antiquité*, by J. Méléze-Modrzejewski. *Zeitschrift der Savigny-Stiftung für*

Rechtsgeschichte, 112, p. 482: „Die spezielle Ansicht Ulpians über das *ius naturale – quod natura omnia animalia docuit, ius non humani generis proprium, sed omnium animalium* (D. 1, 1, 1, 3) – habe keine Verbreitung unter seinen Zeitgenossen gefunden“. However, it is worth noting that the entire content of paragraph D. 1.1.1.3 was taken up in Justinian's *Institutes* 1. 2 pr.

[14] See *supra* n. 4, Kaser, M. (1986). “*Ius publicum*” und “*ius privatum*”, cit., p. 14.

[15] Ziegler, K. H. (1995). Review of *Ius gentium*, by M. Kaser. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, 112, p. 576: “Die vieldiskutierte Formulierung in D. 1, 1, 1, 3: *ius naturale est, quod natura omnia animalia docuit* etc. führt den Verf. dann zur präzisen Frage ‘Recht auch für Tiere?’ (Nr. 25, S. 70-74), die er unter Hinweis auf Ulpian D. 9, 1, 1, 3 (S. 72) verneint”.

[16] Kaser, M. (1986). “*Ius publicum*” und “*ius privatum*”, cit., p. 14: “Für den Sinngehalt des Ausdrucks *i. priv.* läßt sich aus der Aufzählung von *ius naturale, ius gentium* und *ius civile* entnehmen, daß Ulpian darunter Teile der Rechtsordnung, also Recht im ‘objektiven’ Sinn versteht. Andere Juristenstellen mit *i. priv.* weichen davon ab (u. XII, 3). Für D. 1. 1. 1. 2 ist jedoch festzuhalten, daß Ulpian in der Einleitung seines Institutionenwerks nur den didaktischen Zweck verfolgt, den Anfängern Elemente der Rechtsordnung vorzuführen”.

[17] See *supra* n. 9, Ziegler, K. H. (1987). Review of *POLEMOS DIKAIOS und Bellum Iustum. Versuch einer Ideengeschichte*, by S. Clavadetscher-Thürlemann, cit., p. 712.

[18] Ziegler, K. H. (1995). Review of *Ius gentium*, by M. Kaser, cit., p. 576: “Mit Recht hebt Kaser hervor, daß das *ius naturale* ‘von Haus aus kein juristischer Systembegriff’ war, weil es ‘auf keinem rechtsdogmatischen Kriterium beruht’ (S. 58)”.

[19] *Ibidem*: “Die knappe Stellungnahme zum ‘*Ius naturale* bei den Juristen’ (Nr. 22, S. 64/65), die ebenfalls auf Detail-Untersuchungen im ‘besonderen Teil’ vorbereitet, stellt nochmals heraus, daß das ‘Naturrecht’ bei den Römern ‘keine Rechtsentstehungsquelle’ ist: ‘Vielmehr nennt *ius naturale* die Natur als einen normbildenden Faktor und zugleich als Motiv für die Rechtsbildung’ (S. 64)”.

[20] *Ibidem*: “Das *ius naturale* ‘stammt aus der Natur und damit primär aus außerjuristischer Wurzel. Damit war es von *ius civile* und *ius gentium* nicht scharf abtrennbar’ (S. 74). Mit anderen Worten: ‘Systematische Absichten’ lagen Ulpian auch bei D. 1, 1, 1, 3 ‘gewiß fern’ (ebd.)”.

[21] Catalano, P. (1990). *Diritto e persone*, I, G. Giappichelli Editore, Torino, p. 215 and n. 43: “[...] questo concepito infatti si deve alimentare perché nasce non solo per il genitore, cui si dice appartenere, ma anche per la repubblica”.

[22] See *supra* n. 11, Wacke, A. (1989), Notwehr und Notstand bei der aquilischen Haftung, cit., p. 475.

[23] Peter, H. (1985). Review of *Die gegenseitigen Unterhaltsansprüche zwischen Eltern und Kindern in der deutschen Privatrechtsgeschichte*, by E. Krause. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, 102, p. 752: “Im zweiten Teil zeigt uns der Verf. sehr anschaulich, wie das kanonische Recht des Mittelalters das römische Recht ergänzt hat und wie die Glossatoren und Kommentatoren die Aussagen des *Corpus iuris civilis* interpretierten (S. 33–53). Bemerkenswert ist etwa die Feststellung, daß nach Baldus und anderen die Unterhaltungspflicht der Eltern (und insbesondere des Vaters) gegenüber den Kindern im *ius naturale* (im Sinne von Inst. 1, 2 pr.; D. 1, 1, 13) begründet ist (S. 48f.),

wogegen die entsprechende Pflicht der Kinder gegenüber ihren bedürftigen Eltern sich aus dem *ius gentium* ableitet, da sie in der Tierwelt nur ganz ausnahmsweise (angeblich bei Störchen und Schwalben) beobachtet wird; diese Deutung blieb allerdings nicht unbestritten, da man im Codex Iustinianus lesen konnte, *propter naturam et leges* seien die Kinder zum Unterhalt der Eltern verpflichtet (C. 6, 61, 8, 4d)".

[24] Codul civil român, articolul 259 alineatul 1: "Căsătoria este uniunea liber consimțită între un bărbat și o femeie, încheiată în condițiile legii".

GOOD FAITH - A FUNDAMENTAL PILLAR FOR LEGAL RELATIONS. CONCEPTUAL BOUNDARIES BETWEEN GOOD FAITH AND DOMESTIC AND EUROPEAN ABUSE OF RIGHTS.

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Abstract

The study of the concept of abuse of rights, from the moment of its substantiation until now, reveals that the analysis of the existence of an abuse of rights took into account two concepts in antithesis - the objective conception and the subjective conception. The analysis of the subjective factor, transposed in good or bad faith, still presents an overwhelming relevance in the legal diagnosis of the state of affairs.

Good faith is more than a principle of law; it represents an abstract, indefinite legal standard, but to which refer both the definitions of some concepts in antithesis, but also the consolidation and/or recognition of some rights.

The study aimed to analyze, in a synthetic way, the relevance of the elements of good faith as an abstract legal standard and comparison of bad faith, in the context of abuse of rights.

Keywords: *good faith, bad faith, abuse of rights, abuse of union law.*

1. Good Faith. Abstract legal standard.

The *bona fides* legal concept was founded by Marcus Tullius Cicero in the work *De Officiis*, where the philosopher defines the good faith as „sincerity in words (*veritas*) and fidelity (constancy) in commitments”.

According to the Explanatory Dictionary of the Romanian Language, the term (compound) „*buna-credință* (good faith)” means: a) obligation of correct behavior that the parties must meet when concluding and executing contracts (or international treaties); b) certitude of a person that they are acting under a right and according to the law or to what is proper. Good faith presupposes sincerity and honesty. The principle (lat. *principium*) is a fundamental element, a basic idea, a norm of conduct on which a political or legal system is founded.

Good faith is elevated to the rank of general principle of law, and in Romanian private law, good faith, as an abstract legal standard, is regulated in art. 14 para. (1) Civil Code which states that „**any natural or legal person must exercise their rights and perform their civil obligations in good faith**, in accordance with the public order and morals.” In the current regulation, along with the concept of good faith, there are two other essential notions, namely that of public order and that of good morals.

Good faith is considered to „represent, in a very general way, that psychological state of the subject of a legal relationship that defines their honest attitude towards the rights and obligations resulting from such a legal relationship. Good faith is, therefore, the transposition of honesty from the point of view of moral relations into that of legal relation.” [1]

Emphasizing the difference between *morality* and *law*, in doctrine it was noted that: „(...) *law resembles morality, but is not confused in terms of contents. Morality looks at human actions in their conception and tries to prevent them from appearing on the outside, as long as they are in the forum of consciousness and before the execution externalizes them; morality tries to prevent them, projecting on the consequences that would derive from themselves its opposition, the disapproval. The law looks at them from the limit of author's personality, in their external repercussion, without being indifferent to the intention that preceded them, before the execution follows for their clarification.*”[2]

Although there is no legal definition of the *good faith*, it is considered that „*Good faith is an example of the intertwining of moral norms with legal norms (D. Gherasim, op. cit., p. 228). The principle of good faith acts and produces effects in „the most varied fields of civil law: appreciation and interpretation of legal acts, conclusion and execution of contracts, exercise of civil rights, as well as all ways of acquiring rights by the person found in excusable neglect*”[3], but also the fact that „*Good faith, public order and good morals are the benchmarks according to which the subjects of a legal relationship must be guided in exercising the rights and in meeting the obligations.*”[1]

In other specialized works ([1], [4, pp.9-10]), the elements of good faith have been listed as being „(i) *right intention, consisting in the absence of deceit, fraud and violence, fidelity in commitments, in probity and in loyalty; (ii) diligence, as an expression of prudence; (iii) lawfulness, consisting in the circumscription of the actions within the limits of the law and (iv) temperance, consisting in the lack of intention to do harm, to prejudice.*”

2. BAD FAITH - IN ANTITHESIS WITH GOOD FAITH.

Bad faith is defined in doctrine by reference to good faith, as a legal standard and it is noted that „*At the opposite pole, bad faith is based on psychological facts that morality and social ethics dislike, and the law punishes them depending on the gravity of the legal subject's deed acting in bad faith. Bad faith means „malicious intent, recklessness, wrongdoing, and causing harm, all as a result of dishonesty.*”[3] „*The antithesis of good faith is, therefore, bad faith, „manifested by deceit, violence, fraud and abuse of rights*” ([3], [4]).

The two concepts - *good faith* and *bad faith* - are considered complementary notions and, „*Without defining bad faith, this represents the opposite of good faith, so the two notions can only be seen and analyzed in antithesis. As a result, just as good faith represents a set of virtues that must animate the will, as a psychological element of external conduct, so bad faith represents an external attitude that the legislator detests in various forms, from the refusal to recognize a right, until the sanction of the author. This does not mean that bad faith will always produce effects against the author, there are also situations in which the legislator recognizes certain effects, even in its favor (for example the right of the holder of bad faith to usufruct).*”[1]

In an attempt to delimit the concept of bad faith from good faith, it was stated that „*good faith [...] does not simply lead to the idea that its reverse would be nothing but guilt; bad faith is manifested not only by the subjective side of the wrong committed, but also by its objective side, consisting in the deviation or diversion of the exercise of the subjective right from the purpose for which it was recognized by law*” and that „*the exercise of a right for the purpose of violating another's right or freedom is indisputably an abusive exercise and such an exercise implies the objective criterion (s.n., SB) in its assessment.*”[1]

7 ABUSE OF RIGHTS BY REFERENCE TO THE CONCEPTS OF GOOD-FAITH AND BAD-FAITH.

The abuse of rights had a number of definitions¹ throughout its evolution as a concept, many of which placing the abuse of rights in the sphere of harmful intent, often referred to as a manifestation of bad faith.

The formulation of a complete and comprehensive definition of the concept of „abuse of rights” is impossible to offer, given that its analysis and definition was mainly related to the theory adopted at that time².

The essence of the *abuse of rights* lies in the exercise of the right outside the recognized and protected internal and external limits, likely to cause harm. The current Romanian conception of abuse of rights emphasizes objective criteria and detaches itself from the concept of bad faith, emphasizing the lack of good faith, which, to a large extent, can be achieved both intentionally and involuntarily ([4, p. 115], [8], [9]).

A definition of abuse of rights from the perspective of the approach way of the good faith is that, according to which: **„abuse of rights is a form of violation of good faith”**[4, p. 105]. It has been stated [10, pp. 86-87] that *„It is no coincidence that this statement refers to the violation of good faith and not to the exercise of the right in bad faith, because bad faith is not the opposite of good faith, they are not the two faces of the same phenomenon, so that one who has a conduct contrary to good faith is not always in bad faith.*

To support the theory that the violation of *good faith* must be currently analyzed, and not the existence of *bad faith* - in order to argue that abuse of rights may be also committed involuntarily, not only intentionally, it is stated that: *„For this reason, the new Civil Code does not take into account in defining the abuse of rights only the bad faith of the holder present when exercising the right in order to harm another. Excessive and unreasonable exercise of a right, contrary to good faith, are ways of exercising the abuse of rights that can be also committed involuntarily. While good faith is a rule of conduct, an abstract and presumed standard, not subject to probation, which considers the ideal attitude of a reasonable and balanced person, bad faith is no longer a standard, but it characterizes a certain conduct, the one that the holder of the right actually has and is therefore subject to probation. The fact that the definition of abuse of rights refers to the excessive and*

¹ Over time, the definitions of the abuse of rights have been numerous and related to the theory adopted, and today, in contemporary doctrine, it is retained as definition of the abuse of rights *„the exercise of a subjective right violating the principles of its exercise.”*[5], thus resulting that equivalent to an abuse of rights is the exercise of a right performed *„(i) with disregard for law and morality; (ii) in bad faith; (iii) exceeding its limits); (iv) disregarding the economic and social purpose for which it was recognized.”*[5].

² Since the recognition of the theory of abuse of rights, doctrinal controversies have varied over the definition or, rather, the elements that will be analyzed to qualify the exercise of law as being abusive or not, thus outlining two concepts that are intermediate - subjective conception and objective conception.

The conception that went down in history as the *subjective theory* placed the existence of abuse of rights in interdependence and closely related to the psychological element, intentionally, consisting in the intention to harm [6]. 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.

On the other hand, in the development of the *objective theory*, derived from the notion of misuse of power in administrative law, it was emphasized the criterion of law’s social destination, assessing the existence of an abuse of rights whenever the law is exercised *„contrary to the purpose of the institution, its spirit and purpose.”*[7].

unreasonable exercise of the right underlies the conclusion that it can be also committed involuntarily." [10, p. 87].

The lack of the element of bad faith in the current regulation³ emphasizes the objective criterion of assessing the abuse of rights, and in the freedom of choice it offers to identify a possible abuse of rights (and) based on certain subjective criteria, does not require the analysis of an *exercise of the right with the intention of harming another*, but exclusively to verify whether *the exercise of the right was carried out excessively and unreasonably, contrary to good faith*.

"Therefore, it cannot be the holder's exercise in bad faith, with (by) violating the finality of the right, but of exercising intentionally or diverting the right from the social purpose for which it was recognized. Or, diverting the right, its excessive, unreasonable exercising, contrary to good faith, can be also committed involuntarily. And this not only because the rule culpa lata dolo aequiparatur would apply, but also because, as in the law Aquilia et culpa levissima venit, a principle applicable to tortious liability, it should also be reasoned in the matter of abuse of rights (ubi eadem est ratio, eadem solutio debet esse)." [10, pp. 86-87].

8 REGULATION OF ABUSE OF RIGHTS IN ROMANIAN LAW.

In Romanian substantive law, the abuse of rights was for the first time regulated by the provisions of art. 1-3 of the Decree no. 31/1954 on natural and legal persons, repealed by Law no. 287/2009 on the New Civil Code. According to art. 1 of this normative act *„the civil rights of natural persons are recognized in order to satisfy personal, material and cultural interests, in accordance with the public interest, under the law and the rules of socialist coexistence."*, and art. 3 of the same normative act provided that the rights *„can be exercised only according to their economic and social purpose."*

The provisions of that time regulated the *objective, finalist* theory which did not expressly consider the exercise of the right with the intention of harming another, but only the exercise of the right for another purpose than the one considered by its recognition.

Currently, in Romanian private substantive law, the abuse of rights is regulated by art. 15 Civil Code according to which: *„No right may be exercised for the purpose of harming or damaging another or in an excessive and unreasonable manner, contrary to good faith."*

It can be observed that *„The new legal provisions embrace the eclectic conception on the abuse of rights, the first hypothesis evoking the subjective criterion by referring to the purpose of harming or damaging another, which supposes the reference to author's subjectivity and the objective criterion by reference to the excessive and unreasonable exercise to the right to the standard of good faith."* [10, p. 98].

Making a comparison between the form under which the abuse of rights was regulated in the previous legislation (Decree no. 31/1954) and the new Civil Code, it is noted that: *„As we observe from the definition of abuse of right in art. 15 Civil Code, the legislator has currently made a change of vision, eliminating, from the exercise of subjective rights, the economic and social purpose circumscribed to the general, public interest, probably (also)*

³ Art. 14 Civil Code: (1) Any natural or legal person must exercise their rights and execute their civil obligations in good faith, in accordance with public order and good morals. (2) Good faith is presumed until proved otherwise.

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.

amid fierce and justified criticisms, brought after 1990, art. 1 and 3 of Decree no. 31/1954. Octavian Căpățină said that „the regulations of art. 1-3 of Decree no. 31/1954 - not repealed until today (in 1996, n.n., S.B.) - irreparably compromised the elementary rights of the individual and of any collective entity, socializing them as a simple material object. From personal prerogatives, destined by nature to promote their own interests, they were demoted to the level of instruments meant to ensure the supremacy of general interests - those of oppression, those of strangulation of fundamental freedoms - over the holder's residual (minimal) faculties deprived of their natural legal protection.. (...)”[1].

The new perspective on the purpose of the norm is channeled on a criterion of proportionality and not on an abstract notion of the economic and social purpose: *„Circumstantiated in the form of economic and social imperatives, subsumed to certain general, public interests, the purpose proved to be regressive and utopian because, by overcoming the subjective limits, it actually denies the personal interest that motivates any action of an individual in a democracy. Therefore, the purpose of exercising the right - not only material, but also procedural - must be viewed, from an objective point of view, by reference to the comparability criterion from art. 15 Civil Code, which is that of excessive and unreasonable character. In other words, the diversion of the right from the purpose for which it was recognized is established according to the proportionality and reasonableness of its exercise. Proportionality means that the result pursued by the right's holder is not clearly disproportionate in relation to the damage caused, i.e., for the holder to obtain a minor result, it causes a major damage to another legal subject. Reasonableness means (referring to an action) within the usual limits, which has nothing exaggerated, temperate, balanced.” [1]*

As a conclusion of the way in which the abuse of rights is currently regulated, we note that: *„(...) currently, the exercise of subjective right contains a (new) objective element consisting in the proportionality and reasonableness of the exercise (cumulatively combined), to which the subjective, constant element of good faith is added, consisting in the lack of intention to harm. (...)”[1]*

„We therefore argue that in the current state of civil law, abuse of rights is a complex much more complex than that considered by the promoters of the theory that bears its name and that it no longer finds its sole basis in holder's evil intention, reason for which there is talk of its „plasticity”. The sanction of the abuse of rights is required, first, by the injustice of the damage suffered by the victim who bears the effects of excessive conduct in exercising legitimate interests. The obvious disproportion between holder's advantage and the damage suffered by the victim is the starting point in analyzing the appropriate remedy for the unfair situation in which the victim is placed.” [10, p. 97].

9 REGULATION OF ABUSE OF RIGHTS IN EUROPEAN UNION LAW.

At European level, Article 54 of the Charter of Fundamental Rights of the European Union provides the prohibition of abuse of rights: *„Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognized in this Charter or at their limitation to a greater extent than is provided for herein.”*

In applying this article, but also as a consequence of analyzing the situations brought before the Court, the European Court of Justice (currently the Court of Justice of the European Union) has consistently held that the Member States *have* the role to take

measures to prevent the use of Community law⁴ improperly or fraudulently, **thus leading to the shaping of a new principle of Union law** - the prohibition of abuse of rights.

The first case in which the European Court of Justice has explicitly addressed the issue of abuse of rights is the Van Binsbergen Case, which involved a Dutch national acting as a conventional representative, a lawyer in a case before a Dutch court. While the case was still pending, the Dutch lawyer moved to Belgium and, as a result, he lost his right to act as a representative under Dutch law. The Court of Justice of the European Union has considered that the Dutch law, which restricted legal representation to residents, was in principle a restriction on the free movement of services. The Court has ruled, however, that it is legitimate for a Member State to impose restrictions on the freedom to provide services when a person exercises that freedom for the purpose of evading national law, where professional rules of conduct are stricter. The Court has specified that such circumvention may occur when the activity is „wholly or mainly oriented towards the territory” of the Member State whose internal rules are circumvented [11].

The concept of abuse of rights in Union law has been developed by the European Court of Justice with priority in several judgments which mainly concerned the freedom of movement: *„Most cases faced by the Court of Justice, cases involving in one form or another the accusation of abuse of rights, were cases in which natural or legal persons exercised their right of free movement granted by the EC Treaty in a manner which a Member State considered abusive.*

In fact, it was the right of free movement that initiated the Court of Justice's concept of abuse of rights, one of the reasons being that the lack of barriers to free movement led to an increase in the volume of movement, a fact that has often put Member States in a position to consider that their regulatory authorities are challenged by those exercising freedom of movement..” [12]

The same principles were subsequently extrapolated and applied to other fields, such as the tax field (value added tax), the competitive field (economic concentrations), etc.

The reference in the field of clarifying the abuse of rights at Union level remained the Emsland-Starke Case [13] where the Court, vested with a specific application in the tax field (value added tax) has explicitly formulated a „abuse test”: first, finding an abuse requires a combination of objective circumstances in which, despite formal compliance with the conditions laid down in Union rules, the objectives of those rules have not been achieved („the objective test”). Second, it imposes an intention to obtain an advantage from Union rules by artificially creating the conditions prescribed for obtaining it („the subjective test”). This subjective element can be established by proof of complicity between the Union exporter receiving the funds and the importer of goods in the third country. Therefore, ECJ implicitly accepted that the real intention could be established under objective circumstances, if an interested party did not openly admit its intention to obtain an advantage from the Union law (the so-called „objective intentions”).[14]

Another crucial cause in confirming the prohibition of abuse of rights as a principle of law in the European Union is the Halifax Case [15]. With respect to this case, it is stated that: *„The significance of Halifax [case] for the doctrine of abuse in Union law is twofold. First, this case tends to generalize the scope of application of the Union concept of abuse by*

⁴ Following the entry into force of the Treaty of Lisbon, the notion of „Community law” became „Union law”.

applying the „abuse test” to another area of Union law. Second, it further develops the substance of the Union concept of abuse by refining the subjective element of the „abuse test”. [14]

In the specialized works in the field of union law ([14], [16]), but also in the recent practice of the Court of Justice of the European Union, it is therefore discussed to raise the desideratum of prohibiting the abuse of rights at level of (new) general principle of the European Union law: „Thus, art. 11 para. (1) lit. (a) of Directive 90/434 **reflects the general principle of Community [Union] law prohibiting the abuse of rights**. Litigants may not fraudulently or abusively rely on rules of Community [Union] law. Their application could not be extended to cover abusive practices, namely operations which are not carried out in the ordinary course of trade, but only for the purpose of abusively benefiting from the benefits provided for by Community [Union] law.” [17]

10 CONCLUSIONS.

In a legal ideal, relationships should be circumscribed to the principle of good faith and should not be used for the purpose of teasing and/or to resolve other personal grievances/complaints and/or personally - obviously, reality proves that the limits of human nature development prevent fulfilling this desideratum.

The recognition and sanction of abuse of rights is gaining ground in more and more branches of law, and the practical difficulties of qualifying and sanctioning an attitude as being an *abuse of rights* have led to the identification and clarification of „instrument criteria”.

Good faith remains a benchmark in analyzing the *abuse of rights*. Good faith is more than a principle of law; it represents an abstract, indefinite legal standard, but to which refer both the definitions of some concepts in antithesis and the consolidation and/or recognition of some rights.

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LIABILITY OF THE SPOUSE FOR DEEDS PREJUDICIAL TO THE JOINT OWNERSHIP OF ASSETS

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Abstract

The legal regime of the liability of the spouse for legal deeds concluded individually, but which cause prejudice to the joint property of assets raises some nuance debates on the legal classification of civil liability, on the holder of the right of claim triggering the liability of the defaulting spouse, as well as on the sanction applied in case the third party co-contractor acts in ill-faith and has concluded the deed causing prejudice to the joint ownership of assets while being fully aware of the consequences. The legislator has opted for the liability in tort of the spouse at default for causing prejudice to the joint property of assets, while the spouse who did not participate in the conclusion of the prejudicial deed is only granted the right to claim damages, without being entitled to introduce a plea of nullity of the concluded deed. Hence, the spouse is not entitled to introduce a plea of nullity of the deed causing prejudice to the joint ownership of assets concluded by the other spouse even if the third-party co-contractor was aware of the fact that the asset in question jointly owned by the spouses and was able to anticipate the prejudice it will cause to the joint tenancy, thus acting in ill-faith. The sanction for this latter case is the joint liability of the third party and of the spouse who concluded the deed.

Keywords: *management of joint assets, liability of the spouse, prejudicial deed, damages, nullity.*

1. Seat of the Matter. Background.

The civil liability of the spouse who concludes legal deeds prejudicial to the joint ownership of assets is regulated by the provisions in art. 345(4) of the Civil Code, which stipulates that “In so far as their interests related to the joint ownership of assets were prejudiced pursuant to a legal deed, the spouse who did not participate in the conclusion of the deed is only entitled to claim damages from the other spouse, without affecting the rights of the parties who acquired the assets in good-faith”.

The provisions of the aforementioned paragraph (4) are comprised in article 345 of the Civil Code bearing the marginal name “*Deeds of preservation, use and management*”, in section 2 entitled Legal Regime of Joint Ownership, comprised in Chapter VI – Property Rights and Obligations of the Parties.

The legal liability of the spouse, as regulated under article 345(4) of the Civil Code, also applies in the case of a legal deed of preservation, management or use, as regulated under para. (1)-(3) of the same art. 345 of the Civil Code, concluded by one of the spouses individually and which subsequently proves to be prejudicial to the joint ownership of assets. Liability is also triggered in the case of the conclusion of some alienation deeds, but this only applies to the jointly owned assets stipulated under art. 346(2) of the Civil Code.

Hence, in our endeavour, we shall start by a brief review of the concrete means of management of the jointly owned assets, which, if defective, in that they prejudice the rights

and interests of the joint ownership of assets, triggers the liability of the defaulting spouse, to then shift focus to the legal regime of the liability of the spouse for the conclusion of these legal deeds.

2. Management of the jointly owned assets of the spouses.

The law, by art. 345-350 of the Civil Code, institutes a mixed mechanism of management of the joint assets. According to art. 345(1) of the Civil Code: each spouse is entitled to use the jointly owned asset without the express consent of the other spouse. Nonetheless, the purpose of the jointly owned asset may only be changed with the consent of the spouses. According to paragraph (2), each spouse may individually conclude preservation deeds, management deeds regarding any of the joint assets, as well as joint asset acquisition deeds.” According to art. 346(1) of the Civil Code, “The alienation or real property encumbrance deeds having as subject joint assets may only be concluded with the consent of both spouses”.

As it easily follows from the reading of these pieces of legislation, the rule applied is that of the “parallel management” (also referred to as concurrent management), meaning that the management powers legally belong to both spouses, but, in practice, each of them exercises them individually, with some level of deviation possible in both directions, either under the form of joint management, or under the form of exclusive management.

2.1. Parallel (concurrent) management of jointly owned assets.

In their capacity as joint proprietors, by virtue of the powers bestowed upon each of the spouses under the law (but not as representative of the other spouse [1]), the husband/wife enjoys broad management autonomy with regards to the management of joint assets. The spouse may conclude a whole range of legal deeds and their validity is not conditional upon the consent, whether express or presumed, of the other spouse.

The rule of the parallel management covers the following categories of deeds:

2.1.1. Deeds of use, preservation, management concerning any of the movable or fixed joint assets, as well as joint asset acquisition deeds. Deeds of use may, on the one hand, refer to the deeds that suppose the material use of the asset (*usus*), and, on the other hand, to the deeds allowing the party to enjoy produces of the asset used (*fructus*); preservation deeds are those having as a purpose and effect the maintenance, preservation of an economic value, such as the performance of movable and immovable publicity formalities, the interruption of statutes of limitations, etc.; management deeds broadly comprise actual management deeds, such as lease, rental, etc., as well as management deeds qualified pursuant to their end purpose, such as the alienation of assets subjected to loss, damage or obsolescence, legal deeds that, through their very nature, may be construed as dispositions, but which, in the light of their purpose, actually are legal management deeds.

2.1.2. Onerous dispositions having as subject-matter movable assets for which the law does not impose publicity formalities prior to alienation, as well as *small value gratuitous dispositions inter vivos*, i.e., customary gifts. According to art. 1011(4) of the Civil Code, only corporeal movable assets of a value no higher than RON 25,000 may be the subject of corporeal movable assets, except for the cases stipulated under the law. In the specialty literature, it was appreciated [2] that customary gifts are to be construed as the gifts that,

according to the living standard of the spouses and to the material resources, may be regarded as normality.

The entitlement of any of the spouses to freely dispose, within certain limits, of some joint assets, is the consequence of the right of each party, regardless of the chosen matrimonial regime, to freely dispose of professional income (which is regarded as a joint asset if obtained during the legal joint ownership regime), while observing the obligations incumbent upon them with regards to the marital expenditures. From this point of view, depending on the value of the free disposition, sponsorship and patronage may be regarded as deeds available to any of the parties, which they may validly conclude.

The actions brought before the court with regards to such legal acts, i.e., onerous dispositions over movable assets, which are not subjected to publicity formalities, also fall under the scope of parallel management. This means that each of the spouses is entitled to individually stand trial and bring actions for movable or fixed assets, either for possession or petitory, hence, holding the standing to sue, or, as the case may be, being entitled to defend the jointly owned assets (standing to be sued).

The possible conflict triggered by the contradictorily between the legal deeds concluded with each of the spouses with regards to the same joint (such as, in the case of a joint asset, its sale by each of the spouses to different purchasers or the sale of the asset by one of the spouses and the lending thereof for use with the other spouse's consent) shall be settled according to the principle of anteriority, both in the relations between the spouses, and in the relations with third parties[3].

The fact that one of the spouses is entitled to individually conclude a number of legal deeds having as subject joint assets without the validity thereof being conditional upon the other spouse's consent, does not mean either that the spouses are unable to jointly act, or that the operation individually carried out by one of the spouses can, under no circumstances, trigger secondary effects for the other spouse.

3. Liability for legal deeds prejudicial to the joint ownership of assets.

The aforementioned piece of legislation, according to which "In so far as their interests regarding the joint ownership of assets were prejudiced by a legal deed, the spouse who did not participate in the conclusion of the deed may only claim damages from the other spouse, damages from the other spouse, without affecting the rights of the parties who acquired the assets in good-faith", leads to several key ideas that govern the liability of the neglectful spouse with regards to the jointly owned assets through the conclusion of prejudicial deeds:

- the legal deed concluded by one of the spouses with regards to jointly owned assets within the limitations of the parallel management powers are opposable to the other spouse, but they do not entangle personal obligations for the latter;

- the spouse who did not participate in the conclusion of the legal deed is not legally entitled to request the cancellation of the deed concluded under such circumstances, even if the conclusion of such a deed by the other spouse has prejudiced their interests regarding the jointly owned assets;

- the spouse who does not participate in the conclusion of the deed may only claim damages from the other spouse, in so far as their interests in the jointly owned assets were prejudiced following the conclusion of the legal deed by the other spouse.

The legal nature of the liability of the spouse participating in the conclusion of the civil deed prejudicial to the jointly owned assets falls under the scope of tort, because the

prejudice is caused by an extra-contractual illicit act against the jointly owned assets and against the interests of the non-participating spouse in the jointly owned assets. In order for this liability in tort to be triggered against the spouse who individually concluded the deed prejudicial to the jointly owned assets, the non-participating spouse must fulfil and produce proof of all the conditions specific to this type of civil liability [4].

3.1. *Illicit deed*

In so far as the illicit deed is concerned, it materializes in the conclusion by the “defendant” spouse of the legal deed prejudicial to the jointly owned assets.

Considering that the prejudice incurred by the non-participating spouse is caused by the conclusion of a legal civil deed, it may be stated that the spouse will not be granted the right to claim the remedy of the prejudice pursuant to the provisions in art. 345(4) of the Civil Code, if the jointly owned assets are prejudiced through a legal deed, i.e., through a mere act of material use of the jointly owned assets. In other words, the material use of the asset is not an illicit deed that causes prejudice to the jointly owned assets.

Similarly, it is worth noting that the legal deed causing prejudice to the jointly owned assets should, as a hypothesis, be concluded. In our opinion, the omission to conclude the legal deed does not trigger the remedy of the prejudice, because the “claimant” spouse is able to individually conclude the respective deed. Hence, we are of the opinion that the liability only operates if the deed causing the prejudice is an action, consisting of the conduct of the spouse consenting to the conclusion of a legal civil deed with regards to the jointly owned assets.

3.2. *Prejudice.*

With regards to the prejudice incurred pursuant to the conclusion of the legal deed by the spouse, it should firstly be established towards whom the liability of the spouse who concluded the legal deed prejudicial to the jointly owned assets is triggered, i.e., who holds a claim against the liable spouse, and, secondly, it should be clarified whether the prejudice is incurred as a consequence of the infringement of a subjective civil right or of the legitimate interests of the spouse who did not participate in the conclusion of the deed.

With regards to the holder of the debt against whom the civil liability of the “defendant” spouse is triggered, it should be noted that the Romanian doctrine is scarce on the topic, and where opinions have been expressed[5], they stated that the liability in tort of the spouse who concluded the legal civil act is towards the jointly owned assets, not towards the claimant spouse, so that the damages due are regarded as debt towards the jointly owned assets, and not as the personal entitlement of the “injured” spouse. Hence, this right can be enforced upon the partition of the jointly owned assets, either during the legal joint ownership regime, or upon the resolution of the same. This actually is the predominating position in the specialized French literature [6].

However, we are of the opinion that there are sufficient arguments in favour of the hypothesis that the liability of the spouse who concluded the deed prejudicial to the jointly owned assets is directly towards the spouse who did not participate in the conclusion of the deed, so that the claim against the defaulting spouse actually belongs to the spouse who did not participate in the conclusion of the deed, and not to the jointly owned assets.

Our thesis is mainly supported by the very wording of art. 345(4) of the Civil Code, which expressly stipulates that if their *interests* regarding the community of assets were

prejudiced by a legal act, the spouse who did not participate in the conclusion of the deed will only be entitled to claim damages from the other spouse.

A literal interpretation of the wording in the aforementioned piece of legislation leads to the conclusion that the phrase “*their interests*” as used by the legislator directly concerned the interests of the spouse who did not participate in the conclusion of the legal deed. The interests of the “non-defaulting” spouse derive, of course, from the jointly owned assets, i.e., from the estate of assets owned together with the spouse, which was prejudiced pursuant to the conclusion of the prejudicial deed, which is the direct cause of the respective spouse’s interests.

Under the circumstances, it should very importantly be mentioned that each spouse is the holder of a unique and own property, but which is, however, divided into at least two distinct estates, and which stand apart, i.e., the own asset estate and the estate of assets owned jointly with the spouse.

The own asset estate only concerns the spouse owning the same, regarded individually and irrespective of the existence of the joint estate, made up exclusively of their own assets, and of which they may freely dispose as desired, whereas the joint asset estate established starting the very conclusion of the marriage, even though it pertains to each spouse’s property, as a distinct estate, its specific feature is that this estate comprises the same assets that the spouses acquired during marriage under the regime of legal joint ownership and that are governed by the regime of legal joint ownership of the spouses, which interests both spouses, jointly.

We do not acquiesce to the thesis expressed in the French specialty literature[7] according to which the coexistence of three distinct patrimonies is specific to the joint ownership of assets, i.e., the own estate of the husband, the own estate of the wife and the jointly owned estate, because the estate is the attribute specific to the existence of a single subject of law, holder of own property rights and obligations with regards to the assets making up their own estate, or, in the case of the jointly owned assets of the spouses, the thesis according to which they make up an own estate, which is, however, held by both spouses, is not acceptable.

From this latter point of view, we believe that the spouse who did not participate in the conclusion of the legal deed prejudicial to the joint ownership of assets justifies the interest in claiming damages from the “defaulting” spouse, in consideration of the prejudice caused to the jointly owned estate, but the claim cannot belong to the same jointly owned estate, because the due compensation will also inure to the benefit of the spouse causing prejudice to the joint ownership of assets, considering that the wording of art. 345(4) of the Civil Code expressly stipulates that *the spouse who did not participate in the conclusion of the deed* may claim damages from the other spouse.

Hence, it follows that the liability of the spouse causing prejudice to the jointly owned asset estate will not be liable towards the joint ownership, but, instead, towards the other spouse, and the claim is not part of the structure of the jointly owned asset estate, the spouse’s claim belonging to the own asset estate.

This is also justified by the fact that the compensation for any material or moral prejudice caused to one of the spouses represents an own asset, according to the provisions in art. 340(f) of the Civil Code. The fact that the compensation due to the spouse who did not participate in the conclusion of the deed falls under the category of own assets, i.e., it is part of the own asset estate, reinforces the conclusion according to which the claim is also

part of the same own asset estate and, hence, the liability of the “defaulting” spouse will be triggered towards the other spouse, and not towards the joint ownership of assets.

Finally, the last argument in favour of our thesis is that the prejudice, which falls under the scope of the civil liability in tort, is characterized by the fact that it is personal, i.e., only the person incurring an unjustly caused prejudice is entitled to claim the remedy thereof by the author [8].

Considering that the prejudice is a personal one, the thesis according to which the civil liability of the “defaulting” party is towards the joint ownership of assets cannot stand, because, in our opinion, in order for the liability to be towards the joint ownership of assets, the prejudice should be incurred by both spouses. However, even in this latter case where, if we were to hypothetically admit that the prejudice is a collective one, incurred by both spouses, following the prejudice caused to the joint asset estate, this thesis would still not hold, because it would suppose that the spouse who concluded the prejudicial deed, author of the civil tort, grants damages to the joint asset estate of which they also are a holder. In other words, the offender also is the prejudiced entitled to collect the damages, which is unconceivable in our system of law.

Hence, we conclude by stating that the legal liability in tort of the spouse who individually concluded the legal civil deed prejudicial to the jointly owned assets will be directly towards the other spouse, and the due remedies will take the form of a claim legally treated as the own asset of the “non-defaulting” spouse, thus belonging to the own asset estate, even if their interest is justified by the prejudice caused to the joint ownership of assets.

Considering that the wording in art. 345(4) of the Civil Code related to the *interests* of the spouse with regards to the jointly owned assets, the legitimate question arises, in our opinion, as to whether the prejudice incurred by the spouse who did not participate in the conclusion of the deed is triggered by the infringement of a subjective civil right or by a legitimate interest of the injured party.

For the first time, the Civil Code provides for the obligation of the party liable for the infringement of the subjective rights or legitimate interests of other parties. In this respect, we note that, in principle, the provisions in art. 1349(1) of the Civil Code stipulate that all parties are bound (...) not to prejudice, through their actions or inactions, the legitimate interests or rights of other parties, and then, through the provisions in art. 1359 of the Civil Code, which directly impact on the liability for own acts, the legislator states that the author of the illicit deed is bound to remedy the prejudice caused, even if it concerns the legitimate right of another party, in so far as the respective interest is legitimate, serious and, through its manifestation, may be regarded as a subjective right.

The subjective right resides in a faculty acknowledged by the rules of objective law by virtue whereof the holder of this right may obtain a material or moral benefit, in a legal context determined by a civil law relation, regardless of whether such relation is related to property or not [9]. In the context of our review, the rights granted to the spouses by the regime of joint ownership of assets, i.e., the structure of each spouse’s estate and the establishment thereof, the rules governing the management of the joint assets of the spouses and the matrimonial regime resolution terms are of interest.

From this perspective, it may be easily noticed that the prejudice incurred by the spouse who did not participate in the conclusion of the deed firstly derives from the infringement of

their subjective rights with regards to the joint asset estate, bestowed upon them by the legal joint ownership matrimonial regime, as identified above.

The legitimate interest derives from a mere state of affairs, an interest that is not associated to a subjective civil right [10], but which may dictate the remedy of the prejudice thus caused. It is hard to imagine a real-life situation where, pursuant to the conclusion of a legal deed by one of the parties concerning the joint assets, only the legitimate interests of the other spouse are injured, interests to which none of the subjective rights granted by the legal joint ownership matrimonial regime applies, a legitimate interest that is regarded as a mere state of affairs, because the spouses find themselves in circumstances regulated under the law, i.e., marriage under the regime of joint ownership of assets, which cannot be regarded as a mere state of affairs (e.g., concubinage).

Hence, we believe that the legal phrase that the legislator has chosen to use in art. 345(4) of the Civil Code, i.e. “*Their interests* related to the joint ownership of assets” cannot be regarded as suited, because it could suggest that only a prejudice resulting from the injury of the mere interests of the spouse who did not participate in the conclusion of the legal deed is allowed, which we do not agree to. Of course, by no means do we exclude the hypothesis in which the “defaulting” spouse could remedy the prejudice caused to a mere legitimate interest of the other party, interests related to the joint ownership of assets, but such a situation is quite difficult to find in real-life, which is why we believe that the following wording would have been more suited: “In so far as *their rights* related to the joint ownership of assets were prejudiced (...)”.

3.3. *Fault.*

In so far as the element of fault of the spouse who individually concluded the prejudicial legal deed is concerned, some questions arise as to whether the subjective element of the liability can also be taken over as such from the common law. According to art. 1357 of the Civil Code, “The party causing prejudice to another party through a guiltily perpetrated illicit deed is bound to remedy such prejudice.” Paragraph (2) – “The author of the prejudice is liable for the slightest fault.”

The reading of this text of law, which consecrates the principle of liability for all forms of guilt, could authorize the hypothesis according to which the spouse would be held liable even for the slightest fault.

Thus, in the specialty literature [11] it has been stated that the courts should only admit the claim of the prejudice spouse if the fault of the spouse has a certain level of severity under the concrete circumstances of the case.

According to this point of view, we believe that the court should find, based on the submitted evidence, whether the “defendant” spouse had minimum knowledge of the prejudicial effects of the deed they concluded and to the occurrence whereof they consented, even if they did not seek for such effects. In the absence of such circumstances, demonstrated by evidence, we appreciate that the claim for damages should not be admitted.

Furthermore, if the spouse were held liable even for the slightest fault, this would lead to the situation where, through the mere fact of the conclusion of the deed prejudicial to the joint ownership of assets, without a prior subjective presentation of the harmful consequences the deed could trigger and without the consent to the same, the spouse were be held liable for the conclusion of the deed under such circumstances.

3.4. Causality.

With regards to causality, it must exist and it must concern the relation between the illicit deed perpetrated by the spouse, i.e., the conclusion of the deed prejudicial to the joint asset estate of the spouses and the prejudice caused to the non-participating spouse.

4. On the possibility of the spouse to claim the cancellation/nullity of the deed concluded with the third party acting in ill-faith or damages.

The provisions in art. 345(4) of the Civil Code do not grant to the spouse who did not participate in the conclusion of the legal deed the right to claim the cancellation of the deed concluded under such circumstances, and the rights acquired by third parties in good-faith cannot be affected.

Considering the final thesis of this piece of legislation, in case the third-party contractor acted in ill-faith, the question arises as to whether the injured spouse may claim the cancellation of the legal deed concluded by the other spouse or if the deed thus concluded remains valid, but the third party is held liable for the remedy of the prejudice together with the spouse who concluded the deed?

According to art. 345(4) of the Civil Code, "In so far as their interests related to the joint ownership of assets were prejudiced pursuant to a legal deed, the spouse who did not participate in the conclusion of the deed is only entitled to claim damages from the other spouse, without affecting the rights of the parties who acquired the assets of in good-faith."

In the specialty literature[12] it has been shown that the reading of this piece of legislation could accredit two thesis, i.e.: the legal text limits the right of the spouse who did not participate in the conclusion of the deed causing prejudice to the joint ownership to the claiming of damages, this being the only acceptable right, without any allusions to the voidability of the deed concluded under such circumstances; the right to claim the cancellation of the deed seems to be inferred by the legislator, who only protects the interests of the third party contractor acting in good-faith.

It should be stated that with regards to the dispositions having as subject joint movable assets that can be alienated without prior publicity formalities imposed under the law, as well as in the case of the deeds deriving from obligations related to the joint ownership of assets - deeds falling under the scope of the parallel management rule - if concluded by one of the spouses after the divorce petition was lodged to the detriment of the other spouse, the law expressly regulates the voidability of such deed, provided that the third party contractor acted in ill-faith [art. 386 of the Civil Code, corroborated with art. 345(4) of the Civil Code].

In this latter case, the voidability, expressly regulated under the law, only applies with regards to the deeds concluded by the spouse to the detriment of the other spouse, with the participation of the third party acting in ill-faith, after the divorce petition lodging date.

The voidability of the deed is consecrated through a special provision, to be restrictively interpreted, so that this piece of legislation cannot be applied, by analogy, to the deeds concluded by the spouses with the third party acting in ill-faith before the divorce petition was lodged, i.e., during the normal course of marriage. The same treatment, of voidability, pursuant to the common law in the matter of relative nullity of civil legal acts, is undermined by the fact that the spouse whose interests were injured does not hold the capacity as a party to the respective agreement [13].

All the above lead to the conclusion that for the situation in which the spouse concludes the legal act with a third party acting in ill faith the spouse who did not participate in the conclusion of the deed can by no means raise a plea of relative nullity for the cancellation of the deed.

In so far as the absolute nullity of the fraudulent deed concluded with a third party acting in ill-faith is concerned, we believe that such a hypothesis is not acceptable, because the legal rules that were disregarded upon the conclusion of the deed protect the particular interest of the spouse who did not participate in the conclusion of the deed, not a public interest justifying the grounds for virtual absolute nullity.

Hence, we believe that the only research hypothesis for the possibility to claim full nullity of the legal deed concluded by the “defaulting” spouse with the third party acting in ill faith is limited to the illicit cause of the deed.

In agreement with other authors[14], we also believe that, even if an illicit cause is involved, the legal deed thus concluded cannot be cancelled because this would lead to the unjust situation in which the legal deed concluded with the third party acting in ill-faith after the divorce petition is lodged, to the detriment of the other spouse’s interest, is sanctioned by relative nullity pursuant to the provisions in art. 386 of the Civil Code, and the deed concluded at all times during the marriage, up to the lodging of the divorce petition, would be sanctioned by absolute nullity.

Hence, the hypothesis of the absolute nullity of the civil legal deed concluded by the “defaulting” spouse is also excluded and cannot be applied to the deed thus concluded.

Under such circumstances, the most viable solution for the situation in which the third party contractor acts in ill-faith is that of joint liability together with the co-contracting spouse for the prejudice caused to the claimant spouse for the injury caused to the rights and legal interest related to the joint ownership of assets, the third party also being an author of the civil tort, because they knew or could be expected to know the fact that the deed they concluded with one of the spouses is detrimental to the other. The mere knowledge of the legal nature, as joint asset, of the subject of the concluded deed by the third party is of no relevance [15], i.e., it does not produce proof as to the ill-faith of the third party.

To conclude, the factor of ill-faith of the contracting third party with one of the spouses intervenes in the equation of the matter as follows: triggers the liability in tort of its bearer, so that the third-party contractor acting in ill-faith and the co-contracting spouse are jointly held liable for the remedy of the prejudice incurred by the prejudiced spouse. Only if this concerns deeds concluded by the third party in ill-faith with one of the spouses after the divorce petition is lodged, and if the purpose sought by the respective deeds was to fraud the interests of the other spouse, the injured party may resort to the action for relative nullity. The ill-faith in this matter means that the contracting third party knew or could be expected to know that the deed concluded with one of the spouses is detrimental to the other spouse [16].

5. Conclusions.

The cause of the legal liability of the spouse resides in the improper management of the assets belonging to the joint estate through the conclusion of legal deeds that are detrimental to the legal joint ownership of assets, i.e., through which the legitimate rights and interests of the other spouse with regards to the joint ownership of assets were injured.

The liability will rest with the other spouse who is the holder of the claim against the spouse who neglected the joint ownership interests through the conclusion of the prejudicial act. The amounts due to the spouse who did not participate in the conclusion of the prejudicial deed will be included in its own asset estate, being governed by the legal regime of own assets, of which they will be entitled to freely dispose, without the consent of the other spouse.

It seems that the legislative option chosen by the legislator of the new Civil Code is that of the civil liability of the defaulting spouse as the only remedy made available to the spouse whose interests in the joint ownership of assets were prejudiced, without entitling the latter to request the cancellation of the deed concluded with the third party acting in good faith, whose interests are protected in this case. Moreover, it seems that even if the contracting third party knew that the asset representing the subject of the concluded deed belonged to the joint ownership and was able to foresee that the conclusion of such a deed would cause prejudice to the joint ownership of the assets, the deed thus concluded cannot be challenged for grounds of nullity (either relative, or absolute) if it was concluded during the marriage and up to the lodging of the divorce petition by one of the spouses. The relative nullity of this type of deeds concluded with the third party acting in ill-faith can only be cancelled on grounds of relative nullity if they were concluded after the submission of the divorce petition, because this is a case specifically regulated by special provisions, to be restrictively interpreted, and that cannot be applied by analogy to other situations.

We believe that the legislator's option to grant to the injured spouse the possibility to only claim damages from the defaulting spouse, even if the third party contractor acts in ill-faith and the deed was concluded prior to the lodging of the divorce petition, was meant to be an additional means of raising the awareness of the spouses with regards to the way in which they understand to manage and administer their joint estate, their attention being drawn on the negative consequences that the faulty management of the jointly owned assets can bear.

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- [4] See, in this respect, I. Nicolae, *op., cit.*, p. 131; E. Florian, *op., cit.*, p. 219
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- [11] Marieta Avram, *Drept Civil, Familia*. ed. a 2-a, Hamangiu Printing House 2016, p. 272; Also see E. Florian, *op. cit.*, p. 220;
- [12] See E. Florian. *op. cit.*, p.220-221;
- [13] See E. Florian. *op. cit.*, p. 221;
- [14] M. Avram, *op. cit.*, p. 274. Also see E. Florian. *op. cit.*, p. 221-222;
- [15] See M. Avram, *op. cit.*, p. 275;
- [16] See M. Avram, *op. cit.*, p. 275;

ASPECTS REGARDING TORTIOUS CIVIL LIABILITY FOR THE DEEDS OF MINORS

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Abstract

The normal development of social relations requires, on the one hand, the observance of certain rules of conduct in carrying out activities in society, and, on the other hand, the sanctioning of those guilty of violating legal regulations, with the main purpose of repairing damage to the victim.

Delinquent civil liability imposes on all subjects of law the negative obligation not to harm the social values and rights of others by committing illicit deeds.

Although the provisions of the New Civil Code establish that parents have a general obligation to raise and educate their children, during the period when the minors are under the supervision of another person, tortious civil liability may be incurred in its charge in the event that deeds are committed during this time. against the law.

The article details theoretical aspects regarding the responsibility of parents and supervisors for the acts of minors, starting from the different foundation, but also the application of these principles in the practice of the courts.

Keywords: *tortious civil liability, parents, supervision, minors, wrongdoing*

Introduction

Observance of rules of conduct in any activity carried out within the company was a general principle recognized and applied, even before being enshrined in law.

If any legal norm in case of violation provides the way of sanctioning, in this case, the legal repercussion materializes by attracting civil liability which seeks, “mainly, the reparation of a damage, but, at the same time, aims at, to the one who produced the prejudicial deed, the determination of a certain behavior”².

As a result, we can find that in the case of tortious civil liability the breached obligation has a general character, belongs to all subjects of law and establishes in their charge the prohibition to harm the rights of another by unlawful acts, having as source any unlawful legal act caused to a third parties actual or potential harm³.

The analyzed situation confers the right of any person who considers himself prejudiced to be able to bring an action before the court to establish the fulfillment of the general conditions provided by law for liability, namely the existence of an unlawful act, damage, a causal link between deed and prejudice, but also the guilt of the author.

Such a judicial action has as a starting point the fact that the tortious civil liability materializes in an obligation of compensation on the part of the one who caused the damage⁴

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² Mangu, Florin, *About guilt - essential condition of tortious civil liability for one's own deed, according to the Civil Code*, Annals of the West University of Timișoara, no. 2/2011, p.102-115

³ Pop, Liviu, Pop, Ionuț – Florin, Vidu, Stelian Ioan, *Elementary civil law treaty. Obligations under the new Civil Code*, Universul Juridic Publishing House, Bucharest, 2012, p.384

⁴ Ciocină Barbu, Ioan, *A new vision of damage as an element of tortious civil liability*, Acta Universitatis George Bacovia. Juridica - Volume 4. Issue 2/2015, p. 193- 226

and aims at observing the principle of full reparation of the caused damage⁵.

As a rule, we can appreciate that the liability is a personal one, but the Civil Code regulates in art. 1372 the situations of tortious civil liability for the deed of another, respectively the case of illicit deeds committed by minors or persons placed under interdiction, the obligation of liability being based on the law, contractual provisions or the court decision.

The text of the law thus establishes in the task of parents or persons who have the obligation to supervise a special type of tortious civil liability, the legal basis of the two types of liability being different.

We appreciate that, although in some cases the deeds of minors are also limited to crimes, a distinction must be made between criminal liability and civil liability, the latter being focused on the idea of property reparation for the damage caused to the victim.

On the other hand, given the fact that the obligation of patrimonial reparation is the essence of this type of liability⁶, in order to ensure a complete indemnification, the legislator regulated certain situations in which third parties, who do not have quality in the criminal side of the case, can be obliged upon the return of the sums of money representing the damage caused by the wrongful act.

The tortious civil liability of the parents for the deeds of the minors

Based on the idea of an objective guarantee⁷, parental responsibility for the unlawful acts of minors operates without the need to prove guilt, in order to ensure more effective protection of the victim's rights and the possibility of recovering the damage caused, being conceived as a type of complementary liability⁸.

Behavioral deviance in the case of minors that leads to the commission of illicit acts by them often has a strong determining factor in the family, given that studies have shown that most perpetrators of crimes under the age of 18 specify that their conduct was based on educational deficiencies in disorganized or apparently organized families, lack of concern at all levels for their guidance, but also the fact that they come from families with alcoholic parents⁹, appreciating in doctrine that a good education is directly related to positive development of young people¹⁰.

As a result, the involvement of the family in the life of a minor is defining for his future evolution, according to the best interest of the minor¹¹, but also for diminishing the chances for him to commit illicit deeds, given that the family organization, respectively single-parent

⁵ Costache, Mirela Paula, *The current role and valences of the principles and functions of civil liability*, Acta Universitatis George Bacovia. Juridica - Volume 2, Issue 2/2013

⁶ Țita Nicolescu, Gabriel, *Some necessary delimitations between tortious civil liability and contractual liability in Romanian private law*, Universul Juridic Magazine, no. 11 from November 2016, p.29

⁷ Adam, Ioan, *Civil law. Obligations. The legal fact in the NCC regulation*, CH Beck Publishing House, Bucharest, 2013, p.363

⁸ Motica, Adina Renate, *Considerations for the application of the principle of the best interests of the child in the event of the divorce of his or her parents*, Annals of the West University of Timișoara, Law Series, Private Law Section, 2014, p.7

⁹ Dobre, Florin, *Juvenile delinquency*, Acta Universitatis George Bacovia. Juridica - Volume 6. Issue 1/2017

¹⁰ Dascălu, Andra, Singh, Amelia, *Juvenile delinquency - an increasingly common social phenomenon*, Annals of the "Constantin Brâncuși" University of Târgu Jiu, Letters and Social Sciences Series, Nr. 1/2012, p. 38-53

¹¹ Rădulescu, Dragoș Lucian, *The best interests of the minor. Nondiscrimination*, Jus et Civitas, Nr.2/2019, Vol.VI.LXX., U.P.G. Ploiești, p.35

families, families with parents abroad and children raised by other relatives in the country or parents who are convicted of crimes are factors that increase the risk of juvenile delinquency.

Regardless of the integration programs in which the state tries to co-opt children from such backgrounds, in order to be aware of the consequences of criminal acts, without the active involvement of the family, they do not prove effective, training in schools is not enough for a solid foundation in a child's education.

If in the case of civil liability for one's own deed, it is necessary to prove the cumulative fulfillment of the four general criteria for incurring liability, in the event of committing illegal acts by a minor, the condition of guilt of the perpetrator is no longer required to be respected, in the conditions in which the minors do not have the capacity to exercise or have a limited capacity to exercise, being lacking in discernment, within the meaning of art. 1372, paragraph 2 of the Civil Code.

With regard to parents, the specialized doctrine¹² established the existence of a triple presumption that determines the attraction of their responsibility, respectively the existence of deviations in the fulfillment of parental duties that made possible the commission of illicit acts by minors, guilt in fulfilling non-patrimonial parental obligations, but also a causal link between the minor's wrongful act and non-compliance with parental duties.

Given that the obligation of parents to raise and educate their children is a general one, which is not limited in time and does not focus only on the educational side of minors, but extends to all areas of social life, parents can not prove that they were not to blame for the development of their children's educational deficiencies, taking into account the fact that "parental duties far exceed the scope of the obligation of supervision"¹³.

The complex character of parental duties is also reflected by the provisions of art. 487 of the Civil Code, the personal component of the obligations highlighting that "the parents being the first and together responsible for raising the child"¹⁴.

Thus, parental protection of minors derives from the parent-child relationship¹⁵ and aims to ensure that the principles of life applicable between family members also have an impact on society, given that the skills that the child acquires in the family also apply in the relationship with third parties, influencing the way it relates to any type of activity.

In the case of parental responsibility for the acts of minors, the analysis must focus on verifying compliance with parental obligations of upbringing and education and not on compliance with an obligation to supervise the child at the time of the act, which is limited only when the wrongdoing.

If it were admitted that the basis of parental responsibility is a subjective one and that the reporting for attracting liability is limited only to the supervision at the time of the minor's violation of legal norms, it would imply minimizing the role of parents in educating children.

¹² Adam, Ioan, op.cit., p. 370

¹³ Togan, Alexandru Radu, *An analysis on the substantiation of parental responsibility for prejudicial acts of children in Romanian civil law, published in the volume Parental Authority. Between greatness and decay*, Solomon Publishing House, 2018, p.148

¹⁴ Gavrilăscu, Alin-Gheorghe, *Current aspects of the exercise of parental authority*, Annals of the "Constantin Brâncuși" University of Târgu Jiu, Legal Sciences Series, No. 3/2014, p.39-52

¹⁵ Cojocaru, Cristina, *Some aspects regarding parental protection in the current Romanian Civil Code*, Tribuna Juridică Volume 3, Part 1, June 2013

However, since that presumption is a relative one, it can be rebutted, the evidence to the contrary being, on the one hand, proof that at the time of the act the minor was under the supervision of another person who under a contract had this obligation towards him or, on the other hand, that the respective illicit deed committed has nothing to do with the education received in the family, proving the observance of all parental legal obligations of upbringing and education, with the diligence required by the legislator.

It should be noted that the jurisprudence¹⁶ has established that the joint and several liability of the parents for the deeds of minors includes exceptions in the case of divorced parents, so that only the parent with whom the minor lives permanently will be liable, provided that the other parent has only his right to visit within the intervals established by the court and cannot constantly participate actively in the supervision of the child's behavior, so that no responsibility can be held for him.

It should be noted that this jurisprudential perspective predates the entry into force of the New Civil Code and may involve debates from the perspective of the fact that at this time art. 397 of the Civil Code establishes as a rule that parental authority is exercised jointly by both parents after the dissolution of the marriage, which presupposes that the obligations of raising and educating children fall to both parents, not only the one where the child's home is established, and art. 483 of the Civil Code states that both parents are responsible for raising their minor children.

The solution to maintain the objective character of the parents' responsibility towards the illicit deeds of their minor children is found in the specialized practice¹⁷ even after the entry into force of the Civil Code in 2011, in the sense that it is based on personal guilt from lack of supervision and lack of education.

We can appreciate that, although the institutionalized educational system intervenes from an increasingly young age, the school in a generic sense cannot have an exclusive role in the formation of a minor, especially in the situation where he spends most of his time in family, which shapes his behavior and which must lay the foundations of the principles of life, respecting the principle of the best interests of the minor, as the basis of any decision related to family life.

Therefore, the legal norms impose the primary obligation of parents in raising and educating minors, which leads to attracting a civil liability of an objective nature, education being considered a complex process, which must be constantly updated and adapted to both the child's age and with social realities.

The tortious civil liability of supervisors for the acts of minors

The supervision obligation is defined as the duty of the person in charge of organizing, directing, guiding, and controlling the activity of the perpetrator of the prejudicial wrongful act.

The main differences that can be found between the responsibility of the parents and the responsibility of other persons for the deeds of the minors reside in the foundation of the responsibility, but also in its basis.

¹⁶ See Decision no. 2833 of June 4, 2002, C.S.J., Criminal Section

¹⁷ See Decision no. 461 of 18.02.2013 pronounced by the Motru Court, available online at <https://www.jurisprudenta.com/jurisprudenta/speta-i4ugrdq/>, accesat la data de 13.04.2021

Unlike the foundation of parental responsibility for the deeds of minors which is one without guilt, having an objective character, their duties of raising and educating their children are not unlimited only at certain moments, the liability of supervisors is subjective.

Thus, in order to attract the liability of the supervisors, the victim of the damage must first of all prove the meeting of the classic conditions of tortious civil liability, respectively illicit deed, damage, causal link between deed and damage, but also special conditions of a subjective nature that consist in proving that the supervision obligation was not fulfilled through total or partial fault, that there is a causal relationship between the fulfillment of the supervision obligation and the wrongful act, but also the existence of the supervisor's guilt in non-compliance with his duties, these aspects being necessary to be detailed in the motivation of court decisions to justify the solution given by the court.

The presumption of guilt, as a basis for the tortious civil liability of supervisors, is one of a relative nature and can be overturned by proving that they have properly performed their duties, with due diligence required by law in relation to the specific situation of the case.

Establishing the basis of liability is relevant from a practical perspective, related to the way of administering the evidence and verifying the conditions that must be met in order to retain the existence of tort liability.

The doctrine identified that in the sphere of persons who may be responsible in the situation of committing illegal acts by minors can be listed the teachers of pre-university education, in this category being included all cycles of education, nurses, nannies, craftsmen who train apprentices, but and any other persons who may have the status of professionals and who by the nature of their contractual obligations have obligations regarding the supervision of minors.

The jurisprudence in this field is varied, being identified situations in which, in the absence of clear identification of the person from the school unit who had the obligation to supervise, the responsibility was established in charge of the educational unit that acquired procedural quality and was obliged to compensation in favor of the victim, having as legal basis both the provisions of art. 1372 of the Civil Code, as well as special provisions of the education law that prohibit in any educational unit the development of any type of activity that may endanger the health, physical or mental integrity of both students and teachers.

In a similar case, legal liability was also imposed on teachers in a placement center who, by failing to properly fulfill the supervisory obligation that facilitated the unauthorized departure of a minor from the center, created favorable conditions for the minor to be able to committed offenses, being jointly and severally liable with the minor for damages.

The practice also established that the staff of a kindergarten is necessary to fulfill the obligation to supervise minors constantly, uninterrupted while minors are in their legal custody, even during the time when children are in optional educational activities, carried out during the period is located inside the unit, given that the beneficiaries of the services of the school unit are very young and do not have the representation of their activities, needing a permanent supervision.

However, it is clear that the supervisor's responsibility does not completely remove parental responsibility, the two may coexist, but on different grounds also differ with the proof of guilt for each, especially given that the educational process involves not only involvement of teachers, but and parents, who are indispensable partners, who must play an active role in developing their children's school skills.

In addition, the tortious capacity of the minor himself cannot be ruled out if it is proved that he had discernment at the time of committing the act.

For practical reasons related to the concrete possibility of recovering the victim's damage, being rare the cases in which juvenile offenders can be executed, given that they do not have their own financial resources, to respect the principle of equity, the legislator also established the responsibility of supervisors and parents for the deeds of minors.

Conclusions

Delinquent civil liability is an institution of law that was designed by the legislator to ensure compliance with the functions of education - preventive and reparative, in order to reduce the number of cases of wrongdoing involving forms of civil liability.

As a result, this form of responsibility tends to educate the members of society in the sense of observing the legal norms, but also to emphasize the idea of prevention, of imposing a conduct to be assumed by all subjects of law, in the sense of refraining from committing acts of illicit nature, otherwise the role of the reparative function intervenes, as a sanction for violating the law.

The Civil Code regulates the liability of parents and supervisors in the situation of committing illegal acts by minors as they have obligations either deriving from the law or from the contract for supervision and education of children in the spirit of respecting essential socio-moral values guiding the minor at an early age and laying the foundations for his further development.

In conclusion, although the legal basis of the two types of responsibilities is different, the connection between them is given by the legal or contractual duties that both parents and supervisors in a broad sense have towards minors to shape their behavior in the sense of respecting the values. social law and the rules of law, but also of awareness of the risks of committing illegal acts. Failure to comply with these obligations causes the intervention of the state force, either in the field of criminal law by applying a penalty, or in the field of civil law by establishing an obligation to repair the damage caused, in the form of compensation.

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USUCAPTION - A WAY TO MODIFY THE FAMILY PATRIMONY

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Abstract

The usucaption is an institution that sanctions the negligent owner who does not look after the own assets.

Keywords: *usucaption, the acquisition of the right to property, possession.*

The institution of the usucaption emerged long time ago.

The word "usucaption" originates etymologically from Latin: *ūsus* ("use") + *capiō* ("take").

Apart from other methods of acquiring the right to property, the institution of the usucaption has its roots deeply in the Roman law. The Roman law has its beginnings in the code known as Twelve Tables (449 B.C.). The institution of the usucaption was initially mentioned in the Law of the Twelve Tables, the proof of the fact that the Romans took seriously into account this method of acquiring properties.

The Romans created the institution because the right to property was impossible to prescribe. Thus, even the abandoned assets, a land, a house, belonged to the owner forever. The soldiers would go to the war whereas their wives would go to their mothers with their children and they would leave their property (house, land). The years passed, the soldiers died in the war, there were situations when, after 30 or 50 years, the grand children came and said that the land belonged to their grandfathers so they claimed it. The property returned even if another person had used the land all that time. There were circumstances that determined the conditions of emerging a conflict. In order to avoid these delicate situations, was developed the legal institution of the usucaption, which is even nowadays guaranteed in a democratic country.

The asset concerned had to be susceptible of usucaption. Exception from the usucaption made the assets excepted from the possession or from the ownership, the inalienable assets – of the persons under custody, the italic lands etc. – and the assets of owners who were protected from the usucaption – fortresses, tax agencies, churches and pious foundations¹.

In the old age, as for the types of the Roman marriage, the consent was accompanied by the removal of the wife who was under the power of her family chief and her transfer under the power of her husband (*manus*- into her husband's hands). The patriarchal structure of the old Roman family, the wife's role as a mother and as a matron supposed that she started to be under her husband's power. This event used to take place by means of a juridical document known as **conventio in manu** (handy agreement). In this case, the marriage was made **cum manu**. In the Romanian law there were three types of *conventio in manu*: **Confarreatio** (Ceremony), **Coemptio** (Purchase, Form marriage) and **Usus** (Use). **Usus** represented the cohabitation of the man and woman married legitimately for a year. ***He followed the general principles of the usucaption:*** when the period of one year was over, in case the two spouses were still together, the man acquired *manus* upon the woman. This

points out the identity of the position *usus* in the very old Roman law, with the identity of another thing².

In the feudalism, the right to property was characterized by limitations, complexity and overlapping, and it was essentially different from the property in the common Roman law. Moreover, it was characterized by the diversification of the properties according to the initial owners. The property of the laic feudal consisted of mobile and immobile assets; it could be acquired in the original way. (by entering into possession of the assets without an owner, deforestation, occupation) or derived (by the inheritance, princely donation, usucaption, documents between the living persons and the documents *mortis causa*)³.

Theoretically, in the communism, all the assets belong to the Society as a whole, and all its members enjoy the same social and economic statute. Probably the most frequent principle of the ideal communist society is: "From each person according to the skills, to each person according to the needs", a syntagm taken (almost literally) from the New Testament.

In conclusion, we cannot speak of methods of acquiring the private property in the communist Romania, an unofficial name, used by reference to the communist period in the Romanian history in the country that was officially named the Romanian People's Republic, respectively the Socialist Romanian Republic. In this period, the Romanian Communist Party (that was called the Romanian Working Party from 1948 to 1965) was *de facto* the sole political party that dictated by the government the public life in Romania. The Constitution of the Romanian People's Republic of 13 April 1948 is the first Romanian Constitution in the communist period. Although it did not mention explicitly, it abrogated the Constitution of the Romanian Kingdom of 1938. It was in force until the adoption of the Constitution of 1952. It is interesting that this first fundamental law of the Romanian socialist state recognized and guaranteed the private property (Art. 8: The private property and the right to inheritance are recognized and guaranteed by law. The private property acquired by work and savings enjoys special protection). Subsequently, the syntagm "private property" disappeared from the Constitution of the Socialist Republic of Romania of 1965 (Art. 5: The Romanian national economy is a socialist economy based on the socialist property upon the production means. Art. 6: The socialist property upon the production means is either a state property – upon the assets belonging to the entire people, or a cooperative property – upon the assets belonging to each cooperative organization).

Pursuant to Art. 6 of the New Civil Code, "(1) The civil law is enforceable as long as it is in force. It does not have a retroactive power. 4) The prescriptions, the decay and the usucaption commenced and not achieved on the date when the new law entered into force are entirely subject to the legal provisions that instituted them". It results that the usucaption commenced and not achieved on the date when the new law entered into force is subject to the provisions of the Former Civil Code.

Should the Former Civil Code be the enforceable law when we refer to the material right conditions of the usucaption, the provisions of Art. 1049-1052 from the New Code of Civil Procedure related to "The procedure related to the registration of the rights acquired pursuant to the usucaption" are enforceable legal provisions when we refer to the procedure that it is compulsory to follow in law suits having the usucaption as an object.

The material right conditions imposed by the Former Civil Code for the acquisition of the property by the usucaption were, pursuant to Art. 1846-1847, that the possession be useful, namely continuous, uninterrupted, undisturbed, public and under the owner's name.

The possession is continuous when the possessor does it regularly without abnormal intermissions. The possession has to be uninterrupted because the interruption of the possession means its cessation. The possession is undisturbed when it is not founded or preserved by acts of violence against the opponent or from the latter. The possession that is seen by everybody and is known to everybody is a public possession. For the possession to be useful, it is necessary for it to be exercised under the owner's name. In case the one exercising acts of material possession does not do it under the owner's name, then there is only a precarious detention.

By the institution of the usucaption, the negligent owners are sanctioned just as the creditors are sanctioned by the extinctive prescription unless they request the right to debt that they have against the debtors. The resemblance is obvious: should a person not ask for the return of the debt for 3 years, the latter is prescribed. Should a person abandon their property for 30 years and another person possessed it, even in bad faith, knowing that someone else was the owner, the latter becomes the owner in the virtue of the law. The law qualifies him as the owner even if the latter usurped, this is where the word comes from, it is a usurpation of a property. Then, the real owner loses.

Consequently, the action of finding the right to property acquired originally by the usucaption is oriented against the former owner or their heirs; similarly, in the action of finding the extinctive prescription, the debtor starts it in contradiction with the creditor.

Today, the actions in the usucaption admitted by some courts on contradiction with the Local Commission of Land Fund or with the Administrative- Territorial Department are wrong, from my point of view. Most of the citizens come before the court saying that they have the land from their grandparents and that it was theirs and the judge has to find that. The question is: in contradiction with whom? With the Commune? What has the Commune got to do with it? It has no quality and you cannot sue the Administrative- Territorial Department.

The requests by which to ask the Court to find the acquisition by usucaption of the property are generally in contradiction with the Administrative - Territorial Department represented by the Mayor. As reasons, the citizens declare in their requests submitted to the law courts that they own the plots of land and they used them continuously for 30 years, and they even admit that they did not ask for the right to property to be established pursuant to Law 18/1991. In some cases, on the lands for which they request the acquisition by usucaption of the right to property, they built houses or dwellings where they had been living for more than 30 years. The claimants consider that their possession of the land was legitimate, useful, continuous, uninterrupted, undisturbed and public under the owner's name. The court often requests from town halls certificates for the respective plots of land whether the right to property has been restored for another person and there is no other request for the restoration of the right to property. Moreover, the court asks the town halls whether the plot of land belongs to the public domain or not. The claimants also explain that their right to property has never been contested and that they did not have and they do not have any litigations with the neighbours. They have paid for their income and they have been recognized in the field by their neighbours. The claimants consider that they have had the attributes of real owners, acting and making documents under the owner's name for more than 30 years, without interruption. They de jure make their request according to the provisions of Art. 930 and the following ones of the New Civil Code, Art. 1837, Art. 1846 and the following ones of the previous Civil Code.

The practice of the trial courts is not uniform.

In some cases, the court deliberates and notes the following: "Having in view that, from 1974 to 1989, when the provisions of Law no. 58/1974 and no. 59/1974 were in force, the plots of land were not removed from the civil circuit, but the methods of transferring and acquiring them got more limited without removing the private character of the property type, it is obvious that it was not possible to naturally interrupt the course of their prescription, in the meaning of the provisions of Art. 1862, par. 2, Civil Code, that could be invoked as an obstacle to the acquisition of the right to property by means of the acquiring prescription. Thus, it results that the plots of land that made the object of the regulations within Law no. 58/1974 and Law no. 59/1974 kept their private character with a view to the right to property whereas their owners benefitted from the presumption of non precariousness stipulated by Art. 1854 of the Civil Code, as well as the provisions of Art. 1858 of the Civil Code related to other presumptions about the title. Therefore, it is imposed to conclude that the period of time in which these laws were in force did not interrupt the course of prescription commenced previously but it could be invoked while calculating the period of time necessary to find the acquiring prescription of those plots of land. Under these conditions ***the period from 1980 to 1990 will be taken into account while calculating the term of the usucaption***, if it is proven that the possession in that period was useful. Thus, pursuant to Art. 1846-1847, the conditions to acquire the property by the usucaption are that the possession has to be useful, namely: continuous, uninterrupted, undisturbed, public and under the owner's name. It is presumed that the possession is regular, namely of the fact that it is useful, then the person who states that the invoked possession is affected by a vice will have to prove it, in this case, the respondents. The useful character of the possession is to be analysed in periods, namely from 1980 to 1990, from 1990 to 2003 and from 2003 up to the present. For the period 1980-1990, as it has already been shown, the plot of land was not removed from the civil circuit, in order to affect the useful character of the possession. The statements of the persons heard in this case reveal that in this period the plaintiff's father regularly possessed the plot of land without abnormal intermittences, interruption or disturbance by another person. Furthermore, the possession was public, it was not hidden by the real owner and under the owner's name. Taking into account the above mentioned aspects and due to the fact that the conditions stipulated by Art. 1846 and the following of the former Civil Code are met, ***the court finds that the request filed by the plaintiff subsequently agreed by his heiress is grounded.***"

In other cases, the court deliberates and notes the following: "The lawsuit position is a condition for the civil action, in accordance with Art. 32, par. 1, letter b, Civil Procedure Code. Pursuant to Art. 36, the lawsuit position results from the identity between the parties and the subjects of the juridical report, as it is deduced to the judgement. Eventually, Art. 40 stipulates that, without the lawsuit position [...], the court shall reject the request or the defence as it is made by a person against another person without a lawsuit position [...]. It is important to have in view that the usucaption is a legal method to acquire the right to property, which supposes a useful possession for a certain period of time against the previous owner who was not diligent. Before establishing the lawsuit position of the authorities sued, it is necessary to have in view Law no. 215/2001 and Law no. 213/1998, whereas the court has to find first of all who could have a passive lawsuit position in such an action. As for this aspect, is useful Art. 2 of Law no. 213/1998, according to which the state or the administrative- territorial departments exert the possession, the use and

the disposal upon the assets that make up the public domain, to the legal limits and in the legal conditions. Having in view their active lawsuit position, the plaintiffs have to prove the fact that the sued respondent has a passive lawsuit position. In order to determine the person who can have such a position in a civil action in finding the right to property by the usucaption, it is very important to see the way in which the so-called owner got to possess the assets that he wants to acquire. In this case, the plaintiffs admitted that, at the origin of their possession is the document under private signature named "contract of inheritance" signed on the date with the named..... The respondent in this case, the commune, who had a generally neuter position, explained that, from 1986 to 1990, the plots of land were registered on the name of in the agricultural registry, respectively in the cadastral registry of 1982 (the two are the same person). The contents of the mentioned document and the statements of the plaintiffs about the respective plot of land point out the person who has the role of the negligent owner in this case. Although the respective document certifies a private juridical operation unnamed, rather confused, located at the limit between tied to the assignment and maintenance agreement, it is obvious that the named claimed to be the owner by means of that document. Although neither of the parties had proofs of statements, both parties (the plaintiffs and the respondent) claimed that was the exclusive owner of the assets, respectively that it had been registered as such in the agricultural registry from 1986 to 1990. Although it was obvious that the named could not have the position of respondent in this case, having in view that she died in 1992, her position as an owner at the moment when the plaintiffs commenced the possession forced the plaintiffs to go to court with the inheritors. However, they did not make any reference to the seller's inheritors nor did they suggest that there might have been such inheritors, and thus they justified the position of the respondent sued. As for this aspect, the declaration of one witness that she did not have any children is not sufficient because, on the one hand, the proof of such a statement has to be made with more convincing means, and, on the other hand, the children are not the only possible inheritors that might have contrary interests to the plaintiffs. Having these aspects in view, the court shall approve the exception of the lack of the passive lawsuit position of the respondent commune, and then the court ***shall deny the request filed in contradictory with the respondent as it was commenced against a person without a passive lawsuit position.***"

In an identical situation, another court considers that the Administrative -Territorial Department (commune) has a passive lawsuit position for the following reasons: "The usucaption as a way of acquiring the right to property upon an asset is a sanction against the former owner who did not prove to be diligent and who abandoned his asset to another person for a long time. Therefore, the civil action with such a ground has to be turned against the former owner who has a passive lawsuit position in this case. As it results from the probate file registered with the State County Notarial Office, regarding the deceased, it results that the plot of land in litigation was received into possession by her deceased husband, ..., who died in 1948. Therefore, it is impossible to identify the former owner, respectively the author of the deceased, who died in 1948, so the court considers that the action can be filed in contradiction with the Administrative Territorial Department, an institution which can justify the passive lawsuit position in this case. Having in view that the owner's position about the assets found on the public or private domain can belong only to the Administrative- Territorial Department, respectively the commune, city, town or county, that, pursuant to Art. 21, par. 1 of Law no. 215/2001 is the legal entity of the

public right, with full capacity and its own patrimony, represented in justice by the mayor or by the chairman of the County Council pursuant to Art. 21, par. 2, by reference to Art. 62, par. 1 of the above mentioned normative act, the court considers that the Administrative-Territorial Department by the Mayor has a passive lawsuit position in this case. Having these aspects in view, ***the court shall deny the exception of the lack of the passive lawsuit position of the respondent, an exception invoked by the respondent.....*** The action to find the acquisition of the right to property, by the effect of the acquisitive prescription, is not a simple action in finding the existence or inexistence of a right, in the meaning of Art. 35, Civil Procedure Code, but an action with a complex character, representing a genuine action in the achievement because the court order has the effect of constituting rights, the main effect of the usucaption, even if it is retroactive, is that the owner become the holder of the property right or, as the case may be, of another real right upon the asset possessed during the period of time required by the law. The court order pronounced to settle an action having such an object is thus a mixed decision that contains declarative elements and constitutive elements, so that its effects are produced for the past, by making a previous juridical situation be efficient, but also for the future, as a method of acquiring the right to property.... regarding the exercise of ***a useful possession***, the court finds in the Bill of Indictment presented in this case that the plaintiff together with his authors possessed the assets in a continuous public uninterrupted undisturbed way and under the owner's name for more than 30 years. Having the above in view, the court considers that the action is grounded and ***shall approve of the request*** filed by the plaintiff ***and shall find that the latter acquired by the effect of the usucaption of 30 years***, by the junction of his possession with the one of the authors ... the right to property upon the plot of land with the area, located in, a plot of land identified in the location and delimitation plan made by the judiciary expert – Appendix to the expertise report and to the location and delimitation plan received by the Office of Cadastre and Real Estate Advertising by the Reception Minutes no.”.

Another juridical issue is the fact that the useful continuous uninterrupted possession under the owner's name these requirements are not met because the STATUTE of 28 September 1977 of the Agricultural Production Cooperative in force at their establishment, mentioned that, while registering to the latter, the persons had to register all the assets that would become the property of the cooperative. "Art. 1: The Agricultural Production Cooperative is the economic socialist organization where the peasants are willingly united and where they bring their lands and the other main means of production. In the Agricultural Production Cooperative the work is organized jointly whereas the retribution is made according to the quantity and quality of the work, to the achieved production as well as to the economic development of the cooperative. ... Art. 14: the Agricultural Production Cooperative, as a socialist form of organizing the production and the work, expresses the unity of purpose and will of all its members". Thus, the citizens were no longer owners, but the Agricultural Production Cooperative was the owner, and there was no useful possession, a person could no longer possess the assets under the owner's name even if that land had been in the possession of the plaintiff who requested to find the usucaption and even if the land was also in the possession of the authors of the plaintiff. In the period of the communist regime, a person could possess an asset with the title "a land plot in the use". Thus the people were aware that they did not possess the land for themselves, but for the socialist state.

So the requirement that the possession be under the owner's name is not met.

The plaintiffs may invoke the fact that they possessed the land for themselves only after the passing of Law no. 18 of 1991, the Law of the Land Funds. Even in these conditions, Law 18/1991 was derogating. Thus, Art. 8 of Law no. 18/1991 mentions: "The right to the private property upon the lands that belong to the Agricultural Production Cooperatives shall be established in accordance with the current law, by the restoration of the right to property or by constituting this right". As long as the juridical norm stipulates expressly that the person who gave the own land to the Agricultural Production Cooperative has to ask for the restoration of the property, we have another juridical way, not the usucaption.

Even if we accept that all the requirements of the usucaption are met, if the term of useful possession started in 1991 when Law no. 18 passed, the term of 30 years is met, a term expressly established in the former Civil Code. The prescription commenced under the former law are subject to that law.

Conclusion: the correct solution would be to deny the writs of summons having in view the above mentioned reasons.

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THE ROLE OF FAMILY MEMBERS IN ORGAN DONATION FOR TRANSPLANTATION

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Abstract

The need for organ transplantation is constantly increasing not only at national level, but also at European and global level, representing one of the most sensitive aspects in the field of medical policies. At the same time, the European legislature analyzes the problem of insufficiency of human organs available for transplantation, as the biggest challenge for Member States in the field of organ transplantation¹.

Currently, the number of organ donations is insufficient compared to the number of patients on the waiting list for transplantation, and members of the European Parliament point out that the mortality rate of these patients is particularly high.

The consent expressed by the family members in order to take organs for donation is an important limiting factor for the successful realization of the donation and, implicitly, of the transplant. The refusal of family members to donate organs is therefore a key element of the lack of organs.

In Europe, the refusal of families to donate the organs of their deceased relatives varies between 6% and 42%. Differences in attitude, which is difficult to understand in this case as well, could be explained by the variety of procedures for donor consent legislation, for living and deceased donors, as well as other important cultural, economic and social factors that influence society's perception of donation benefits².

Keywords: organ donation, transplant, opt-in, opt-out, consent of family members.

1. Problematics

According to data provided by the National Transplant Agency, there is an acute crisis of donated organs at national level, with worrying statistics:

In 2019³, there were 85 real deceased donors (person who according to the Law⁴ is declared a donor and from whom organs and / or cells were taken), representing 4.3894% per million inhabitants, 20 more than in 2018⁵, when there were only 65 real deceased donors, representing 3.25% per million inhabitants.

Below are presented some of the types of organ transplants performed in the reference years 2018 and 2019, as follows: (i) in 2019 there were 211 kidney transplants (of which 154 with organs taken from brain-dead donors and 57 with organs taken from living donors), 3532 patients waiting for transplantation on 31.12.2019, of which 16 patients died, and in 2018 183 kidney transplants were registered (of which 119 with organs taken from

¹ https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONGML+IM_PRESS+20080418IPR27078+0+DOC+PDF+V0//RO&language=RO

² Communication from the Commission on Organ Donation and Transplantation: Political Action at EU Level, <https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:52007DC0275&from=EN>

³ <https://www.transplant.ro/Statistica/2019/Raportare%20transplant%20organe%202019.pdf>

⁴ Law no. 95/2005 on the reform in the field of health, Title VI - Carrying out the sampling and transplantation of organs, tissues and cells of human origin for therapeutic purposes

⁵ https://www.transplant.ro/Statistica/2018/Transplant-Donare_2018.pdf

brain-dead donors and 64 organs taken from living donors) and 573 patients admitted to the waiting list, of which 13 patients died; (ii) in 2019 75 liver transplants were registered, 629 patients waiting for transplant on 31.12.2019, of which 27 patients died, and in 2018 69 liver transplants and 573 patients admitted to the list were registered waiting, of which 32 patients died; (iii) in 2019 there were 6 heart transplants, 32 patients on the waiting list for transplant on 31.12.2019, of which 4 patients died, according to the 2018 statistics according to which there were 7 heart transplants and 29 patients admitted to the waiting list, of whom 9 patients died; (iv) in 2019 3 lung transplants were performed, there were 6 patients waiting for transplant on 31.12.2019, of which one patient died, compared to 2018 in which 4 lung transplants were performed and 6 patients were listed on waiting list. At the same time, in 2019⁶ there were 267 interviews and requests for acceptance for donation, of which 63 were rejected by the families of the potential donor, and in 2018⁷ there were 248 interviews and requests for acceptance for donation, resulting in 57 refusals of families.

The statistics confirm, first of all, (i) the acute organ crisis in Romania, where currently, the legislation provides that the basis for organ harvesting, the express consent (*opt-in* system) given during life by the donor or given by the family in the event of brain death of the donor, and (ii) the need to facilitate multi-organ transplantation that allows the efficiency of the time, resources and finances necessary to perform the transplant and postoperative care.

1.1. The *opt-out* system

By comparison, however, the world leader⁸ in the number of transplants performed and the number of donors - Spain - benefit from favorable legal provisions for transplantation, by introducing the *opt-out* system which involves the existence of a presumed consent of the population to be a donor. organs. After the introduction of the *opt-out* system, Spain went from 14 donors per million population (pmp) to 46.9 pmp donors, reaching by far the highest index, not only of Europe, but of the world.

In 2017, due to the possibility of performing multitransplantation, Spain⁹ managed to perform 5260 organ transplants taken from 2183 deceased donors, of which 3200 kidney transplants and 1200 liver transplants, 300 lung transplants and 300 heart transplants.

Moreover, in 2018¹⁰, Spain achieved a new record, both in terms of the number of donors from which organs were taken (2243) and in terms of the number of organs transplanted (5314). New records were also set for the number of kidney and lung transplants, while the number of liver transplants has declined, most likely due to the emergence of new treatments to fight the hepatitis C virus.

This success is due, in part, as can be seen from the analysis below, to the possibility of performing the multi-organ transplant, as well as the application of the *opt-out* system, resulting in maintaining Spain as the world leader in transplantation for 27 consecutive years.

⁶ <https://www.transplant.ro/Statistica/2019/LA%202019.pdf>

⁷ <https://www.transplant.ro/Statistica/2018/WLRO-2018.pdf>

⁸ <https://www.lamoncloa.gob.es/lang/en/gobierno/news/Paginas/2019/190121transplant.aspx#:~:text=%22The%20ONT%20is%20celebrating%20its,in%20kidney%20and%20lung%20transplantation>

⁹ <https://healthykidneyinc.com/2018/06/29/spain-world-leader-kidney-transplantation-transplants-disease/>

¹⁰ <https://www.lamoncloa.gob.es/lang/en/gobierno/news/Paginas/2019/190121transplant.aspx>

1.2. Comparison between donation and transplant rates in opt-out and opt-in systems

Comparative studies¹¹ on *opt-out* (also called presumptive consent) and *opt-in* (also called explicit consent) systems for organ donation show that there is a much higher rate of donation and transplantation in countries where the *opt-out* system is applicable.

Analyzing 35 OECD Member States (of which 17 were classified as *opt-outs* and 18 were classified as *opt-ins*), it was found that in *opt-out* systems compared to *opt-in* systems there is no significant difference in the total rates / million population of deceased donors, but there has been a reduction in rates / million population of living donors in the *opt-out* states.

However, the simple transition *per se* to the *opt-out* system is not a quick and unique remedy for increasing the donation rate, being necessary to inoculate the benefits of donation and transplantation among the population by educating and informing the population.

2. Applicable law at national level

In Romania, currently, the opt in system is applicable, which involves the expression of explicit consent during life, in favor of donation, through a notarial deed of consent for collection and registration in the National Register of donors of organs, tissues and cells. This possibility is regulated by the provisions of art. 147, point 5 of Law no. 95/2006 on health care reform, according to which *the collection can be done without the consent of family members if, during the lifetime, the deceased person has already expressed his option in favor of donation, by a notarial deed of consent for collection and registration of donors of organs, tissues and cells, according to the model form approved by order of the Minister of Health.*

In the same sense, art. 81 of the Civil Code stipulates that *the collection of human organs, tissues and cells, for therapeutic or scientific purposes, from deceased persons is carried out only under the conditions provided by law, with the written consent, expressed during the life of the deceased or, in the absence with the written, free, prior and express consent given, in order, by the surviving spouse, parents, descendants or, finally, by relatives in collateral line up to and including the fourth degree (hereinafter referred to as a member / family members).*

In the absence of such explicit consent, given during life, the role of expressing this consent rests with the family members of the potential donor. Thus, art. 147, point 4 of Law no. 95/2006 on healthcare reform stipulates that *the removal of organs, tissues and / or cells from deceased persons is done only with the written consent of at least one of the major family members or relatives, in the following order: surviving spouse, parents, descendants, brother / sister, other relative in collateral line up to the 4th degree inclusive, according to the model form approved by order of the Minister of Health*¹².

At the same time, even in the event of the written consent of at least one family member, *the withdrawal cannot be made in any form if, during his lifetime, the deceased person has already expressed his option against the donation, by refusal to donate. . In this*

¹¹ idem 10

¹² See Order of the Minister of Health no. 1,170 / 2014 regarding the approval of the form models for the application of the provisions of title VI of Law no. 95/2006 on health care reform, published in the Official Gazette of Romania, Part I, no. 765 of October 22, 2014.

case, the act of refusal of donation will be presented by the relatives to the transplant coordinator (art. 147, point 6 of Law no. 95/2006 on health care reform).

2.1. Legislative vacuum

However, the following are not regulated: (i) the situation in which, during the lifetime, the consent to donate was expressly expressed, but the family members oppose and vehemently refuse to donate to the medical staff, respectively (ii) the situation in which during the life the refusal to donate was expressly expressed, but the family members express their desire and express their consent in the sense of taking the organs for donation, evading the provisions of art. 147, point 6, the final thesis of Law no. 95/2006 on health care reform, by failing to present *the act of refusal of donation*¹³.

If in the first situation (suppression of consent expressed during life to donate) we can imagine well-founded causes that justify the refusal of family members, the same is not the case in the second situation (suppression of refusal expressed during life not to donate), a situation that can lead to a lot of controversy. In any case, both the taking of organs despite the refusal of the donor, and the refusal of taking despite his consent, lead to the violation of the right to dispose of one's own body after death, in accordance with the provisions of art. 80, para. (1) of the Civil Code, according to which *any person [...] may dispose of his body after death*.

At the same time, concerns about bodily integrity arise as follows: if a person expresses consent to the removal of his or her organs for donation and use in a transplant procedure, he or she agrees to commit an act which would otherwise be , would be a violation of the right to integrity of the person (art. 3 - Right to integrity of the person - Charter of Fundamental Rights of the European Union, according to which *everyone has the right to physical and mental integrity. In the fields of medicine and biology must be respected in particular : (a) the free and informed consent of the person concerned [...]*¹⁴). Any such donation would be based not on the wish of the donor, but on the values and wishes of his family members; but if the suppression of the will to donate can be, to some extent, acceptable — though morally problematic — the suppression of the refusal to donate is certainly a subject as fragile as it is difficult. chosen in the context of the above-mentioned rights regarding bodily integrity. The premise of such suppressions could diminish (even more) confidence in the specific system and procedures for donation and transplantation, superficially encouraging attempts by family members to suppress consent or refusal to donate.

It results, therefore, that the role of family members is decisive in performing the transplant in Romania. In this regard, we reiterate the following statistics: in 2019, 63 out of 267 interviews and requests for acceptance for donation were rejected, and in 2018, 57 out of 248 interviews and requests for acceptance for donation were rejected by family members of potential donor.

Ongoing awareness-raising should be the key element of any communication strategy. The population should be encouraged to discuss organ donation and make their intentions

¹³ <https://journals.sagepub.com/doi/full/10.1177/1751143719846416>

¹⁴ In its judgment of 9 October 2001 in Case C-377/98, *Netherlands v European Parliament and Council*, Rec. 2001, pp. I-7079, paragraphs 70, 78, 79 and 80, the Court of Justice has confirmed that the fundamental right to integrity of the person is part of Union law and includes, in the fields of medicine and biology, free and informed consent. cause of the donor and the recipient.

known to their relatives, given that only 41% of European citizens have discussed organ donation in the family. Thus, there is an important positive correlation between discussing organ donation within the family and the willingness to donate organs¹⁵.

However, against the background of a strong feeling of pain generated by the news of the brain death of the loved one, there are congruent and other factors that influence the decision of family members regarding the expression of consent for donation, such as religious affiliation and its approach to donation and organ transplantation (their perception as medical operations that save human life, and not as interference in the divine will), the level of education, etc. In most cases, lack of knowledge about brain death and organ donation has been identified as the main reasons for family members' refusal to donate organs¹⁶. Despite all these fears, most families declared a high degree of satisfaction after transplanting the donated organs, realizing how well one can be born from such great suffering as the loss of a family member.

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WHY DOES REGULATING THE RESERVED PORTION OF THE SUCCESSION BY ROMANIA CAN'T ENGAGE STATE RESPONSIBILITY UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS?

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Abstract

In this study, the author analyzes the institution of the reserved portion of the succession from the perspective of the obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms and its additional protocols. Citing relevant case-law of the European Court of Human Rights, it is established why regulating the reserved portion of the succession by Romania can't engage state responsibility under the European Convention on Human Rights.

Keywords: *state responsibility, reserved portion of the succession, European Court of Human Rights*

1. Introduction

The reserved portion of the succession, the available quota and the reduction of excessive liberalities are governed by Book IV Title III Chapter IV of the Civil Code¹. Considering that the institution of the reserved share was regulated by the Civil Code of 1864, the explanatory notes of the new law did not mention it. It was highlighted that a civil code offers, above all, constant principles of law, around which any type of society is structured, regardless of time and space².

Basically, the possibility of not giving effect to some contracts, regarding disinheritances and liberalities³, represents a normality of the Romanian society, due to the deep roots in the collective mentality.

According to art. 1086 of the Romanian Civil Code, the reserved portion of the succession is the part of the assets of the inheritance to which the reserved heirs are entitled by law, even against the prior wishes of the deceased, who decided to disinherit, make donations and leave legacies.

In accordance with art. 1087-1088 of the same law, a reserved heir (surviving spouse, descendant or privileged ascendant) is entitled to half of the share of the inheritance which, in the absence of liberalities or disinheritances, would have been due to him as legal heir.

Due to the possibility of the reserved heirs to request the reduction of excessive liberalities, in most cases, the wishes of the deceased person, who sought or at least accepted their removal from the inheritance, in whole or in part, are not followed.

¹ Law no. 287/2009, republished in the Official Gazette no. 505 of 15 July 2011

² <http://www.cdep.ro/proiecte/2009/300/00/5/em305.pdf>

³ According to art. 1097 para. (1) of the Civil Code, the reduction has as effect the ineffectiveness of the legacies or, as the case may be, the cancellation of the donations to the extent necessary to complete the reserved share

We do not intend to rally to those who militate in favour of preserving the reserved portion of the succession nor to those who believe that it should no longer be found in the modern legal landscape, where the will of the deceased should take precedence (regardless of the number of successors or their financial status⁴). In fact, we are not interested in eliminating the theoretical disputes (which often highlight the differences between the Romano-Germanic and Anglo-Saxon law systems) between the two. We are coming up with a new approach, from the perspective of the Convention for the Protection of Human Rights and Fundamental Freedoms and its additional protocols.

Given the national rules that define the reserved portion of the succession and the effects of reducing excessive liberalities, we need to discuss about the right to respect for private and family life, discrimination and the protection of property.

Having in mind the theoretical character of the present study, in the following we will examine separately the obligations under art. 8, art. 14 of the Convention, art. 1 of Protocol No. 1 and art. 1 of Protocol No. 12, although, in an actual case, the relationship between them would often require a common analysis.

According to art. 32-34 of the Convention, after dealing with a case, only the European Court of Human Rights may hold Romania responsible for violating these fundamental rights and freedoms.

2. Right to respect for private and family life

As set out in art. 8 § 1 of the Convention, everyone has the right to respect for his private and family life, his home and his correspondence.

The essential object of art. 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are nonetheless similar. In both contexts regard must be given to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation⁵.

In order to see if the reserved portion of the succession falls within at least one of the four interests identified in art. 8 § 1, we must use the Court's case-law. According to art. 32, the jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols.

The Court did not consider it possible or necessary to attempt an exhaustive definition of the notion of "private life". However, it would be too restrictive to limit the notion to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings⁶.

⁴ Situation encountered in the Anglo-Saxon legal system. Open [https://uk.practicallaw.thomson-reuters.com/6-510-1840?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomson-reuters.com/6-510-1840?transitionType=Default&contextData=(sc.Default)&firstPage=true), https://eltelawjournal.hu/wp-content/uploads/2016/10/2015_2_08_Ildik%C3%B3-N%C3%A9meth.pdf

⁵ Kroon and Others v. The Netherlands, 27 October 1994, § 31, <http://hudoc.echr.coe.int/eng?i=001-57904>

⁶ Niemietz v. Germany, 16 December 1992, § 29, <http://hudoc.echr.coe.int/eng?i=001-57887>

Despite the comprehensive concept of "private life", the Court has never analyzed the reserved portion of the succession from this perspective. Therefore, we point out that the first interest identified in art. 8 § 1 is not applicable.

The possibility of inheriting title to property, in whole or in part, is a hypothetical and speculative element, not a concrete tie in existence. Accordingly, in this case, we must conclude that there isn't a "home", as an autonomous concept⁷.

It is obvious that the reserved portion of the succession does not concern the correspondence of a person. Correspondence should imply the protection of the confidentiality of a communication (letters, telephone calls, electronic messages etc.). So, the last interest identified in art. 8 § 1 is not applicable.

The notion of "family life" under Article 8 of the Convention is not confined to marriage-based relationships⁸. The term includes at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life⁹.

Over 40 years ago, the Court stated that family life does not include only social, moral or cultural relations, for example in the sphere of children's education; it also comprises interests of a material kind, as is shown by, amongst other things, the obligations in respect of maintenance and the position occupied in the domestic legal systems of the majority of the Contracting States by the institution of the reserved portion of an estate. Whilst inheritance rights are not normally exercised until the estate-owner's death, that is at a time when family life undergoes a change or even comes to an end, this does not mean that no issue concerning such rights may arise before the death: the distribution of the estate may be settled, and in practice fairly often is settled, by the making of a will or of a gift on account of a future inheritance; it therefore represents a feature of family life that cannot be disregarded¹⁰.

The Court emphasized that the right of succession between children and parents, and between grandchildren and grandparents, is so closely related to family life that it came within the sphere of Article 8. It has thus considered that matters of intestate succession – and voluntary dispositions – between near relatives prove to be intimately connected with family life¹¹.

Taking into consideration the restricted sphere of reserved heirs defined by art. 1087 of the Romanian Civil Code, recognized to form or should form a stable social nucleus, we consider that the regulation of the reserved portion of the succession falls within the scope of art. 8 of the Convention, from the perspective of family life. The national legislator's reasons concerned the strong presumption of tight (or at least close) ties between spouses, parents and children (and their lineal descendants). When such links did not exist, cases of indignity¹² and the term of successional option¹³ may be effective means to protect the real relations of family life, taking into account the effects of the provisions of art. 960 para. (1), (2) and art. 2545 para. (2) of the Civil Code.

⁷ Demopoulos and Others v. Turkey (dec.), 1 March 2010, § 136-137, <http://hudoc.echr.coe.int/eng?i=001-97649>

⁸ V.D. and Others v. Russia, 9 April 2019, § 90, <http://hudoc.echr.coe.int/eng?i=001-192208>

⁹ Marckx v. Belgium, 13 June 1979, § 45, <http://hudoc.echr.coe.int/eng?i=001-57534>

¹⁰ Marckx v. Belgium, 13 June 1979, § 52, <http://hudoc.echr.coe.int/eng?i=001-57534>.

¹¹ Pla and Puncernau v. Andorra, 13 July 2004, § 26, <http://hudoc.echr.coe.int/eng?i=001-61900>

¹² Art. 958-959 of the Civil Code

¹³ Art. 1103 of the Civil Code

We must not omit that the definition of reserved heirs, within the meaning of art. 1087 of the Romanian Civil Code, is based on a presumption of affectivity, maintenance and mutual aid. Moreover, some characteristics of these social ties are regulated by the mentioned law as legal obligations¹⁴.

In addition, according to art. 1125-1126 of the Civil Code, the surviving spouse, the descendants and the privileged ascendants are successors that have the right to exercise de facto dominion over the estate, to administer this patrimony and to exercise the rights and actions of the deceased. Thus, the close relations of this family nucleus can be capitalized from the opening of the succession, so that they can do whatever is necessary regarding the deceased person's patrimony, until the issuance of the heir certificate or the judicial recognition of the acceptance of the legacy.

Once we have established that art. 8 of the Convention is applicable, we must note that there are two sides to consider. One concerns the limitation of the right of the reserved heir (half of the quota which, in the absence of liberality or disinheritance, would have been due to him as a legal heir), while the second concerns the impossibility of a natural person to dispose of the entire estate, through liberalities or disinheritances.

We agree with the Court's reasoning, which highlighted that it is not a requirement of art. 8 that a child should be entitled to some share in the estates of his parents or even of other near relatives. In the matter of patrimonial rights, art. 8 in principle leaves to the Contracting States the choice of the means calculated to allow everyone to lead a normal family life and such an entitlement is not indispensable in the pursuit of a normal family life¹⁵. Although the Court referred to a minor, the stated element also applies in cases where the reserved heir is an adult, according to the principle *ubi eadem est ratio, eadem solutio esse debet*.

Moreover, art. 8 does not guarantee to a mother complete freedom to give or bequeath her property to her child: in principle it leaves to the Contracting States the choice of the means calculated to allow everyone to lead a normal family life and such freedom is not indispensable in the pursuit of a normal family life¹⁶. Given that this reasoning was applied by the Court to a mother-daughter relationship, which is based on a fact as intimate as birth, we see no impediment in applying it to the other reserved heirs.

As the reserved portion of the succession, regulated by Romanian law, is consistent with the guarantees of art. 8 § 1, it is unnecessary to verify the requirements of art. 8 § 2. Furthermore, in the absence of an interference, one cannot speak of a negative or a positive obligation¹⁷ of Romania.

All things considered, we can say that the analysed institution does not *per se* offend against art. 8 of the Convention, that regulates the protection of individuals against arbitrary interference with their privacy and family rights. In fact, given the reserved portion of the succession, Romania acts in a way that allows the normal development of family life.

¹⁴ See art. 485, art. 487-488, art. 499, art. 516 of the Civil Code

¹⁵ *Marckx v. Belgium*, 13 June 1979, § 53, <http://hudoc.echr.coe.int/eng?i=001-57534>

¹⁶ *Marckx v. Belgium*, 13 June 1979, § 61, <http://hudoc.echr.coe.int/eng?i=001-57534>

¹⁷ For the distinction between negative and positive obligations, see *Bărbulescu v. Romania*, 5 September 2017, § 108-112, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-177082%22%5D%7D>

3. Protection of property

Article 1 of Protocol No. 1:

"1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

2. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

The Court underlined that Article 1 of Protocol No. 1 guarantees in substance the right of property and comprises three distinct rules. The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of property. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and subjects it to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The Court has to ensure that the last two rules are applicable before determining whether the first one has been complied with. The three rules are not, however, "distinct" in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property; accordingly, they must be construed in the light of the general principle laid down in the first rule¹⁸.

3.1 About the reserved heirs

These successors could inherit only the reserved portion of the succession, which is only half of the quota which, in the absence of liberalities or disinheritances, would have been due to them as legal heirs. Therefore, domestic law prevents them to inherit the full share of the property, taking into account the will of the deceased. In what follows, we will consider only this difference mentioned above, which is, in fact, the only loss suffered by the reserved heirs. Only about this material damage, those could claim to be victims, within the meaning of art. 34 of the Convention.

The essential element of the first part of art. 1 of Protocol No. 1 is the protection of property. In the absence of possessions, this article is not applicable.

The concept of "possession" within the meaning of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to ownership of material goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions" for the purposes of this provision (see *Iatridis v. Greece* [GC], no. 31107/96, § 54, ECHR 1999-II; *Beyeler v. Italy* [GC], no. 33202/96, § 100, ECHR 2000-I; and *Parrillo v. Italy* [GC], no. 46470/11, § 211, ECHR 2015)¹⁹.

Thus, the European Court of Human Rights is not bound by the definition provided by art. 535 of the Romanian Civil Code. For this reason, we will not take it into account either.

¹⁸ Zvolský and Zvolská v. The Czech Republic, 12 November 2002, § 63, [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-60749%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-60749%22]})

¹⁹ Béláné Nagy v. Hungary, 13 December 2016, § 73, <http://hudoc.echr.coe.int/eng?i=001-169663>

We highlight the general principles relating to the scope of the conventional provision in question:

« Although Article 1 of Protocol No. 1 applies only to a person's existing possessions and does not create a right to acquire property (see *Stummer v. Austria* [GC], no. 37452/02, § 82, ECHR 2011), in certain circumstances a "legitimate expectation" of obtaining an asset may also enjoy the protection of Article 1 of Protocol No. 1 (see, among many authorities, *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 65, ECHR 2007-I).

A legitimate expectation must be of a nature more concrete than a mere hope and be based on a legal provision or a legal act such as a judicial decision. The hope that a long-extinguished property right may be revived cannot be regarded as a "possession"; nor can a conditional claim which has lapsed as a result of a failure to fulfil the condition (see *Gratzinger and Gratzingerova v. the Czech Republic* (dec.) [GC], no. 39794/98, §§ 69 and 73, ECHR 2002-VII). Further, no "legitimate expectation" can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and the applicant's submissions are subsequently rejected by the national courts (see *Kopecký v. Slovakia* [GC], no. 44912/98, § 50, ECHR 2004-IX). At the same time, a proprietary interest recognised under domestic law – even if revocable in certain circumstances – may constitute a "possession" for the purposes of Article 1 of Protocol No. 1 (see *Beyeler*, cited above, § 105).

In cases concerning Article 1 of Protocol No. 1, the issue that needs to be examined is normally whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by that provision (see *Iatridis*, cited above, § 54; *Beyeler*, cited above, § 100; and *Parrillo*, cited above, § 211). In applications concerning claims other than those relating to existing possessions, the idea behind this requirement has also been formulated in various other ways throughout the Court's case-law. By way of example, in a number of cases the Court examined, respectively, whether the applicants had "a claim which was sufficiently established to be enforceable" (see *Gratzinger and Gratzingerova*, cited above, § 74); whether they demonstrated the existence of "an assertable right under domestic law to a welfare benefit" (see *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 51, ECHR 2005-X); or whether the persons concerned satisfied the "legal conditions laid down in domestic law for the grant of any particular form of benefits" (see *Richardson v. the United Kingdom* (dec.), no. 26252/08, § 17, 10 April 2012).

In *Kopecký*, the Grand Chamber recapitulated the Court's case-law on the notion of "legitimate expectation". Following an analysis of different lines of cases concerning legitimate expectations, the Court concluded that its case-law did not contemplate the existence of a "genuine dispute" or an "arguable claim" as a criterion for determining whether there was a "legitimate expectation" protected by Article 1 of Protocol No. 1. It took the view that "where the proprietary interest is in the nature of a claim it may be regarded as an "asset" only where it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it" (see *Kopecký*, cited above, § 52).

One of the lines of case-law on "legitimate expectation" referred to above involved situations where the persons concerned were entitled to rely on the fact that a legal act, on the basis of which they had incurred financial obligations, would not be retrospectively invalidated to their detriment (see *Pine Valley Developments Ltd and Others v. Ireland*, 29

November 1991, § 51, Series A no. 222; and *Stretch v. the United Kingdom*, no. 44277/98, § 35, 24 June 2003). In this line of cases, the “legitimate expectation” was thus based on a reasonably justified reliance on a legal act which had a sound legal basis and which bore on property rights (see *Kopecký*, cited above, § 47). Respect for such reliance follows from one aspect of the rule of law, which is inherent in all the Articles of the Convention and which implies, inter alia, that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by the Convention (see, as a recent authority, *Karácsony and Others v. Hungary* [GC], no. 42461/13, § 156, 17 May 2016, with further references).

Notwithstanding the diversity of the expressions in the case-law referring to the requirement of a domestic legal basis generating a proprietary interest, their general tenor can be summarised as follows: for the recognition of a possession consisting in a legitimate expectation, the applicant must have an assertable right which, applying the principle enounced in paragraph 52 of *Kopecký* (rendered above) may not fall short of a sufficiently established, substantive proprietary interest under the national law²⁰ ».

The difference between the succession quota (which, in the absence of liberalities or disinheritances, would have been due to the reserved heirs as legal heirs) and the reserved portion of the succession is a simple wish for the persons specified by art. 1087 of the Civil Code. First of all, we take into account the fact that it cannot be a substantive right protected by Romanian law. Although this aspect does not necessarily prevent the interest in question from being regarded as a “possession”²¹ within the meaning of Article 1 of Protocol No. 1, we must emphasize that, prior to the opening of the succession, the reserved heirs did not have any right regarding the deceased's patrimony. Secondly, even after the death of *de cuius*, the mere status of heir²², according to art. 1126 of the Civil Code, could only lead to a *de facto* possession of the estate (which does not include the property donated by *de cuius*), temporary in principle (until the release of the heir certificate²³ or judicial recognition of ownership)²⁴.

Art. 1125 of the Civil Code regulates the heirs' right to administer the patrimony of *de cuius* and to exercise the rights of the deceased. So, prior to the exercise of the successional option right, there is only a simple successor²⁵, who did not express his desire to inherit even the reserved portion of the succession. Moreover, the successor has no right to what exceeds the reserved portion of the succession.

Art. 1128 and art. 1129 of the Civil Code regulate the entry of the universal heirs, heirs under universal title and legatees into possession upon the bequeathed assets. Practically, from the moments specified by these dispositions, the heirs defined by art. 1126 of the Civil Code no longer possess the goods which form the object of the liberalities, remaining, if

²⁰ Béláné Nagy v. Hungary, 13 December 2016, § 74-79, <http://hudoc.echr.coe.int/eng?i=001-169663>

²¹ Depalle v. France, 29 March 2010, § 68, <http://hudoc.echr.coe.int/eng?i=001-97978>

²² The surviving spouse, the descendants and the privileged ascendants are mentioned by art. 1126 of the Civil Code.

²³ Article 1133 para. (1) of the Civil Code stipulates that the heir certificate proves the quality of heir, legal or testamentary, as well as the proof of the property right of the accepting heirs over the assets of the inheritance, in the share that belongs to each

²⁴ For the situation when the heirs automatically acquire the property right at the person's death, see *Inze v. Austria*, 28 October 1987, § 38-40, <http://hudoc.echr.coe.int/eng?i=001-57505>

²⁵ See art. 1100 para. (2) of the Civil Code

they request the reduction of the excessive liberalities, only with the reserved portion of the succession.

We must not forget that the reduction of excessive liberalities, which violates the reserved portion of the succession, takes place upon request, according to art. 1092-1093 of the Civil Code. In this way, the reserved heirs are able to obtain the share provided by art. 1088 of the same Code. If a heir is not diligent in asserting his rights and does not request the reduction of excessive liberalities for 3 years, he will be sanctioned by extinguishing his material right to action²⁶. Therefore, if excessive liberalities exist, the reserved heirs need to claim the reserved portion of the succession, according to national law, otherwise not collecting even the minimum quota.

Future income cannot be considered to constitute “possessions” unless it has already been earned or is definitely payable²⁷, which is not the case.

The reserved heir’s expectation [concerning the difference between the share of the estate (which, in the absence of liberalities or disinheritances, would have been due to the reserved heirs as legal heirs) and the reserved portion of the succession] is not legitimate. First of all, it is not based on a legal provision or a legal act. So, it’s not the situation of protecting the reserved heir’s good faith against the arbitrary interferences by the Romanian public authorities. Secondly, in order for the successor to have a right (regarding the previously mentioned part of the inheritance) that can be recognized, the restrictive elements of adverse possession²⁸ should be met, in which case the reserved portion of the succession would no longer be relevant.

In this theoretical study we will not examine the possible cases of long-term possession of an estate asset (following long-term tolerance by donees, legatees or public authorities²⁹), situations that require knowledge of concrete details.

Considering the relatively short time³⁰ and the fact that possessing assets from the estate characterizes a simple holder, we don’t consider this interest to be a sufficiently important and recognized economic value to constitute a material interest in the sense of Article 1 of Protocol No. 1.

In fact, the conventional provision does not create the right to acquire possessions in the future³¹.

Thus, in the case of reserved heirs, the difference between the quota (which, in the absence of liberalities or disinheritances, would have been due to them as legal heirs) and the reserved portion of the succession cannot be considered a “possession” within the meaning of Article 1 of Protocol No. 1. Therefore, this conventional provision is not applicable.

3.2 *About de cuius*

According to art. 12 para. (1) of the Civil Code, anyone may dispose of his property freely, unless the law expressly provides otherwise.

²⁶ See art. 1095, art. 2500 para. (1) of the Civil Code

²⁷ Denisov v. Ukraine, 25 September 2018, § 137, <http://hudoc.echr.coe.int/eng?i=001-186216>

²⁸ See art. 928-940 of the Civil Code

²⁹ For the effects of long-term tolerance, see, for example, Öneriyıldız v. Turkey, 30 November 2004, § 124-129, <http://hudoc.echr.coe.int/eng?i=001-67614>

³⁰ Article 1103 para. (1) of the Civil Code stipulates that the right of successional option is exercised within one year from the date of opening the succession

³¹ Marckx v. Belgium, 13 June 1979, § 50, <http://hudoc.echr.coe.int/eng?i=001-57534>

The Court stressed the need to protect the “legitimate expectation” of the deceased³². However, the Court was not convinced that denying the inheritance rights of one or more family members could contribute to the strengthening of peaceful relations³³.

The Romanian state does not fully respect the wishes of natural persons (who should be allowed to exercise their legal capacity to the greatest extent possible³⁴), censoring, if necessary, upon request, the effects of liberalities or disinheritances, for the benefit of reserved heirs. In fact, natural persons can dispose freely of only part of their property³⁵ and cannot affect the reserved share.

The impossibility of *de cuius* to dispose of his entire property, through liberalities or disinheritances, if reserved heirs exist, must be regarded as an interference with the rights protected by Article 1 of Protocol No. 1.

Indeed, the right to dispose of one’s property constitutes a traditional and fundamental aspect of the right of property. The second paragraph of Article 1 nevertheless authorises a Contracting State to “enforce such laws as it deems necessary to control the use of property in accordance with the general interest”. This paragraph thus sets the Contracting States up as sole judges of the “necessity” for such a law. As regards “the general interest”, it may in certain cases induce a legislature to “control the use of property” in the area of dispositions inter vivos or by will. In consequence, the limitation to dispose of one’s property, through liberalities or disinheritances, is not of itself in conflict with art. 1 of Protocol No. 1 to the Convention³⁶.

3.3 About the donees

It is in the first place for the national authorities, and in particular the courts of first instance and appeal, to construe and apply the domestic law. That principle, which by definition applies to domestic legislation, is all the more applicable when interpreting an eminently private instrument such as a clause in a person’s will. In a situation such as the one here, the domestic courts are evidently better placed than an international court to evaluate, in the light of local legal traditions, the particular context of the legal dispute submitted to them and the various competing rights and interests. When ruling on disputes of this type, the national authorities and, in particular, the courts of first instance and appeal have a wide margin of appreciation. Accordingly, an issue of interference with private and family life could only arise under the Convention if the national courts’ assessment of the facts or domestic law were manifestly unreasonable or arbitrary or blatantly inconsistent with the fundamental principles of the Convention³⁷.

As stated in art. 985 of the Civil Code, a donation is a contract in terms of which the donor gives something, irrevocably, to the donee. In principle, unless otherwise specified, the donee becomes the owner of the donated thing when both parties agree (formal and substantive law requirements must be satisfied).

Of course, the donee has the powers embedded in his property right until the eventual reduction that would lead to the cancellation of the donation to the extent necessary to complete the reserved share, according to art. 1097 para. (1) of the Civil Code.

³² Brauer v. Germany, 28 May 2009, § 43, <http://hudoc.echr.coe.int/eng?i=001-92752>

³³ Fabris v. France, 7 February 2013, § 66, <http://hudoc.echr.coe.int/eng?i=001-116716>

³⁴ See art. 38-40 of the Civil Code

³⁵ See art. 1088-1090 of the Civil Code

³⁶ Marckx v. Belgium, 13 June 1979, § 63-64, <http://hudoc.echr.coe.int/eng?i=001-57534>

³⁷ Pla and Puncernau v. Andorra, 13 July 2004, § 46, <http://hudoc.echr.coe.int/eng?i=001-61900>

Therefore, the facts of the case (the donee's property right is sufficiently recognised under national law³⁸, even if it is revocable in certain circumstances³⁹) fall within the ambit of Article 1 of Protocol No. 1.

We notice that the donation reduction, being a loss, is an interference with the donee's right to the peaceful enjoyment of his property. If Romanian law had not regulated the reserved portion of the succession, the donees would not have suffered any damage.

Considering the complexity of the legal circumstances in the present case, we will examine the situation of the donees under the first sentence of the first paragraph (the general rule set out in art. 1 of Protocol No. 1). In accordance with the Court's case law⁴⁰, we note that it is difficult to indicate a special rule. First of all, the deprivation of possessions by donation reduction seems to indicate an extinguishment of ownership, a taking of property under the second sentence of the first paragraph of Article 1 of Protocol No. 1. Secondly, the effects of the donation together with the need to ensure the minimum reserved share to the reserved heirs seem to indicate a regulation of the use of inherited property within the meaning of the second paragraph of Article 1 of Protocol No. 1, due to the fact that the donated possessions are closely related to the inheritance until the succession settlement.

We emphasize that the two special rules are only particular instances of interference with the right to peaceful enjoyment of property as guaranteed by the general rule set forth in the first sentence.

To be deemed compatible with Article 1 of Protocol No. 1, the interference must fulfil certain criteria: it must comply with the principle of lawfulness and pursue a legitimate aim by means reasonably proportionate to the aim sought to be realized⁴¹.

Having in mind that the reduction of excessive liberalities is regulated by the Romanian Civil Code, a law accessible to any interested person, we note that the interference meets the requirement of lawfulness. We take into consideration the one and only statutory interpretation of the reserved share and the fact that the applicable provisions of domestic law are sufficiently precise and foreseeable in their application, which excludes arbitrary interferences by public authorities.

The Court noted that the institution of the family is not fixed, be it historically, sociologically or even legally. The protection of the traditional family is arguably a legitimate aim⁴². In the light of this aspect, due to the close ties (marriage and kinship) between the deceased and the reserved heirs, the mentioned interference is in the public interest.

Examining the reasonable relationship of proportionality between the means employed and the aim pursued, given the public and predictable nature of the Civil Code, we must underline that the donees knew (or at least should have known) that their rights could be challenged, by reducing excessive liberalities. Therefore, by accepting the donation, they assumed the risk that the contract would be subject to reduction.

³⁸ See *Molla Sali v. Greece*, 19 December 2018, § 128-132, <http://hudoc.echr.coe.int/eng?i=001-188985>

³⁹ See *Beyeler v. Italy*, 5 January 2000, § 105, <http://hudoc.echr.coe.int/eng?i=001-58832>

⁴⁰ *Dokić v. Bosnia and Herzegovina*, 27 May 2010, § 56, <http://hudoc.echr.coe.int/eng?i=001-98692>

⁴¹ *Beyeler v. Italy*, 5 January 2000, § 108-114, <http://hudoc.echr.coe.int/eng?i=001-58832>

⁴² *Mazurec v. France*, 1 February 2000, § 50, 52, <http://hudoc.echr.coe.int/eng?i=001-58456>

According to the Court, every child (biological or adopted) has a connection with his or her parents, in terms of social relations and the consequences connected with his or her family life and the resulting property rights⁴³.

The need to ensure the protection and perpetuation of family relationships, which, in addition to affection, also include goods, should not be omitted. Reserved heirs form an extended family cell and should inherit due to the links between them, presumed to be close, under normal circumstances. In fact, the human-property relationship is based, in principle, on the human-family symbiosis, in terms of ensuring the mental and social comfort absolutely necessary for the accumulation of assets (throughout life).

Basically, the reserved portion of the succession represents a last economic relation between the deceased and the heirs mentioned by art. 1087 of the Civil Code, being an incentive for keeping alive the memory of *de cuius*.

As a result, we consider that, in this case, the donees don't bear a disproportionate and excessive burden. Thus, a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

3.4 About the legatees

Art. 986 of the Civil Code shows that the legacy is the liberality whereby the testator is disposing that, when he will die, one or more legatees will acquire his entire property, a share of it or some assets.

Even the reserved heirs can be legatees, as there is no legal provision that forbids them to inherit in both qualities.

At the request of those interested, excessive liberalities can be reduced. In this way, legacies will be ineffective and will be reduced, hence the impossibility of the legatees to become the owners of the assets necessary to complete the reserved share. The mentioned goods represent a loss of the legatees, who could claim to be victims, within the meaning of article 34 of the Convention. In fact, they can acquire only a share of the deceased's property.

According to art. 115 para. (3), art. 116 para. (1), (3) of Law no. 36/1995 republished⁴⁴, art. 984 para. (1) of the Code of Civil Procedure⁴⁵, we note that, in principle, the reduction of excessive liberalities takes place before the recognition of the legatee's quality of co-owner. Before this last moment, national law does not consider the testamentary heir as owner of assets.

Under Romanian law, the legatee is not considered the owner of the assets necessary to complete the reserved portion of the succession. However, this aspect does not necessarily prevent the interest in question from being regarded as a "possession" within the meaning of Article 1 of Protocol No. 1, as we highlighted in the subsection "About the reserved heirs".

The assets necessary to complete the reserved share are a benefit of the reserved heirs. So, the legatees can only hope to obtain them. It is relevant that, prior to the opening of the succession, the reserved heirs did not have any right regarding the deceased's patrimony.

⁴³ Pla and Puncernau v. Andorra, 13 July 2004, § 61, <http://hudoc.echr.coe.int/eng?i=001-61900>

⁴⁴ Law no. 36/1995 of civil-law notaries and notarial activity, republished in the Official Gazette no. 237 of 19 March 2018

⁴⁵ Law nr. 134/2010 republished in the Official Gazette no. 247 of 10 April 2015

At the same time, until the universal legatees or legatees under universal title take possession of the estate and the legacies are handed over, in accordance with art. 1128-1129 of the Civil Code, the legatees (if they are not heirs regulated by art. 1126 of the Civil Code) do not even exercise *de facto* dominion over the inherited property. Taking this moment into account and the limitation period stated by art. 1095 para. (1) of the Civil Code regarding the right to action in reduction of excessive liberalities, we note that the possession exercised by the legatee regarding the assets necessary to complete the reserved share, according to art. 1097 para. (2) of the Code, is not, in principle, a long one. We also take into account the fact that, as stated by art. 1096 para. (1) of the Civil Code, legacies are reduced before donations.

Prior to accepting the inheritance, the legatees do not have any power regarding the assets necessary to complete the reserved share or the rest of the assets provided by the legatee. The delay in accepting the inheritance leads to the impossibility of the legatee to claim the inheritance.

So, the testamentary heirs need to claim even the assets that are not necessary to complete the reserved portion of the succession, according to art. 1103 of the Civil Code.

Given the public and predictable nature of the Civil Code, the testamentary heirs knew or at least should have known that the deceased's will is not absolute, the ineffectiveness of the legacies to the extent necessary to complete the reserved share being a situation provided by law. Therefore, by accepting the inheritance, they assumed the risk of their legacies being reducing.

Thus, the expectation of the legatees (regarding the assets necessary to complete the reserved portion of the succession) is not legitimate.

Bearing in mind these circumstances, we consider that the interest of the legatees cannot be regarded as a "possession" within the meaning of Article 1 of Protocol No. 1.

In fact, the Court stated that Article 1 of Protocol No. 1 does not guarantee the right to acquire possessions, in particular on intestacy or through voluntary dispositions. The hope of recognition of the survival of an old property right which it has long been impossible to exercise effectively cannot be considered as a "possession" within the meaning of Article 1 of Protocol No. 1, nor can a conditional claim which lapses as a result of the non-fulfilment of the condition⁴⁶.

4. Prohibition of discrimination

As set out in art. 14 of the Convention, the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 1 of Protocol No. 12:

"1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1".

⁴⁶ *Fabris v. France*, 7 February 2013, § 50, <http://hudoc.echr.coe.int/eng?i=001-116716>

The Court pointed out that Article 14 of the Convention complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to “the enjoyment of the rights and freedoms” safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions, and to this extent it is autonomous, there can be no room for its application unless the facts in issue fall within the ambit of one or more of the latter⁴⁷.

The fact that we have already underlined the applicability of some rights and freedoms protected by the Convention (the right to respect for private and family life, as well as the protection of property) indicates the possibility of analyzing art. 14 taken in conjunction with art. 8 and / or art. 1 of Protocol No. 1, even though we previously concluded that there had been no violation.

According to the general principles as enunciated in art. 14, stated by the Court⁴⁸, in order to find that the application of the reserved share gives rise to discrimination, we should identify a difference in treatment of an individual or group of individuals compared to another person or group of persons, in analogous or relevantly similar situations, without an objective and reasonable justification. Considering the specificity and uniqueness of the reserved portion of the succession, meant to ensure to the reserved heirs a minimum part of the inheritance due to family ties⁴⁹, we consider that Romanian law does not regulate comparable relevant situations. Thus, *de cuius*, the reserved heirs, donees or legatees cannot complain about the fact that they were treated differently compared to other persons, in analogous or relevantly similar situations.

Taking art. 14 into consideration, we eliminate the examples of equal treatment compared to other persons whose situations are significantly different⁵⁰, due to the fact that this is not the case of *de cuius*, the reserved heirs, donees or legatees. In fact, compared to them, we cannot identify other individuals, in significantly different situations, who would suffer/benefit from the same effects of the reserved share, of the available quota and of the reduction of excessive liberalities.

The notions of discrimination prohibited by both Article 14 of the Convention and Article 1 of Protocol No. 12 must be interpreted in the same manner⁵¹. Therefore, if it weren't for the applicability of some rights and freedoms protected by the Convention (the right to respect for private and family life, as well as the protection of property), but one of the categories⁵² provided by the Explanatory Report to Protocol No. 12, those previously established, regarding the lack of discrimination from the perspective of art. 14, are applicable *mutatis mutandis* in the case of art. 1 of Protocol No. 12.

5. Conclusions

In view of the above, in our opinion, the European Court of Human Rights may not hold that there has been a violation of art. 8, art. 14 of the Convention, art. 1 of Protocol

⁴⁷ Hämäläinen v. Finland, 16 July 2014, § 107, <http://hudoc.echr.coe.int/eng?i=001-145768>

⁴⁸ Molla Sali v. Greece, 19 December 2018, § 133-137, <http://hudoc.echr.coe.int/eng?i=001-188985>

⁴⁹ It is necessary to take into account the particular circumstances. See Fábíán v. Hungary, 5 September 2017, § 121, <http://hudoc.echr.coe.int/eng?i=001-176769>

⁵⁰ Thlimmenos v. Greece, 6 April 2000, § 42-44, <http://hudoc.echr.coe.int/eng?i=001-58561>

⁵¹ Sejdić and Finci v. Bosnia and Herzegovina, 22 December 2009, § 55-56, <http://hudoc.echr.coe.int/eng?i=001-96491>

⁵² See Savez crkava „Riječ života” and Others v. Croatia, 9 December 2010, § 103-105, <http://hudoc.echr.coe.int/eng?i=001-102173>

No. 1 and / or art. 1 of Protocol No. 12. Thus, regulating the reserved portion of the succession may not engage Romania's responsibility under the Convention.

Moreover, the Court emphasized that the institution of the reserved portion of an estate is to be found in the domestic legal systems of the majority of the Contracting States⁵³. This attention paid by the Court to the national legislation in the member states of the Council of Europe allows the Convention to be a living instrument, interpreted in the light of present-day conditions⁵⁴.

From a comparative perspective, we must mention the fact that the existence of the reserved share is a rule for the Member States of the European Union⁵⁵ also, which proves the existence of common European values. Moreover, Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession⁵⁶ expressly indicates the notion of reserved share, regulated by the law applicable to the succession.

⁵³ *Marckx v. Belgium*, 13 June 1979, § 52, <http://hudoc.echr.coe.int/eng?i=001-57534>

⁵⁴ *Tyrer v. The United Kingdom*, 25 April 1978, § 31, <http://hudoc.echr.coe.int/eng?i=001-57587>

⁵⁵ https://e-justice.europa.eu/content_general_information-166-ro-en.do?init=true&member=1

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MOTHER IN ROMANIAN POSITIVE LAW

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Abstract

Used from the beginning of speech, throughout life, with its own meaning - woman in relation to her children - or figuratively - source, origin - the word mother could not bypass the all-encompassing field of natural law – jus naturale - and the positive law. The Romanian legislator enshrines numerous provisions from which its protection and protection emerge, especially in terms of filiation, recognizing as the mother of a child only the woman who gives birth to him, rejecting the juridical fictions resulting from the gestation for another.

Keywords: mother, wife, parentage, parent, wife.

1. Considerations regarding the word of mother

Mother, from lat. *mater* is the woman considered in relation to her children, being the name that this woman's children give or when they address her or when they talk about her [1], but, at the same time, it can be the affective term with which a woman addresses her children or to a younger person [2]. In current speech, we encounter the phrases adoptive mother, to designate the woman who adopts the child born of another woman, stepmother, meaning the wife of the child's father recognized in the relationship with his mother, mother-in-law - mother of the husband.

The mother is the beginning of all beginnings [3]. Representing *the origin*, the word *mother* can be used figuratively with the meaning of the starting point of a thing, source, cause (*repetition is the mother of learning*) and in compound words, often used in legal language, such as: matriculation, maternal, maternity, matriarchal, mother company [4], mother country [5].

The *mother* is a word with universal meaning, born, according to linguists, from the beginning of the baby's speech because, spoken aloud, using lip sounds¹ and long vowels, the exact movement that a child's mouth makes when breastfeeding is observed. In fact, the Latin variant *mamma* is better known as *breast* [6].

Used from the beginning of speech, throughout life, with its own or figurative meaning, the word *mother* could not bypass the all-encompassing field of natural law - natural jus - and implicitly the positive one.

De lege lata, the term of *mother* is found in many internal regulations that enshrine the important role that the legislator recognizes to *mothers* in society. The *mother* enjoys increased protection through all the legal provisions enacted to preserve her ancestral role as creator, caregiver, protector, educator, counselor, an irreplaceable landmark in the life of every human being.

¹ Those made with the help of the lips (b, p, m).

2. *Mother in internal regulations*

In view of the respect that the *mother* enjoys in the Romanian society, but also due to the external influences [7], the internal legislator instituted an anniversary day, *Mother's Day*, as the first Sunday of May².

At the same time, for the same reasons, the Romanian legislator ruled that between the life of the *mother* and the life of the conceived but unborn child, the *mother's* right to life prevails, if the pregnancy to give birth to the child represents a major and immediate risk to one's life [8]. In the same sense, the criminal legislature establishes that it is not a crime to terminate the course of pregnancy for therapeutic purposes performed by an obstetrician-gynecologist until the age of twenty-four weeks of pregnancy, or the subsequent termination of pregnancy, for therapeutic purposes, if it is done in the interest of the *mother* [9].

In domestic law, we find many provisions regarding the *mother*. We consider, first of all, the provisions of the Civil Code, in which the word *mother* appears, in matters related to the identification of the natural person, filiation, guardianship institution, succession, but also in other normative acts such as, by way of example: *Law 272/2004 on the protection and promotion of the rights of the child* [10] mentioning the term *mother* in situations regarding the identification of the child, his protection and *implicitly* protection of the *mother*, *Law 119/1996 on civil status documents, republished* [11], *Law 210/1999 on parental leave* [12], according to which the father has the right to take over the rest of the non-maternity leave and the indemnity due to the *mother* in case of her death during childbirth or maternity leave, *Law 350/2006 of Youth* [13] establishing the obligation of the state to promote non-discriminatory employment policies, with priority given to young *mothers*.

2.1. *Mother in terms of parentage*

Filiation gives expression to a presumably affective relationship between the child and the parents, and, in this regard, Aristotle said that *mothers love their children more than fathers because they are much more entitled to know that the children are hers* [14].

In the matter of filiation, the conception of the civil code gives expression to the Latin adage *mater in iure semper certa est* (in law, the *mother* is always certain) and *mater semper certa, pater incertus est* (the *mother* is always certain, the father uncertain) [15].

The filiation - as a biological but also legal connection - with the *mother* results from the fact of the birth of the child by a certain woman³ and this fact is proved by the birth certificate and the birth certificate drawn up based on it⁴, which states the identity of the *mother* and the identity of the born child. The birth certificate is drawn up, as a rule, on the basis of the verbal declaration of any of the parents, the identity document of the *mother* and the declarant, the medical certificate confirming the birth and, as the case may be, the parents' marriage certificate⁵.

² Law 319/2009 for the establishment of Mother's Day and Father's Day, M.Of. 694 of October 15, 2009.

³ Article 408 para. (1) "Means of establishing parentage" ("Affiliation to the mother results from the fact of birth: she can also be established by recognition or by court decision").

⁴ Article 409 para. (1) "Affiliation is proved by the birth certificate drawn up in the civil status register, as well as by the birth certificate issued on its basis"

⁵ Article 14¹ of Law 119/1996 on civil status documents

When the birth was not registered in the civil status register or the child was entered in this register as being born of unknown parents, the maternity of the child can be established by recognizing the *mother*⁶, which is irrevocable even if it was made by an essentially revocable act such as the will⁷, and in case, for any reason, the proof of maternal filiation cannot be obtained by the birth certificate as well as in the situation where the reality of those included in the birth certificate is contested, the maternity is established by court decision⁸.

If the marital status of the *mother* has no relevance regarding the establishment of the maternal parentage, on the other hand, the same marital status at the date of birth or conception of the child is the determining criterion of the way of establishing paternal parentage.

Thus, the *mother* married at the time of conception or birth of the child also transmits to him the filiation towards the father through the effect of the legal presumption of paternity⁹, granted by the legislator to the mother's husband. And the unmarried *mother* transmits to the child the filiation towards an alleged father also through the effect of a legal presumption of paternity if she manages to prove that she lived with him during the legal time of conception¹⁰.

It is the *mother* who will help her child out of wedlock to identify his father, initiating action on his behalf in establishing paternity, even if she is a minor¹¹. If she has filed an action for the establishment of paternity, the *mother* will also be entitled to compensation from the alleged father in the amount of half of the expenses of birth, childbirth and those incurred with her maintenance during pregnancy and childbirth even when the child was born dead or he died before the decision on establishing paternity was handed down¹². The right of the *mother* to demand that the father of the child out of wedlock be held liable for expenses during pregnancy and childbirth shall be subject to the national law of the *mother*¹³.

The *mother* is also the one who can deny the paternity of the child, but for its protection and security only within 3 years from the date of birth of the child¹⁴. In this situation, the *mother's* interest will be limited to the child's best interest in removing a paternity that does not correspond to reality in order to establish the connection with the biological father. In this context, it was shown that the *mother* must prove that the admission of this action opens not only in the abstract, but concretely, the way to establish the true paternity of the child, otherwise the action can be rejected as uninteresting [16].

The filiation towards the *mother*, as it results from the birth certificate consolidated by the state possession in accordance with it, is, in principle, unassailable since the means of removing the maternity thus presumed are not allowed by art. 411 para. 1 and 2 of the Civil Code, according to which the action of the beneficiary of the maternity in the claim of a different maternal affiliation is inadmissible, as well as the action of any person in contesting the maternity [17].

⁶ Article 415 para. 1 Civil Code

⁷ Article 416 para. 3 Civil Code

⁸ Article 442 Civil Code

⁹ Article 408 para. 2 Civil Code

¹⁰ Article 426 Civil Code

¹¹ Article 425 para. 1 Civil Code

¹² Article 428 Civil Code

¹³ Article 2606 Civil Code

¹⁴ Article 431 Civil Code

Exceptionally, if it has been established by a court decision that there has been a substitution of a child or a substitution of a *mother* (of a woman other than the one who gave birth), the filiation towards the *mother* can be proved by any means of proof.

These strict hypotheses that allow the way to contest maternity enshrine the conception of the Romanian legislator who refuses to accept the procedures having as object the gestation for another, the Romanian law not recognizing as *mother* than the woman giving birth, the phrases surrogate *mother*, loan *mother*, biological *mother* having no legal support. Even in the absence of an express text of law, the "gestation conventions for another" are absolutely null because they aim at trading values that are related to public order and good morals.

2.2. *Mother in other civil matters*

As an effect of the filiation, the *mother* will have the right to choose the first name and surname, in accordance with the law, that the child will bear, the right to choose the first name being his exclusive prerogative when only the filiation towards the *mother* is established. The chosen first name can be refused by the civil status officer only if he is indecent, ridiculous or that is likely to affect public order, good morals or the interests of the child¹⁵. However, the child's name can be chosen by someone else only in exceptional situations in which the parents, but especially the *mother*, would remain unknown. Thus, *the child who is abandoned by the mother in the hospital*¹⁶ and whose identity could not be established within the term provided by law will bear a name established by the mayor's order [18], which strengthens the traditional concept of certainty about a certain mother as a parent of the newborn. The law to which reference is made is *Law 272/2004 on the protection and promotion of children's rights*, which establishes a maximum duration of 36 days for the identification of the *mother*.

The *mother*, but also the father if paternity is established, has the obligation to support his minor or adult child if he is continuing his studies, but without exceeding the age of 26, providing him with the necessities of life as well as education, teaching and professional training¹⁷.

In terms of guardianship, the "*mother of a child under 8 years of age*"¹⁸ may refuse to continue guardianship according to the law¹⁹, so, even more, she may refuse the appointment even if it was made by pre-existing mandate contract. As a rule, in case the appointment of the person for the position of guardian was made by mandate contract, his appointment by the court will be made without his consent, presumably, irrefutably assuming that he was expressed *ex ante*, on conclusion of the contract. Pursuant to the principle *pacta sunt servanda*, the trustee is bound by the execution of the validly concluded mandate. However, he may refuse the appointment only when there are justified, express and limiting reasons provided by law, including the situation of the *mother of a child under 8 years of age*. By this provision, the legislator recognizes and presumes the full involvement of the *mother* in the upbringing and supervision of the young child to such an extent that he finds no respite for the protection of another individual.

¹⁵ Article 84 para. 2 Civil Code

¹⁶ Article 84 para. 3 Civil Code

¹⁷ Article 499 para. 1 Civil Code

¹⁸ Article 119 para. 1 Civil Code

¹⁹ Article 120 para. 1 lit. b Civil Code

In terms of inheritance, the *mother* is a *privileged ascendant* who has a vocation to inherit the deceased child and comes to his inheritance if there are no descendants of the deceased or they do not meet the necessary conditions to inherit²⁰ and is a *surviving spouse* of the deceased father of their children in competition with them, in which capacity she will be called to inherit in competition with any of the classes of legal heirs and will have a right of habitation over the house in which she lived until the date of opening the inheritance that is part of the inheritance assets. Although the *mother* is nominated separately, we note that the provisions referred to do not establish a legal regime distinct from that of the father, which may have the same qualities from a legal point of view in the same circumstances.

In matters of international adoption, by ratifying the 1993 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, adopted in The Hague [19], the Romanian state undertook to ensure that the *mother's* consent to adoption was given only after the birth of the child²¹.

2.3. Mother in criminal matters

Regarding the criminal treatment applied to the *mother* for the crimes that a woman could commit in this capacity, we notice that the legislator establishes a special criminal policy.

If we consider *the killing or injury of the newborn by the mother* [20] in relation to other crimes against life or bodily integrity and health, we observe a less severe sanction²² if the deed occurs no later than 24 hours after birth and if the *mother* is in a state of mental disorder, as the legislator recognizes the state of physiological suffering caused to the *mother* by the act of birth.

For the same reasons related to the state of mental disorder of the *mother*, and the harm to the fetus [21] committed during birth by the mother knows a milder treatment, by reducing the punishment limits by half²³.

If the murder or injury of the child is committed after 24 hours from birth, the act will constitute *the crime of domestic violence* [22], in which case, on the contrary, considering the natural connection of affection and protection that should be inherent in the *mother-child* relationship the sanctioning regime will be aggravated by increasing the special maximum by a quarter.

3. Conclusions

From the exposed and analyzed regulations, it results that the Romanian legislator was not influenced by the laws of other states, refusing to take over institutions that distort the role of *mother*, as it has been preserved for thousands of years, the traditional concept being transposed in a modern way, which highlights, in relation to natural law, the immutable nature of its role, a role that impresses legal science itself, contrary to its dynamics, a perennial nuance.

The legal norms governing the legal institutions intended for the protection of the *mother* are norms that, implicitly, protect the child from the aspect of his superior interest, and this superior interest grants the *mother*, equally, the same protection, the legal

²⁰ Article 976 Civil Code.

²¹ Article 4 lit. c point 4 of the Hague Convention.

²² Imprisonment from 1 to 5 years for murder, respectively from 1 month to 3 years for injuries.

²³ Article 202 para. 4 Criminal Code.

provisions interfering and emphasizing the will of the legislator to stable legal status for the perpetuation of the human species in a natural way.

The analysis and exposition of the norms that regulate the legal status of the *mother* in various matters of law, especially civil law, allow us to express the conclusion that civil law can be considered the *mother* of law.

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SUCCESSION REPRESENTATION AND FAMILY

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Abstract

Life by its very nature presupposes death, so that all people, regardless of their will, have a limited physical existence in time, which causes them to think about how their goods will be divided as well as, who will be the people that will benefit, when they will pass into non-existence. Family is among those who, according to the law, can inherit the deceased's property.

In law, issues related to the representation of the estate and the connection between persons belonging to the same family, even beyond death, are regulated in both the legal and testamentary inheritance. In the following, we will analyze theoretical and practical aspects regarding the succession representation and its connection with the family.

Keywords: *Succession representation, representation of the unworthy, representation of the renouncer, legal inheritance, successors, deceased, family.*

Successional representation

Successional representation is a separate legal institution, which has neither to do with the conventional representation of the principal by the trustee nor with the legal representation of the minor or the judicial interdicted by the parents or guardians at the conclusion of legal acts[1].

Successional representation is regulated by the Civil Code in Book IV 'About inheritances and liberalities', Title II 'Legal inheritance', Chapter II, in articles 965-969. The definition is given by the legislator in article 965, the successional representation being the institution through which a legal heir of a more distant degree, ascends, by virtue of the law, in the rights of his ascendant, to collect the part of the inheritance that would have belonged to him if he would not have been unworthy in relation with the deceased, at the date of the inheritance's opening . Therefore, in order to be able to talk about the successional representation, we must consider only those situations when the person called to the succession table has the quality of legal heir, a condition regulated in the provisions of art. 965 of the Civil Code, according to which '.... a legal heir'. Also, from the definition given by the Civil Code it results that the deceased persons can be represented and, as a novelty, the unworthy , removing the dispositions, considered unequitable, of the old Civil Code, but both the renunciate and the disinherited, if they are non reservist, can't be represented. Regarding the deceased persons at the same time as de cuius, in the specialized literature [2].it was argued that this is allowed because the law requires that the representative be a person lacking the capacity to inherit, and this happens only if the person is deceased. Or if the cuius and his son die in a plane crash and it cannot be established if one survived the other, at the moment of opening the inheritance of cuius, his son does not have successional capacity, so that his descendant of cuius can be represented.

In the case of testamentary inheritance, the successional representation cannot operate, being only the will of the deceased expressed during his life and also considering the character of *intuitu personae* (of the person), which the will has.

The legislator, through the institution of representation, took into account the sentimental approach of the deceased, towards those persons in the family who could rise by representation in a degree closer to kinship with the deceased, thus limiting the representation, only in the case of descendants of the deceased's children, without limitation in kinship and descendants of siblings of the deceased, up to and including the third degree. Thus, no manifestation of will on the part of the representative is necessary in the sense of applying the rules of representation [3]. but the representatives can influence the rules governing this institution only by renouncing the inheritance, not being able to accept the inheritance partially or under a certain condition.

The right to inheritance cannot depend on chance (the predecessor or the survival of some relatives), and the premature death of the parents must not harm some of the children nor benefit others [4].

The usefulness of the representation consists in the fact that, through the effects it produces, it removes some unjust consequences of the proximity principle of the degree of kinship and of the principle of equality between relatives of the same degree. Thus, for example, the deceased had three children, two of whom preceded him, leaving two children each. If we applied the principle of proximity of the degree of kinship, the inheritance would be collected by the living child of the deceased, who - being of the first degree - would remove from the inheritance the grandchildren of the deceased's son, second degree relatives. Such an unjust solution is removed by the institution of successional representation, which allows grandchildren to go up, taking the place of predecessor parents, allowing them to collect the part of the inheritance that would have been due to them if they had been alive at the date of opening the inheritance. Likewise, if all the children of the deceased had died on the date of the inheritance's opening and one had left a child, and the other two, two children each, the five grandchildren of the deceased, second degree relatives, will share the inheritance not equally, according to the principle of equality, but - representation being allowed - the first one will take one third, and the other four, will take two thirds together, one third for each strain, that is, as much as their parents would have taken if they had been alive.

Successional representation is a benefit granted by law to legal heirs where the predecessor ascendant is called represented, while the person who comes to inherit by representation is called representative [5].

Representation of the unworthy

Analyzing the general principles of legal devolution of inheritance and the exceptions to these principles, as well as the general conditions of the right to inherit, we can see that in our Civil law, only the deceased can be represented at the date of opening the succession, which if he were alive would have had both succession capacity and a concrete vocation to inherit.

By exception, the person alive at the date of succession's opening, can be represented, only in the situation where he is unworthy towards the deceased, the rules of representation in inheritance being 'modernized', through the amendment of the Civil Code, brought by Law 287/2009. Due to the criticisms brought to the regulation of the old Civil Code, as well as to the recent evolutions from the comparative law of some countries with which we are legally related. Thus, compared to the old regulations that prohibited both the representation

of the unworthy and the representation of the renunciate, the situation changed, only partially, offering the possibility of representing the unworthy.

This aspect represents a novelty in our Civil law, thus can be represented the person lacking the capacity to inherit, as well as the unworthy, even alive at the date of the inheritance's opening [6], but to come by successional representation to the inheritance of the deceased, the representative must meet all the general conditions to inherit him [7]. Also, the representation operates even if the representative is unworthy of the represented person or has given up the inheritance left by him or has been disinherited by him [8]. The conditions that refer to the person of the represented, show us that first of all, he must be deprived of the capacity of succession or be unworthy of the deceased, even if he is alive, and secondly, the place of the represented must be a useful place. However, there are authors [9] who consider that this condition cannot be retained because 'disposing in the sense that the unworthy heir can be represented, the new Civil Code, naturally, can no longer retain the condition that the place of the represented be useful', but other authors [10] consider that indignity is only an exception to this condition, which refers to the fact that if the person was alive at the date of the inheritance's opening, he would have had a concrete legal vocation to the inheritance. The condition referring to the person of the representative, who, in order to collect an inheritance must have successional capacity, general legal vocation to inherit and not be unworthy of the *cuius*, renouncer or disinherited, is irrelevant if the representative is unworthy of the ascendant or deceased because he does not collect his inheritance.

A particular effect of the successional representation is the obligation of reporting that comes on the children of the unworthy who have collected the inheritance from which their author was excluded. If the unworthy person is represented by a descendant of his who collects the deceased's inheritance and later, another child is born, the representative will be obliged at his death, to report only the surplus value resulting from the patrimony or from the inheritance received by representing the unworthy person [11].

Representation of the renouncer

Ever since the successional representation proved to attract attention in a special way, the most controversial category of people to whom no solution has been discovered, that meets all the requirements is that of the renouncer.

Considering that it is not right for a person to be negatively affected by a mistake of the ascendant or of which he is not guilty, the representation of the unworthy was admitted. In these conditions, the question is why did the legislator choose to ban the representation of the person who renounced the inheritance? What are the descendants of the renouncer more guilty of, compared to the deceased compared to the descendants of the unworthy towards the deceased, not being able to inherit it? Moreover, the abolition of the title of heir of the unworthy does not entail the interdiction of his representation by his descendants. All the descendants of the unworthy will be able to come to the succession by representation and not only in their own name as it was in the old regulation.

The impossibility of representing the renouncer is a limitation on ensuring equality between strains and is implied by the interpretation of Art. 967 paragraph (1) of the Civil Code. Thus, for example, the deceased has two children, one of whom is unworthy, who has two children, and the other one is a renouncer, who has one child. If we applied the principle of proximity of the degree of kinship, according to the old regulation, the

inheritance would be collected, equally, by the three grandchildren of the deceased, second degree relatives. But considering the new changes brought and the impossibility of representing the renouncer, at the inheritance of the deceased, only the two children of the unworthy will be called, through the representation, putting together all the succession table, half each.

Part of the legal doctrine considers that the solution chosen by the new Civil Code is a little unbalanced, the balance tilting to the detriment of the renouncer's children. In this matter there are solid arguments 'for' and 'against', but we can not fail to note that a much more serious act of a person - such as an attempted murder against the heir, has no property consequences, while the will of a successor to renounce inheritance does not allow his successors to inherit what is valid for the successors of the unworthy, even renouncing.

The decision not to allow the renouncer to be represented, however, has an explanation. This was taken in relation to the social context in Romania and the needs of our society. Thus, it was considered that the borrowing of the French regulation would not fit the current Romanian social context, namely a former communist society, with a much weaker economic power than the French one and with a confidence in legal institutions slowly built [12].

The cases arising in the judicial practice were also taken into account, which showed concretely in what conditions in the Romanian society a person renounces the inheritance and what are the reasons and consequences of such a renunciation or, more importantly, what effect would the permission have had on the family relations the representation of the renouncer[13].

An example of a case that would obviously affect family relations, if the renouncer's representation were accepted, would be when the one who renounces the inheritance wants to offer help to his other relatives, usually siblings, and decides to give up his father's succession. If it were not forbidden to represent the renouncer, the son of the person who gave up could create great tension in the family by violating the word of his parent. Often, in rural areas, there are situations in which a parent is helped by the son who stays next to him more than by those who have left, and then the parent decides that the fortune remains to the son who was with him. But as access to notaries as well as legal education are limited, in the sense that the alternative ways in which one can dispose of wealth are not known, the legislator considered that the prohibition of representing a person who decided to give up an inheritance to which he was entitled, is the most suitable option for the Romanian society. Many times, the parent's desire to leave the fortune to a certain son will remain just a word that the brothers will comply out of respect for the parent, without being constrained by law in this regard. Again, it was considered immoral for a grandson to be given the opportunity to disregard a wish of one of his ascendants.

Other situations in which a person could give up the inheritance are when there are burdens and debts of the inheritance and the successor does not want to bear them, a situation in which the successor has such damaged relationships with the de cuius that he does not want to inherit anything from him or the situation in which creditors' fraud is desired [14]. In addition, as I presented above, the hypothesis was taken into account in which the successor wants to gratify a co-inheritor as a sign of gratitude.

Although the argument that it is necessary to maintain equality between strains is important, it is not just the argument that must be taken into account to determine whether or not the renouncer should be represented. Regarding death or indignity, these represent

legal facts, while renunciation is a legal act. The renouncer consciously expresses its consent, and if it is not respected, ie he is to be represented by his descendants, the rule of freedom in accepting or renouncing the inheritance is no longer applicable to him.

Romanian law and comparative law on representation

The succession representation as it is currently perceived by the Romanian society differs from the previous regulation, due to the changed mentality of the society and the legislative changes that have always influenced the Romanian legislator. If we look at the reform of the legal succession undertaken by Justinian in sec VI, we find that it gave full consecration to cognation (blood kinship) as the foundation of devolution ab intestato . The priority of the vocations ordered it according to the proximity to the deceased, in an order in which - comparing Novellae 118 and 127 with the texts of the new - we cannot identify fundamental differences. The successional situation of the surviving husband had been corrected by Novellae 53 and 117, regulating the usufruct of the poor widow. The solution exists in the rules of the old Romanian law, from where it passed in our civil code, being later replaced with more equitable solutions.

This similarity shows once again the special stability of inheritances compared to other branches of private law. An area as closely related to the private life of the human individual in general as successions cannot undergo fundamental changes, and the basic pattern of devolution can't be essentially different only by contradicting the elementary tendencies of any of us.

The Civil Code of 1864, allowed only the representation of the deceased, not being allowed the representation of the unworthy or of the renouncer. However, it is interesting to note the evolution of succession representation. Around the 19th century, there was a medieval concept, a medieval theory of succession representation, according to which, according to Gaius' institutions, the possibility of descendants from sui heredes to inherit was replaced by the deceased ascendants [15]. Sui heredes [16]. is a term that could be translated by internal heirs or by those who inherit themselves, because since during the life of the ascendant, they were considered somewhat co-owners of the family fortune, shared in its establishment. By the death of the head of the family, a confirmation of their previously existing rights was made, taking place a continuation of the person of the deceased [17]. The successive sui heredes were in fact all those who came under the power of the pater familias, and the inheritance was divided on the heads, meaning , equally, if they were relatives of the same degree, and if they were of different degrees, the inheritance was divided into stems.

This theory mainly influenced the French legislation from which we also absorbed, being immediately taken over by Down Canada. After that, other European countries followed, such as Switzerland, which also allowed the representation of living people, ie the unworthy, the renunciant and the disinherited. In the Spanish Civil Code, although the representation of living persons was not allowed in principle, there are still two exceptions: the unworthy and the disinherited. Similar to the Swiss regulation was the Italian one related to the representation of the unworthy, and the Germans considering that the unworthy and the renouncers are non-existent persons, they could be represented. In Catalan law there are most categories of persons that can be represented: the deceased, the absentees, the unworthy and the renouncers, but not the disinherited ones.

Under the reign of King Charles II, a new Code was drafted, which never entered into force, but which provided that the deceased could be represented, the renunciant or the unworthy being replaced by the effect of representation by his descendants, according to the degree of kinship [18].

In 1971, the draft Civil Code was drafted, which, in art. 843, para. (5) spoke about representation, saying that representation will operate if the representative is unworthy or disinherited, art. 845 expressly regulating that the renouncing heir cannot be represented, so if the representation cannot intervene, then the descendants in a straight line or the descendants of brothers and sisters will inherit according to their own right.

In French law, after the 2000s, two reforms in terms of successions and liberalities were noted. In 2001, the first reform took place, which allowed the representation of the unworthy, but maintained the ban on the representation of the renouncer. However, in 2006 there was a second reform in the field of successions and liberalities, which was implemented starting with January 1, 2007 and which allowed the representation of the renouncer. It should be noted that the representation of the renouncer was not simply regulated, but only in the conditions in which legal mechanisms were regulated that allow within a family to be able to create differences between descendants, even going to the violation of the succession reserve [19].

In Romanian law after the 2000s, more precisely in 2003, a first phase of the project regarding the new Romanian civil code was carried out. The proposed project admitted the representation of the deceased, the commoner, the renunciant and the unworthy. This bill was not validated in this form by the Senate, which amended the proposed text, removing the renouncer from the category of persons who could be represented. A commission was set up at the Ministry of Justice in 2006-2009, which amended the bill adopted by the Senate in 2004, and some committee members proposed that the renouncer could also be represented, following the idea already adopted in Greek civil codes, France, Italy and Switzerland. The main argument to support this proposal was equality between strains, without distinguishing how representation occurs in case of death, indignity or renunciation. During the voting session, the commission decided by a majority of votes that in the current evolution and development of the Romanian society it is recommended not to admit the renouncer's representation.

In the Italian Civil Code, the representation is regulated in the second book of the code, suggestively entitled *Libro Secondo - Delle successioni* (Book Two - About successions). An important difference regarding the representation concerns the possibility allowed by the Italian Civil Code of the representative to inherit also in the case of testamentary succession. [20]. Therefore, it is provided that, in the case of testamentary succession, if the legatee cannot or does not want to accept the bequest, his descendants will be able to accept the legacy, by representation, unless it is a right of usufruct or another personal right. According to the Italian Civil Code, legitimate or natural descendants can accept the succession in all cases where their ancestors cannot, or do not want to accept, the legal inheritance or the legacy. [21.] Also, the Italian Civil Code expressly provides that the descendants can inherit by representing the ascendants if they have renounced the inheritance [22].

In the French Civil Code, the institution is also regulated in its full form. Thus, the Civil Code stipulates that the represented person may be predeceased, unworthy or renounce [23]. Regarding succession representation, the French Civil Code contains a concise definition that calls this institution of law a 'legal fiction' [24]. and presents it as the

circumstance in which the representative takes over the rights of the representative, a change to the old code that called this institution a 'fiction of the law' [25].

Unlike the French Civil Code, the Romanian Civil Code explains both the meaning of the term to be represented and that of the representative and presents the two cases in which representation can take place. At the same time, the Romanian legislator also took a step in improving this succession technique, giving up in 2006 the artificial and harmful concept of 'fiction of the law'. Thus, the new Civil Code reformulated the notion as follows: 'by succession representation, a legal heir of a more distant degree, called a representative, ascends, by virtue of the law, in the rights of his ascendant , or....' [26] but it did not go to the end, as the French did, because it did not admit the representation of the renunciant.

The Civil Code of the Quebec province is similar to the Romanian Civil Code through the fact that the representation of the renouncer is not allowed, expressly providing for this [27]. Thus, it can be seen that other legal systems have considered that this option is more appropriate.

The permanence found explains why European unification is the least advanced in this field, where the current movements in Brussels - although extremely active in recent years - do not go beyond the harmonization of rules of procedure and those of private international law. ' [28].

Conclusions

Considering the fact that the Civil Code does not expressly provide that comorians or co-deceased may be represented, I consider that it is necessary for the legislator to intervene, being necessary in this respect, a proposal of lege ferenda. Moreover, I consider that the succession representation in this case, should work only between cormorians or co-deceased within the first class of heirs, respectively towards the descendants. The reason I have in mind is the strong blood relationship between descendants and ascendants, and the fact that parents want to protect their children so that they can inherit their possessions when they are no longer in this world.

Also, I consider that it would be opportune and without disadvantages, to offer the possibility of succession representation within the testamentary inheritance, like the regulations from the Italian Civil Code. Thus, if the legatee cannot or does not want to accept the legacy, he can, through the succession representation, accept the legacy of his descendants. If the deceased has decided to leave his entire fortune by will, to one or more persons, I consider that he mainly does not want the division of the inheritance either to the persons or in the order provided by the legal inheritance. Also, the will of the deceased can be the way to pay even moral debts, which if they could have been paid otherwise to the legatee, the benefit would have reached the descendants of the legatee, if the legatee died before the testator .

Another very important aspect is the impossibility of representing the renouncer, which offers both advantages and disadvantages. Although the regulation disregards ensuring equality between strains, adapted to the current social context, certainly in the future when society will be ready, the possibility of modifying this regulation will be considered.

Observing the evolution of society, as well as the continuous change of needs, certainly the institution of representation, will undergo changes, leading to different conditions of representation or modification of the persons who can be represented or the representatives.

It is almost impossible to find solutions that will satisfy each person regarding the succession representation.

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A FEW ASPECTS REGARDING FAMILY MEDIATION

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Abstract

Most states consider beneficial to resolve family law disputes through mediation, rather than in court. In Croatia, parents involved in divorce and custody proceedings are required to use the mediation procedure first. Psychologists from the Centers for Social Protection use mediation.

Mediation is sometimes combined with other activities. For example, in Estonia, a child care specialist assists parents in the mediation procedure in the early stages of a trial. In Germany, the child's legal counsel provides assistance to parents through mediation. [1] Many disputes that entered the mediation process were resolved by this method. According to some, almost 60-80% of mediated conflicts were resolved by finding a solution agreed by the parties to the conflict. [2]

Keywords: mediation, family conflicts, divorce, sharing

1. The emergence of family mediation

"The family is the core of civilization," said Will Durant, and a Marxist saying reminds us that it is "the basic cell of society" and the "only natural" J.J. Rousseau. The family's past impacts on its present, in terms of aspects related to continuity, as well as those related to changes and interruptions of tradition. Today, the family is put to the test if we talk about modern trends and the pressure of new challenges, and at the same time it is called to demonstrate its vitality and expressiveness, taking into account the freedoms acquired over time.

In this context of the diversity and complexity of the family, the society has tried over time, through various means, to keep it stable and its purpose and to keep them unaltered. One of these means is mediation. Mediation is an alternative form of problem solving between two or more parties (in our case parents and / or children) with well-defined goals, which over the years has become increasingly remarkable for the efficiency with which it has managed to separate the emotional part of the rational one, helping to negotiate and understand the problems, based on trust in the mediator.

In the case of conflicts in the family, one way to resolve disputes within it, in the interests of all members, but especially in the interests of children, through a third party, in conditions of neutrality, impartiality and confidentiality is *family mediation*.

Family mediation has emerged in the U.S. in the 1970s to avoid the difficult divorce proceedings that placed the parties in an antagonistic relationship and nullified any possibility of reaching an agreement. In 1985, the state of California was the first to pass a law requiring parents who were in conflict over the custody of their children to discuss a mediator.

From the USA, family mediation has spread to Canada, where it has not become a mandatory procedure. Subsequently, family mediation expanded to English-speaking countries - New Zealand, Australia, the United Kingdom and then to European countries, the latter taking over the Canadian model. In the United Kingdom, family law has imposed

since 1996, as a condition for the state to grant the sums necessary for representation by a lawyer, the obligation of partners filing for divorce to go to a mediator to determine whether their dispute can be resolved. resolved through mediation. In Norway, mediation is a mandatory procedure before filing for divorce for couples with children under 16.

According to the provisions of art. 259 of the Civil Code, marriage is defined as *"the freely consented union between a man and a woman, concluded under the law"*, both persons pursuing the same goals, culminating in the desire to form a family.

Communication, dialogue itself and finding the right techniques for problem solving in different areas of social or economic interest have brought an appropriate meaning to the term "mediation", starting with Ancient Greece and Ancient Rome. Nowadays, these practices are essential in resolving one of the most widespread family disputes, the dissolution of marriage, the number of which is growing substantially. [3]

1.1 Dissolution of marriage by divorce

Divorce procedure. A. Divorce applications can be resolved judicially for any of the reasons contained in art. 373 - 404 of the New Civil Code, if the spouses address the court. The court checks if there are good reasons, if the relations between the spouses are seriously damaged and the continuation of the marriage is no longer possible. The court may pronounce the divorce through sole fault or, when the evidence in the case leads in this direction, through common fault.

B. To the extent that the spouses agree to the divorce and do not have minor children, the dissolution of the marriage may also be ordered by administrative means or by notarial procedure. An element of novelty is the fact that the notarial procedure can be used even when there are minor children, but only if the spouses agree on all aspects related to the relations between them and the relations between parents and minor children. [4]

Until recently, the provisions of art. 64 of Law no. 192/2006 allowed divorce through mediation but, by Decision no. 33 of 2019 of the High Court of Cassation and Justice [5], there have been changes in this regard, namely: a) *the court cannot enshrine the mediation agreement on the agreement of the parties on the dissolution of marriage* and b) *on resolving ancillary issues divorce, the court may consecrate the mediation agreement having this object*.

The family mediator is an arbitrator, his main characteristic being neutrality. In mediating family conflicts, communication techniques and the "negotiation" of a middle situation, convenient for both parties are the two essential levers to avoid the dissolution of marriage. Over time, the law, taking into account social changes, has modernized the status of the mediator, enriched the various opinions, the specialized doctrine, the efficiency in terms of avoiding divorce increasing considerably.

In art. 2 para. (1) of Law no. 192/2006 on mediation and the organization of the mediator profession, with subsequent amendments and completions, regulates the possibility for individuals or legal entities to *"resolve conflicts of any kind through the mediation procedure, even after initiating a lawsuit in court in unless the law provides otherwise"*. Article 64 para. (1) shows which misunderstandings between spouses can be resolved through mediation: continued marriage, sharing of common property, exercise of parental rights, residence of children, parental contribution to child support and any other misunderstandings that arise in relations between spouses regarding the rights they may have under the law. [6] [6]

The mediation agreements concluded by the parties, in the cases / conflicts that have as object the exercise of parental rights, the parents' contribution to the maintenance of the children and the establishment of the children's domicile, take the form of an expedient decision.

As it appears from the interpretation of the provisions of art. 64 para. 2 of the Mediation Law and jurisprudence, as long as the decision to divorce is the consequence of the spouses' misunderstanding in continuing the marriage, the court may take note of the mediation agreement by which the parties agreed on the mediation, thus the agreement on dissolution and settlement ancillary issues, issues in most cases essential, can be filed with the court competent to rule on the divorce.

1.2 Mediation of divorce with children

Divorce with children is a sensitive subject for any family that goes through a separation, the mediator's mission is to strictly maintain the solution of each problem, deviations and disclosures from the subject are harmful, the purpose of mediation is not emotional or psychological support, but on the priorities and interests of children. Custody mediation is usually exercised by both parents, which is by definition a process designed to be cooperative, to reach amicable agreements and to help create a *parenting plan*. [7]

The parenting plan is a written agreement stipulating each parent's schedule, including the responsibilities of both parties regarding parenting. This document is based on certain determinants, observed by the mediator and negotiated with the parents. There is no standard of a parenting plan, priority and final will be the one that will reflect the best interests of the child, and at the discretion of the court, it will be reviewed. Very important aspects are developed regarding the children's home after separation. In this case, it is important to maintain a regular schedule with a flexibility that is advantageous for children, scheduling visits, which include visits from other relatives who are part of children's lives, important holidays, education, vacations and so on.

1.3 The sharing of common goods acquired during the marriage

The division of goods acquired in marriage is another important and very common issue. Spouses in conflict may reach a settlement that can be drafted in writing, in the form of an agreement, by the mediator, which will include all the clauses agreed by them. If the transfer of ownership of real estate, as well as other real rights, is subject to the sanction of absolute nullity, the mediation agreement will be presented to the court, which will become the cornerstone in the separation of assets, after verification by court of substantive and formal conditions.

2. Jurisprudential guidelines

Regarding the way of dissolving the marriage and the impossibility of divorce through mediation, the jurisprudential guidelines are divergent. Examining the jurisprudence at national level, the People's Advocate showed that the existence of a non-unitary practice regarding the interpretation and application of the provisions of art. 2 para. (4), art. 59 para. (2) and art. 64 para. (2) of Law no. 192/2006, as well as of art. 373 lit. a) and art. 374 para. (1) of the Civil Code, being identified three guidelines:

According to the first jurisprudential guideline, some courts have considered that the mediation agreement regarding divorce cannot be noted, holding that divorce is a personal

action, regarding the status of the person, and which, according to art. 2 para. (4) of Law no. 192/2006, cannot be the object of mediation. In the same sense, according to the provisions of art. 64 para. (1) lit. a) of the mentioned normative act, the misunderstandings between the spouses regarding the continuation of the marriage, and not the divorce can be solved through mediation. In addition, divorce is not one of the cases in which an expedited decision can be pronounced based on the mediation agreement, according to the provisions of art. 64 para. (1) of the same law. The referral to the court cannot be made through a request for approval of the mediation agreement regarding the divorce between the spouses, but only through a request for the dissolution of the marriage. It was appreciated that divorce is not among the misunderstandings between spouses that can be resolved through mediation, listed in art. 64 para. (1) of Law no. 192/2006. Instead, the court may take into account in settling the case the agreement between the parties regarding both the form of the divorce and the settlement of its ancillary claims.

In a second jurisprudential guideline, the courts have taken into account the divorce mediation agreement, but only if the court rules on the dissolution of the marriage by agreement, after verifying the free consent of the parties to this effect before the court, under the conditions of art. 931 para. (1) of the Code of Civil Procedure, practically transforming the request for a judgment on the basis of the divorce mediation agreement into a divorce application by the agreement given before the court. The issuance of a decision approving the agreement of the parties, expressed in the mediation agreement, to divorce can only be done in compliance with the requirements imposed by law. [8]

According to the third jurisprudential guideline, the courts had a different approach, appreciating that the divorce mediation agreement can be noted, based on art. 59 para. (2) and art. 64 para. (2) of Law no. 192/2006, provided, where appropriate, that the agreement of the parties respects the principle of the best interests of the minor. In this respect, the opinion was expressed that the court has the obligation to verify whether the mediation agreement between the parties regarding the relations between the divorced parents and their minor children, the establishment of the minors' residence and the establishment of the maintenance pension does not prejudice the interests of the minors. [9]

3. The family mediation process

Family mediation takes place during the agreed time, its temporalities being defined by human aspects, namely emotions and feelings. [10] Mediation has its own contour, becoming more and more defined over time, encompassing different positions and actions, including negotiation. The doctrine is explicit about the confusions between mediation and negotiation, writers like Ștefan Boncu [11] defining negotiation as a part of the process of reaching a common denominator. Family mediation gives people in conflict the opportunity to see clearly, beyond the harshness and conflicting opinions, helping them from the position of a neutral person, focused on the agenda of essential issues to think of proposals and develop strategies that would normally have been rejected. because of the curtain of negative elements, feelings and own. The family mediator contributes to the creation of a framework, relational, listening and dialogue device away from any form of internal or external pressure and coercion.

For the last 25 years, this branch has been given greater importance, especially in French-speaking countries where practitioners like Jean-Louis Lascoux turn a profession

into a real legal mechanism, with decision-making power for the parties involved in the dispute.

Jean-Louis identifies six essential "stages" of the mediation process (the term stages being considered a sensitive one): context, listening, definition, decision, validation and conclusion. [12]

The context consists in interviewing the parties, obtaining information about the conflict, then, by *listening* giving space and relief, the relationship of trust between the parties and the mediator is built so that later a *definition* can be given to the whole situation. Based on the stories and foundations so far, he will be able to make a *decision*; this stage is extremely relevant because, by expressing the interests and positions of one party, the other will become more receptive and communicative about the perception of the conflict. *Validation* is marked by the stage of the process in which the adversary, who until then had been his adversary, became an ally with whom he can communicate and make concessions; at the time of *conclusion*, the parties must undertake to abide by what they have agreed and to sign.

Conclusions

Solutions for family mediation are diverse and advantageous, can save time and unnecessary expenses, and emotionally balance the deadlocked parties. We reiterate that whatever the subject, whether it is sharing, the exercise of parental rights, the establishment of the children's domicile, the contribution of parents to child support or any other misunderstandings that arise in relations between spouses, various external factors and emotional implications are meant to degrade the lucidity and impartiality of the subjects concerned, preventing and often prolonging the resolution of the problem.

Through mediation, in general, conflicts of any kind can be resolved in a short time and with much lower costs compared to a lawsuit in court. When it comes to resolving conflicts within a family, mediation is the most advantageous way to find solutions to problems that may seem impossible to overcome, maintaining a calm, neutral atmosphere, leaving room for trust and objectivity on the part of those involved.

Conflicts shatter society, while peace unifies and strengthens it. Family mediation therefore leads to prosperity and unity within any group. We want this type of mediation to be stimulated (not only financially, but also legislatively) in the future, substantially by state authorities and understood by as many citizens as possible and by law practitioners alike.

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THEORETICAL AND PRACTICAL CONSIDERATIONS ON THE SETTING-UP OF THE GUARANTEES OVER THE RECEIVABLES DERIVING FROM A PROMISSORY NOTE

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Abstract

The specificity of the banking activity has always been characterized by the generating of a significant influx of goods (goods), both when the credit institution has provided financing to its customers of any type and when the credit institution has made available to the customers its payment instruments (in the form of promissory notes) to facilitate payments.

*Obviously, on the solid legal background created by Law no. 58/1934 on the bill of exchange and promissory note and by Law no. 59/1934 on the check, the bill of exchange trade was revitalized after December 1989, the date from which all commercial activity was rearranged on other pillars, and the National Bank of Romania ("NBR") prudently regulated the circulation of bills of exchange, through a robust legislation such as the Framework Norm no. 6/1994 on the trade made by credit institutions with bills of exchange and promissory notes (hereinafter referred to as **Norm 6**), Framework Norm no. 7/1994 on the trade made by credit institutions with checks, (hereinafter referred to as **Norm 7**).*

*The new Civil Code brought novelties regarding the establishment of collateral over the receivables ascertained through nominative titles, **to order** or to bearer, through the movable mortgage. Also, the negotiable titles (including promissory notes) issued in materialized form and, therefore, susceptible to physical appropriation, may be the subject of the **pledge**.*

In the activity of financing and bank guarantee, the promissory note is used as a credit guarantee, which is right, secondarily, being capitalized primarily, in this context, the credit title trait of the promissory note.

Thus, by executing the promissory note, in case of an event of default, defined according to the credit agreement, the function of the payment instrument (specific to a promissory note) is also highlighted.

Thus, this article aims mainly to make some necessary distinctions regarding the establishment of guarantees over the receivables derived from a promissory note (issued by the legal person receiving the loan or issued or endorsed, in most cases, by a person as an associate / shareholder, administrator, without limitation, of the legal person contracting the loan) and the transmission / assignment of the amounts incorporated in a promissory note, the effects of the avail on the patrimony of the natural person and the highlighting of proposals de lege ferenda.

Keywords: credit title, promissory note, pledge, mortgage, natural person

Section I. The credit title. Notion and delimitations

At the terminological and content level, there is no uniform approach in the applicable legislation regarding the credit titles.

Thus, the Norm 6 defines, in the Article 2, the bill of exchange and promissory note as negotiable credit titles and payment instruments which ascertain the obligation assumed by the debtor to pay at sight or at a certain fixed maturity, to the beneficiary or at his order a determined amount of money.

As can be seen, the legislator gave precedence to the credit title function of the promissory note, a fact justified, *inter alia*, possibly by the following:

- a) the numerical prevalence of banking operations of this type;
- b) as an effect of point (i), this is the main purpose pursued by the legislator (*ratio legis*);
- c) facilitation of the unfolding of the commercial relations.

In the same way, it should be noted that the credit title function of the promissory note does not have the meaning of a credit facility, respectively that a credit institution or non-bank financial institution provides the customer with a sum of money for a certain period, according to the Article 2193 et seq. of the Civil Code, which regulates the credit facility, with the obligation to repay the borrowed amount and the interest by the beneficiary of the amount at maturity.

Thus, the credit title function concerns the payment by the debtor, regardless of the source (bank credit, own or attracted funds) of a sum of money to the beneficiary, at maturity.

Basically, it is about **making a payment**, according to those mentioned in the bill of exchange.

Thus, the function of credit instrument and **payment instrument** of a promissory note can be considered as ambivalent and interchangeable, in the sense that they are mutually reinforcing, one being the cause of the other.

In this sense, there is also the recent commercial doctrine, which recommends the qualification of the bill of exchange as a commercial title bearing value¹.

With particular reference to the purpose pursued by making the payment, the promissory note is also considered **a guarantee tool** in the context of the cooperation between the professional traders².

It should be emphasized that Law no. 58/1934 does not offer *expressis verbis* a definition of the bill of exchange, but it is deduced from the whole regulation that details the features of the bill of exchange, the mechanisms of its functioning and the execution.

Regarding the check, it is not expressly defined by Law no. 59/1934, but it is defined as a payment instrument used by the holders of bank accounts with corresponding cash in these accounts, created through a bank deposit, from collection operations or from granting a credit, according to the Article 2 from the Norm 7.

It should be noted that the specific element of the check is the existence of the provision or cash required to make the payment. The lack of provision was one of the variants of the act of fraud provided by the old Criminal Code.

Currently, the lack of provision no longer triggers the criminal liability, according to the new Criminal Code (Law no. 286/2009).

In practice, the check is mainly considered a payment instrument.

With reference to the Civil Code, there are a variety of indirect references to the credit titles (indirectly to the promissory notes also), as follows:

- a) the Article 2050 (in the matter of the commission contract) refers to the **credit titles**;

- b) the Article 2389 refers to the **nominative titles, to the order or to the bearer** that can be the object of a movable mortgage;
- c) the Article 2480 (from the pledge area) refers to the **negotiable titles issued in materialized form**;
- d) the Article 2464 (from the area of mortgage execution) speaks of the **negotiable titles and representative titles**.

The terminological diversity used in the references to the same notion, respectively the credit title, encountered in the Civil Code, is, among others, an effect of a *status quo* existing in the legislation on the credit titles from the date of entry into force of the Civil Code.

Therefore, the recourse to the relevant doctrine is saving, from this perspective.

The doctrine mainly uses a unitary terminology, respectively that of the credit titles.

Thus, in an opinion, the credit title is defined as a category of values that consists of documents, documents that incorporate the patrimonial right provided in them, so that the person who holds them is also the holder of the right³.

In another opinion, the credit title is the document under which its legitimate holder is entitled to exercise, at a certain date, the right shown in the document⁴.

By reference to the definitions listed, the features of the credit title are⁵:

- a) the literal trait, respectively the content and the extent of the rights are determined exclusively by those mentioned in the title;
- b) the autonomous trait which translates into the fact that the rights and obligations of the title are independent from the original legal relationship;
- c) the formal trait which means that the respective title can have only the form prescribed by law;
- d) the constitutive character of the rights, in the sense that the document is the original source of the afferent rights and obligations, these not being able to be exercised in the absence of the document;
- e) mean of payment / crediting and guarantee, depending on the context and the purpose pursued.

In view of the above, we consider that the express definition of the credit titles with reference to bills of exchange, promissory notes and checks is desirable to be made in the relevant legislation (especially in the Civil Code).

It is also advisable to clearly define in the relevant legislation the notions of negotiable titles issued in material form or negotiable securities, equity securities, registered or promissory notes, in order to eliminate any confusion and areas of interference with credit securities.

Section II. Promissory note. Main features

First of all, the promissory note is a credit title, under private signature, which connects in the process of its creation two persons, respectively the issuer and the beneficiary, the title being created by the issuer, who undertakes to pay a fixed amount of money, at a certain term or upon presentation to another person, called beneficiary, who has the quality of creditor (The Article 490 of the Norm no. 6).

According to art. 104 of Law no. 58/1934, the promissory note includes:

- a) *the name of the promissory note entered in the text of the title and expressed in the language used for the drafting of this title*

This requirement is an effect of the formalism specific to the credit title. However, there is a standard promissory note format, also considering that the bills of exchange trade is under the prudential supervision of the NBR. From the way the legislator regulated the bills of exchange, given the complexity of the relations between the participants in the bills of exchange, the volume of traded amounts, the need for predictability, traceability and security of the payments, it can be concluded that this activity (bills of exchange) is of public interest;

b) the unconditional promise to pay a certain amount

For reasons of confidence in the bills of exchange trade and to ensure the stability of the financial system, the promise of payment must not be affected by a condition of any kind, which must be expressed in wordings which exclude any ambiguity;

c) the maturity

The indication of the maturity is a necessary element in this context, for the certainty of the bill of exchange circuit. Exceptionally, the lack of maturity makes the security payable at sight;

d) the place where the payment must be made

This statement is one of the necessary conditions for authorizing the payment. In the absence of this mention, the place of issuance of the title will be the place of payment which is presumed to be the domicile of the issuer;

e) the name of the person to whom or on whose order the payment is to be made

This is the beneficiary indicated by the issuer in title who will be able to claim the amount of money or to indicate the person who will receive the payment at his order;

f) the date and the issuance place

The date will be individualized by day, month and year.

The place means the indication of the locality where the title has been issued. In the absence of such indication, the issuance place shall be that shown next to the name of the issuer;

g) the issuer's signature

The law requires the indication of the name and surname of the natural person or the name of the legal person or of the obligating entity, as well as the code of the issuer, taken from the identification or registration documents of the issuer;

The promissory notes are applicable to the promissory note, insofar as they are not incompatible with the nature of this title, according to Article 106 of Law no. 58/1934.

The main elements that differentiate the promissory note from the bill of exchange are the following:

a) regarding the bill of exchange, there is the unconditional order to pay a certain amount of money (the Article 1, point 2 of the Law no. 58/1934) and regarding the promissory note, there is the unconditional promise to pay a certain amount;

b) in the case of the bill of exchange there are 3 parts (drawer, drawee and beneficiary) and in the case of the promissory note there are only 2 parts (the issuer and the beneficiary).

Section III. Some considerations regarding the collateral of receivables derived from promissory notes

First of all, a distinction has to be made between the setting-up of the guarantees over the receivables derived from the promissory note through the movable mortgage or pledge

and the transmission of the receivables by the special assignment as regulated by the Article 13 from the Law no. 58/1934.

The new Civil Code expressly provides that the receivables established by nominative titles, titles at order, at bearer may be the object of the movable mortgage (the Article 2389, letter b).

Thus, in the situation where a loan is guaranteed, among others and with the receivables derived from promissory notes, it is necessary to sign a movable mortgage and register it in the National Register of Movable Publicity to preserve the priority of the rights belonging to the secured creditor.

In the same way, the possibility of signing an assignment of a receivable for the purpose of a guarantee cannot be completely eliminated, in the case of contracts having the effect of preserving or establishing a right over a good, in order to ensure performance of an obligation, whatever the number, their nature or name, which are opposable to third parties who have acquired rights over those goods only if they are entered in the publicity registers, according to the rules established for mortgages, in line with the Article 2347 of the Civil Code.

The rights derived from the promissory note may be transferred (transmitted) by its holder to another person by written declaration and signed on the title and by handing over the title.

This transmission is a special assignment, as it results from the Article 1588 of the Civil Code.

Given this particularity, the creditor secured by a movable mortgage is protected, among others, by the right of pursuit enshrined in the Article 2345 of the Civil Code, according to which the mortgage right is maintained over the goods encumbered in any hand would pass.

With regard to the pledge, the Civil Code expressly states that tangible movable goods and the negotiable titles issued in material form may be the subject of the pledge.

Thus, according to the new legal paradigm, only movable assets susceptible to material detention fall within the area of the Article 2480 of the Civil Code. In this sense are the provisions of the Article 186 of the Law no. 71/2011, according to which, the pledge designates all the real movable guarantees that require the dispossession of the debtor of the property affected by the guarantee, regardless of the moment and the legal basis of their constitution.

An interesting aspect is given by the provisions of the Article 902, 2nd paragraph, point 15 of the Civil Code which refers to the pledge on a mortgaged receivable, an aspect that is not formally reconciled with the principle of pledging (movable) assets, respectively those susceptible to appropriation.

The solution was given by the doctrine, in the sense that it can form the object of the pledge a negotiable title issued in materialized form that incorporates a claim that is an intangible good. In other words, it is a perfect overlap between the negotiable title and the claim embedded in the title⁶.

In accordance with art. 2481, 2nd paragraph of the Civil Code, the pledge over the negotiable titles is constituted, in the case of the nominative titles, by their remittance, and in the case of promissory notes, by their endorsement, for the purpose of guarantee.

The nominative titles are those that contain the name of the right holder and the transmission is made by remittance, mention on the title and in the issuer's register.

The title to the bearer does not determine the person of the holder, who is usually the one who holds the document.

The promissory note states a right that can be exercised, only by a determined person or by a person who has received by special assignment or endorsement these rights.

Thus, the publicity of the pledge on the negotiable titles can be achieved through the 2 ways previously highlighted and not by registration in the National Register of Movable Publicity.

In practice, a complex situation may arise when a movable mortgage and a pledge for 2 different creditors are constituted on the same receivable incorporated in a promissory note. In this case, the solution is given by the Article 2423 of the Civil Code, according to which the creditor whose mortgage is registered in the National Register of Movable Publicity is preferred to the pledge creditor, even if he obtained the detention of the mortgaged property prior to the registration of the mortgage.

This text has a deficient wording and seems to make ineffective a valid pledge, established through public and unequivocal detention, prior to the registration of the mortgage in the National Register of Movable Publicity, being prevalent here the date of registration of the mortgage in the National Register of Movable Publicity.

The text must be revised in the sense that the mortgage registered in the National Register of Movable Publicity should not have priority towards a pledge, if it was legally constituted prior to the registration of the mortgage in the National Movable Publicity.

Thus, for now, it is advisable to set up a movable mortgage, although the pledge is easier to set up than a mortgage.

Regarding the endorsement on promissory note granted by individuals, this is a real surety, being desirable for the creditor, the endorsement coming also from the guarantor's spouse, with the waiver of the benefits of division and discussion, for spouses who have opted for the regime legal community.

Section IV. Conclusions

In the financing and guarantee reports, it is recommended to establish a movable mortgage over the receivables derived from the promissory notes. Also, in order to eliminate the impediments in the application of the law, it is necessary to revise the Article 2423 of the Civil Code (according to the Section III) and the clearer definition of the credit titles especially in the Civil Code (according to the Section I).

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Section D

BRIEF CONSIDERATIONS ON JUDICIAL CONTROL AND THE INFLUENCE IT CAN HAVE ON THE FAMILY OF THE PERSON UNDER CRIMINAL INVESTIGATION

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Abstract

Judicial control is a procedural instrument that restricts the rights and freedoms of the defendant, in order to achieve the purpose of the criminal trial, by preventing the suspect from evading criminal prosecution and committing other crimes.

Recently, the institution of judicial control has been subject to criticism from the doctrine, as well as from judicial practice, which have highlighted a number of contradictions in the legal texts.

The recent decisions of the Constitutional Court and the High Court of Cassation and Justice are intended to fill in and correct these shortcomings, but these modifications sometimes prove to be achieved too late, as they have already produced legal consequences.

Even if at first sight, the measure of judicial control does not seem to have a decisive influence on the family of the investigated, there may be situations in which, due to the very long period of ordering such a preventive measure, negative influences can be found.

Keywords: *judicial control, preventive measure, criminal investigation, defendant.*

1. Introduction

This study deals with the measure of judicial control, from the perspective of how it is regulated in the Code of Criminal Procedure, respectively of the problems that have arisen in the recent judicial practice and of the solutions found for some of them by the High Court of Cassation and Justice and the Constitutional Court.

In order to carry out an in-depth research on the subject, an analysis of the measure of judicial control from an individual perspective follows, which also includes a report on a series of solutions found in jurisprudence that we considered relevant.

We will note from the following that beyond the general changes, in the case of each preventive measure, there have been a number of changes in their content, sometimes in terms of duration, the judicial body that may order it and others[1].

2. Judicial control

Judicial control is one of the most complex legal institutions we encounter in criminal proceedings, especially due to mixed characteristics it has.

In order to be represented as an effective judicial instrument at the disposal of the criminal prosecution bodies and the court, judicial control requires a logical, clear regulation in accordance with the principles governing the criminal process and the principles that protect fundamental human rights and freedoms, as well as to ensure proportionality between those involved in the conduct of criminal proceedings.

From our perspective, the legislator has the task of overseeing the creation of a legal framework in line with the constitutional requirements regarding the implementation of the

judicial control measure, following that the Constitutional Court is to intervene in exceptional situations where the existence of a legislative gap or a discrepancy between the legal provisions could not be foreseen.

The doctrine states that the preventive measure of judicial control is presented as a combination of three different preventive measures that were provided in the previous regulation, respectively: the obligation not to leave the locality, the obligation not to leave the country and provisional release under judicial control. The choice of the legislator is a correct one, given that the preventive measures I have listed above had, to a large extent, the same content [2].

Thus, we can define judicial control as the least restrictive measure of rights and freedoms among the preventive measures we find in the criminal procedural legislation in Romania [3]. Due to this particularity, we can observe that in judicial practice, it is ordered, extended and maintained without the need to meet very strict requirements, as in the case of provisional detention.

In the light of the current Code of Criminal Procedure, judicial control is, as a rule, an *a priori* measure of pre-trial detention, autonomous from it, differing essentially from the measure of provisional release under judicial control provided by the old Code, which was an *a posteriori* procedural measure conditional on the prior existence of a lawful and well-founded state of arrest (as an exception, it is possible to place a person under judicial control in the event of the replacement of the measure of provisional detention or house arrest) [4].

In view of these issues, the judiciary often fails to carry out an in-depth examination of the proportionality and necessity of such a measure, to which it should pay much more attention, because taking, extending, maintaining the obligations that accompany it, without the need for them, it would lead to a restriction of the rights and freedoms that the defendant can wrongly enjoy.

In order to order, extend or maintain the measure of judicial control, a series of conditions must be cumulatively fulfilled which are imperative and from which the judicial bodies cannot derogate [5].

Therefore, even if the defendant's obligations in addition to the standard ones are often not imposed on the defendant, judicial control can affect, as mentioned above, both the defendant's life, as well as the community to which it belongs (example: the right to work). On the other hand, where additional obligations are imposed on it, such restrictions on rights and freedoms are much more visible and more severe, which can affect the lives of him and his family, (example: restricting or limiting the right to free movement, the right to intimate, family life, etc).

Thus, if the judicial body imposes on the defendant the observance of one or more of the obligations provided by law, they must be clearly identified in order to enable him to comply with his conduct while he is under those restrictions [6].

In this regard, we consider that the measure of judicial control is a procedural means that leads to the restriction or impairment of fundamental rights and freedoms of the individual, which must be taken, extended or maintained only if all the requirements imposed by the legislator are met, with the observance of the principle according to which this does not represent an end in itself, but even a means provided by law to ensure the proper conduct of the criminal process, respectively to prevent the accused from evading criminal prosecution or from committing other crimes.

After February 1, 2014, a series of inaccuracies were reported in the specialized studies, respectively of some gaps regarding the regulation of the judicial control measure. Thus, in order to correct these provisions, the contest of the decisions of the Constitutional Court or of the Government Ordinances was appealed, by which the specific provisions of the judicial control were modified.

A first issue was the duration of the judicial control, which during the criminal investigation can be extended by the prosecutor, by ordinance, if the grounds that led to the measure are maintained or new grounds have emerged to justify its extension. These provisions also apply if the measure has been taken by the judge of rights and freedoms.

The option of the legislator not to establish a determined duration during which the judicial control can be ordered, regardless of the procedural phase in which we are, represents an element of novelty. Thus, unlike the old regulation where it was shown that during the criminal investigation, the duration of the obligation not to leave the country or locality could not exceed 30 days, the measure can be extended if necessary and only motivated. However, each extension could not exceed 30 days, and the maximum duration of this measure during the criminal investigation was one year. Exceptionally, when the sanction provided by law was life imprisonment or imprisonment of 10 years or more, the maximum duration of preventive measures restricting liberty was 2 years. Regarding the trial phase, the previous regulation did not provide a maximum term for taking the measure of the obligation not to leave the locality or the country [7].

The need to establish and comply with a reasonable deadline was signaled in the decisions of the courts even before the entry into force of the current Codes, these issues being subject to attention today. Thus, it was noted that the extension of preventive measures restricting liberty must also take into account the concept of "reasonable time" necessary to be observed in order to verify the validity of any accusation in criminal matters. In these conditions, if the defendant was ordered to leave the town or country for two months, the competent bodies did not carry out criminal proceedings, and the reasons on which the measure was ordered have ceased to exist, the extension of the measure is no longer necessary [8].

A first amendment, which was brought to judicial control, concerned Article 211-217 of the Criminal Procedure Code, by decision no. 712/2014 of the Constitutional Court, the exception of unconstitutionality concerning the aforementioned articles being admitted. Thus, by admitting the exception of unconstitutionality, it was found that the provisions of Article 211-217 of the Code of Criminal Procedure are unconstitutional, because it violates Article 53 of the Basic Law on the restriction of the exercise of fundamental rights or freedoms in relation to individual freedom (Article 23), free movement (Article 25) and intimate, family and private life (Article 26).

In order to rule on this decision, the Court found that, although the current Code of Criminal Procedure includes judicial control and judicial control on bail, it does not provide for the duration for which such measures may be ordered. However, the exceptional nature of preventive measures, which involves restricting the exercise of fundamental rights and freedoms, imposes their temporary, time-limited nature. The Court therefore held that the rules of criminal procedure which enable the judiciary to order preventive measures of judicial control and judicial on bail for indefinite periods are contrary to the requirements of Article 53 of the Constitution.

From our point of view, such a provision establishing the duration of the judicial control was necessary, the legislator having to anticipate such a hypothesis, whereas, as long as it laid down the period for which a custodial measure may be ordered, it should also determine the period for which a non-custodial measure may be ordered.

By decision no. 17/2017 [9] The Constitutional Court admitted the exception of unconstitutionality and found that the provisions of Article 213 (2) of the Criminal Procedure Code are unconstitutional to the extent that the settlement of the complaint against the Prosecutor's Order by which the measure of judicial control was taken is made with the application of the provisions of Article 204 (4) of the Criminal Procedure Code. Thus, in the reasoning of this decision it was noted that, in the event of a complaint against the prosecutor's order ordering the application or maintenance of the measure of judicial control, during the criminal investigation, the legislator had not regulated a clear deadline for its resolution, as established in the situation of resolving the appeal against the decision ordering the measure of judicial control by the judge of rights and freedoms, of the preliminary chamber or by the court. At the same time, it was revealed that the provisions of the Code of Criminal Procedure that regulate the preventive measure of judicial control, did not provide either the term for which it could be ordered or the maximum duration of this measure, noting that the right of the judiciary is thus evident, when it comes to ordering judicial control, as a preventive measure, for unlimited periods of time, as it implies the unlimited restriction of the fundamental rights and freedoms covered by the content of this measure. It was noted that, according to the constitutionality standards shown above, such a restriction is unconstitutional, as the principle of proportionality affects the normative content of the fundamental rights concerned, therefore their substance, not limited to restricting their exercise. The way in which he understood to solve the problem of the complaint against taking or prolonging the preventive measure of judicial control, the legislator has established an aspect of uncertainty, which may call into question the very effectiveness of such an appeal, which is even in contradiction with Article 21 of the Constitution.

At international level, a judgment of the ECHR should be noted where it was stated that the ban imposed on the applicant to prohibit him from leaving the country for 5 years and 2 months was disproportionate, as the applicant was forced to stay in a foreign country and was not allowed to leave for a short time. Also; the criminal proceedings against the applicant have been going on for a considerable period of time and no decision has yet been pronounced at first instance. Moreover, the preventive measure was lifted and, with the consent of the national court, the trial continued without the applicant's presence. Therefore, a fair balance between public interest and the applicant's rights was not maintained [10].''

In addition to the issue raised above, the ECHR has established that national courts have an obligation to clearly state the reasons behind a particular decision. However, in judicial practice we often find solutions in which the courts do not motivate almost any of the pronounced decisions. In a recent decision, the court of judicial control ruled that the court had not in any way motivated the imposition of new obligations on defendants, contrary to the provisions of Article 203 (5) of the Criminal Procedure Code, which provide that all requests, proposals in the same conclusion must be substantiated [11].

In addition to the need to state reasons for taking such a measure, the court must also take into account the need for such a measure to be necessary. In this respect, in practice it is shown that the maintenance of judicial control is no longer justified when none of the

purposes of the criminal proceedings, regulated by Article 202 of the Criminal Procedure Code, require the restriction of the defendant's freedom any longer. The entry of the criminal process into the phase of the judicial investigation, which can be lengthy, considering the large number of acts to be performed, the procedural conduct of the defendant, as well as that there are no suspicions from which it would result in committing other crimes or evading from judgment, which lead to the conclusion that there are no longer solid arguments to restrict the defendant's freedom [12].

The wording of the provisions of paragraph 10 is deficient in several respects. If the maximum total duration of the measure has been fulfilled, it ceases automatically, so that another preventive measure is possible only if new elements appear to justify it. Based on those new elements, which determined the taking or prolongation of the judicial control, it is not possible to order the replacement of this measure with a more restrictive one and even less it is not possible to order another measure after the legal termination of the judicial control. Replacement with another more serious measure is only possible if new elements have emerged to justify it. On the other hand, the scope of the provisions of paragraph 9 is unjustifiably restricted only to the course of the trial, which are incidental to the above and to the prosecution [13].

Another resolution that decisively influenced the regulation of judicial control is represented by Decision no. 79/2018 [14] by which the exception of unconstitutionality was admitted and it was found that the phrase "in the first instance" contained in Article 215 (8) of the Code of Criminal Procedure is unconstitutional. Thus, it was noted that, by decision no. 712 of December 4, 2014, the Constitutional Court, conducted a constitutional examination, the lack of deadlines and the maximum duration for which the preventive measure of judicial control and judicial control on bail can be ordered, considering that their non-regulation leads to the violation of the provisions of the Constitution. As a consequence of pronouncing the previously mentioned decision, the legislator adopted the Government Emergency Ordinance no. 82/2014, by which it established the maximum term and duration for which the judicial control can be ordered only regarding the procedural phases of the criminal investigation, respectively of the trial in the first instance, without regulating a maximum period for this measure for the procedural phase of the appeal. In such a context, the Court has ruled that the legislature has not completed its constitutional task of establishing from a normative point of view the maximum duration of judicial control for all the procedural stages in which it can be ordered, which is in contradiction with Article 20, Article 23, Article 25, Article 26, Article 39, Article 41, Article 45 and Article 53 of the Constitution, on the one hand, respectively Article 147 (4) of the Fundamental Law, according to which the decisions of the Constitutional Court are generally binding and have power only for the future.

As a result of this decision, it was the duty of the legislator to amend the provisions contained in the Code of Criminal Procedure, in order to bring them into line with those existing in the Constitution.

Such interventions can be carried out even before the publication of the decision of the Constitutional Court, so that when the provisions of the decision become mandatory and the inapplicable legal texts from the perspective of their unconstitutional content, the judicial bodies have a unitary tool for applying legal norms.

Thus, during the criminal investigation, the measure of judicial control may be ordered by the prosecutor or by the judge of rights and freedoms for a period of no more than 60

days. Regarding the criminal investigation, the judicial control can be extended by the prosecutor, by Ordinance, in the event that the reasons that led to the measure are maintained or new reasons have emerged to justify the extension of this measure, with each extension having a maximum term that may not exceed 60 days. During the criminal investigation, the duration for which the measure may be ordered may not exceed one year, if the sanction provided by law is a fine or imprisonment of more than 5 years, respectively, 2 years if the penalty provided by law is imprisonment of more than 5 years or life imprisonment.

In the procedural phase of the preliminary chamber, the judge of the preliminary chamber or the court during the trial may order the taking of judicial control over the accused person for a period that may not exceed 60 days. However, during the trial at first instance, the total duration of the judicial control may not exceed a reasonable time, and in all cases may not exceed 5 years, which shall be calculated from the time of the trial [15].

A decision of the European Court of Human Rights shows that in order to analyze the proportionality of the obligations accompanying the measure of judicial control, it is necessary for the authorities to provide the reasons for taking such a measure and, on the other hand, for the measure to be accompanied by effective procedural safeguards by which the authorities consider maintaining it and avoiding arbitrariness. Thus, there are situations in which the national court has made a comprehensive reasoning on the reasons why the defendant should no longer be deprived of liberty, but did not provide any reason why he should fulfill the obligation not to leave the country in order to complete the criminal investigation, this obligation automatically reverting to him. [16].

The problem of analyzing the reasons for taking such a preventive measure, its extension or maintenance is one of the most discussed, because, as the ECHR also shows, we often encounter situations in which the courts rule on such solutions, without indicating the reasons that led to their decision. This judicial automatism is dangerous because, if we encounter it in the case of judicial control, it can also be encountered in other situations, such as those of provisional detention, or of house arrest.

Even if judicial control appears to be a mild measure compared to other preventive measures, if we are dealing with a situation like the one described above, it is hard to believe that there is no negative impact on the family of the person under investigation. Thus, the period of time during which the defendant is being investigated under the rule of a preventive measure should be reasonable, so as not to prejudice even the family life of the defendant.

From our point of view, the legislator should consider amending the text of the law regarding extension; respectively maintaining judicial control after a significant period has elapsed (1 year, 2 years), in the sense of establishing the task for the judicial body to reconsider the obligations imposed on the defendant. Thus, after such a period, it is not justified for the defendant to have to fulfill all the obligations initially set, but only a part of them, some freedom being able to be ensured, and the criminal trial can be carried out in optimal conditions with the observance of the other restrictions.

The establishment of such an obligation for the judiciary with respect to certain rigors, would lead to a thorough and clear verification of the procedural situation of the defendant, which would eliminate the cases currently existing in judicial practice where we encounter a simple analysis of these conditions.

For example, in practice it is shown that the removal of certain prohibitions, such as leaving the country, can be lifted, if, at a certain point in the proceedings, such a measure appears to be excessive in relation to the current state of the criminal investigation and the specific nature of the offenses under investigation. A duration of 2 years of the measure of judicial control, taken in continuation of another preventive measure that was close to the special maximum provided by law for criminal prosecution, given that the defendant has fully complied with the obligations imposed on him, he can justify the conclusion that further restriction of the defendant's freedom of movement only within the country is no longer proportionate to the restriction on his freedom of movement. [17].

Any measure restricting the exercise of the right to free movement must be provided for by law, pursuing one of the legitimate aims set out in point 3 of Article 2 of Protocol no. 4 and maintain a fair balance between the general interest and the rights of the person concerned [18]. This decision of the European Court shows the importance of the right to free movement for the person under investigation. At the same time, from our point of view, through this restriction of the researched person's freedom, it can have negative consequences, including on those close to him, if the family effectively lives in another country, the lack of contact being decisive in this respect.

As stated in the doctrine, it is necessary to respect a reasonable time limit in restricting the freedom of the individual [18], the verification of this aspect must be carried out following a complex assessment on the criteria to which we referred previously.

In addition to the above, the legislator considered it necessary to provide protection to the family in certain situations, where there are suspicions that the defendant may bring damages to it. Thus, they may be forbidden to return to the family home to protect their interests, avoiding contact with the defendant. Through this ban, the legislator sought to protect the best interests and values that the family represents for the society.

There are situations in practice that can reveal that, including judicial control even if it is a preventive measure not very restrictive of freedom, can influence the behavior, the life of the investigated person, if the obligations they have to fulfill are not regularly reconsidered. Thus, there should be clear rules, which impose on the judicial bodies the obligation to re-evaluate them periodically, not simply to carry out a simple analysis of them, as is currently the case.

3. Conclusions

We appreciate that such elements had to be inserted from the inclusion of the measure of judicial control in the Code of Criminal Procedure, in order to avoid the situations that arise in the judicial practice, the considerations that we find in the motivation of the decision of the Constitutional Court being more than relevant to motivate the necessity to impose these changes.

At the same time, we believe that these changes are beneficial even for the speedy conduct of the criminal process, as the judiciary is obliged to perform its tasks more punctually, so as not to make it impossible to extend the measure of judicial control.

In this regard, we consider that the judicial body must carry out an in-depth analysis of the framework for extending the measure of judicial control and intervene by Ordinance or Conclusion only when necessary.

Moreover, even the legislator provided for the obligation for the judiciary to permanently reconsider the reasons it had in mind when taking this measure and for the

continuous verification of their subsistence, in order to order either revocation or replacement when necessary, or when new reasons so require.

We can see from the content of this study that regarding the measure of judicial control, the legislator had to anticipate some of the inaccuracies reported in judicial practice in order not to appeal to the Constitutional Court.

We believe that the judiciary should take into account that the restriction of the liberty of the person under investigation may have a negative impact on his family, consequently, all the elements should be closely analyzed in order not to arrive at an unjustified restriction, unnecessary to the case brought before the court, and which would have a detrimental influence on the investigated person and his family.

In order to achieve the most complete legislative process possible, the legislator should pay particular attention to the issues raised in practice in the solutions handed down by international courts, in order to finally result in legal norms that correspond to the new relevant standards.

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FAMILY PROTECTION IN ROMANIAN CRIMINAL LAW

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Abstract

Criminal law has dedicated a chapter to crimes against family, which incriminate the most serious violations of social relations that defend family relations. In addition to this chapter, criminal law also provides a chapter entitled "Crimes committed against a family member", which criminalizes in art. 199 Criminal Code domestic violence and in art. 200 Killing and injuring the newborn by the mother.

Separate from the criminal law, law no. 217/2003, on the prevention and combating of domestic violence, establishes an administrative framework for the prevention and combating of domestic violence. The author analyzes this framework in terms of crime dynamics and the effectiveness of combating crime.

Keywords: domestic violence, family violence, crimes against the family.

1. INTRODUCTORY CONSIDERATIONS

Crimes against the family are a subgroup within the group of crimes that affect relationships on social coexistence. The composition of this subgroup was made according to the criterion of the special legal object, more precisely according to the social relations regarding the family, as a special social value defended by the criminal law. In the Criminal Code in force, crimes against the family are positioned in Chapter II of Title VIII dedicated to crimes that affect relations on social coexistence, as in the previous Criminal Code. The difference is that incest was introduced in this chapter, which was included in the 1969 Criminal Code in the chapter "Offenses concerning sexual life", adultery and ill-treatment of minors were abandoned and a new crime was introduced - denying access to compulsory general education.

2. Concept and characterization

The family is a fundamental form of social organization, consisting of people united by emotional ties and kinship. The family is a form of organization of social life based on marriage or kinship [1]. The family is a social reality through the community of life between spouses, parents, children, relatives [2]. In the sociological sense, by family we mean the group of people united by marriage, filiation or kinship that is characterized by community of life, interests and mutual aid [3]. In the legal sense, by family we mean the group of people between whom there are rights and obligations arising from marriage, kinship, as well as other relationships assimilated to family relationships [4]. The doctrine finds a diversification of family models in the contemporary world. In addition to the classical family of husband, wife and minor children, based on marriage, appeared the single-parent family, composed of the unmarried mother and her children, as well as the sociological marriage, ie the family union, consisting of father, mother and their children, who do not they are based on marriage [5]. Since the 1970s, there has been an obvious family crisis in Western societies in its traditional form. In recent years, especially in the Anglo-Saxon countries, families composed of homosexual partners have sought and obtained social and

even legal recognition [6]. According to art. 16 of the Universal Declaration of Human Rights, "from the age of legal age, men and women, without any restriction as to race, nationality or religion, have the right to marry and to found a family. They have equal rights to contract the marriage, during the marriage and to its dissolution". The constitutive act of the family is marriage, which, according to art. 259 para. (1) of the Civil Code, is "the freely consented union between a man and a woman, concluded in accordance with the law". After 1970, both in Europe and in the USA, there was an increase in the number of couples who prefer free unions, which led to the emergence of legislative regulations that recognize these forms of cohabitation. In the jurisprudence of the European Court of Human Rights, the notion of "family" has extended to the family relationships that factually exist [7]. In Romania, the Civil Code in force does not recognize free union, considering as partners two single persons [8]. The jurisprudence of the European Court of Human Rights, by the judgment of Schalk and Kopf against Austria of June 24, 2010, ruled that a homosexual couple, cohabiting in a stable manner, benefits from the protection of art. 8 and art. 14 of the Convention, which presupposes that states offer these couples the possibility of legal recognition of their relationship through appropriate regulation [9]. The family of tomorrow can neither be defined nor described. Only a few coordinates can be drawn from it: it will be narrower and more fragile in terms of its psychological, emotional and social functions [10].

3. The legal object of crimes against family

Crimes against the family have the same special legal object, namely the social relations whose existence is ensured by the defense of the family. Crimes against the family infringe the rights resulting from family relationships, the right to dependancy, education, physical health, etc. Given that the normal conduct of family relations conditions the life, health and rights of family members, the defense of these relations must be carried out effectively. In addition to the defense by means of civil law, it is necessary to incriminate that deed that seriously harms family relations [11]. The group of crimes against the family is made up of crimes that are directed mainly against family relations: bigamy (art. 376 of the Penal Code), incest (art. 377 of the Penal Code), family abandonment (art. 378 of the Penal Code), preventing access to compulsory general education (art. 380 of the Penal Code). The crimes of domestic violence and theft between family members (art. 231 C. pen.), were not included in this framework, since it was considered that these crimes harm, mainly, other categories of social relations and only in the subsidiary family relations.

4. Common aspects of crime against family

4.1. A first common aspect of crimes against the family is the object and subject of these crimes.

4.1.1 The generic legal object consists of social relations whose normal evolution requires the observance of the rules of social coexistence.

The special legal object consists of family counseling relationships.

4.1.2 The direct active subject is a person who must have the quality of spouse, parent or person to whom a minor child has been entrusted.

4.1.3 The passive subject is, also, a person who has the special quality of husband, wife, parent, minor child, etc.

4.2. A second common aspect refers to the content of the offenses.

4.2.1 All crimes against the family are characterized by the existence of a **premise situation**, consisting of a legal relationship prior to the crime. In cases of bigamy and family abandonment, the premise consists in a marriage, in the offenses of non-compliance with the measures regarding the minor and impeding the access to the compulsory general education, the premise situation consists in an obligation of raising and educating the minor..

4.2.2 There are also common issues regarding the **objective side**. The **material element**, although it is different for each crime, is achieved through an action, except for one case, the modalities provided by art. 378 para. (1) lit. b) and c) C. pen.

The immediate consequence is the creation of a state of danger for the existence of marriage or for the upbringing and education of the minor.

4.2.3 Regarding the **subjective side**, all crimes against the family are committed intentionally: the active subject provides for immediate follow-up and pursues or accepts its occurrence.

4.3. A third common aspect concerns the **forms and modalities of crime**. Thus, in the crimes against the family, only the consumed form is incriminated, and in terms of the modalities, only the simple or typical modality was retained. If one of the offenses is accompanied by serious consequences, a competition of offenses will be held.

4.4 Finally, the sanctioning regime is another aspect common to crimes against the family, which, with the exception of incest, punishable exclusively by imprisonment, are punishable by imprisonment alternatively with a fine.

4.5 Regarding the criminal procedure, the criminal action is initiated ex officio, except for the crime of abandonment of the family, in which case the criminal action is initiated upon the prior complaint of the injured person.

5. The evolution of family life

The evolution of family life is strongly influenced by the conditions of the social life in which it takes place. Lack of jobs or inadequate activities related to the preparation of the person, decreased income due to economic crises, cause spouses to seek support in the consumption of alcohol or other psychoactive substances that almost always lead to the degradation of family life. In order to protect and support the family, develop and strengthen family solidarity, Romania has adopted law no. 217 of May 22, 2003, for the prevention and combating of domestic violence. Article 203 of this law defines the concept of domestic violence as any intentional action or inaction of physical, sexual, psychological, economic, social, spiritual violence that occurs in the family or domestic environment, or between spouses or ex-spouses, as well as between current or former partners, regardless of whether the aggressor lives or has lived with the victim. Domestic violence thus includes any type of aggression against the family environment, any intentional action or inaction, which tends to destabilize the family balance, to affect family life, the raising and educating of children. In order to support the prevention and fight against domestic violence, art. 199 of the Criminal Code, with the marginal title "Domestic Violence", increased by a quarter the special maximum penalty provided by law for the offenses of murder, aggravated murder, bodily injury, grievous bodily harm and fatal blows to a member of family. But domestic violence does not stop at these crimes. In a selection of statistical data on domestic violence, published annually by the Public Ministry, there are **physical assaults** (murder - art. 188 Criminal Code, aggravated murder - art. 189 Criminal Code, hitting or other violence -

art. 193 Criminal Code, personal injury - Article 194 of the Criminal Code, beatings or injuries causing death - Article 195 of the Criminal Code, ill-treatment of a minor - Article 197 of the Criminal Code, killing or injuring a newborn by a mother - Article 200 of the Criminal Code, interruption pregnancy - Article 201 Criminal Code, harm to the fetus, Article 202 Criminal Code, illegal deprivation of liberty - Article 205 Criminal Code), **sexual assault** (rape - Article 218 Criminal Code, sexual assault - Article 219 Code criminal, sexual intercourse with a minor - Article 220 Criminal Code, sexual corruption of minors - Article 221 Criminal Code, recruitment of minors for sexual purposes - Article 222 Criminal Code, incest - Article 377 Criminal Code), **economic aggression** (abandonment family - Article 378 of the Criminal Code), **psychological assaults** (non-compliance the measures regarding the minor - art. 379 Penal Code) [12]. Among the novelties introduced by this normative act, we list the reception centers and recovery centers for victims of domestic violence, social assistance units, with or without legal personality, which provide accommodation, care, legal and psychological counseling, support for adaptation to life active, professional insertion of victims of domestic violence, their prevention, rehabilitation and social reintegration (art. 20). The most important element of novelty introduced by this normative act in Romanian law is the protection order, provided by art. 38, according to which the person whose life, mental or physical integrity or freedom is endangered by an act of violence by a family member, may notify the court that, in order to remove the state of danger, to issue a protection order, by which to order, on a provisional basis, one or more measures, obligations, prohibitions. When domestic violence takes the form of a crime, it is prevented and combated by criminal law. The total number of domestic violence crimes in 2020, compared to 2013, decreased by 25.8%. Minor physical assaults (offenses of hitting or other violence) increased by 117.55%, while serious physical assaults decreased: murder by 7% and personal injury by 45%. There was a significant increase in rape offenses, 86%, and sexual intercourse with a minor, 332%. Slight increases were registered regarding the crime of ill-treatment applied to the minor, 15.78%. On the other hand, significant decreases were registered in the crimes of family abandonment, 77.71%, and incest, where from 7 cases in 2013 it reached 0 in 2020. In the same reference period, the total number of victims decreased by 34.3%, of minors by 60.53%, while of parents increased by 12.85%, of husbands by 71%, of grandparents by 8.3% and of other relatives by 34%. Regarding the perpetrators of violence, 96% are men and 4% are women. There should be no sign of equality between acts of domestic violence and crime, the statistics registering only those cases in which a criminal complaint has been filed. According to statistics from the police, published in the press [13], in the first 7 months of 2020, 4856 provisional protection orders were issued. Of these, most were issued in Bucharest, 602, Vaslui, 232, Braşov 202. According to the same statistics, the pandemic period favored a slight increase in domestic violence, with 2.3% more complaints from women assaulted by life partners. Activists against domestic violence have pointed out that aggression has increased in all countries where quarantine has been imposed, due to the Coronavirus pandemic, with significant increases in China, Italy, Spain, Cyprus and Brazil. Regarding Romania, we can conclude that the rate of domestic violence is slightly decreasing, even if compared to the total number of defendants sent to trial, the number of defendants sent to trial for domestic violence was 0.66% in 2010, compared to 0.99 in 2019. However, this increase is only apparent, taking into account the fact that compared to 2010, the total number of defendants sent to trial decreased in 2019 by 46%. In these conditions, we can speak not of an increase

of domestic violence, but of a decrease compared to the reference year, even if its percentage registers a slight increase in relation to the total number of defendants sent to trial.

6. Conclusions

The family enjoys a wide protection in Romanian criminal law. Domestic violence severely affects social life, leading to family breakdown and negatively influencing the upbringing and education of minors. Romania has created a system of administrative bodies for combating domestic violence, to which is added the activity of non-governmental organizations, which advocate for the prevention and combating of domestic violence, and which have proven their effectiveness, both by themselves and especially in collaboration with the other organs of the state.

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PARTICULAR ASPECTS REGARDING THE APPLICATION OF THE *CONVENTION ON CONSENT TO MARRIAGE, MINIMUM AGE FOR MARRIAGE AND REGISTRATION OF MARRIAGES* IN STATES PARTIES

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Abstract

Marriages between minors, early marriages and forced marriages have been and continue to be a serious violation of human rights, in general and of the rights of minors, in particular. It is a violation of the right to freely express one's consent, on the one hand, and of the right to physical integrity and mental health, on the other. Failing to comply with these rights results in the violation of other rights such as the right to education. These were sufficient reasons for the international society to understand in 1962 the need to regulate, by an international legal instrument, the consent to marriage, the minimum age for marriage and the registration of marriages. The Convention entered into force in 1964, but once the consent expressed, the States customized its application at national level, through reservations and declarations.

Keywords: *convention; consent to marriage; minimum age for marriage; registration of marriages; application; reservations; declarations*

1. Introductory aspects

On 10 December 1962 in New York, the United Nations Convention on the Consent to Marriage, the Minimum Age for Marriage and the Registration of Marriages was signed at the level of the United Nations^[1]. We consider that it was a necessary, and moreover a progressive step for that period, given that marriages between minors, early marriages and forced marriages^[2] have constituted and continue to be a serious violation of human rights, in general and of the rights of minors, in particular.

The Convention is interesting, in several respects.

First of all, we note the small number of articles, namely 10 of which only three (art. 1-3) regulate, on the merits, the issues concerning marriage. The other articles are dedicated to details regarding those provisions common to any international legal instrument: signing conditions; the expression of consent to become party to the Convention, the entry into force, the possibility of denunciation, the settlement of any disputes that may arise regarding interpretation and application, and the final protocol clauses.

^[1] The 16 signatory states are: Chile, Cuba, Denmark, the United States of America, France, Greece, Guinea, Israel, Italy, New Zealand, the Netherlands, the Philippines, Poland, Romania, Sri Lanka and Sweden;

^[2] Forced marriages are marriages "in which the consent of one or both parties is lacking or is not respected, and are not protected by international or Union law. Forced marriages and arranged marriages are characterized by the fact that both parties fully and freely consent to the conclusion of the marriage, although a third party has a dominant role in choosing the partner" (Fuerea, A., (2016), *Dreptul Uniunii Europene – principii, acțiuni, libertăți*, Universul Juridic Publishing House, Bucharest, p. 216);

Another specific aspect of the Convention is its position, in the systematization of treaties carried out at the level of the United Nations, in the field reserved to *the condition of the woman*^[3] (Chapter XVI), and not to that of human rights (Chapter IV), as expected, if we refer to its title. Its inclusion in that field is not, obviously, accidental. This aspect emerges from the Preamble to the Convention, but also from the Preamble to the Resolution^[4] of the UN General Assembly of 1 November 1965. By corroborating the provisions from the preambles of the two international legal instruments, we identify the legal ground underlying the inclusion of the Convention in the category of those concerning the condition of women in society.

Everything starts with the specificity of the condition of women in different states, regardless of the moment we refer to. The provisions of the Convention are in full agreement with the reality according to which it is “necessary to encourage the strengthening of the family structure”^[5], so that it would truly represent the “core cell of any society”. This cannot be accomplished without recognizing men and women, who reached the age of majority, the right to marry and to found a family, not regardless of any situation, but with the recognition of the future spouses’ equal rights, concerning marriage. This last aspect makes the nubile age to be considered the age at which the human body reached full development, and not the age provided in the legislation, custom or culture of the states. Moreover, any marriage must be concluded only with the free and full consent of the future spouses. All those clarifications did not represent a novelty element for the year in which the Convention was adopted, because they had been enshrined since 1948, by the Universal Declaration of Human Rights. The importance of recognizing the right in conjugal choice had been an issue on the agenda of the UN General Assembly since 1954, when in *Resolution 843 (IX) on the status of women in private law: ancient customs, laws and practices that undermine human dignity of women*, it acknowledged that “certain ancient customs, laws and practices relating to marriage and the family to which women are subject, are incompatible with the principles set forth in the Charter of the United Nations and the Universal Declaration of Human Rights”^[6].

The status of women was taken into account, even in the *Supplementary Convention on the Abolition of Slavery, Slave Trade and Institutions and Practices Similar to Slavery*^[7], of 1956, which, in art. 1 letter c) point i) stipulated that states must take all necessary measures to abolish or abandon any institution “by virtue of which a woman is betrothed or married, without her having the right to refuse, in exchange for monetary compensation or in kind paid to the parents, guardian, family or another person or group of people”. Art. 2 provides that, in order to eliminate these practices and institutions, States must commit to establish, “where necessary, the minimum age for marriage, to encourage the use of a procedure which allows both future spouses to freely express their consent to marriage in the presence

[3] Next to the Convention on the Political Rights of Women, adopted in New York on 31 March 1953 and the Convention on the Nationality of Married Women, adopted in New York on 20 February 1975;

[4] Resolution 2018 (XX);

[5] According to Resolution 2018 (XX) of 1 November 1965;

[6] Art. 16: 1. “From the nubile age for marriage, a man and a woman, without distinction as to race, sex, language or religion, have the right to marry and to found a family. They have equal rights as to marriage, during marriage and at its dissolution. 2. The marriage can be concluded only with the free and full consent of the future spouses”;

[7] Adopted on 7 September 1956 by the United Nations Conference of the Plenipotentiaries convened in pursuance of the provisions of Economic and Social Council Resolution 608 (XXI) of 30 April 1956;

of a competent civil or religious authority and to encourage the registration of marriages”. After considering this legal context, the negotiators of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages in States Parties inserted in the Preamble, the need for “all States, including those which have assumed responsibility for the administration of Non-Self-Governing territories; Trust Territories until their achievement of independence (...), to take all appropriate measures with a view to abolishing such customs, ancient laws and practices, by ensuring, inter alia, complete freedom in the choice of a spouse, eliminating completely child marriages and the betrothal of young girls before the age of puberty, establishing appropriate penalties where necessary and establishing a civil or other register in which all marriages will be recorded”.

Another peculiarity is that, although we do not find in the content of the Convention, regulations on the possibility or prohibition of setting out reservations or declarations, a number of States, once they expressed their consent to become party to this international legal instrument, agreed to exclude or amend the legal effect of certain provisions of the Convention concerning their application. Moreover, as stated in the doctrine: “legislative changes that occur at a given time pose serious problems to one field of law or another in terms of interpretation and application of certain regulations”^[8].

2. The “pillars” of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages

We find the entire quintessence of the Convention in the first three articles (art. 1-3) which we can consider the “pillars” of the Convention. Thus, in accordance with the content of the three articles, the pillars of the Convention can be named as follows: pillar I – the consent; pillar II - the minimum age for marriage and pillar III – the registration of marriages.

The first pillar (Art. 1) regulates the aspects concerning the consent to marriage. In order for a marriage to be legally concluded, it is necessary for the intended spouses to express their free and full consent. Only one exception to this rule is allowed, namely “it shall not be necessary for one of the parties to be present when the competent authority is satisfied that the circumstances are exceptional and that the party has, before a competent authority and in such manner as may be prescribed by law, expressed and not withdrawn consent”. In addition, the validity of the marriage is conditional upon the presence of a competent authority to solemnize the marriage, and of witnesses. At the same time, pursuant to art. 1, States Parties to the Convention must introduce into national law, the need for publicity, which must be “sufficient”.

As its name suggests, *Pillar II (Art. 2)* requires States Parties to the Convention to take all legislative measures “necessary to specify the minimum age for marriage”. The conclusion of the marriage is thus conditioned by reaching a certain age. However, the Convention establishes an exception when a competent authority has granted a dispensation as to age, based on the cumulative fulfilment of two conditions: for serious reasons and in the interest of the intending spouses.

Pillar III (Art. 3) establishes, for the competent authority of each State party to the Convention, the obligation that all marriages are entered in an appropriate official register.

[8] Ștefan, E.E., (2013), *Contribuția practicii Curții Constituționale la posibila definire a aplicabilității revizuirii în contenciosul administrativ*, Magazine of Public Law no.3, Universul Juridic Publishing House, Bucharest, pp. 82-83;

Given the above situation, what the doctrine states is fully applicable: “(...), if in the case of the principle of legality, the states have been concerned to insert it in the most important regulations, both nationally and internationally, the same cannot be said of morality”^[9].

3. The specificity of the application of the Convention in some States Parties

As stated above, the text of the Convention does not contain any provisions regarding the possibility or impossibility of formulating reservations or declarations by States wishing to become parties. However, as it is often the case in the presence of a multilateral treaty, as it is “difficult to adjust all the sensitivities and interests of States”^[10], one of the parties to the Convention formulated reservations, when expressing its consent to assume its rights and obligations arising from this. The possibility of entering these reservations, even in the absence of special provisions in this regard, is recognized by international law, which “allowed the practice of formulating reservations (...) in order to “respond” to the particularities of the situation of each state”^[11]. The only condition that could be mentioned is that “the formulation of reservations presupposes compliance with the substantive and formal conditions enshrined in the Vienna Convention”^[12] on the Law of Treaties (1969). One of the essential requirements regarding the substance is that the reservation must be compatible with the object and purpose of the treaty. Contrarily, the reservation will not be accepted and will have the legal consequence of “preventing the reserving State from acquiring the status of a party to the treaty”^[13]. In the literature, it is stated that, if a State objects to a reservation of another State, “on the ground that the reservation is incompatible with the object and purpose of the Treaty, the effects will not occur on the State that objected or on the other States, regardless of their position on the reservation”^[14].

According to official data^[15], 17 of the 56 states that are parties to the Convention have used their right to enter reservations to the Convention. The specificity of the application of the Convention by States parties is based on these reservations, which the States have formulated in order to exclude the legal effects of some provisions of the Convention. According to art. 21 para. (1) letter a) of the Vienna Convention on the Law of Treaties^[16], a reservation modifies for the State author of the reservation in its relations with the other parties, the provisions of the Treaty to which the reservation refers.

^[9] Ștefan, E.E., (2017), *Legalitate și moralitate în activitatea autorităților publice*, Magazine of Public Law no. 4, p. 96;

^[10] Gălea, I., (2021), *Manual de drept internațional*, vol. I, Hamangiu Publishing House, Bucharest, p. 365;

^[11] Gălea, I., (2021), *Manual de drept internațional*, vol. I, Hamangiu Publishing House, Bucharest, p. 365;

^[12] Maxim, F., (2012), *Aspecte teoretice și practice privind tratatul. Izvor principal al dreptului internațional public*, Universul Juridic Publishing House, Bucharest, p. 56;

^[13] Maxim, F., (2012), *Aspecte teoretice și practice privind tratatul. Izvor principal al dreptului internațional public*, Universul Juridic Publishing House, Bucharest, p.57;

^[14] Maxim, F., (2012), *Aspecte teoretice și practice privind tratatul. Izvor principal al dreptului internațional public*, Universul Juridic Publishing House, Bucharest, page 57;

^[15] See in this regard,

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVI-3&chapter=16&clang=_fr (accessed on 10 April 2021);

^[16] Since 1969;

3.1. *The case of the state of Bangladesh*

Two of the reservations submitted to the Convention on Consent to Marriage, the Minimum age for Marriage and the Registration of Marriages that call the attention, are those of the State of Bangladesh^[17]. These reservations concern art. 1 and 2, on the one hand and art. 2, on the other hand. Thus, “The Government of the People’s Republic of Bangladesh reserves the right to apply the provisions of art. 1 and 2, regarding the legal validity of child marriage, in accordance with the law of people from different religious communities of the country”^[18]. At the same time, “The Government of the People’s Republic of Bangladesh will not be bound by the exception clause of art. 2, which provides as follows: “except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses”.

Four States Parties to the Convention objected or sent communications to the Secretary-General regarding Bangladesh’s reservations. Finland and Sweden raised objections, while the Federal Republic of Germany and the Netherlands sent communications. Strictly legal, the difference between *objections and communications* is given by their regulation in the Vienna Convention on the Law of Treaties, in the sense that, in art. 20 para. (4) letter b), the possibility of objecting is mentioned, while the communication does not benefit from such a mention.

The position of the above four states is similar up to a point. They all considered that the reservation was of an “extremely general” nature, which “raised doubts as to Bangladesh’s full commitment to the object and purpose of the Convention”. The expression “the rights of people from different religious communities of the country”, within the reserve, is equivalent, in the opinion of the German Government, to a serious violation of one of the three basic pillars (as we called art. 1-3) of the Convention. With regard to the same wording, the Government of Finland considered that “reservations are subject to the general principle of the interpretation of Treaties according to which, a party may not rely on the provisions of its national law to justify the failure to perform its Treaty obligations”^[19]. For its part, the Government of Sweden argued that “it is in the common interest of States that the treaties to which they have chosen to become parties, are complied with as to their object and purpose by all parties, and that States must be prepared to bring any changes in national law to fulfil their obligations under these Treaties”^[20]. The same attitude was expressed by the Government of the Netherlands, which stated that the reservation in question “tends to limit the responsibilities” of the state of Bangladesh.

In accordance with the objections raised, but also in compliance with the provisions of the Vienna Convention on Treaties, the four Governments concluded, and here is the difference of position, as follows: The Governments of Finland and Sweden stated that their objection did not prevent the entry into force of the Convention between Bangladesh and those States, which means that it will apply, with the *express mention* that Bangladesh *will not benefit from that reservation*, while the Governments of the Federal Republic of

^[17] Stated at accession on 5 October 1998;

^[18] Source: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVI-3&chapter=16&clang=_fr (accessed on 10 April 2021);

^[19] Source: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVI-3&chapter=16&clang=_fr (accessed on 10 April 2021);

^[20] Source: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVI-3&chapter=16&clang=_fr (accessed on 10 April 2021);

Germany and the Netherlands also stated that their objection does not prevent the entry into force of the Convention, without however specifying, whether Bangladesh *will benefit or not from that reservation*, as it had been the case of the other two governments.

What is the legal consequence of the wording of the two final mentions (“*will not benefit from the mentioned reservation*” and the lack of this statement)? In other words, how is the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages going to be applied between Bangladesh and the States which have objected or sent communications, on the one hand, and Bangladesh and the States which have not objected, nor have they sent communications, on the other hand? It is obvious that it involves a reservation declared invalid by 4 States Parties, as this is incompatible with the object and purpose of the treaty. Will the declaration of invalidity of the reservation have effect in relation to all States Parties to the Convention, “whether they have tacitly accepted or objected to the reservation”^[21]? We find the answer to this question formulated in the literature^[22], under the form of two theories, namely: the theory of validity and the theory of opposability. According to the first theory, finding the validity or invalidity of a reservation has the same effect for all parties. Thus, in this case, an invalid reservation will not produce effects, being considered null, regardless of its acceptance or the formulation of objections. According to the second theory, the reservation will produce effects depending on its acceptance or the formulation of objections. If the doctrine agrees on two solutions, in response to the above question, the UN Commission on International Law argues that an invalid reservation is null and void, regardless of the acceptance or objections of other states^[23].

Therefore, with regard to the application of the Convention on Consent to Marriage, the Minimum Age for Marriage and the Registration of Marriages by Bangladesh, we note that it is “bound” by the Convention, without, however, benefiting from the reservation stated, which means that it will apply, including the provisions of art. 1 and 2 of the Convention. We appreciate, however, that Bangladesh has the right at any time to express its wish not to be a party to the Convention.

3.2. The application of art. 8 of the Convention by the United States of America

According to art. 8 of the Convention, any dispute between the States Parties concerning the interpretation or application of the Convention shall be settled by negotiation, as a technical-diplomatic means of settling disputes in a peaceful manner. By way of exception, the dispute, the settlement of which has not been possible by negotiation, shall be brought before the “International Court of Justice at the request of all parties to the dispute, unless the parties have agreed otherwise”. A declaration on the application of this article has been formulated by the United States of America. According to this declaration, the United States of America specify that accepting the provisions of art. 8 does not imply that they “may constitute a precedent for subsequent instruments”.

[21] Gâlea, I., (2021), *Manual de drept internațional*, vol. I, Hamangiu Publishing House, Bucharest, p. 372;

[22] Gâlea, I., (2021), *Manual de drept internațional*, vol. I, Hamangiu Publishing House, Bucharest, p. 372;

[23] According to *Guide de la pratique sur les réserves aux traités*, 2011: “4.5.1 Nullity of an invalid reservation: A reservation which does not comply with the conditions of formal and substantial validity (...) is automatically void and, consequently, devoid of any legal effect. 4.5.2 Reactions to a reservation considered invalid: 1. The invalidity of an invalid reservation does not depend on the objection or acceptance of a Contracting State (...)”;

3.3. The application of the Convention by the State of Fiji

After becoming a party to the Convention on 19 July 1971, Fiji exercised its right to formulate declarations, in its quality of successor state, following independence. Thus, the Government of Fiji waived “reservations and declarations stated on 9 July 1970 by the Government of the United Kingdom of Great Britain and Northern Ireland concerning the laws of Scotland and Southern Rhodesia”^[24]. In addition, regarding art. 1 and 2, the Government of Fiji stated that they would be interpreted, meaning that the validity of marriages entered into, under the law of another state or territory would not be recognized, on the one hand, and would not require the adoption of a legislative provision allowing the conclusion of a marriage in the absence of one party, on the other.

3.4. The declarations of France, Guatemala and Hungary regarding the application of art. 1 of the Convention

France stated two declarations, both referring to art. 1, once it expressed its consent to become a party to the Convention. Thus, “France declares that it will apply art. 1 paragraph 2 of the Convention in accordance with the provisions of its domestic law, reserving the solemnization of marriage without the presence of one or other of the future spouses to the only exceptions provided by its law, which expressly stipulates this”. The second declaration refers to the fact that France “will apply art. 1 paragraph 1 of the Convention in accordance with the provisions of its domestic law concerning the conditions for waiving the formality of publicity”.

The first declaration contains all the elements of an “interpretative declaration”, by which France specifies and clarifies the situation in which, at national level, it is permissible to conclude a marriage without the presence of one of the parties, as an exception agreed by the Convention. The second declaration, however, may give rise to discussions about the effect it has, in order to clarify the issue if it were not a question of reservation rather than declaration. The main difference between declaration and reservation is given by the effects they produce: through the declaration, the State stating it, provides further clarification on the “meaning or scope of the Treaty”^[25], while through the reservation, the State aims to exclude the legal effect of certain provisions of the treaty and / or to modify their legal effects. If we analyse the content of the second declaration by reference to the provisions of art. 1 paragraph 1 of the Convention, we find the following: the paragraph contains the provision according to which marriage is legally concluded “(...) after due publicity, according to the provisions of the law”; the declaration states that France may waive the formalities concerning publicity in accordance with its own legislation. It is a situation which could be brought into question if, by that second declaration, France did not enter a reservation. This could be analysed if we consider that its intention was to change the legal effects of the obligation to publicize marriage, provided that the Convention does not include any exception. As this is not a unilateral act prejudicial to the object and purpose of the Convention, the validity or invalidity of such a wording cannot be brought into discussion. Moreover, “according to the ILC Guide, the declaration must be interpreted in

^[24] Source: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVI-3&chapter=16&clang=_fr (accessed on 10 April 2021);

^[25] Gălea, I., (2021), *Manual de drept internațional*, vol. I, Hamangiu Publishing House, Bucharest, p. 366;

good faith, in the ordinary sense given to its terms, in order to identify the intention of its author, in the light of the treaty to which it refers”^[26].

For its part, Guatemala stated that it does not consider itself bound by the provisions on publicity of marriage and the presence of witnesses, as long as its legislation does not provide for these conditions and therefore shall not apply them when the parties are Guatemalan.

Hungary too, joins France concerning the declaration on the application of art. 1 paragraph 2, in the sense that “it does not feel obligated (...) to authorize the conclusion of a marriage in the absence of one of the future spouses”^[27], thus excluding the possibility offered by the Convention, through the exception provided.

3.5. The territorial application of the Convention in the Netherlands

Considering the administrative-territorial specificity of the Netherlands, the Plenipotentiary Minister of the State formulated a reservation concerning the territorial application of the Convention, on behalf of the Government of the Kingdom. Consequently, invoking the equality of public law between the Netherlands, Suriname and the Netherlands Antilles, the Convention was signed on 10 December 1962 for only one or two parts of the Kingdom, following that, “at a subsequent date, by a written notification addressed to the Secretary-General of the United Nations” the provisions of the Convention shall be extended to the other Party or Parties of the Kingdom. On 2 July 1965, the Convention was ratified and applied to the entire Kingdom.

3.6. The declaration of the Philippines and the reservation of the Dominican Republic regarding the application of art. 1 paragraph 2 of the Convention

With regard to the exception stipulated in the Convention when it provides that a marriage may be concluded, by way of exception, also with the duly motivated absence of one of the future spouses, the Philippines declare that, under the provisions of their Civil Code, do not consider an obligation to authorize on its territory, a marriage by proxy or marriages of the kind provided in that paragraph, when such forms of solemnity of marriage are not permitted by the Philippine law. On the Philippine territory, the celebration of a marriage in the absence of one of the two parties, under the conditions provided in that paragraph, shall be possible only if the law of the Philippines allows it”^[28].

With regard to the possibility of concluding a marriage by proxy, the Dominican Republic has reserved the right for the provisions of national law to prevail over those of the Convention. Therefore, the Dominican Republic applies art. 1 paragraph 2 only with reservations.

3.7. The application of the Convention by the United Kingdom of Great Britain

An interesting approach regarding the application of art. 1 paragraph 2 and art. 2 of the Convention is that of the United Kingdom of Great Britain, which, due to the particularities

^[26] Maxim, F., (2012), *Aspecte teoretice și practice privind tratatul. Izvor principal al dreptului internațional public*, Universul Juridic Publishing House, Bucharest, p. 69;

^[27] Source: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVI-3&chapter=16&clang=_fr (accessed on 10 April 2021);

^[28] Source: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVI-3&chapter=16&clang=_fr (accessed on 10 April 2021)

resulting from the territorial structure, was put in a position to set out several declarations. Thus, the Government of the United Kingdom mentions that the provisions of art. 1 paragraph 1 and art. 2 shall be interpreted as relating to marriages entered into under the law of a State Party and not as recognition, under the law of a State or a territory, of the validity of marriages entered into under the law of another State or territory. In addition, the provisions of art. 1 paragraph 1 are not applicable to marriages resulting from ordinary and well-known cohabitation under Scottish law. Regarding the exception established by paragraph 2 of art. 1, concerning the possibility of concluding the marriage in the duly justified absence of one of the parties, the United Kingdom does not require the adoption of a legislative provision to that effect, to allow a marriage to be contracted in the absence of a party. Another declaration concerns the territorial application of the Convention. It had not applied to Southern Rhodesia until the Government of the United Kingdom notified the Secretary-General that it was in a position to ensure that the obligations under the Convention were fully implemented in that territory as well.

3.8. The application of the Convention in other States Parties

A careful analysis of the application of paragraph 2 of the first article of the Convention shows that a number of States have agreed to enter reservations. Thus, Denmark, Finland, Greece, Iceland, Norway and Sweden state, in the same terms, that they shall not apply those provisions and cannot therefore be opposed to them.

Regarding Romania, we note that our country signed the Convention on December 27, 1963 and ratified it almost 30 years later, in 1992^[29]. Once it expressed consent, our country also joined the states that agreed not to apply the provisions of paragraph 2 of art. 1, entering a reservation to that effect^[30].

4. Instead of conclusions ... something about the topicality of the Convention

Although more than 56 years have passed since the entry into force of the Convention^[31], we find that the protection established by this legal instrument, still remains a goal. The arguments for this sad statement are provided by the reality of international society. According to statistics, by 2018, “over 750 million women married before the age of 18, and of these, 250 million married before the age of 15”^[32], and what is really worrying is that “every year about 15 million more girls get married before the age of 18, and of these 4 million get married before the age of 15”^[33]. To these realities, the following are added^[34]: 156 million boys married before the age of 18, and of these, 25 million married before the age of 15; about 40 million girls between the ages of 15 and 19 are married or living in cohabitation. In addition to all these aspects, it is estimated that by 2050, about 1.2 billion girls will already be married before they turn 18.

^[29] Law no. 116/1992, published in the Official Gazette of Romania”, Part I, no. 330 of 24 December 1992.

^[30] Art. 2 of Law no. 116/1992: “Romania shall not apply the provisions of paragraph 2 of art. 1 of the convention regarding the celebration of marriage in the absence of one of the future spouses”;

^[31] December 9, 1964;

^[32] European Union Foreign Affairs Committee, *Report on the EU external strategy against forced and early marriages - next steps*, (2017/2275 (INI)), Rapporteur: Charles Goerens, 24 May 2018, point E, p. 5;

^[33] European Union Foreign Affairs Committee, *Report on the EU external strategy against forced and early marriages - next steps*, (2017/2275 (INI)), Rapporteur: Charles Goerens, 24 May 2018, point E, p. 5;

^[34] European Union Foreign Affairs Committee, *Report on the EU external strategy against forced and early marriages - next steps*, (2017/2275 (INI)), Rapporteur: Charles Goerens, 24.5.2018, point E, p. 5;

Given that there are Member States in the European Union that allow marriage at 16, with the consent of parents, we consider it necessary to adopt a rule setting the universal minimum age for marriage at 18. At the same time, administrative, legal and financial measures are needed at national level to ensure the effective implementation of this requirement. The implementation of these measures must, of course, be carried out in compliance with the “right to marry and the right to found a family”^[35], as enshrined in the Charter of Fundamental Rights of the European Union.

However, instead of conclusions, as the literature has shown: “Man is born free, this is a universal truth that is undoubtedly valid, it no longer needs to be argued, regardless of the path you choose to prove this truth”^[36].

^[35] **Fuerea, A.**, (2016), *Manualul Uniunii Europene*, 6th edition, revised and added, Universul Juridic Publishing House, Bucharest, p. 94;

^[36] **Ștefan, E.E.**, (2013), *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ*, Pro Universitaria Publishing House, Bucharest, p. 19.

THE RIGHT TO FAMILY LIFE AT THE LEVEL OF EUROPE

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Abstract

The importance of the family in society has been emphasized since ancient times, which has led to its enshrinement in international human rights law, stating that every person should benefit from family life. Existing universal international regulations are an example of how states have agreed to enshrine various issues related to ensuring and guaranteeing the right to family life. Being faithful to universal provisions, however also under the influence of the traditions specific to each region, the states have adopted a series of legal instruments of a regional nature. Thus, the analysis of European regional regulations leads us to a research of the documents adopted at the level of the Council of Europe, but also at the level of the European Union without neglecting the jurisprudence of the two European courts, namely: the European Court of Human Rights and the Court of Justice of the European Union.

Keywords: *family life, family members, family relations, European Convention on Human Rights, Charter of Fundamental Rights of the European Union*

1. GENERAL CONSIDERATIONS

Family and, implicitly, family life are two concepts that have been enshrined in international legal instruments of an international and regional nature, being also the subject of jurisprudential debates. The importance of the family in society has been emphasized since ancient times, regardless of how this concept was identified, which led to its enshrinement in international human rights law stating that every person should benefit from family life. In order to research the way of consecrating the right to family life at European level, we consider it necessary to review the international legal instruments that regulate aspects related to family life and constitute the basis from which the regional regulations start. In this sense, in Article 16 (3) of the Universal Declaration of Human Rights adopted on December 10, 1948 by the UN General Assembly states that "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State". At the same time, Article 23 (1) of the International Covenant on Civil and Political Rights, adopted on December 16, 1966, reiterates the consecration of the Universal Declaration of Human Rights; and Article 10 (1) of the International Covenant on Economic, Social and Cultural Rights, adopted on 16 December 1966, states that "The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses." The need to respect and guarantee the right to family life for all persons has led to its consecration in international documents that regulate specific issues. Thus, the International Convention for the Protection of the Rights of All Migrant Workers and Members of Their Families adopted on 18 December 1990 stipulates that its provisions apply to migrant workers and their family members throughout the migration process. With regard to the notion of family member, the Convention defines

this term by stating that family member refers to "persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned". Another international document that enshrines multiple aspects of ensuring the right to family life is the Convention on the Rights of the Child adopted by the UN General Assembly on November 20, 1989. The enshrined aspects concern the observance of the rights and duties of the natural parents of the child or members of the extended family or of the community, guardians or other persons who, by law, have children in care; the right of the child to know and be cared for by his parents; the right of the child to maintain family relations; the right of the child not to be separated from their parents against their will, unless the competent authorities so decide; the right of the child who has been separated from both parents or from one of them to maintain personal relations and direct contact with both parents on a regular basis, unless this is contrary to the best interests of the child; the right to request family reunification; the right of the child whose parents reside in different states to maintain, apart from exceptional situations, personal relationships and direct contacts, on a regular basis, with both his parents, etc. The Convention on the Rights of Persons with Disabilities provides protection for this category of persons by paying specific attention to children with disabilities. Thus, it regulates the commitment of states that are parties to the convention to take immediate measures to raise awareness at the family level of issues specific to people with disabilities, but also their obligation to adopt all legislative, administrative, social, educational and other measures to protect persons with disabilities, both within the family and outside it; the aim will be to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parental status and interpersonal relations; children with disabilities will be provided with equal rights in family life. At the same time, the situation in which the small family cannot take care of a child with disabilities is taken into account, in which case all efforts will be made to ensure alternative care within the extended family, and, if this is not possible, within the community, in a family-type environment.[1] The universal regulations mentioned are an example of how states have agreed to enshrine various issues related to ensuring and guaranteeing the right to family life, which can be complemented by many other provisions adopted at the international level.

Being faithful to the universal provisions, but also under the influence of the traditions specific to each region, the states have adopted a series of legal instruments of a regional nature. Thus, the analysis of European regional regulations leads us to a research of the documents adopted at the level of the Council of Europe, but also at the level of the European Union, without neglecting the jurisprudence of the two European courts, namely: the European Court of Human Rights and the Court of Justice of the European Union.

2. SPECIFIC ASPECTS DETERMINED BY THE APPLICATION OF THE PROVISIONS OF ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ON THE OBSERVANCE OF THE RIGHT TO FAMILY LIFE

The analysis of the documents adopted at the level of the Council of Europe starts from the research of the aspects regulated by the European Convention of Human Rights. Thus, the point of reference of the researched topic is considered Article 8 of the European Convention on Human Rights intended to regulate the right to respect for private and family

life. According to the mentioned article "Everyone has the right to respect for his or her private and family life, home and communications. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." In the literature the approach of the indicated provisions is made separately taking into account on the one hand the doctrinal and jurisprudential aspects of the right to respect for privacy, and on the other hand the particularities identified in theory and practice related to the right to respect for family life. At the same time, the elements resulting from the comparative analysis of the two concepts, of private life and family life, are debated, the existing practice determining the doctrinaires, but also the European judges to investigate specific situations in order to frame them in one of the two concepts; or even to identify cases that concern both private life and family life. In this sense, a relationship that cannot be included in the category of relationships related to family life, can be analyzed from the perspective of relationships that are specific to private life. In addition, the European judge ruled that the registration of a marriage has the effect of recognizing a person's legal marital status which concerns both the person's private life and family life as provided for in Article 8 of the European Convention on Human Rights. [2]

In addition to the already existing connection between the two conventional rights governed by Article 8, the specialized doctrine, and in particular the relevant jurisprudence, has highlighted the relationship between this article and the other articles of the European Convention on Human Rights, including the relationship with the Protocols to this Convention. If we are to address the provisions of Article 2 governing the right to life, we could say that without respect for the right to life of a person, the right to respect for private and family life cannot be protected. Moreover, at the same time, it is emphasized that in the case of investigations into alleged violations of the right to life, the aim should be to ensure the right to respect for private and family life in accordance with Article 8. With regard to respect for family life and taking into account the scope of Article 8 of the European Convention on Human Rights, which includes the relations between family members, in particular relations involving children the case law of the European Court of Human Rights has highlighted the connection between Article 3 governing the prohibition of torture and Article 8 considering that in the case of children they are entitled to protection from the State in the event of threat to their physical and mental well-being, the States being obliged to take all necessary measures to prohibit corporal punishment of children. If we approach the provisions of Article 6 of the European Convention on Human Rights in relation to the provisions of Article 8, we can say, based on what is found in the literature, but also from a jurisprudential point of view, that the two provisions are closely related. Thus, in cases where the observance of the right to family life is analyzed, their solution can be related only to the provisions of Article 8, as the examination of the facts can be done from the perspective of both articles depending on the circumstances of those cases. With regard to Article 14 of the European Convention on Human Rights, which regulates the prohibition of discrimination, it is noted that this article has often been corroborated with Article 8. Recognition of same-sex unions has been a frequently discussed topic in terms of the connection between the two articles. Another aspect within the scope of application of the right to respect for family life was the subject of the Alexandru Enache case against

Romania. In that case, the applicant alleged that he had been the subject of an injustice based on sex discrimination on the ground that his application for postponement of the sentence had been rejected on the ground that Article 453 (1) (b) of the Criminal Procedure Code allows only convicts who have a child under the age of one to request such a postponement. In ruling on the admissibility of the claim, the Court concluded that the impossibility of obtaining a postponement of the execution of the sentence, even though his child was less than one year old, had an impact on the applicant's right to respect for his family life, both the provisions of Article 8, but also the provisions of Article 14 of the Convention being applicable in this case. Thus, as regards the facts of the dispute, the applicant could claim that he was in a situation comparable to that of the convicts, but that situation must be examined from the point of view of justifying the difference in treatment. The difference in treatment is discriminatory if it is not objectively and reasonably justified, if it does not have a legitimate aim or if there is no reasonable relationship of proportionality between the means used and the aim pursued. Analyzing the arguments presented by the Romanian Government, the European Court of Human Rights considered that there is a reasonable relationship of proportionality between the means used and the legitimate aim pursued. Thus, the Court concluded that there had been no violation of Article 14 of the Convention in conjunction with Article 8 thereof [3]. In the case law of the European Court of Human Rights, the investigation of the connection between Article 8 and Article 14 has also taken into account the difference in treatment based on birth out of wedlock in relation to birth in marriage, the difference in treatment between the father of a child born in a relationship in which the parents live together without being married and the father of a child born in a marriage-based relationship, the discriminatory treatment resulting from the refusal of the authorities to allow persons forming a binational couple to keep their own family name after marriage, the prohibition of the adoption of Russian children by American nationals, or in the case in which parental authority has been withdrawn on the basis of a distinction based on religious considerations. [4]

According to the provisions of the European Convention on Human Rights, respect for family life and the specific aspects involved in it are also ensured by other documents adopted at the level of the Council of Europe. In this respect, the provisions of the revised European Convention on the Adoption of Children, adopted in 2008, which seeks to ensure the best interests of the child, can be invoked. Thus, the provisions of the convention have been extended to unmarried heterosexual couples who have entered into a partnership registered in the states that recognize these partnerships. At the same time, the convention gives states the possibility to extend adoptions to same-sex couples who are married to each other, or who have entered into a partnership as well as couples of different sexes and of the same sex living together in a stable relationship. [5] The Convention of 25 October 2007 for the Protection of Children against Sexual Exploitation and Sexual Abuse is the first instrument to establish various forms of child sexual abuse as a crime, including such abuse in the family or at home using force, coercion or threats. The Convention on Personal Relations with Children, adopted in 2003, aims to improve aspects of the right to national and cross-border contact, to strengthen the right of children and their parents to maintain regular personal relationships. The right may be extended to contact between a child and persons other than their parents, in particular where the child has family ties to such a person. The European Convention on the Exercise of the Rights of the Child, adopted in 1996, provides for measures aimed at promoting the rights of the child, in particular in

family proceedings before the judicial authorities. Among the family procedures considered are those regarding custody, residence, access, filiation, adoption, guardianship, elimination or restriction of parental responsibility, etc. The provisions of the Revised European Social Charter of 1996, by which States Parties undertake to promote the economic, legal and social protection of family life, should not be omitted. The European Convention on the Legal Status of Children Born out of Marriage, adopted in 1975, has as its main objective the alignment of the legal status of children born out of wedlock with that of children born out of wedlock. The main provisions take into account aspects related to paternal and maternal affiliation, recognition of denial and challenge of paternity, attribution of parental responsibility and rights of succession of children. [6]

The provisions of binding legal instruments are supplemented by provisions of a recommendation nature. Thus, in the 2010 Recommendation, the Committee of Ministers recommended that Member States take steps to provide legal recognition to stable couples, without discrimination between different-sex and same-sex couples. By Recommendation 1474 of 2000, the Parliamentary Assembly of the Council of Europe recommended that the Committee of Ministers call on the Member States to adopt legislation governing registered partnerships. Following the recommendations made, some European states have adapted their legislation to the recommendations made, and the jurisprudence of the European Court of Human Rights has applied these principles in resolving cases. Regarding Romania, in 2020, remarks were made to it regarding the absence of a legal framework for the recognition of stable relations between persons of the same sex. Commissioner Mijatovic emphasized that as far as same-sex couples are concerned, they are part of the rich diversity of families that make up today's society. In the absence of recognition, they are practically forbidden to fully enjoy their right to privacy and family life.

We show that the legal provisions mentioned are supplemented by a series of other provisions contained in legal instruments of a binding or recommendatory nature that concern other aspects related to family life, such as immigration, expulsion, the right to become a genetic parent, etc.

3. RESPECT FOR THE RIGHT TO FAMILY LIFE ACCORDING TO THE RULES ADOPTED AT THE LEVEL OF THE EUROPEAN UNION

Naturally, the search for rules on the protection of human rights in the European Union is launched by invoking the provisions of Article 6 of the Treaty of Lisbon. According to the indicated article "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law." [8] In light of the

above, we reiterate the provisions of the Charter of Fundamental Rights of the European Union, which in Article 7 govern the right to respect for private and family life, the home and the secrecy of communications, and Article 33 of the Charter of Fundamental Rights of the European Union regulates family life and professional life. At the same time, it is necessary to mention the provisions of Article 52 (3) ensuring the connection between the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights, showing that the rights governed by the Charter correspond to the rights guaranteed by the European Convention on Human Rights, their meaning and scope, including the restrictions that may be allowed, are the same as those provided for in the European Convention on Human Rights, the protocols to that convention, but also the case law of the European Court of Human Rights. This is without prejudice to the autonomy of European Union law and the Court of Justice of the European Union. The last provision of this paragraph establishes that the previous provisions do not prevent the right of the European Union to confer a wider protection. Referring to the list drawn up to present the connection between the rights enshrined in the Charter and the rights enshrined in the European Convention on Human Rights, it is shown that Article 7 of the Charter corresponds to Article 8 of the European Convention on Human Rights. [9] In conclusion, this right has the same meaning and scope as Article 8, and the restrictions are identical in the case of the two provisions. As regards European Union law, the provisions in primary sources are supplemented by provisions of the categories of sources of European Union law, as well as by the rules set out in other documents. Thus, an example is Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children suspected or accused in criminal proceedings by Member States are obliged to ensure the efficient and regular exercise of the right to family life by guaranteeing the right to maintain regular relations with parents, family and friends. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC whereby family members already residing in the territory of the host Member State should be protected in the event of the death of the EU citizen, divorce, marriage annulment, termination of the registered partnership, primarily by maintaining the right of residence exclusively on a personal basis. Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection by which greater attention is paid to the best interests of the child, Member States focusing on family reunification, the well-being and social development of the minor, considerations for the safety and security of the minor. States shall ensure that in the case of minor children of applicants or minor applicants they are accommodated with their parents, their siblings or another adult family member responsible for them on the basis of the legal provisions, or the practice of the Member State concerned, and provided that the best interests of the minor are ensured. Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the context of a transfer within the same company, laying down the conditions of entry and residence for more than 90 days in the territory of the Member States of third-country nationals and their family members, as well as their rights, in the context of a transfer within the same company.

Regulation (EU) no. 604/2013 of the European Parliament and of the Council of 26 June 2013 laying down the criteria and mechanisms for determining the Member State responsible for examining an application for international protection; presented in one of the Member States by a third-country national or a stateless person who pays particular attention to the best interests of the child in all the procedures provided for. Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards relating to the conditions to be met by third-country nationals or stateless persons in order to be eligible for international protection to a uniform status for refugees or persons eligible for subsidiary protection and to the content of the protection granted which in Article 23 governs matters relating to the maintenance of family unity. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing the Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC recognizing the right of all citizens of the Union to move and reside freely within the territory of the Member States should also be granted to members of their families, regardless of their nationality. As provided for in the Directive, the definition of "family members" should include the registered partner, where the law of the host Member State treats the registered partnership as an equivalent of marriage. In the case of persons who are not included in the category of family members as defined above and who do not automatically enjoy the right of entry and stay in the host Member State, the situation should be examined by the host Member State on the basis of its own national law, to decide whether the entry and residence of such persons may be granted, taking into account their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen. Directive 2003/86/EC on the right to family reunification, the main purpose of which is to protect the family unit and facilitate the integration of third-country nationals.

From the rich practice of the Court of Justice of the European Union, but also from the jurisprudence of EU Member States, it can be argued that the resolution of cases subject to trial was achieved by the proper interpretation of regulations regardless of the specific issue identified. Thus, in the case of the refusal of the state authorities to register a marriage with the correct name indicated on the grounds that the national language on the basis of which the registration is made does not contain certain letters specific to that surname, what needs to be replaced by those letters has been considered an infringement of the provisions of the Charter of Fundamental Rights of the European Union and the provisions of Article 8 of the European Convention on Human Rights. In this respect, it was emphasized that a person's name and surname are considered as a means of identifying a person's identity and how the person is assigned to a family. Therefore, the refusal to recognize the first and last name acquired in another Member State can be considered a restriction on the principle of free movement of persons and an infringement of the right to respect for private and family life. [10] By a reference for a preliminary ruling from the United Kingdom Supreme Court, it sought an interpretation of the concept of direct descent established by European Union rules in the case of a child who was placed under the guardianship of an EU citizen under the Algerian *kafala* system, to see if the request for the entry and residence of such a child as one of the family members of an EU citizen is justified, given that the placement does not create a parent-child relationship. The EU Court of Justice has stated that such a situation

does not fall into the category of parent-child relations, but it is up to the competent national authorities to facilitate the entry and residence of such a child as one of the other family members of an EU citizen, in accordance with Article 3 (2) (a) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, analyzed in relation to the provisions of Article 7 and Article 24 (2) of the Charter of Fundamental Rights of the European Union for a balanced and reasonable assessment of all circumstances. If it is established that the child and his guardian, who is a citizen of the Union, lead a genuine family life and that the child depends on his guardian, the requirements relating to the fundamental right to respect for family life, combined with the obligation to take the best interests of the child into account, it requires, in principle, that the child be given the right of entry and residence to allow him or her to live with his or her guardian in his or her host Member State. [11]

With regard to Article 33 of the Charter of Fundamental Rights of the European Union, we believe that research must focus on both regulated aspects, with professional life having a major influence on family life, as it results even from the provisions of the indicated article in which it is emphasized that a conciliation of the family life with the professional one must be pursued. Among the documents adopted at EU level relevant to the content of this article we can refer to the European Pillar of Social Rights which states that "Parents and people with caring responsibilities have the right to suitable leave, flexible working arrangements and access to care services. Women and men shall have equal access to special leaves of absence in order to fulfill their caring responsibilities and be encouraged to use them in a balanced way." European Parliament resolution of 12 May 2016 on the application of Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC calls on the Member States to guarantee the rights granted by social policies in the field of the family. Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC of the Council applies not only to self-employed persons but also to the spouses of self-employed persons or their life partners who are not employees or associates in the undertaking if they regularly participate in the activity of the self-employed person.

The existing normative provisions at the level of the European Union have benefited from a proper application both in the activity of the Court of Justice of the European Union and in the activity of the Member States' authorities, by their proper interpretation and compliance with the specific issues identified in the cases under analysis. [12]

CONCLUSIONS

Concluding on the presented aspects, we can show that we are in the presence of a rich and varied set of normative provisions which leads to the existence of a stable jurisprudential framework, result of stable and applied normative interpretations regarding the assurance and guarantee of the right to family life. Although the practice of European states is challenging, being the result of the evolutions of contemporary society, but also of respecting their traditions, adapting the norms to the identified requirements and achieving a

deep interpretation of the norms, both at the level of the Council of Europe and of the European Union, it responds to the specifics of the causes under analysis. The statement is supported by the presentation of the scope of Article 8 of the European Convention on Human Rights, but also of the scope of Article 7 of the EU Charter of Fundamental Rights. The rich jurisprudence of the European Court of Human Rights highlights the invocation of the provisions of Article 8 in the following situations: in the case of family relationships as a result of marriage, but also of family *de facto* relationships; in the case of same-sex relations; on matters relating to civil unions or registered partnerships; on the right to respect the decision to become a parent in the genetic sense; on the right of family members to enjoy each other's company; on the connection between the biological father or the biological mother and the children; on the child raising allowance, custody of the child/parental authority and right of access; international child abduction; adoption; families taking a child into foster care; parental authority and state care; relationships with siblings and grandparents; the right of a person deprived of liberty to keep in touch with family members; immigration and expulsion; children in detention centers; family reunification; return and expulsion decisions, residence permits and material interests. Being the correspondent of Article 8 of the European Convention on Human Rights, Article 7 of the EU Charter of Fundamental Rights enjoys a similar scope, but adapted to the normative provisions adopted at EU level and to its competence, being strongly engaged in respecting the free movement of persons, their economic and social rights. As regards states, they comply with their obligations as both a member of the Council of Europe and a party to the European Convention on Human Rights, as well as the obligations assumed towards the EU in the case of the EU member states, properly applying the adopted rules and taking into account the relevant jurisprudence, but following the preservation of traditions and customs.

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CONSIDERATIONS REGARDING THE NOTION “FAMILY MEMBER”. EVOLUTION OF LEGAL REGULATION

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Abstract

The family was a priority of the Romanian legislator, who gave increased importance to the family institution. For example, the "Explanatory Memorandum" of the Criminal Code of 1968 states that "in our organization, the development and consolidation of the family is a major concern of the state, of society as a whole." The family, in modern society, has been protected not only by the Romanian legislator, but also by European and international bodies, there are constant concerns in adopting an optimal legal framework. The adoption of the European Convention on Human Rights in 1950 was an important moment in ensuring the legislative framework necessary to protect private and family life.

Keywords: *close relatives, family member.*

Introductory considerations

Over the time, the institution of the family found its regulation in the texts of Herodotus and Xenophon, in provincial Roman law [1], in the Law of the Country (from the early feudalism of the ninth-fourteenth centuries AD), in customary law (which was not removed by the introduction of rules), in written law - represented by rules and, to a lesser extent, in "royal law", represented by royal deeds. Subsequently, we find regulations of the family in *Pravilniceasca condica* from 1780 in Wallachia, in the *Caragea Legislation* [2] from 1818 in Wallachia and in the *Calimach Code* [3] - Civil code of Moldavia from 1833.

History of legal regulation

The entry into force, on December 1, 1865, of the Civil Code meant "a new era in Romanian matrimonial law" [4], the marriage being transformed, according to the model of French legislation, into a civil contract.

In close connection with the family and with the regulation of legal relations born within it, the notion of relatives appears, the importance of this terminology being especially on the criminal side, the relatives being exonerated from criminal liability in certain situations. For example, art. 53 of the *Cuza Criminal Code* (the first Criminal Code of Romania, which we appreciate that in its time was a modern criminal law, which established a regime of protection, both criminal and social) provided that "Relatives from above and from below, the husband and wife, brothers and sisters, are not considered cover-ups ", and art. 197 provided for a case of impunity for the crime of hiding criminals for "upper and lower relatives, husband or wife", while parricide "is never excusable" (art. 252). The notion of family member is not found in the *Cuza Criminal Code*, the only regulation being the one regarding "relatives", as we showed before.

In the Criminal Code of 1936, for the first time in the national criminal legislation, we find the phrase "family member" in Chapter II, Section I: Attacks and plots against the person of the King, the Royal family and the constitutional form of the State, art. 204 stipulating that "Attacks of the same kind against the Queen, the Crown Prince or against the other members of the Royal family....". We are thus witnessing a change in the legislator's perspective, which establishes a new notion in criminal law.

Further, art. 205 of the Criminal Code of 1936 defines the analyzed phrase, showing that "By" the other members of the Royal family "are meant the ascendants, descendants, brothers and sisters of the King, as well as the children of his brother, in masculine order". Otherwise, the Criminal Code 1936 refers only to relatives, as it results from disp. art. 131, art. 271, art. 447, art. 511, art. 526, art. 538, art. 543. The Criminal Code of 1936 also regulates the notion of relatives, in art. 183 point 5 "relatives are the ascendants, their spouses and parents, brothers and sisters, adopted children, relatives in a straight line, brothers-in-law and sisters-in-law".

Title XII of the Criminal Code 1936, called "Crimes against the family", sanctioned bigamy, incest and adultery (art. 443 - 447). We also find "Crimes against marital status, family abandonment and abuse of the right to correction" (art. 448 - 455) or kidnapping (art. 456-462).

Art. 464 points 4-6 of the Criminal Code 1936, the legatee provided the penalty for forced labor for life, for committing the crime of murder, if the passive subject of the crime had the quality of "legitimate, adoptive or natural ascendant or descendant; brother or sister; the husband".

In the 1968 Criminal Code, the legatee regulates both the phrase "close relatives" and "family member." Thus, art. 149, with the marginal name "Close relatives", shows that:

1. "Close relatives" are the ascendants and descendants, brothers and sisters, their children, as well as persons who have become by adoption, according to the law, such relatives.

2. The provisions of the criminal law concerning close relatives, within the limits provided for in the preceding paragraph, shall apply in the case of adoption with full effects, to the adopted person and his descendants and in relation to natural relatives, and in case of adoption with restricted effects, the adoptee and his descendants and in relation to the relatives of the adopter.

The quality of "close relative", in the old Criminal Code, often concerned the person of the offender (active subject), constituting a cause of impunity or a circumstance modifying the punishment (aggravating or mitigating), for some crimes, due to the nature to them, they had the quality of close relatives, both the active and the passive subject (for example, the murder of a relative, the theft between relatives). [5]

Law no. 197/2000 for the modification and completion of some provisions of the Criminal Code introduced art. 149 ind. 1, which shows that the family member means the spouse or close relative, if the latter lives and manages together with the perpetrator.

The criminal law punished more severely if the acts of violence were committed by a family member against other family members. [6]

As a result of the introduction of the phrase "family member" in the Criminal Code, new provisions / circumstantial elements of the offenses under art. 180 paragraph 1 ind.1 and paragraph 2 ind.1, art. 181 para. 1 ind.1, art. 197 para 2 lit b ind.1.

The notion of family member, provided in art. 149 ind. 1 of the old Criminal Code, also included that of a close relative, but only on the condition that she lived and managed with the perpetrator. The criminal legislator eliminated this condition (to live and house with the perpetrator) - as we will show below - from the new criminal law, a solution that we consider appropriate.

Committing a crime of violence against a family member appeared in the old Criminal Code as an aggravating factor in the offenses of hitting or other violence and bodily harm, was found in a form close to aggravated murder (murder committed against a spouse or close relative), but it did not exist in the case of serious bodily injury and death. It is true that among the general aggravating circumstances, the old Code provided for the circumstance in which the crime was committed "through violence against family members" [art. 75 para. (1) lit. b) Thesis II, Criminal Code of 1968]. However, this unifying provision in the General Part was confusing, leading to wrong solutions, leading to a double aggravation of criminal liability for the same cause; the intervention of the Supreme Court was required, which, by way of an appeal in the interest of the law, ruled that such a double aggravation is inadmissible. [7]

In the 2004 Criminal Code (not in force), the legislator regulates both the phrase "close relatives" and "family member".

Art. 164, with the marginal name "Close relatives", shows that:

1. "Close relatives" are ascendants and descendants, brothers and sisters, their children, and persons who have become such relatives by adoption by law.
2. The provisions of the criminal law concerning close relatives, within the limits provided for in the previous paragraph, shall apply, in case of adoption, both to the adopted person and to his descendants and in relation to the natural relatives.

Art. 165, with the marginal name "family member", shows that: "Family member" means the husband or close relative, if the latter lives and manages with the perpetrator.

The notion of "family member" in the current law regulations

In the current regulation, the Criminal Code 2009, entered into force on February 1, 2014, the phrase "family member" is defined in art. 177 para. 1, as follows:

- a. ascendants and descendants, brothers and sisters, their children, as well as persons who have become by adoption, according to the law, such relatives;
- b. the husband;
- c. persons who have established relations similar to those between spouses or between parents and children, if they live together.

Alin. 2 of the same article stipulates that the provisions of the criminal law regarding the family member, within the limits provided in par. 1 lit. a, applies, in case of adoption, to the adopted person or to his descendants in relation to the natural relatives.

The persons who are part of the category of "family member", according to art. 177 para. 1 lit. of the Criminal Code, are, on the one hand, the persons between whom there is a natural kinship (art. 405 para. 1 Civil Code), ie a connection based on the descent of a person from another person or on the fact that several persons have a common ancestor, and, on the other hand, the persons between whom there is a civil kinship, ie a relationship resulting from the adoption concluded under the conditions provided by law (art. 405 para. 2 Civil Code). [8]

Natural kinship can be in a straight line or collateral. The kinship is in a straight line in case of the descent of a person from another person and can be ascending or descending (art. 406 para. 1 Civil Code).

Kinship is collateral when it results from the fact that several persons have a common ancestor (art. 406 para. 2 Civil Code).

The degree of kinship in a straight line is established by the number of births: thus, children and parents are first degree relatives, grandchildren and grandparents are second degree relatives (art. 406 paragraph 3 letter a of the Civil Code).

The degree of kinship in collateral line is established according to the number of births, ascending from one of the relatives to the common ascendant and descending from him to the other relative; thus, the siblings are second-degree relatives, the uncle or aunt, and the third-degree nephew, the fourth-degree primary cousins. (art. 406 para. 3 letter b Civil Code).

Art.177 paragraph 1 letter b, the spouse, has the quality of spouse the person who legally concluded the marriage and there is this quality even if the spouses are in the process of divorce or are in fact separated. [8]

Art.177 para.1 lit. c, persons who have established relations similar to those between spouses or between parents and children, if they live together. This category includes persons who have established relations similar to those between spouses, ie concubines, or between parents and children, provided that they live together in the same place, to cohabit. This presupposes that the respective persons live, maintain and manage together. [8]

Art.177 para. 2 was reformulated in accordance with the regulation on adoption, specifying that the provisions of paragraph 1 apply to the adoption and the adopted person or his descendants in relation to natural relatives. This modern wording differs from that of art. 149 Criminal Code. 1968, which distinguished between full-adoption and restricted-adoption, a distinction that is no longer made today, when there is only full-effect adoption.[9]

According to the explanatory memorandum to Law no. 286/2009 on the Criminal Code, "the notion of family member was also affected by an amendment, given the waiver of regulatory parallelism in the code in force (at that time), which operates both with the notion of close relatives and with that of family members. The meaning given by the project to the notion of family member comes to fully absorb in its content the notion of close relatives, but also includes persons who have established similar ties to those between spouses or between parents and children, provided they live together. that art. 177 para. 1 of the (current) Criminal Code indicates two categories of persons that make up the concept of "family member", respectively the actual (formal) members of a family (art. 177 paragraph 1 letters a and b of the Criminal Code) and persons assimilated to them (art. 177 paragraph 1 letter c of the Criminal Code). [10]

The meaning given to the notion of "family member" comes to fully absorb in its content the notion of close relatives, but also includes persons who have established similar relationships between spouses or between parents and children, provided cohabitation, and the solution it is fully justified in the light of the large number of couples living in common-law marriage today, and there is no basis for denying them criminal protection similar to that granted to married couples. [11]

The text of art.177 represents a fusion of the provisions of art.149 and art.149 ind.1 of the previous criminal law, with some modifications (for example, the waiver of the

mentions regarding the adoption with restricted effects), to which were added and those persons who have established relations similar to those between spouses or between parents and children, if they live together. In the new conception, the expression "family member" has been extended and fully absorbs in its content the notion of "close relatives". ' . [9]

We consider opportune the change that occurred, considering that the New Criminal Code, in art. 177, gives a much broader content to the expression "family member" than the previous Criminal Code, in art. 149 ind. 1. This is to remove the regulatory parallelism from the previous criminal law, which operated with both the notion of "close relatives" and that of "family member". For these reasons, the meaning of the term "family member" in the new Criminal Code absorbs in its entirety the text and the text on the expression "close relatives", but also includes persons who have acquired similar relationships between spouses or parents. and children, provided they live together. In this way, the expression "family member", within the meaning of the criminal law, as formulated in art. 177 of the Criminal Code is harmonized with the one already enshrined by Law no. 217/2003 for the prevention and combating of domestic violence (domestic, according to the latest amendments to the law), but also with the existing regulations in other European Criminal Codes. [8]

According to art. 5 para. 1 of Law no. 217/2003, by family member is meant:

- a) ascendants and descendants, brothers and sisters, their spouses and children, as well as persons who become relatives by adoption, according to the law;
- b) spouse and / or ex-spouse; siblings, parents and children from other spouses of the spouse or ex-spouse;
- c) persons who have established relationships similar to those between spouses or between parents and children, current or former partners, regardless of whether or not they lived with the aggressor, ascendants and descendants of the partner, as well as their siblings;
- d) the guardian or another person who exercises in fact or in law the rights towards the person of the child;
- e) the legal representative or other person who takes care of the person with mental illness, intellectual disability or physical disability, except for those who fulfill these attributions in the exercise of professional tasks.

Law no. 217/2003, by regulating the protection order, aimed at creating ways to protect victims of domestic violence, a complex tool that can be used in an emergency to avoid exposure to aggressive treatments. Art. 38 provides for three conditions of admissibility: the finding of committing an act of violence, the act of violence to be life-threatening, physical or mental integrity or the freedom of the victim and the act to be an act of domestic violence, in the sense that it is committed by a family member within the meaning of art. 5 of Law no. 217/2003.

Conclusions

Although most of the norms of family law are found in the Civil Code, we find that the notion of family member is not defined by the Civil Code, but its regulation is found in the Criminal Code and in special laws.

Compared to the lack of unity in defining the analyzed notion, it is necessary to clarify the notion of family member, the inclusion of persons in this category being essential in the analysis of cases brought to court, for example, in the case of protection orders. Therefore,

de lege ferenda we propose the definition of the phrase “family member” in the Civil Code as well.

REFERENCE

[1] Hanga, V. (1955). *Chrestomathy for the study of state and law*, vol. I, pp. 97-104.

[2] The legislation was considered to be the most important and complete code in the Romanian countries, superior to the Calimach Code due to the clarity of the language and its Romanian style. The code was close to modern codes, Prince Caragea wishing, by enacting this law, to remove the shortcomings of the unwritten law, but also those of the written one, in force. The written laws and royal deeds did not apply much, and Ypsilanti's *Condica* contained "too few, imperfect, and unworthy dispositions to weigh and correct the justice of each." In addition, the ruler tries not to stay behind the movement of legal renewal in neighboring countries, and especially in Moldova, where the "Assembly of Laws of Andronache Donici" appeared in 1814. The sources of the legislation are shown, for the most part, in the promulgation charter, namely: the legislation is "gathered from the royal rules and from the righteous *condica* and from the customs of the earth that have been followed so far." The Caragea Code is a synthesis of the "Summary" of Constantin Armenopolu, written in 1345, which in turn represents a compilation of laws of Emperor Leo the Philosopher. Apart from these sources, we also note the influence of the French Civil Code of 1804. Although it was said to be a law of civil law, we cannot say this about the Caragea Legislation, which includes not only civil law norms, but also criminal law norms, , procedural and commercial law. The legislation consists of six parts: the first four contain provisions of civil and commercial law, the fifth part provisions of criminal law and the sixth part procedural provisions. Part I contains provisions "about persons", "for the cheek" dividing them by sex, by birth, by capacity and by luck. The paper classifies people by sex, birth and ability, but states that the woman is inferior to the man. Part II is smaller in number of articles and contains paragraphs "about things", namely about their mastery, rules regarding the use of things. Part III is the most extensive and deals with "the matter of bonds and contracts," and Part IV is devoted to the matter of donations. The last two parts, namely part V entitled "for guilt" (in the sense of guilt) and part VI entitled "for the judgments", are not of interest for the current definition, being provisions of criminal law, civil procedural law and criminal proceedings. Therefore, the Caragea Code, located in the continuation of the legislative tradition in the Romanian space, objectified in the rules of the feudal era, includes three codes: the Civil Code (I-IV), the Criminal Code (V) and the Code of Civil and Criminal Procedure (VI). From the point of view of the vision and the normative content, the Caragea Code is located at the intersection between tradition and modernity, Urs, I.R, Duțu, M., collective (2018). *Romanian legal encyclopedia*, Vol.I, AC, Ed. , Ed.Universul Juridic, pp.683.

[3] By elaborating the Calimach Code, it was wanted to remove the shortcomings of the unwritten law, but also those of the written one in force, as it is recorded even in the promulgation deed of July 1, 1817: “..... what is done in their decisions and the collapse of the steadfastness of those determined, of which not a little shaking was caused to the varnishers, I thought with good reason that they should be born for the following reasons: that is, from the darkness of the cause of the pretense of the times, or of their murmured, confused, and too little clarified interpretation, or of their oppositions and unfoundedness, being composed in unusual languages. So, to uproot these harmful causes ”Urs,

I.R., Duțu, M., collective (2018). Romanian legal encyclopedia, Vol.I, A-C, Romanian Academy Publishing House, Universul Juridic Publishing House, pp.683.

[4] Hamangiu, C., Rosetti-Bălănescu, I., Băicoianu, Al. (1996). Romanian Civil Law Treaty, vol. I, Publishing House. All, pp. 185.

[5] Dongoroz, V., collective (2003). Theoretical explanations of the Romanian Criminal Code, vol. II, 2nd edition, Romanian Academy Publishing House, All Beck Publishing House, pp.422.

[6] Antoniu, G., Daneș, Ș., Popa, M. (2010). The current criminal code commented on the meaning of all, Orizonturi Publishing House, pp.209.

[7] Cioclei, V. (2013) .Criminal law.Special part.Crimes against the person and crimes against property, Ed.C.H.Beck, pp. 25, with reference to Decision no. IV / 2005 of the I.C.C.J., United Sections (RIL).

[8] Pascu, I., Dobrinoiu, V., collective (2014). The new Criminal Code commented. The general part, Second Edition, revised and added, Universul Juridic Publishing House, pp.808-810.

[9] Antoniu, G., Toader, T., collective (2015). Explanations of the New Criminal Code, vol.II, art.53-187, Universul Juridic Publishing House, pp.541.

[10] The decision of the C.C.R. no. 215 of June 2, 2020 regarding the exception of unconstitutionality of the provisions of art. 117 para. 1 lit. a of the Code of Criminal Procedure and of art. 177 para. 1 of the Criminal Code, published in the Official Gazette no. 588 of July 6, 2020.

[11] Although the Constitution does not define the notion of "family life", in its jurisprudence, the European Court of Human Rights has held that the notion of "family life", defended by art. 8 of the Convention, is not limited to families based on marriage and may include other de facto relations (Judgment of 3 April 2012 in Van der Heijden v. The Netherlands). In other words, there is "family life" in the case of a de facto relationship equivalent to marriage, so the Constitutional Court finds that the reason for regulating the right to refuse a hearing remains in the case of persons who have relations similar to those of the spouses those of the spouses with the suspect or defendant, since the substantial purpose of establishing this right is the protection of "family life", having a major importance in society, regardless of the existence of a formal registration. So, as long as the principle of equality before the law presupposes the establishment of equal treatment for situations which, depending on the aim pursued, are not different, then the Court finds that there is no objective and reasonable reason why persons having similar relations to those between spouses or have had relations similar to those of the spouses with the suspect or defendant to be excluded from the exercise of the right to refuse to testify as witnesses in criminal proceedings "] WWW.sintact.ro, information accessed on 18.04.2021, at 15:32.

KILLING OR INJURING OF THE NEWBORN COMMITTED BY THE MOTHER IN THE NEW INCRIMINATING FORMULA

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Abstract

The killing of the newborn by the mother constitutes one of the offences with a strong emotional impact, unfortunately, still quite widespread especially in social environments in precarious situations.

In this paper we set out to analyse this offence from a complex perspective, so that we can define and explain as correctly as possible the legislation in force, by reference to established doctrinal opinions in the matter, to judicial practice, and to the different ways of criminalising this act in the legislation of other states. We have addressed a number of controversial issues, such as the novelty of the current incrimination, the attempt to the offence of infanticide, the sanctioning of criminal participation or the notion and limits of the state of mental disorder, characterized by diminished discernment.

This scientific approach includes a number of proposals for a ferenda law, formulated with a view to supplementing and improving the legal text, as well as eliminating ambiguities likely to give rise to an uneven judicial practice in such a sensitive area.

Keywords: *infanticide, child murder, attempt, biological mother, surrogate mother, newborn, mental disorder, diminished discernment, murder, family violence.*

1. Introductory aspects

The right to life and the right to physical and mental integrity of any person fall within the sphere of the fundamental rights of the human being, being recognised and guaranteed both at the level of the national laws of any democratic state and at international level, by treaties and conventions. Indisputably, these rights are the most important human rights and every individual has an obligation to respect them, in the event of injury to them being criminally liable.

"Although the need to guarantee the right to physical and mental integrity is present in the morality plan at the beginning of human existence, and in the plan of legislative consecration, constitutionalism and movements generated by ideals have led to the creation of a written guarantee, the continuing importance of protecting this right by criminal means is reflected in the current criminal phenomenon"¹.

"The idea, generally valid, that physical and mental integrity is one of the most important attributes of the person is reinforced by the regulations of the new romanian criminal legislation, especially since the reversal of the order of protection of social values is intended to center the criminal protection on the individual"².

[¹] Ifțimiei, A. (2014). Protecția penală a dreptului la integritate fizică și psihică în dreptul penal român și francez. Penal Law Review no.2/2014, p. 127.

[²] Ifțimiei, A. (2014). Protecția penală a dreptului la integritate fizică și psihică în dreptul penal român și francez. Penal Law Review no. 2/2014, p. 139.

The offence of killing or injuring the newborn by the mother is one of the offences with a strong emotional impact.

Constituting qualified murder in the current criminal laws, infanticide is a general term, which does not concern only the killing of a newborn by the mother. The attenuated form of the crime of murder, child murder is limited only to the murder of the newborn by the mother and therefore does not imply the suppression of the life of any child, being criminally incriminated in the criminal law of the states³ as a separate offence or as a circumstance of infanticide.

Although the mother is not unconscious, thus not excluding her mental capacity, but still having diminished responsibility on the background of a psycho-physiological state caused by birth, it can be explained to some extent her act of killing her newborn child. That would be the justification for the attenuated criminalisation of the killing of the newborn by the mother immediately after birth⁴.

2. Infanticide from a historical perspective

Looking back in time, we find that infanticide in antiquity, although admissible in some cases, was punished just like any crime of murder. The crime was widespread in Ancient Rome, Ancient Greece, China, India or Japan, the methods of committing being very different. In works of Plato, Seneca, Plinius, we find important information about the murder of unwanted newborn babies. Infanticide was also seen as a way to control population growth. In Sparta, children with disabilities were condemned to the suppression of life. Roman law severely punished child murder unless the author was *Pater Familias*, as he was legally recognized as having the right to dispose of his own child's life and to decide his fate. Infanticide was mainly done by abandoning the newborn baby in the wilderness or by poisoning.

In medieval times, although no distinction was made between infanticide and other forms of murder, sometimes the law provided for infanticide the penalty of burning at the stake, except that the punishment was imposed on child killers, not on mothers, who committed such acts in desperate situations.

During the Middle Ages, in Europe, it was known and often practiced by unmarried women who gave birth to illegitimate children. Moreover, legislation in most European states strictly criminalized the killing of newborn bastards by the mother. Subsequently, child murder was also prohibited by law for married women.

North America and England during the first half of the 17th century faced a huge increase in infanticide cases, which led to the introduction of the death penalty and its application to mothers who committed the act of killing their newborn child. The same punishment was incidental for hiding the dead bodies of newborn babies.

The year 1647 is the year in which a gentler sanctioning regime is introduced for the first time in Russia for mothers who commit the offence of infanticide.

Cesare Beccaria promoted the idea that the woman who gave birth to an illegitimate child in special circumstances or as a result of rape, should be punished more gently if she chose to kill her child than to live in dishonor. In his view, it is unjustified to impose a penalty in the case of the commission of crimes, unless the prevention of these crimes have

[³] Except Italy.

[⁴] Boroi, A. (1999). *Infrațiuni contra vieții*. All Beck: Bucharest, p.151.

not been tried first⁵. Later, in modern criminal legislation, regulations were introduced whereby mothers who commit the act of killing their newborn child immediately after birth were given lighter punishments, given that after birth they are in a very difficult situation⁶.

At the end of the 19th century, England was the only country in Europe that did not distinguish between child murder – as a attenuated form of the crime of murder, in the light of the mother's state of mental disorder – and infanticide – as an aggravated form of murder.

3. Aspects of comparative law

Currently, countries such as Denmark, Norway, Croatia, the Netherlands, Bulgaria, Lithuania criminalise the killing of the newborn child by the mother immediately after birth in attenuated form, providing for a prison sentence of up to a maximum of 3 years (in Bulgaria) to 8 years (in Denmark, Norway, Croatia). A man who does not provide the necessary assistance to the woman pregnant by him is liable to a fine or imprisonment of up to 1 year in Denmark⁷, and in Norway⁸, for such a situation is provided for imprisonment of up to 2 years. In the Netherlands, the penalty imposed on the mother who is guilty of infanticide is imprisonment of up to 6 years or the imposition of a fifth-category fine.

In the United Kingdom, for scientific medical reasons, child murder is regulated by a special law⁹ so that the scope of this crime is much greater. In this respect, it is accepted that the mother whose discerning is diminished, since she has not recovered from the disturbance caused by the birth or the effect of the consistent lactation of the birth, should benefit from a gentler punishment regime in the event that she kills a child up to 12 months of age.

Like the situation in the UK, Canada regulates the offence of infanticide by establishing that the infant can be up to one year old. According to the Canadian Criminal Code, infanticide is causing the death of the newborn child by the mother who has not recovered from the effects of childbirth or lactation, penalising the offence with imprisonment of up to 5 years.

In Portugal, it is criminalized as a child murder the act of the mother who "kills the child during or shortly after birth and still being under the disruptive influence of the birth", penalty imposed being the prison sentence from 1 to 5 years¹⁰.

Also with a sentence of up to 5 years it is sanctioned in Russia as infanticide as an attenuated form of the crime of murder, "killing by the mother of her newborn child, during or immediately after his birth, or the killing by the mother of her newborn child in conditions of mental trauma or in a state of mental disorder that does not exclude responsibility"¹¹.

In Italy, "the mother who causes the death of her own newborn immediately after birth or of the foetus during childbirth, when the act is determined by conditions of material and moral abandonment during childbirth or immediately after birth" is criminalised as an attenuated variant of the crime of murder, being punishable by imprisonment from 4 to 12

[⁵] Beccaria, C. (1983). *An Essay on Crimes and Punishment*, fourth ed.. Pocket Library: Boston, pp. 75-79.

[⁶] Boroi, A. (1999). *Infrațiuni contra vieții*. All Beck: Bucharest, p.152.

[⁷] The Danish Penal Code (2001). Saint Petersburg Yuridichesky Center Press.

[⁸] Criminal Legislation of Norway (2003). Saint Petersburg Yuridichesky Center Press.

[⁹] Nicknamed The Infanticide Act, in force since 1938.

[¹⁰] Portuguese Criminal Code from 1995 (DL no. 48/95), updated on 21.02.2013.

[¹¹] Article 106 of the Criminal Code of the Russian Federation from 1996.

years¹². At the same time, a prison sentence of up to 21 years is provided for those "who compete in the act of the first paragraph", except in cases where "they acted solely for the purpose of supporting the mother", when the sentence will be reduced from one third to two thirds.

On the first of March 1994, France repeals Article 300, which criminalises infanticide as being the murder or the assassination of the newborn child, and now there are applied the provisions of Article 221-1 of the French Criminal Code adopted in 2004, which provide for a life sentence if it is committed a murder of a minor under the age of 15. It should be noted, however, that in many such cases, when the victims were newborn children and the acts were committed with diminished responsibility, the punishments imposed were more lenient.

A similar situation it is found in Spain and Germany, where the rules on the offence of infanticide have been repealed and the sanctioning of such acts is carried out in accordance with the provisions on the offence of murder.

4. Considerations regarding the incrimination of infanticide in Romania

In Romania, since 1864 the legislator criminalized infanticide¹³, stipulating in article 230 of the Criminal Code that for the murder committed by the mother on her newly born child the punishment was forced labor for life, and in article 332 para. (2), that reclusion was the punishment when the deed was committed on an illegitimate child.

In the Carol II Criminal Code¹⁴, infanticide was regulated in article 465 and established as punishment the heavy imprisonment from 3 to 5 years for the mother who was guilty of killing the natural child before the expiration of the term of declaration at the registry office.

In the previous Criminal Code¹⁵, infanticide was incidental to any mother being in a state of disorder caused by the physiological process of birth, who would have killed her baby immediately after birth, when drafting the regulation taking into account the fact that, since any mother benefits from the assistance of the state and society, a child born out of wedlock is no longer a burden for her¹⁶.

The crime of killing or injuring the newborn by the mother is an attenuated form of the crime of murder and is currently regulated as a separate crime in the text of article 200 of the Romanian Criminal Code, being part of Title I, Chapter III - Offences committed against a family member. "The distinct incrimination in the chapter regarding crimes against the family entails the existence of a complex legal object, materialized in the social relations regarding the bodily integrity and health of the person, respectively to the normal coexistence within the family"¹⁷. According to article 200 of the current Criminal Code, "(1) The killing of a newborn child immediately after birth, but not later than 24 hours, committed by the mother in a state of mental disorder shall be punished by imprisonment

[12] Article 578 of the Italian Criminal Code.

[13] The Romanian Criminal Code from 1864, republished in the Official Gazette no. 185 from October 22, 1912.

[14] The Criminal Code of Carol II of 1936, published in the Official Gazette no. 65 of March 18, 1936.

[15] Law no. 15/1968 Criminal Code of Romania, published in the Official Gazette no. 79-79 bis from June 29, 1968.

[16] New Criminal Code and Previous Criminal Code comparative presentation (1968). Political Publishing House: Bucharest, p.115.

[17] Iftimiei, A. (2014). Protecția penală a dreptului la integritate fizică și psihică în dreptul penal român și francez. Penal Law Review no. 2/2014, p. 128.

from one to 5 years. (2) If the facts provided in articles 193-195 are committed on the newborn child immediately after birth, but not later than 24 hours, by the mother in a state of mental disorder, the special limits of the punishment are one month and, respectively, 3 years”.

In the 1969 Criminal Code, the deed was criminalized under the generic name of "infanticide". The doctrine¹⁸ stated that the legislator should have maintained the marginal name of infanticide, especially since throughout the history of Romanian criminal law there is a tradition in this regard. In our opinion, the new name given to this crime is more appropriate given that the material element has expanded, including the manner of committing the offence by injuring the newborn.

In the previous criminal legislation the necessity to incriminate this deed in attenuated form was justified by the physiological and mental state of the mother, a condition affected by the birth process, and, given the existence in practice of many such cases, we consider it appropriate to maintain this regulation in a similar form including in the current version of the Criminal Code. In view of a multitude of socio-moral aspects, we agree that the injury of the newborn by the mother should be sanctioned in an attenuated form. Therefore, we consider it equally opportune to extend the area of incidence of this regulation, including on the acts of injury to the newborn by the mother in any of the ways provided in articles 193, 194 and 195 of the Criminal Code, with the application of a milder sanctioning regime.

5. Killing or injuring the newborn by the mother – a crime against life or against a family member?

Regarding the inclusion of this offence in a new group of incriminations, it has been stated in the doctrine that <<the systematization of crimes is done in relation to the “generic legal object” and, more precisely, either in relation to the classification of subjective rights or in relation to the division of the law into branches, meaning taking into account the nature of the protected obligations>>¹⁹, and that the legal object cannot constitute the quality of family member, as “it is neither a subjective right nor an obligation”²⁰, but only “a simple circumstance, which serves exclusively to individualize the punishment”²¹. It was also pointed out that, <<given that the offence called "Killing or injuring the newborn committed by the mother" was included in the group of offences committed against a family member, we have to claim that it has a complex legal object, meaning it provides protection, mainly, to specific obligations of family law and, only in the alternative, to non-patrimonial personal rights (right to life, right to bodily integrity and health) - which is not only false, but also completely unacceptable>>²². The author motivates her statement by stating that "this

[18] Antoniu, Ge. (2008). Observații cu privire la anteproiectul unui al doilea nou Cod penal (II). Penal Law Review no. 1/2008, pp. 11-12.

[19] Guiu, M. K. (2015). De la pruncucidere la uciderea ori vătămarea nou-născutului săvârșită de către mamă. Revista Universul Juridic no. 1/2015, p. 20.

[20] Guiu, M. K. (2015). De la pruncucidere la uciderea ori vătămarea nou-născutului săvârșită de către mamă. Revista Universul Juridic no. 1/2015, p. 20.

[21] Guiu, M. K. (2015). De la pruncucidere la uciderea ori vătămarea nou-născutului săvârșită de către mamă. Revista Universul Juridic no. 1/2015, p. 20.

[22] Guiu, M. K. (2015). De la pruncucidere la uciderea ori vătămarea nou-născutului săvârșită de către mamă. Revista Universul Juridic no. 1/2015, p. 21.

offence does not provide protection for any specific obligation of family law"²³ and that "the protection of the right to life is of exceptional importance and, therefore, ensuring this protection can not take a background, but must remain priority (because, in the absence of this protection, the recognition of any other subjective right would be useless)"²⁴. So far, we totally agree with the author. The author also points out that, since Title VIII, Chapter II of the Criminal Code regulates the group of offences committed against the family, "the occurrence of this second group of crimes (Title I, Chapter III) is not justified, which, at least at first sight, taking into account exclusively the name given to it ("Offences committed against a family member"), it seems to have an identical legal object, meaning it seems to ensure the protection of certain relations specific to family law"²⁵. The author also discusses the fact that this new group of offences creates difficulties in determining whether the commission of the act against a family member constitutes an aggravating circumstance or, on the contrary, a mitigating circumstance, since although "in the Explanatory Statement it is alleged that committing an offence through violence against a family member is a general aggravating factor"²⁶, the legislator increased the sanctioning regime only in the case of the offence of family violence (provided by article 199 of the Criminal Code), in case of killing or injuring the newborn by the mother providing some much gentler.

In our opinion, the intention of the legislator is clear, in the sense that he sought to incriminate crimes committed against a family member in an aggravated form, as it is natural. Moreover, the Explanatory Statement expressly states the following: "the committing of the offence by violence against a family member involves an aggravation in the case of all the offences for which this is justified"²⁷. Regarding the killing or injury of the newborn by the mother, the mitigating circumstance is not the quality of family member, but the mental state of disorder of the mother who went through the birth process. Therefore, in this case the aggravation of the sanctioning regime is not justified. Compared to the above, in order to avoid misinterpretations, we express the opinion that the legislator should have chosen another name for Chapter III of Title I of the Criminal Code, namely "Offences against life and bodily integrity or health committed against a family member".

6. Considerations regarding the new incrimination formula

Regarding the legal nature of this offence, there have been controversies in the doctrine, in the sense that it would constitute either an autonomous offence or an attenuated form of the crime of murder. According to Professor Dongoroz, the offence of infanticide is "essentially an act of murder, but subjected to a mitigated sanction." In addition, the new formula for criminalizing the offence of killing or injuring the newborn by the mother is in line with the legislator's specification in the Explanatory Statement to the draft Criminal

[²³] Guiu, M. K. (2015). De la pruncucidere la uciderea ori vătămarea nou-născutului săvârșită de către mamă. *Revista Universul Juridic* no. 1/2015, p. 21.

[²⁴] Guiu, M. K. (2015). De la pruncucidere la uciderea ori vătămarea nou-născutului săvârșită de către mamă. *Revista Universul Juridic* no. 1/2015, p. 21.

[²⁵] Guiu, M. K. (2015). De la pruncucidere la uciderea ori vătămarea nou-născutului săvârșită de către mamă. *Revista Universul Juridic* no. 1/2015, p. 21.

[²⁶] Guiu, M. K. (2015). De la pruncucidere la uciderea ori vătămarea nou-născutului săvârșită de către mamă. *Revista Universul Juridic* no. 1/2015, p. 22.

[²⁷] Explanatory Statement to the draft Criminal Code, p. 24, available on: <https://www.senat.ro/legis/PDF%5C2009%5C09L260EM.pdf>, accessed on 21.04.2021

Code, respectively the offences committed against a family member regulated in Title I, Chapter III "constitute nothing but aggravated or mitigated forms of offences against life or bodily integrity". We consider that it was necessary to clarify the legal nature of this offence, as it is relevant also for establishing the legal classification of the deed of those who intentionally determine or help the mother to commit the deed.

From the analysis of the text of the first paragraph, we notice that the legislator, although brings significant changes, still maintains the provisions of the offence of infanticide incriminated in the previous Criminal Code. An extremely gratifying aspect is the fact that "currently, compared to the previous text, infanticide has its source in any kind of disturbance that the mother may feel during the birth and immediately after, without making any difference regarding its nature (of the disorder). Along with this change, the new regulation returns to the introduction of an absolutely determined period in which the deed is considered infanticide, and not qualified murder: 24 hours from birth"²⁸.

Another element of novelty is the second paragraph, which incriminates in an attenuated form the acts of hitting and injuring the newborn in any of the ways provided in articles 193, 194 and 195 of the Criminal Code, by the mother in the same state of mental disorder, within a maximum limit of 24 hours from birth. Therefore, "the killing of the newborn child, under the same conditions as those set out above, but with praeterintention, is an attenuated form of the offence of death-causing blows"²⁹. Also, "thus extending the reasons for the disturbance, in the new context, infanticide, as well as the acts of hitting, bodily injury or death-causing blows committed on the newborn child also include situations of domestic violence, in which the victim is a minor"³⁰.

The attenuated variant does not extend to the acts committed out of culp. We emphasize that this extension of the area of incidence of the offence in question was not necessary either, since, as the Explanatory Statement shows, there is a tradition in our national law of correlating the state of birth disorder with spontaneous intent, in the sense that in the circumstance of committing the deed out of culp it will be incident the mitigating judicial circumstance provided by article 75 para. (2) letter b).

We consider auspicious the fact that, by introducing the second paragraph in the content of article 200 of the Criminal Code, the legislator has chosen to extend the legal object of this offence, including social relations regarding the physical integrity and health of the newborn, as a mother in a state of mental disorder due to childbirth can only cause injury to the newborn, not necessarily killing him. Failure to incriminate the injury to the newborn by the mother would have been a shortcoming of our criminal law which could have unfavorable consequences. In our opinion, it is unacceptable for a mother who killed her newborn child to be punished more gently than when it would have caused him injuries. Even if the current regulation also presents certain deficiencies, we consider that in its absence the very purpose of the criminal law would not be achieved.

[²⁸] Vlădilă, L. M. (2014). Implicațiile semnării Convenției privind prevenirea și combaterea violenței împotriva femeii și a violenței domestice asupra dreptului penal român și spaniol. *Penal Law Review* no. 3/2014, p. 158.

[²⁹] Vlădilă, L. M. (2014). Implicațiile semnării Convenției privind prevenirea și combaterea violenței împotriva femeii și a violenței domestice asupra dreptului penal român și spaniol. *Penal Law Review* no. 3/2014, pp. 158-159.

[³⁰] Vlădilă, L. M. (2014). Implicațiile semnării Convenției privind prevenirea și combaterea violenței împotriva femeii și a violenței domestice asupra dreptului penal român și spaniol. *Penal Law Review* no. 3/2014, p. 159.

The deed can be committed intentionally by an action (strangulation³¹, suffocation, burial, applying blows to the newborn in the head area with the intention of killing him, throwing from above, drowning, burning, poisoning, his exposure to adverse weather conditions), but also through inaction (refusal to feed the child). It should be noted that these actions are not strictly characteristic of the intended manner of committing the offence in question. Therefore, in practice it may happen that the death of the newborn occurs as a result of one of these actions, but involuntarily. In this circumstance, it is very difficult to establish the voluntary or, on the contrary, involuntary, accidental character of the action, for which the court could order either the acquittal or the legal classification of the deed in the crime of homicide out of culp.

The deed constitutes the offence of killing or injuring the newborn committed by the mother and if the act of killing took place within the period of 24 hours from birth, but the death of the child occurred after it³².

But it can happen that during the birth or immediately after, for medical reasons related to the birth process, the mother to be in a comatose state or unconsciousness, from which she recovers only after 24 hours, committing the deed in outside this legal period. In such a circumstance, the committed deed will take the form of murder (respectively, of the crime of family violence, provided by article 199 of the Penal Code), the mother no longer being able to benefit from the attenuated form provided by article 200 of the Criminal Code, which does not seem correct to us. Out of the desire to put an end to some controversies determined by the old regulation of the crime of infanticide, the romanian legislator decided to limit the incidence of this offence to the deeds committed within the strict term of 24 hours from birth, but, unfortunately, thus generated the risk of occurrence situations in which mothers in a state of mental disorder caused by birth do not benefit from the incidence of the provisions of article 200 Criminal Code.

In our opinion, regarding the sanctioning regime provided for in the manner in question in the first paragraph, the sentence of imprisonment from 2 to 7 years should have been maintained from the old regulation of the crime of infanticide, and in the presence of particularly serious circumstances, the legislature should have to provide for an even harsher regime of punishment.

We also consider it is necessary to introduce a new paragraph providing for the attempt to murder of the mother of the newborn to be punished when the child has suffered serious injuries to bodily integrity or health.

As the responsibility of a child lies with both biological parents, as well as with the protection of the child's life, we propose to incriminate the act of leaving the pregnant woman helpless in connection with the pregnancy and the birth of a child. In this regard, we express the view of the necessity to be applied a sentence of imprisonment of up to 2 years as a result of criminal prosecution of any man who does not give his pregnant woman, reasonable and necessary support regarding the pregnancy and birth of a child, and if the woman affected by a mental disorder caused by helplessness commits the act of killing or

[³¹] High Court of Cassation and Justice. Criminal section. Decision no.892 / 2014 of March 24, 2014. File no.6668 / 109/2011. available on: <https://legeaz.net/spete-penal-iccj-2014/decizia-892-2014>, accessed on 21.04.2021.

[³²] To see in this regard, Boroi, A. (2011). Drept penal. Partea Specială: conform Noului Cod penal. C.H. Beck: Bucharest, p.86.

injuring the newborn, the punishment applicable to that man shall be imprisonment for up to 3 years³³.

The immediate consequence of this crime consists in the death or injury of the newborn child, a consequence that can occur immediately after committing the action or inaction that constitutes the material element of the incrimination in question or later, as the legislator does not distinguish.

The causal connection between the mother's action or inaction and the result produced is relevant and must exist; more precisely, the result must certainly be a consequence of the mother's action. At the same time, the causal connection must also exist linked with the mother's state of mental disorder³⁴.

The form of guilt can be direct intention, indirect intention or *praeterintention*. If the facts described in article 200 of the Criminal Code are committed out of culp, the legal classification of the deed will be murder out of or bodily injury out of culp, and in the circumstance in which the deeds are the consequence of a premeditation, the classification will be made in the provisions of article 199 of the Penal Code, which criminalizes family violence.

7. Considerations regarding the subjects of the offence

The active subject of this offence is qualified and unique, namely the mother, who at the time of the crime is affected by a state of mental disorder. It doesn't matter if the mother is married or not.

Since the law does not distinguish between a biological mother and a surrogate mother, we consider it is irrelevant for the incidence of the offence whether the active subject is the biological mother or a surrogate mother. We must emphasize, however, that although any of them going through the process of birth may be affected by a state of mental or physical disorder, the surrogate mother has no genetic or legal connection with the child she gives birth to. This aspect could generate certain difficulties in the application of the law, reason for which we consider that the intervention of the legislator would be necessary in the sense of expressly specifying that the active subject can be the biological mother or a surrogate mother.

Another issue raised by the extension of the significance of the state of mental disorder from that related to birth to any other state of mental disorder, could be the legal framework of the act of a biological mother to kill her newborn child, whom a surrogate mother gave birth to that child.

The mother who has not reached the age of 14 will not be able to be criminally liable for the crime of killing or injuring the newborn.

The passive subject is also qualified, in the person of the newborn baby. The condition for the existence of the offence is that he to be born alive, being irrelevant his health or viability or if the umbilical cord was cut or the placenta was removed.

Thus, following the scientific-medical research, the beginning of the extrauterine life will be established according to the particularities of the birth process and will be recorded

[³³] A number of provisions similar to those proposed by us are also contained in the Criminal Code of Norway, which also provides (in art. 241) and that the man who is aware that the woman pregnant by him intends to commit an act likely to endanger the life of the child, if he does not take action to prevent that act, may be punished with imprisonment for up to 3 or 4 years (if the act results in the death of the child).

[³⁴] Dobrinoiu, V., Neagu N. (2014). Drept penal. Partea Specială. Universul Juridic: Bucharest, p.77.

in a report of forensic expertise, a report which the court will have to take it into account in order to resolve the case.

The crime of infanticide also persists in the circumstance in which the newborn killed immediately after birth, even if he had not been killed, would have lived a short period of time, limited to only a few hours.

Regarding the phrase „immediately after birth”, in medicine it is stated that birth is the physiological act by which the viable fetus is expelled or extracted naturally³⁵.

Criteria that show that the newborn was born alive include the installation of extrauterine respiration (observed by macroscopic, microscopic and hydrostatic study of the lungs) and the entry of air into the middle ear and digestive tract (observed by macroscopic and hydrostatic study of the stomach and intestines).

The quality of the child's newborn can be established by forensic expertise, following the examination of the body at the place of the deed. In the first 24 hours after birth, the baby may still show signs of intrauterine life and birth, such as blood on the body, traces of meconium³⁶ or white-yellow organic substance, a fresh portion of the umbilical cord, tumors at birth. It should be noted, however, that these signs can be maintained for a period of up to 7-10 days after birth, which makes it quite difficult to establish with certainty whether the killing took place in the first 24 hours after birth. We also emphasize that, from a medical point of view, the maximum duration in which a child can be considered a newborn cannot exceed 10-14 days³⁷.

Analyzing comparatively the formula of incrimination of killing or injuring the newborn by the mother in the 4 codes that have followed one another since 1864, we find, regarding the period in which the deed committed could be considered infanticide, that the most appropriate form is the one used by the legislator of the Criminal Code Carol II, the others generating a whole series of controversies. According to the Criminal Code of 1936, the term of declaration at the registry office was considered the maximum term in which the act of the mother to kill her newborn child could be included in the crime of infanticide. In accordance with current legal provisions, this period is 15 days.

Assuming that there is a plurality of victims, in the sense that the mother would have given birth to twins, triplets, quadruplets, there will be a real contest of offences. Therefore, in such cases, there can be no question of committing an offence in a continuous form, nor can it be a simple offence in the form of natural unity.

8. Considerations regarding the mental state of the mother

For the existence of the offence of killing or injuring the newborn committed by the mother within 24 hours after birth, it is essential, as we have shown before, that the mother to be in a state of mental disorder.

Under the rule of the old regulation of the offence of infanticide, in a decision³⁸, the Iași Court of Appeal held that “it is not necessary to change the legal classification of the deed in

[³⁵] Medical Dictionary, vol. II (1969). Medical Publishing House: Bucharest, p. 49, quoted by Dungan, P., Medeanu, T., Pașca, V. (2010). Manual de drept penal. Partea specială, vol. I. Universul Juridic: Bucharest, p. 115.

[³⁶] Substance eliminated immediately after birth by the newborn in the form of excrement.

[³⁷] To see in this regard, Basarb, M., Pașca, V., Mateuț, Gh., Butiuc, C. și alții. *Codul penal comentat*. Hamangiu: Bucharest, p. 126.

[³⁸] Iași Court of Appeal, Criminal Decision no. 234 of June 24, 2004, File no. 1447/2004..

the offence of infanticide, as the defendant's state of disorder was not determined by the process of birth, as it is required by the provisions of article 177 of Penal Code³⁹. However, the Court of Appeal considered that it is necessary to recognize personal mitigating circumstances in favor of the defendant, with the consequence of reducing the sentence, compared to her personal data and the circumstances of committing the deed". Also, "the High Court considers that undoubtedly any mother, inexperienced, primiparous, affected by an insufficient educational framework, feels a strong disturbance, at the moment after the birth of a child, considered illegitimate. However, the difference between the offence of aggravated murder and infanticide is not given by the emotional aspect in which the perpetrator finds himself, but by an abnormal psychological state produced during birth and determined by the fact of birth, scientifically certified by a specialized forensic examination. So, the state of disorder referred to in article 177 of the Penal Code, regarding the offence of infanticide, is due to labor of childbirth, meaning the physical act of giving birth and not a general fear, determined by educational deficiencies or adjacent circumstances to the physiological process of birth, that lead to the idea of hiding a natural act appreciated as being illicit. Conflict states prior to and extrinsic to the birth, such as fear of parental reaction or disapproval of others, which may have influenced the psyche of the defendant, are only motives for the act, having no legal significance of birth disorders, so as it is required by the provisions of article 177 of the Penal Code. Or, in this case, on the basis of a forensic examination it was established with certainty that the defendant did not present postpartum mental disorders, and the imputed deed was committed with discernment (psychiatric expertise report no. 352 / PSH of April 1, 2003)"⁴⁰.

In the context of the current Criminal Code, we find it interesting that the Romanian legislator has expressly regulated in an attenuated form the killing or injuring of the newborn by the mother only in the first 24 hours after birth, but also when the act is committed due to a mental disorder of any kind, not just birth disorders, as in the previous Criminal Code. Therefore, on the one hand, it limits the period in which the mother can commit the deed in order to be subject to the provisions of article 200 of the Penal Code, and on the other hand, extends the nature of birth disorders to disorders of any nature. And this in the conditions in which, often, such disorders appear only after the first 24 hours after birth. We also emphasize the fact that the judicial practice has proved that many times the consequences of this condition were not only medical, respectively abnormal psychophysiological states that can sometimes occur as a result of the birth process, in connection with the birth, but especially by socio-economic states (for example: the father's refusal to recognize his child, the mother's parents' disgrace, dishonor, loss of work, school expulsion, fear of parents especially if the mother is a minor, in some social environments fear of homelessness in case of expulsion by parents or partner, mockery of those close to the mother, social marginalization of the mother, precarious financial situation, mother's hatred of a pregnancy resulting from rape or incest, a pregnancy which, for various reasons, does not she was able to discontinue it on time, legally and medically, although she would have liked to have done so). We believe that when assessing the state of mental disorder, the degree of mental maturity of the mother must be taken into account, because there are many cases when young women aged 12-14 even end up giving birth to children, which then they

[³⁹] It is about of the previous Criminal Code.

[⁴⁰] High Court of Cassation and Justice. Decision no. 4956/2004 of October 4, 2004, File no. 4425/2004, available on: <https://legeaz.net/spete-penal-iccj-2004/decizia-4956-2004>, accessed on 24.04.2021.

kill immediately after birth. We consider that the legislator has extended the scope of mental disorders related to birth to any disorders that involve diminishing discernment, as negative socio-economic aspects, not to be ignored, on the background of special psycho-affective state inherent in the birth process, can generate or amplify, when a fund already exists, the mother's mental disorder with the consequence of killing her newborn baby.

The mother's state of mental disorder does not imply the inability to be aware of the reality or of the consequences of her deeds, but only the diminishing of the discernment, somewhat its limitation. On the other hand, the diminishing of discernment due to the state of mental disorder does not equate to its lack. Therefore, diminished discernment should not be extended to irresponsibility, because it would arise in the situation in which the active subject of the offence of killing or injuring the newborn by the mother, could only be an irresponsible person. Since irresponsibility is a cause of non imputability, we would be in the absurd circumstance that this offence would be the only one in the entire Criminal Code, which would punish an act when there is no guilt.

"This state of disorder that characterizes the subjective behavior of the active subject of the offence of infanticide is the defining element that marks the distinction between infanticide and the crime of murder"⁴¹ and its existence must be proven at the time of killing the newborn child.

"Some courts consider that a mother who kills her child immediately after birth is presumed to be in a state of mental disorder"⁴², and others consider that this must be proven by forensic expertise to attest the existence of diminished discernment at the time of committing the deed. However, there are also situations in practice when the forensic report could not establish exactly what was the mental state of the mother at the time of the crime, the court finding that "most likely, the defendant had much diminished discernment"⁴³.

As far as we are concerned, we believe that the correct solution would be for the state of mental disorder to be retained only when the court assesses its existence in relation to the circumstances of the crime and only after conducting a forensic examination in this regard. In support of our opinion, we recall a decision⁴⁴ in which the supreme court ruled that "The operation of individualization of punishment is the exclusive attribute of the judge who, perceiving through his own senses the perpetrator's attitude towards the crime committed and its consequences, is able to assess the extent of the society retaliation. To mechanically apply the factual and legal elements retained by the indictment would mean emptying the content of the judicial investigation activity, transforming the magistrate into an executor. Or, according to the Constitution and criminal law, the role of the courts is completely different, namely to decide, in the spirit and letter of the law, whether or not there is guilt,

[⁴¹] High Court of Cassation and Justice, Criminal Section, Decision no. 892/2014 of March 24, 2014, File no. 6668/109/2011, available on: <https://legeaz.net/spete-penal-iccj-2014/decizia-892-2014>, accessed on 21.04.2021.

[⁴²] Suceava Court of Appeal, criminal decision no. 239/2003. Law Review no. 6/2004, pp. 211-212, quoted by Guiu, M. K. (2015). De la pruncucidere la uciderea ori vătămarea nou-născutului săvârșită de către mamă. *Revista Universul Juridic* no. 1/2015, p. 24.

[⁴³] See in this regard, Marghita Court, Criminal sentence no. 116/2020 of September 30, 2020, available on: <https://sintact.ro/#/jurisprudence/534609301/1/decizie-nr-116-2020-din-30-sept-2020-judecatoria-marghita-uciderea-ori-vatamarea-nou-nascutului...?keyword=Uciderea%20sau%20vatamarea%20nou%20nascutului&cm=SREST>, accessed on 15.04.2021.

[⁴⁴] High Court of Cassation and Justice. Decision no. 4956/2004 of October 4, 2004, File no. 4425/2004, available on: <https://legeaz.net/spete-penal-iccj-2004/decizia-4956-2004>, accessed on 24.04.2021.

the degree of social danger of the deed and the need for a longer or shorter re-educational process for the resocialization of the offender". At the same time, we emphasize that the mental disorder must be taken into account by the court, including on the basis of medical evaluations, being irrelevant if this condition continued even after exceeding the 24-hour period.

On the background of the subordination of the decision pronounced by the court by the results of the medical expertise and given the above, we can not help but wonder how beneficial is the interference of medicine in the criminal justice process, what limits should be kept and if this interference is not to generate in the court decision errors with the most negative consequences. However, we believe that the interference of medicine is necessary in the process of administering justice, which is why we subscribe to the opinion expressed by Professor Dongoroz, in the sense that medicine has the task "to determine whether, how and when these disorders occur, the existence, intensity and their duration, but once established it is the role of criminal law to retain and give legal effects due to such situations"⁴⁵.

Given the above, we believe that the legislator should have defined in the current Criminal Code the notion of mental disorder, because in practice there is no unitary interpretation of it, which may lead to uneven application of the law. Although this is not desirable, the legal classification of the deed in the crime of murder or in the crime of killing or injuring the newborn committed by the mother is often dependent especially on the result of medical investigations; and this is because the state of mental disorder is established by forensic expertise. In connection with the issue under discussion, it should be emphasized that in the medical literature it is appreciated that postpartum and lactation psychoses are characterized by lack of discernment, which in criminal cases would have the effect of removing criminal liability. On the other hand, in the legal literature, it is considered that these mental states are only likely to diminish discernment. Therefore, we believe that the legal definition of this notion is appropriate and necessary to ensure that the needs of society in the field of ensuring the effective protection of the child's right to life are met. Given the fact that in medical science this phrase can have many meanings, as well as its different interpretation by established authors in criminal law, we propose by law *ferenda* the intervention of the legislator in the sense of defining the notion we are talking about.

We must not deny the fact that there is a possibility that the mother has the intention to kill her newborn child during pregnancy, and this intention to be determined by the same reasons that determined her state of mental disorder after birth. In such a situation, if it is proved that the intention of the mother who killed her newborn child immediately after birth was not a spontaneous intention, determined by a state of disorder, but the mother enforced a decision taken before this time, then the deed does not constitute the offence of infanticide, and will be classified as a crime of murder (more precisely, family violence under the incidence of mitigating circumstances). The defendant's act of concealing the pregnancy and taking measures to ensure that the birth takes place in conditions unsuitable for keeping the newborn child alive, conditions in which he died shortly after birth,

[⁴⁵] Dongoroz, V. (1972). *Pruncucidera*, in Dongoroz, V., Kahane, S., Oancea, I., Fodor, I., Iliescu, N., Bulai, C., Stănoiu, R., Roșca, V. (1972). *Explicații teoretice ale Codului penal român*, vol. III, partea specială. Editura Republicii Socialiste România: Bucharest, p. 204.

subjectively seeing the intention to kill the infant meets the elements of the crime of aggravated murder, and not those of the crime of infanticide⁴⁶.

9. Considerations regarding the attempt to the offence of killing or injuring the newborn by the mother

We subscribe to the opinion expressed in the doctrine according to which “killing or injuring the newborn committed by the mother being a material offence, which has the immediate consequence the producing of a result, is susceptible to unfolding in time and, therefore, to perform imperfect forms: preparatory acts (preparers) and attempt”⁴⁷. Therefore, although possible, they remain outside the scope of incrimination, but acquire relevance in the field of criminal liability when the mother in a state of mental disorder commits the murder or injury of the newborn, and the result occurs, being absorbed in the content of the offence incriminated by article 200 of the Criminal Code⁴⁸.

Analyzing a decision⁴⁹ of the High Court of Cassation and Justice, we note that the supreme court also admits in a decision the existence of an attempt to the offence of infanticide, but, at the same time, emphasizes the impossibility of prosecuting it. Thus, the High Court ruled as follows: “The murder of the newborn child, committed immediately after birth, by the mother who was in a state of mental disorder caused by birth, found on the basis of a forensic examination, meets the constituent elements of the offence of infanticide provided in article 177 of Penal Code. If the mother’s act of killing in such a state did not produce its effect, the newborn child being saved, the solution to acquit her is legal, as the attempt at the crime of infanticide is not incriminated”⁵⁰.

In view of the above, in the context of current criminal law, in our opinion, if the mother has fully carried out the activity of suppressing the life of the newborn, but the result, namely the death of the child, did not occur for reasons independent of the mother's will, then the legal classification of the deed in the provisions of article 200 para. (2) of the Criminal Code can be made only if the mother acted with the intention of injuring the newborn, not of killing him. Since even now the attempt to kill the newborn by the mother is not incriminated, we consider that the solution is to acquit the mother, but at the same time we express our disagreement with the decision of the legislator of the current Criminal Code to leave the attempt in outside the sphere of incrimination. Both in the previous legislation and in the current Criminal Code, the legislator did not motivate in any way the lack of incrimination of the attempt to the offence of infanticide. In one opinion⁵¹ it was stated that the legislator “took into account the best interests of the child, the fact that the trial and conviction are likely to further alienate the mother from the child, increasing her feelings of hatred towards him, while the child, being very fragile and injured, he would absolutely need his mother's care”.

[⁴⁶] Supreme Court, criminal section, Decision no. 2067 / 04.11.1977, in Repertoire 1976-1980, p. 282.

[⁴⁷] To see in this regard, Boroï, A. (2011). Drept penal. Partea Specială: conform Noului Cod penal. C.H. Beck: Bucharest, p.88.

[⁴⁸] To see in this regard, Boroï, A. (2011). Drept penal. Partea Specială: conform Noului Cod penal. C.H. Beck: Bucharest, p.88.

[⁴⁹] To see in this regard High Court of Cassation and Justice. Criminal Section, decision no. 1948 from March 22, 2005.

[⁵⁰] High Court of Cassation and Justice. Criminal Section, decision no. 1948 from March 22, 2005.

[⁵¹] Guiu, M. K. (2015). De la pruncucidere la uciderea ori vătămarea nou-născutului săvârșită de către mamă. Revista Universul Juridic no. 1/2015, p. 23.

In our opinion, the decision of the legislator in order not to incriminate the attempt to an offence of murder (killing the newborn child) remains incomprehensible, especially because the legislator punishes the perpetrator for the attempt to the offence of bodily injury (when the deed was committed for the purpose of producing an infirmity, serious or permanent aesthetic damage or traumatic injury or damage to health). In addition, carefully analyzing the second normative modality of article 200, we can say that the material element consists in execution acts specific to the attempted murder, which it distinguishes them from murder being only the intention with which the perpetrator acted. In a decision⁵² it was stated that “the distinction between a crime of attempted murder and a crime against bodily integrity or health is represented by the defendant's mental attitude towards the result produced as a consequence of the criminal action carried out. Characteristic of the intention is the prediction by the perpetrator of the result of his deed, the mental representation of the result of the deed. The perpetrator acts intentionally not only when the prediction of the result is the very purpose of his action, but also when the production of the result is seen as a necessary or accompanying means of the desired result. Consequently, the indirect intention exists when the perpetrator who foresees the socially dangerous result of his deed, although he does not pursue the production of that result, commits the deed accepting the eventuality of its production. (...) Thus, in the case of the crime of attempted murder, the defendant pursues or accepts, as a result of his action, the possibility of the death of a person, a result that does not occur independently of his will, but in the case of a crime against bodily integrity or health of the person, the defendant pursues or accepts only the injury of the bodily integrity or health of a person as a result of his criminal action”.

We could try to solve the problem of the lack of sanctioning the attempt by applying the provisions of par. 2 of article 200 of the Penal Code, but, following the logical reasoning contained in the decision of the Galati Court of Appeal previously set forth, since the actions that form the material element of the second normative modality of the offence provided by article 200 of the Penal Code are incriminated only if the mother's intention is not to kill, they can never be assimilated or interpreted as an attempt to kill the newborn.

We emphasize once again that these actions are sanctioned when the perpetrator acts with *praeterintention*, but remain unpunished in the most serious situation, respectively when they are committed with the intent to kill, which is unacceptable. Therefore, although it is not desirable, the attempt to kill the newborn in the first 24 hours after birth by the mother in a state of mental disorder cannot be punished, perpetuating the lacunar situation in the previous Criminal Code.

10. Considerations regarding criminal participation

The doctrine has established that persons who determine, facilitate or help the mother in a state of disorder caused by birth to perform the activity of killing the newborn will be punished for instigation or complicity (as appropriate) in the crime of murder, regardless of whether they knew or did not know that the mother was affected by the disorder caused by the birth⁵³.

On the other hand, it was considered that, on the contrary, the correct solution would be the legal classification in instigation or complicity (as the case may be) in the offence of

[⁵²] Galati Court of Appeal, Criminal decision no. 1223 / A / 05.12.2018.

[⁵³] To see Pașca, V., Mateuț, Ghe., Butiuc, C. (2007). *Codul penal comentat*. Hamangiu: Bucharest, p. 123.

infanticide, the argument being that the acts of accomplices or instigators must be framed in relation to the act committed by the perpetrator, the circumstances of the offence being reflected also on the participants insofar as they were known or predicted⁵⁴. In this respect, even the judicial practice is uneven⁵⁵.

And yet, the reason for this incrimination is to protect the mother who, in a state of mental disorder, kills her newborn baby in the first 24 hours after birth. In the absence of the state of mental disorder, her deed will no longer fall within the provisions of article 200 of the Criminal Code, but in those of article 199 of the Criminal Code. We specify that article 199 of the Criminal Code criminalizes family violence and absorbs in its content the crime of murder, being practically an aggravated form of it. In the case of accomplices or instigators, the problem of the state of mental disorder caused by birth cannot be discussed. Consequently, we consider it is appropriate that the legal classification of the deeds committed by them to be done for acts of complicity or instigation (as the case may be) to the crime of family violence (if the accomplice / instigator is a family member) or to the crime of murder, and not to the crime of killing or injuring the newborn, following that only the mother will be responsible for committing the crime provided by article 200 of the Criminal Code. In support of our opinion, we recall a decision of the supreme court⁵⁶ according to which the mother will be sanctioned for committing the offence of infanticide (article 177 of the previous Penal Code), and the other participants will respond according to the provisions of article 175 letters c) and d) of the Criminal Code of 1969. We subscribe to the opinion expressed in the doctrine that it would be indicated that "the legislator, following the example of the Italian legislator, explicitly provide for the situation of participants in the crime of killing a newborn child"⁵⁷. At the same time, we believe that when the mother, who is in a state of mental disorder, is the one who intentionally determines or helps another person to kill her newborn child immediately after birth, it would be natural for her to be responsible for acts of complicity or instigation (as the case may be) to the offence incriminated by article 200 of Criminal Code. Professor Dongoroz, in reference to article 465 of the Criminal Code Carol II expressed the following: "We believe that the mother also benefits in this case from the excuse that justifies the lesser punishment provided in the article 465, because this excuse is based on a psycho-physiological state that is identical in the case of killing with one's own hand and in the case of instigation"⁵⁸.

Assuming that there are strong indications that a male person who is an accomplice or instigator of the activity of killing or injuring the newborn by the mother in a state of mental disorder or who intentionally commits the deed (when the mother in a state of mental disorder has the quality of accomplice or instigator), is the biological father of the newborn baby, but cannot be considered a family member within the meaning of article 177 of the Penal Code, we propose that the court to oblige him to perform the paternity test, as the

[⁵⁴] To see Pașca, V., Mateuț, Ghe., Butiuc, C. (2007). *Codul penal comentat*. Hamangiu: Bucharest, p. 123.

[⁵⁵] To see in this regard, Boroi, A. (2011). *Drept penal. Partea Specială: conform Noului Cod penal*. C.H. Beck: Bucharest, p.85.

[⁵⁶] The decision of guiding The Supreme Court, Guiding decision no. 2/1976.

[⁵⁷] Ioniță, Ghe.I. (2014). *Uciderea copilului nou-născut de către mamă. Aspecte juridico-penale și medico-legale*. Penal Law Review no. 1/2014, p. 82.

[⁵⁸] Dongoroz, V. (1937). *Comentare (Pruncucidere)*, in *Codul penal Carol II vol. III*, annotated by Rătescu, C.G., Aznavorian, H., Ionescu-Dolj, I., Pop, T., Periețeanu, I.G., Papadopolu, M.I., Dongoroz, V., Pavelescu, N. (1937). Editura Librăriei SOCEC & Co., S.A.: Bucharest, p. 44.

quality of family member is a circumstance likely to contribute to the individualization of the punishment.

11. Conclusions

From those analyzed in this study, we find that it is often very difficult to achieve a correct legal classification of the act of killing or injuring the newborn by the mother, either because of the way the legal text is formulated, or because of the circumstances of the case. But this does not justify giving up criminalizing the offence in question and holding irresponsibly, because the purpose of criminal law would no longer be achieved. We also believe that for a mother in a state of mental disorder who kills her newborn child immediately after birth, the sanction for committing murder with the application of only mitigating judicial circumstances is far too harsh, especially since, after committing such an act it is difficult to assume that she would repeat such an experience.

Given that this crime is still quite widespread and that the legal text requires, as we have shown throughout the paper, a number of amendments and completions, we hope that the opinions and proposals of the law *ferenda* formulated to contribute to improving the quality of legislation in such a sensitive area as it is killing or injuring the newborn baby by the mother.

CRIMINAL AND CRIMINOLOGICAL ASPECTS OF INCEST

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Abstract

Through this paper we propose an analysis of the crime of incest, as it is currently regulated in the Romanian Criminal Code by comparison with the old regulation, highlighting certain relevant aspects of this crime, as well as problems that may arise in the interpretation and application of the incest incrimination rule.

As we know, the crime of incest has generated several discussions in the literature. Divergent views focused both on how to regulate this crime and on the idea of decriminalizing consensual incest. Last but not least, given the evolution over time of the norm of incrimination of incest, it seems that the legislator was not very clear about the social value protected by this crime. In this regard, we recall that in the draft of the new Criminal Code, incest was no longer provided as an independent crime, it being considered that it is sufficient to incriminate the incest committed by coercion or by making the victim unable to defend himself or to express his will or taking advantage of this state, as an aggravated variant of the crime of rape. Eventually, the current Criminal Code came out of the parliamentary procedure, keeping the crime of incest in crimes against the family, but with certain modifications compared to the old Criminal Code, in the sense of restricting the scope of this crime only in the case of consensual sexual intercourse and reducing the limits of punishment. Also, although the Explanatory Memorandum of the new Criminal Code states that this crime protects the morality of family relationships, we note that the legislator included in the rule of incrimination only sexual intercourse, excluding oral sex or anal intercourse – vaginal or anal penetration or any other acts of a sexual nature, as alternative normative ways of accomplishing the material element of this crime.

Keywords: *incest, sexual intercourse, direct relatives, crime against family, brothers and sisters*

1 History of incest regulation

Sexual relations between direct relatives or between brothers and sisters have been considered antisocial acts and have been severely punished since ancient times. Thus, in the Hammurabi Code, drafted in the seventeenth century BC. During the Babylonian king Hammurabi the Great, capital punishment was provided for incest. In feudalism, incest was assigned the capital punishment, being considered a very serious deed.

Regarding the Romanian territories, we mention the "Cartea Românească de Învățătură" ("Romanian Book of Learning"), also called "Pravila lui Vasile Lupu" (Vasile Lupu's Code"), printed in 1646 in Moldova by the logothete Eustache at the order of Vasile Lupu, in which incest was considered "*a sin and a mistake worse and more terrible than adultery*"[1]. At the same time, in Wallachia is printed in 1652 the work "Îndreptarul legii" ("Correcting the law"), also known as "Pravila lui Matei Basarab" („Matei Basarab's Code"), in which it was shown that "*mixed blood is a sin and a mistake worse and more terrible than adultery*"[2].

The first Romanian Criminal Code, adopted in 1865 during the reign of Alexandru Ioan Cuza, did not criminalize incest. This omission is mainly due to the fact that the first Romanian Penal Code had as its module the French Penal Code of 1810 (Napoleon Code). We can say that the next Romanian Criminal Code, published in 1936, also known as the Carol II Criminal Code, is the first Romanian normative act that criminalized incest. Thus, according to Article 447 of this Criminal Code, *"sexual intercourse or sexual inversion between relatives in a direct line, as well as between siblings, constitutes the crime of incest and is punishable by correctional imprisonment from one to 3 years. A minor under the age of 15, seduced by an adult, is not punished. The criminal action can be initiated only with the prior complaint of a first degree ascendant or collateral. The punishment pronounced against the father and mother also attracts the loss of guardianship"*. The crime was provided for in Chapter I with the marginal name *Bigamy, incest and adultery*, in Title XII, which had the marginal name *Torts against the family*.

As can be seen, incest was included in the category of crimes, the Criminal Code of 1936 using the tripartite classification of illegal acts in crimes, torts and misdemeanors. We remind you that both the Romanian Criminal Code of 1865 and the Romanian Criminal Code of 1936 took over this Trinitarian division of crime; which was first retained by the Criminal Code of the French Revolution (known as "Codul lui brumar" year IV) and which was later taken over by the Criminal Code of 1810 (Napoleon Code) [3]. According to this classification of crime, the most serious crimes were considered crimes, while the category of torts included the vast majority of crimes and the category of contraventions included less serious crimes. We note that, according to this Criminal Code, incest protected the morality of sexual relations within the family, being considered a crime against the family.

The Socialist Criminal Code of 1968, which entered into force in 1969, regulated the crime of incest in Article 203, in the chapter on crimes against sexual life. According to this Criminal Code, incest protected the freedom and integrity of sexual life, sexual intercourse between direct relatives or between siblings being punishable by 2 to 7 years.

2 Some aspects of the relationship between incest and rape and sexual intercourse with a minor in the old regulation

As can be seen, in all regulations criminalizing incest, as such, including the 1968 Criminal Code, the act was considered a crime both if it was committed with the consent of the parties involved as well as the case in which the consent of one of the parties was lacking.

In these circumstances, there was the issue of the relationship between the crime of incest, on the one hand, and statutory rape if the act was committed without the consent of one of the parties; or the crime of sexual intercourse with a minor if the act was committed with the consent of the participant who has not reached the age of 15, on the other hand.

In the case of the crime of sexual intercourse with a minor, the relationship of this crime with incest did not raise real problems, retaining an ideal concurrence of offences. Such a solution was obvious from a legal point of view, given that an absorption of consensual incest by the crime of sexual intercourse with a minor would have meant that in the case of the second offense we would retain either a legal complexity of offenses, as a form of the legal unit of offenses, or a natural complexity of offenses.

Thus, for the hypothesis of the legal complexity of the crime, the crime of sexual intercourse with a minor should have included in its content, either as a constitutive element

or as an aggravating circumstantial element, the content of the offense of incest. However, the offense of sexual intercourse with a minor regulated by Article 198 of the Criminal Code of 1968 did not include, either in the standard version or in the aggravated variants, the circumstance of committing the act between siblings or direct relatives not even providing for the situation in which the deed could have been committed on a family member.

As regards the hypothesis of natural absorption, this could not be accepted, given that the commission of the crime of sexual intercourse with a minor does not naturally involve, by the manner in which it was committed, the meeting of the constituent elements of the crime of incest.

The real problem that appeared in the jurisprudence prior to the current Criminal Code was that of the relationship between the crime of incest and the crime of rape. This is because the offense of rape provided for in Article 197 (2) b¹) the aggravated variant consisting in the rape committed on a family member. According to Article 149¹ of the 1968 Criminal Code, *family member means the spouse or close relative if the latter lives and manages the household with the perpetrator*.

Starting from the definition given to family members in the Criminal Code, part of the doctrine and jurisprudence has shown that the passive subject of the crime of incest is included in the passive subject of the crime of rape in the aggravated version provided by Article 197 (2) b¹) of the 1968 Criminal Code, for which reason it is necessary to conclude the absorption of the offense of incest in the aggravated variant of the offense of rape provided for in Article 197 (2) b¹) of the Criminal Code [4].

In another opinion, also supported both in doctrine[5] as well as in jurisprudence [6], it has been shown that the thesis of incest absorption in the aggravated version of the crime of rape cannot be accepted. It has been pointed out that this solution cannot be accepted in view of the fact that the circumstantial element of the aggravated variant of the offense of rape provided for in Article 197 (2) b¹) of the Criminal Code is not identical with the content of the crime of incest, therefore the absorption of incest cannot be retained in this aggravated variant of rape seen as a form of legal unity of crime. At the same time, we are not in the situation of a natural absorption of incest in the aggravated version of the crime of rape.

Considering the contradictory solutions in the practice of the courts, the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice declared an appeal in the interest of the law on the legal classification of the facts which, in relation to their concrete content, meet both the constituent elements of the crime of rape as well as those of the crime of incest. The prosecutor's office argued that it is necessary to have sexual intercourse with a person of the opposite sex, a family member, with whom the perpetrator is a direct relative or sibling, committed by coercing them or taking advantage of their inability to defend themselves or to express their will to be included in both the rape offense provided for in Article 197 1 and 2 b¹) of the Criminal Code, as well as in the incest offense provided for in Article 203 of the same code, in concurrence.

The Supreme Court allowed the appeal in the interest of the law and established that sexual intercourse with a person of the opposite sex, who is a direct relative or sibling by coercing them or taking advantage of their impossibility to defend themselves or to express their will, constitutes both the offense of rape provided for in Article 197 (1) of the Criminal Code and (2) b¹) of the same article (if the victim lives and manages a household with the

perpetrator), as well as the crime of incest provided for in Article 203 of the Criminal Code, in ideal concurrent offenses[7].

In giving reasons for its decision, the Supreme Court recalled the provisions of Article 33 (b) of the 1968 Criminal Code, according to which the ideal concurrence of offenses was retained *when an action or inaction, committed by the same person, due to the circumstances in which it took place and the consequences it produced, meets the elements of several offenses*. Therefore, the Supreme Court states that, if incest is considered to be absorbed by the aggravated form of rape provided for in Article 197 (2) b¹) of the Criminal Code, then the provision of Article 33 b) of the Criminal Code, on the ideal concurrence of offences would be rendered ineffective, which would be contrary to the overall regulation of the competition of crimes in the Romanian criminal law system.

We consider it important to add that this conclusion of the Supreme Court is necessary in particular in view of the broader definition given by the criminal law to the phrase *family member*, which does include *in-line relatives, siblings*, but is not limited to them. Thus, if the passive subject of the crime of incest would have included any person who falls within the scope of the phrase family member, we would have been in the presence of the inclusion of incest in the aggravated version of the crime of rape, in which case indeed incest would have been absorbed by this aggravated version of rape.

3 The context of the adoption of the current form of the incest incrimination norm

In the Draft of the new Criminal Code originally sent for approval to the Parliament, the incrimination of incest as a separate crime had been abandoned. In the conception of this draft, a distinction was made first of all between non-consensual incest (also called aggressive) and consensual (or non-aggressive) incest. The incest without consent was also considered sexual intercourse with a minor, given the immaturity of the victim and the position of inferiority in which the victims find themselves in relation to the perpetrator, even if they consent to sexual intercourse. At the same time, the draft law extended the scope of criminal protection of these persons, by criminalizing not only sexual intercourse, but also oral or anal sex of any other acts of vaginal or anal penetration, as well as of acts of a sexual nature other than those listed above.

Second, the solution was chosen to incriminate incest without the consent of one the parties as an aggravated variant of other crimes against sexual freedom and integrity. Thus, we find the aggravating circumstantial element consisting in committing the act on a direct relative, or siblings, in the case of crimes of rape, sexual assault, sexual intercourse with a minor and sexual corruption of minors.

However, the aspect that generated the most discussions was the decriminalization of consensual incest. Thus, in the Explanatory Memorandum to the Draft originally submitted to the Parliament, the Ministry of Justice showed that the regulation of incest was abandoned as a separate crime, preferring the solution of taking the most common hypotheses of incest found in jurisprudence as aggravated forms of some crimes against the liberty and sexual integrity of a person. In the motivation of the adopted solution it was shown that this regulatory model is also found in other European penal codes adopted or amended in recent years, such as the case of France, Spain, Portugal, Belgium or England.

According to the Drafting Commission, the consented incest did not justify a criminal reaction, the issue of consented incest being an aspect of social pathology, and not of

criminal incrimination. In the Commission's view, the lack of criminal sanctions does not amount to a lack of reaction from society to such acts, given that they will continue to be rejected by society both morally and legally. Thus, it was considered that criminal sanction is not the most appropriate measure to prevent and combat this phenomenon, being more appropriate to adopt medical and social measures.

The main justification for proposing such measures to prevent and combat this phenomenon and to treat such behaviors was to argue that incest is mainly based on pathological, medical, social and, of course, moral factors[8]. The Commission also argued that the assertion that in the existing regulations in the 1968 Penal Code incest had as its object of protection the morality of sexual relations was false. Thus, if until now the legislator had really been concerned about the morality of sexual relations, he would have incriminated not only sexual intercourse, but also other sexual acts, such as oral or anal sex. However, in reality, it should be noted that the object of criminal protection refers only to biological issues, and considers the major risks of giving birth to children with birth defects. But we are not in the presence of such a mass phenomenon, to justify criminal protection[9]. The doctrine has shown that only a few isolated cases in society can not affect the biological background of a society, therefore it does not appear necessary to criminalize such acts, especially since there is no evidence that consensual incest is a mass phenomenon, given that at the time of Parliament's discussions on this subject in prisons there were only eight people definitively convicted of this crime;[10].

The prosecutor's office attached to the High Court of Cassation and Justice argued that the incrimination of incest should be maintained, showing that "*sexual freedom must be restricted if it endangers the health of the human species or the moral basis of the family and society in general*"[11]. It was also argued that the option of decriminalizing non-aggressive incest is a moral crime, a direct invitation to incest. It was also shown that Romanian traditions would not be taken into account and the idea that incest is allowed would appear in the human mind, given that for people who do not have legal knowledge the difference between decriminalization and legalization is not very clear.

4 Incest in the current Criminal Code

The parliamentary debates that followed were very heated and resulted in the re-incrimination of consensual incest, in the current Criminal Code, but in Chapter II with the marginal name *Offenses against family* of Title VIII named *Offenses that harm social relationships*, considering that incest harms family relationships and not sexual freedom.

Thus, according to Article 377 of the Criminal Code, *sexual intercourse with consent, between persons related in direct line or between siblings is considered incest*, and it shall be punishable by no less than 1 and no more than 5 years of imprisonment.

It has been argued in parliamentary debates that by incriminating consensual incest, the deeply immoral nature of this deed and the non-acceptance by society of such deviant behavior in family relationships are emphasized.

However, given the current way of regulating the crime of incest, the question arises as to whether this crime really protects social relations regarding the morality of family sex life. If the legislator had taken into account the morality of family sex life, as a socially protected social value, then he should have criminalized not only consensual sexual intercourse, but also other consensual sexual acts. However, we find that other sexual acts

have been excluded from the incrimination, such as: oral or anal intercourse, acts of vaginal or anal penetration, as well as any other acts of a sexual nature.

It is difficult to understand the legislator's explanation when he considered, for example, that sexual intercourse between father and daughter is immoral, but anal, oral, vaginal or anal penetration is acceptable in terms of conditions of moral normalcy, in a family.

Given the way in which incest is criminalized in the current Criminal Code, a possible conclusion would be that the legislator did not specifically seek to protect the morality of sexual relations within a family. This is because the crime of incest only criminalizes sexual intercourse, which involves the conjunction between the male and female sexual organs[12]. Therefore, excluding other sexual or sexual acts, we could conclude that the social value protected by this norm of incrimination is the perpetuation of the species and the preservation of the biological qualities of human existence, in order to avoid the birth of children with malformations, and not the morality of sexual relations in the family. However, having regard to the provisions of Article 177 (1) of the Criminal Code, according to which the provisions of the criminal law on family members also apply to adopted persons, we find that the crime of incest will be retained even when the relations of kinship result from adoption, in which case we will not be able to claim that the biological aspect is affected. In the same vein, it should be noted that, according to the rule of incrimination, sexual intercourse between two people who use contraceptives is also incest, although in such a situation the perpetuation of the species is not endangered.

5 The relationship between the crime of incest and other crimes in the current regulation

Regarding non-consensual incest, we have shown that this way of committing incest has been taken as an aggravated variant of the crime of rape (in the case of sexual acts specific to rape) and the crime of sexual assault (in the case of acts of a sexual nature other than those provided for in the case of the offense of rape). As I said before, in the current regulation, incest requires the consent of both parties between whom sexual intercourse takes place.

In these circumstances, in the case law[13] It has rightly been argued that after the adoption of the new Penal Code it is impossible to retain the ideal concurrent offenses of rape and the crime of incest, given that Article 377 of the Criminal Code defines incest as consensual sexual intercourse between direct relatives or between siblings, while rape involves coercion. Thus, sexual intercourse cannot be performed at the same time and consented by coercion, in order to be able to retain the ideal concurrence of offenses. In these conditions, Decision no. II / 23.05.2005 pronounced by the High Court of Cassation and Justice on appeal in the interest of the law on the relationship between rape and incest is no longer relevant.

However, the current incrimination of incest only concerns consensual sex. Other sexual acts specific to rape, with the exception of sexual intercourse, as well as other acts of a sexual nature than those provided for in rape are not among the ways of committing the crime of incest, even if they are carried out with consent.

In these circumstances, with regard to the relationship between consensual incest and crimes of sexual intercourse with a minor and sexual corruption of minors, we remind that the legislator has opted for his incrimination as an aggravated variant of specific crimes that

protect the integrity and freedom of sexual life of minors and which require the consent of the injured person. In the form in which the Criminal Code entered into force, incest consented to in the manner incriminated by Article 377 of the current Criminal Code was absorbed in the aggravated version provided by Article 220 (4) a) Criminal Code of the crime of sexual intercourse with a minor, while incest consented to in other ways not committed by Article 377 of the Criminal Code, we find it as a circumstantial element in the aggravated version provided by Article 221 (2) a) of the crime of sexual corruption of minors.

With regard to the crime of sexual corruption of minors, there are no particular problems regarding the relationship with incest, given that the specific actions of the two crimes are different. Problems could have arisen with regard to the crime of sexual intercourse with a minor. Given that there is a perfect overlap between the norm of incrimination of the crime of incest and the aggravating circumstantial element of committing the crime of sexual intercourse with a minor, there was no problem in the jurisprudence regarding the retention of the incest absorption thesis in this aggravated variant of the crime of sexual intercourse with a minor. However, this aggravating circumstantial element lasted in its current form for only a few years.

Thus, by Emergency Ordinance no. 18/2016, the circumstantial element of Article 220 (4) a) of the crime of sexual intercourse with a minor is changed, the expression "*the minor is a direct relative or sibling*" being replaced by "*the minor is a family member*". In these circumstances, at the moment this aggravated variant of the crime of sexual intercourse with a minor has a much wider scope than the one considered in the case of the crime of incest. Therefore, the issue of the relationship between the crime of incest and the crime of sexual intercourse with a minor is raised again. Considering the arguments previously brought by the supreme court by Decision no. II/23.05.2005 in the case of the relationship between the crime of incest and the crime of rape in the regulation of the old Criminal Code, we consider that in the current configuration of the Criminal Code the only possible solution is to retain an ideal concurrence of offenses between incest and sexual intercourse with a minor in the aggravated version provided by Article 220 (3) a), motivated by the fact that the material element of the crime of incest does not perfectly overlap with the aggravating circumstantial element of the crime of sexual intercourse with a minor, and a possible absorption sentence would be irrelevant to the provisions of Article 38 (2) of the current Criminal Code, which regulates the formal competition of offenses.

6 Instead of conclusions

As can be seen, the norm of incrimination against incest still raises certain issues, such as the relationship with the crime of sexual intercourse with a minor, but at the same time it generates contradictory discussions about the need to criminalize incest or about the social value protected by the current norm of incrimination. Unfortunately, we find that our legislator fails to give a clear regulation of this fact, which would make problems of interpretation of the legal norm easily avoidable. Also, without denying the arguments brought by the legislative forum in favor of maintaining this rule of incrimination, we cannot fail to see that the solutions to prevent incest are still reduced only to the repressive side.

However, in the literature[14] it has been rightly pointed out that in general the commission of this crime is generated or favored by the inappropriate conditions in which

certain categories of people live, by extreme poverty, lack of education, promiscuity, alcoholism, drug use, and more and more often due to family dismemberment due to the departure of one of the parents to work abroad.

Therefore, we believe that these should be the areas in which the legislator should intervene as a matter of priority, with effective measures, if this phenomenon is really to be prevented. But to do this, the state's criminal policy should focus more on the results of criminological and sociological research. With regard to criminological research, we are considering in particular the practice of anti-crime, by taking over scientifically substantiated proposals for the application of both legal means, (and here we have in mind not necessarily criminal norms but a set of legal norms that contribute directly or indirectly to this preventive approach), as well as some empirical means (we have in mind institutional practices) to combat the causes that generate or favor this phenomenon. The mere incrimination of incest, as an act that harms an important social value, is not enough to prevent and combat it.

Recall that in France incest is no longer criminalized since the Criminal Code of 1810 and consensual incest is not a crime in other European countries, such as Belgium, the Netherlands, Portugal and Spain, but also in Japan, China, South Korea, Brazil or Argentina. However, the taboo of incest has deep roots in Romanian society, and in Central and Eastern European society, and these aspects must be taken into account. For this reason, we consider that there is too little discussion about this social problem. However, in order to eliminate this phenomenon, it must first be discussed and analyzed, in order to understand the causes that generate it, causes that must be acted upon as a matter of priority.

As reported at one point in the German press, when a spokeswoman for the German Christian Democratic Party was asked to comment on recommendations made by the German Ethics Committee on the decriminalization of incest, it criticized the recommendations, referring to the need to protect children, although the Ethics Council had not made any recommendations on incest involving children. Also in a sociological study by psychologist Jonathan Haidt, the vast majority of subjects disagreed with an incestuous relationship between the subjects of his experiment, Julie and Mark, adult siblings who went on vacation and decided to have sex just to see how it was. When the interviewed subjects were asked to motivate their opinion, most offered explanations removed from the issue of the story, and when it was pointed out that their explanations are removed from the story, they replied: *I can't explain, it's just wrong*. Researcher Jonathan Heidt said the reactions were *appalled from a moral standpoint*. Thus, Peter Singer, a professor of bioethics at Princeton University, considers that in the case of the taboo on incest, these answers given by the subjects interviewed by Jonathan Heidt in his study are obvious from the point of view of human evolution, but the question arises as to whether it is right for human judgment as to what we consider a crime to be determined only by feelings of repulsion, feelings which probably played an important part in the human evolution of our ancestors, who were devoid of contraception.[15].

Finally, we show that the analysis of statistical data provided by the National Authority of Penitentiaries shows that in the last three years the number of persons in prisons, definitively convicted for this crime is very low and has decreased steadily. Thus, if in January 2018 in the Romanian penitentiaries there were only four people definitively convicted for committing the crime of incest (out of a total of 23,050 people) [16], in March 2021 their number had decreased to only two people (out of a total of 22,233 people)[17].

Therefore, at least from the point of view of legal (or tried) crime, we find that consensual incest is not a mass phenomenon and the dynamics of this type of crime is declining.

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THE FUNERAL IN TIMES OF COVID-19: WHERE IS THE BOUNDARY BETWEEN THE MEASURES NEEDED TO COMBAT THE PANDEMIC AND THE ORTHODOX CANONICAL NORMS?

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Abstract

By an order of the Minister of Health dated 6.04.2020, the state authorities took a series of sanitary measures in the cases of people suffering from COVID-19 who died in hospital units, respectively banned the cosmetic and dressing manpower of their bodies, before to be placed in plastic bags.

These procedures contradict the canonical tradition and norms, because, for Eastern Christians, the preparation of the body of the deceased for the funeral ritual has a special significance. In the Christian conception, death is only a stage that man must go through to enter eternity. This study aims to analyze the legal provisions adopted by the authorities of the temporal power in the fight against the pandemic and the impact they had on the rights and obligations of the families of the deceased, both from a canonical and secular national and international perspective.

Keywords: *pandemic, human dignity, canon law, burial, religious freedom.*

1. THE FUNERAL RITUAL FROM A CHRISTIAN-ORTHODOX PERSPECTIVE

Funeral rituals are found in all religions and peoples of the world, from ancient times. Archaeological findings reveal that, since the Paleolithic, since the first complete skeletons date the dead were buried in an orderly manner and not thrown at random, being surrounded by stones or various objects, which suggests that a ceremonial was previously performed.

According to Christian teaching, man's death occurs by the disintegration of the human being into the two constituent parts: the body - which returns to the earth from which it was born (Genesis 3: 9) and the soul - which returns to the Creator. Because the body is considered, as mentioned in the Holy Scriptures, to be the Church of the Holy Spirit (I Corinthians 6:19; IV Kings 23: 17-18), its burial must be done with great care and attention, following the Christian practice. [1] According to the father and the great theologian Dumitru Stăniloae, "*the body is, in the Christian faith, the image of the soul and is created by God through an act of special attention*".[2]

According to the Holy Fathers of the Church, the purpose of a Christian's life is deliverance [3], which is obtained only in God's Judgment for sin (Romans 5: 9; 1 Thessalonians 5: 9), therefore, the way in which the believer appears before The Righteous Judge has a capital significance. Tradition requires that the lifeless body be washed, mandatorily, with water and then put on new clothes and an icon be placed in its hands. The symbolism of this process is that of remembering that the bodies of the righteous will

resurrect with greatness, at the second coming of Christ, clothed in the new garment of incorruption. Subsequently, the body is sprinkled with agheasma, in order to express, thus, the desire for its soul to appear sanctified at the fearful judgment. At the end, ash and oil are poured over the body lowered into the pit of dust. The dust symbolizes sealing according to the divine decree (Genesis 3: 1; 18:27; Ecclesiastes 12: 7; II Corinthians 5: 1), the ashes signify the sacrifice of physical toil, and the oil is a symbol of fruitfulness to serve in spirit and truth through prayer (Matthew 5: 1-12). Thus, according to this sealing, the body must remain in the earth until the day of resurrection (1 Thessalonians 4:16), for the body thus prepared will be resurrected for judgment and reward at the end of the world (Matthew 25: 32-45).[1]

Or, in the conditions in which an Orthodox Christian infected with the COVID-19 virus dies in a hospital unit, he/she is subjected to procedures that contravene his/her religious practices, guaranteed by domestic and international norms, that also affect his/her dignity. In accordance with the specific Protocol on the management in case of death of patients infected with the new coronavirus (SARS-CoV2), provided in the Order of the Minister of Health no. 570/2020, no cosmetic maneuvers were performed on the deceased persons nor were they dressed before being placed in the bag. [5] Even if the deceased person has not previously expressly expressed, for various reasons, the desire to be buried according to the specific Christian-Orthodox ritual, we consider that it is presumed, given that he/she is baptized.

The cases presented in the media with priests who were buried without any clothing, although the canonical norms require that they be dressed in priestly vestments and wear the Holy Scripture on their chests, as well as situations in which the bodies of the deceased were in unnatural positions in the coffin, created a wave of social discontent. Thus, on 09.04.2021, more than one year after the adoption of Order no. 570/2020, promoted under the pretext of fighting the pandemic, the Ministry of Health returned and issued a new order [6], which allowed the relatives of the deceased to make available to the hospital the clothing for the deceased, without it being embalmed and without allowing the whole religious funeral ritual to take place. This measure, although insufficient, came to repair a serious inequity, suffered by more than 25,000 patients who died since the initial order was issued, who were buried without clothes and without any object of worship.

2. MEASURES TAKEN BY THE TEMPORAL POWER TOWARDS THE DECEASED

On 11.03.2020, the World Health Organization declared the COVID-19 pandemic. In this context, the states of the world have taken an unprecedented series of measures in an attempt to reduce the spread of this new virus. In Romania, on 16.03.2020, by presidential decree, it was ordered to establish a state of emergency throughout the country, given that the number of people infected with the new SARS-CoV-2 virus, as well as the number of deaths caused by it began to grow significantly. Subsequently, the state of emergency was replaced by the state of alert, in order to create the general framework necessary to implement restrictions that have the effect of limiting certain rights.

On 6.04.2020, the Minister of Health approved the Specific Protocol on the management in case of death of patients infected with the new coronavirus (SARS-CoV2), which stipulates that the *“personnel involved in the handling of the corpse must spray biocidal products type TP22 or formaldehyde solution over the corpse, then must insert it in*

two resistant vinyl bags, as follows: after each insertion of the corpse in the bag, biocidal product type TP22 is sprayed using a fine spraying equipment, then it is inserted in the coffin, closing and sealing the coffin lid. The family or the representatives of the local public administration (for social cases) will be the ones to make available the coffin in which the body is placed. From this moment until the burial / cremation, the coffin will remain closed, any action to open it being forbidden. Burial / Incineration will be carried out as soon as possible with the coffin sealed". [5]

At first reading, it can be seen that the text of the administrative act does not expressly provide for the exclusion of the deceased person infected with the new coronavirus (SARS-CoV2) and who has not undergone an autopsy from the right to observe common hygiene practices, including cosmetics and clothing. Although the procedure lists, in point no. 5, certain stages regarding the handling of the corpse after identification, in which there is no mention about cosmetics and clothing, only point no. 7 expressly provides, in the case of autopsied corpses, that cosmetic and dressing operations are not performed on them before they are placed in the bag. However, according to the rule of interpretation *exceptio est strictissimae interpretationis*, the situation could also be extended to the situation of non-autopsied corpses. Therefore, we agree with the opinion expressed in the judicial practice, according to which the interference with the right to respect the right to human dignity inserted in the provisions of this Ministerial Order is not sufficiently clearly regulated and therefore not regulated by law. The requirement of the predictability of the law concerns the way the social body receives the content of normative acts, in the sense of understanding them, the legal norm must be clear, intelligible, as those to whom it is addressed must not only be informed in advance about the consequences of acts, their facts, but also to understand the legal consequences thereof. [7] The European Court of Human Rights held, in the rulings of 26.04.1979, 20.05.1999, 4.05.2000 and 25.04.2006, in the cases *Sunday Times v. The United Kingdom of Great Britain and Northern Ireland*, *Rekvenyi v. Hungary*, *Rotaru v. Romania* and, respectively, *Dammann v. Switzerland*, that a law is a rule laid down with sufficient precision so that any person can foresee the consequences which may follow from a given act; therefore, the rule is foreseeable when it offers a certain guarantee against arbitrary infringements of public power.[8]

However, even if clearly regulated, the measures that prevent the sanitization by a minimum of cosmetic care and dressing of the body of any deceased person infected with the new SARS-CoV2 coronavirus are disproportionate to the purpose pursued. Or, according to Article 8 paragraph 2 of the European Convention on Human Rights, the proportionality between the purpose of the law, which in this case would be to protect public health, and the means used to achieve it must be maintained. In its settled case law [9] the Constitutional Court has examined, in the light of a *test of proportionality*, whether interference with a fundamental right is *justified*, whether the objective pursues the purpose of the regulation as *legitimate* and whether it is *reasonable* in relation to the objective pursued and not tends to transform this right into an illusory / theoretical one. According to the principle of proportionality, as the Court held in Decision no. 662/2014, paragraph 28, any measure taken must be adequate - able to objectively achieve the purpose, necessary - indispensable for the achievement of the purpose and proportionate - the right balance between competing interests to be appropriate to the purpose pursued. According to the model of this proportionality test, the risks of contamination to which employees of medical institutions are exposed if specific precautions for infection prevention are observed,

especially given that most of these people are vaccinated against the virus, do not justify interference with religious freedom and to the human dignity of the deceased.[10]

3. THE RIGHT TO BURIAL ACCORDING TO ONE'S OWN CONVICTION

13.1 Religious Liberty

There are a number of international documents that protect religious freedom, instruments to which Romania has adhered over time: the Universal Declaration of Human Rights of 1948 (Article 18), the International Covenant on Civil and Political Rights (Article 18), The Charter of Fundamental Rights of the European Union (Article 22), the Treaty on the Functioning of the European Union (Article. 17), as well as the European Convention on Human Rights (Article 9). Regarding the precise content of the concept of religious freedom, the European Union aligns with the international law already in force, stating the existence of two components: on the one hand, the freedom to adhere or not to a religious or non-religious faith and the possibility to change it with another, and on the other hand, the freedom of its manifestation, both individually and within the community of faith.[11]

Also, at the level of the European Court of Human Rights, the European court ruled in the case *Johannische Kirche and Peters v. Germany* that *freedom of worship applies to the burial of the dead, insofar as it is an essential part of religious practices*. [12]

In domestic law, we have norms at constitutional level, respectively Article 29 paragraph (1) of the Constitution, which provides that "*freedom of thought and opinion, as well as freedom of religious beliefs may not be restricted in any form. No one can be forced to adopt an opinion or adhere to a religious belief, contrary to his/her beliefs*" and also Article 29 paragraph (5), which provides that the state supports religious cults, "*including by facilitating religious assistance in the army, hospitals, penitentiaries, asylums and orphanages*." At infra-constitutional level, we have Law no. 489/2006 on religious freedom and the general regime of cults, republished, which establishes in Article 2 paragraph (1) that "*religious freedom includes the right of every person to have or to adopt a religion, to manifest it individually or collectively, in public or in private, through practices and rituals specific to worship*".

The national legislator understood the importance of this constitutional right, especially in the social context present in our country, with a majority Christian-Orthodox people, consecrating, by law, the crime of impeding religious freedom. Article 381 of the Criminal Code provides that the impediment or disturbance of the free exercise of the ritual of a religious cult, which is organized and operates according to law, is punishable by imprisonment from 3 months to 2 years or a fine. The legal object of this crime is the relations regarding the freedom of conscience and the freedom to exercise a religious cult, which is organized and operates according to the law. With regard to the objective side, in a first aspect, the material element consists in the action of preventing or disturbing the freedom to exercise such a religious cult, and the immediate consequence is manifested by creating a state of danger for social coexistence, based on freedom of conscience. and the exercise of a religious cult and there must be a causal relationship between the incriminated actions and the socially dangerous consequence.

The state, by regulating this crime, has raised the importance of the right to religious freedom, ensuring a series of guarantees for any person that the rituals of the religious cult to which he/she belongs will be strictly observed. However, in order to minimize the religious ritual and downplay it from the perspective of human contact, the state must

thoroughly justify this interference in a constitutional right. The balance between the two constitutional rights, the right to religious freedom and the right to health becomes even more difficult in the context of the irreversibility of actions specific to the funeral ritual, the effective repair of the damage not being possible in concrete, the deceased's body being buried and rotting.

Thus, the state has the task of ensuring effective measures for the protection of both rights or, if it chooses to tip the balance in favor of the right to health, it is obliged to ensure reparation by monetary equivalent of the moral damage caused to the deceased and his/her family. An alternative would be to respect both rights, by establishing carefully regulated measures and by authorizing commercial agents to provide services specific to the funeral ritual for a fee, but in conditions of maximum safety for the population.

13.2 Human Dignity and the Right to Family Life

The dignity of a person is not only a fundamental right in itself, but is the very basis of fundamental rights. The 1948 Universal Declaration of Human Rights included human dignity in its preamble: "*Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.*" [13] In case law, the Court of Justice has confirmed that the fundamental right to human dignity is part of Union law.[14]

The state has a positive obligation to take all reasonable and appropriate measures to protect the rights guaranteed by Article 8 paragraph (1) of the European Convention on Human Rights, namely the right to respect for private and family life, home and correspondence. In the case of *Pannulo and Forte v. France*, in which the applicants complained that the authorities had returned the body of their son, who had died in hospital, as a result of which they had not been able to bury him religiously for several months and to pray at his grave, the European court has decided to examine the count exclusively in relation to Article 8 of the Convention.[12]

Today, religion is often seen as a source of discrimination, disagreement or division. However, religion was in fact the third great factor in the unification of mankind, along with money and empires. Because all social orders and hierarchies are imagined, they are very fragile, and the larger the society, the more fragile it is. The crucial historical role of religion has been to give superhuman legitimacy to these fragile structures. Religions claim that our laws are not the result of human whims, but are determined by an absolute and supreme authority. This helps to place at least some fundamental laws beyond any possibility of challenge, thus ensuring social stability. Religion can therefore be defined as a system of human norms and values that is based on a belief in a superhuman order.[15]

At national level, the Constitution provides, through Article 26, that public authorities respect and protect intimate, family and private life, and according to Article 72 of the Civil Code, any person has the right to have his/her dignity respected, Articles 78-81 of the Civil Code regulating obligations regarding respect due to the person also after his/her death, including the fact that the deceased is due respect for the way his/her body is treated after death. Therefore, the deceased person is due respect for his body, and this can determine the kind of his own funeral and can dispose of his body after death. In all cases, the confessional affiliation of the deceased person and the observance of his or her will to decide on his or her own funeral and to dispose of his or her body after death shall be taken into account.

According to Article 17 paragraph (1) of Law no. 102/2014 on cemeteries, human crematoria and funeral services, regarding the burial are obliged to order the following persons: a) the person who has agreed by contract that he/she will take care of the funeral; b) the person established by the will of the deceased; c) in the absence of the will, the spouse of the deceased person, who lived in the same dwelling with the deceased person in the last part of his / her life; d) another close relative of the deceased, up to and including the 4th degree. Thus, **the family members of the deceased also have a legal obligation to ensure the funeral of the deceased**, being a situation that is part of all family decisions, the family being the one who knows his/her religious beliefs and have immediate access to his property, with which he/she wanted to be buried.

Restricting the possibilities of family members to fulfill their legal and moral obligation causes them non-pecuniary damage, primarily causing suffering to the family, and also affects the rights of the deceased to dignity and to dispose of the funeral. However, this interference, even in the context of the COVID-19 pandemic, must find a solid justification, so that any person affected by these legal provisions understands the importance of this interference, its justification, the need to adopt it in a democratic society, the timing of the measure and the state support it can receive to ensure reparation for the damage caused.

CONCLUSIONS

We consider that the right to human dignity has been seriously affected by these insufficiently justified and amended restrictions after more than a year, and the state should urgently regulate the way in which non-pecuniary damage can be repaired to the deceased and members of family. The state implicitly acknowledged its guilt in managing this situation and a violation of the rights of the deceased by the regulation of 09.04.2021 which allowed the dressing of the deceased by COVID-19, a regulation that came a year and a month after the prohibition of any ritual on the body of the deceased. Or, it may have confirmed an improvement in the sanitary conditions in the hospital units which currently allow the body of the deceased to be clothed and the access of two family members, in which case it should be proved that measures have been taken at the hospital units, which remedied previous deficiencies, deficiencies that made it absolutely impossible to respect the right to religious freedom and the right to human dignity.

What is certain is that, in this context, the need for the state authorities to approach the religious authorities and together to adopt measures that can alleviate the deficiencies of funeral rituals is clear.

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PSYCHOLOGICAL PROFILE OF ADOLESCENT PERSONALITY WITH DEVIANT BEHAVIOR

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Abstract

Deviant behavior is a particular case of behavior that consists in endangering the fundamental values of society by significantly removing the perpetrator from the social, moral and legal norms of society, reflecting a conflicting state of the individual with the social environment; by committing antisocial actions harmful to society. This deviant behavior is determined by a variety of factors, among which we mention: the hereditary characteristics of the personality, as well as those acquired from the social environment in which the adolescent grew up and was educated.

Keywords: *psychological profile, adolescent, personality, deviant behavior, education, family, delinquency.*

Today's teenagers live in a world full of tensions of socio-economic and political transformations, constant evolution and redefinition of professions and occupations.

Family and school are the institutions called to fulfill the fundamental task of the teenager's socialization. The family is the place where the child, the adolescent, finds her references and models that will give her flexible and stable personality dimensions and structure. Family's social task remain the same: to facilitate to the teenager the acquisition of the norms, values and abilities necessary for her development as an individual that belongs to society.

The school role is to create a connexion between family and profession, presenting the teenager student with a set of social experiences meant to facilitate learning of values such as independency, consequences, academic achievement, responsibility.

Teenagers are also characterized by a volcanic progress of their creative abilities in a variety of fields where they did not excel or make themselves noticed before.

As Ursula Şchiopu and Emil Verza highlight, adolescence is the period of intense transformations, with the most evident effects on the teenager's appearance, behavior and internal relationships with the external world.

Adolescence is characterized by focus of the personality on mastering the acquired social roles and status in the teenager's school life or peers group. During this phase self-education and wish of perfection are achieved, as a compensation of the wish for independence.

During adolescence, the personality and its highly intense main features are rebuilt on new foundations, which create an internal game of freedom on the consciousness level, ever more internal dialogues related to complex moments in the teenager's life, that require making decisions, evaluations, understandings. It is that period in life when feelings of responsibility and gratitude are formed, as an expression of the teenager's social self.

From the point of view of the emotions, adolescence is presenting the most obvious transformations, resulting in passion outbursts (first love, jealousy, hatred). This period is marked by intense maturization on all levels, including the sexual one, informing all sensory

structures. Imagination, affectivity, interrelationships of all kinds start informing socialized sexual identity and its integration with the body-self.

Summarizing, a natural question arises: Why choosing the topic of teenager personality development from the perspective of affectivity.

A possible answer emerges from studying the quality of the attachment developed in the individual's childhood in her relationship with the parents and the family, with definitory effects upon the consecutive development and structuring of their personality, that will cristalize during adolescence. Existing studies and theories confirm the presence of three main types of attachment relationships, respectively: secured attachment (presenting trust in others and the wish to explore the external environment), unsecured or anxious attachment (determined by the parent's inconstant, contradictory behavior, and inducing in the child an ambiguous and hesitant behavior), and the extremely unsecured or ambivalent attachment (resulting from the parent's lack of affection and indifference, as well as the absence of a normal relationship based on love and safety between parents and child). This last type of attachment leads to losing trust in self and others, the feeling of personal unworthiness and to dealing with the failures and disappointments by employing defence mechanisms of „emotional freezing” (total emotional nonimplication).

A balanced personality is the result of developing a secured attachment, based on family affection and security, ever since the first years of life, assuming the values of an adaptive pattern of communication with others, enhancing creative abilities, individual responsibility and independence, and the totality of the factors bearing education, representing an important element in personality formation.

1. Adolescence: Definition and Characteristics

Etymologically, the word adolescence comes from the Latin “adolesco-ere”, meaning to grow, to get strenght, to mature. The pioneer in adolescence studying, G. Stanley Hall (1904), considers this phase as the „youth of peoples”, starting with the interpretation of fundamental data of an essentially biological conception, from which physiological, genetical, statistical and „dramatic” ones derive, insisting on the domination of negative characteristics: the contradictorality, vanity, egoism, altruism, etc.

Among the most well known researchers studying the adolescence and its issues, focusing on various traits, we count: F. Mendeuse, who stated that adolescence is a „mental anarchy”; M. Debesse (1970), who shows that adolescence is the „era of juvenile enthusiasm”, the „ego affirmation”, and who dealt with the „juvenile crisis”; Ch. Buhler, who shows that adolescence is the „denial era”; E. Spranger, considers that adolescence is characterised by „the deep solitude feeling”, by „radicalism and idealisation tendency”, enhancing the awareness process.

2. Stages of Adolescence

Most experts divide adolescence into three stages that, chronologically, are: preadolescence (11-14 years old), characterized by the intertwining and the oscillation between infantile and mature conducts. Family and the environment treat the teenager at times as a child, and as a youngster at others, an ambiguity that generates anxiety, irascibility, and even hostility. The self-affirmation wish is shaped during this stage, and the need of abstract knowledge grows; adolescence proper (14-19 years old), marked by a particular differentiation and shaping of abilities and abstract thought, enrichment of

knowledge, and the socialization of teenager's aspirations. During this time, the teenager identifies professional options, shaping her concept of the world and life, and acquiring legal rights and duties when reaching the legal adult age; prolonged adolescence (19-25 years old), characterized by acquiring a larger independence by the youngster who gets a new professional and social status, with increased duties.

3. Adolescence Psychological Profile

By the definition presented by *Dicționarul Enciclopedic de Psihiatrie* (Constantin Gorgos, coord. 1984), the adolescence represents „the stage of transition in the development of the individual who overcomes the pubertal spurt, characterized by major biological and psychological transformations”. Following deeper into this aspect of „breaking balance”, M. Debesse tried to grasp the sense of the future becoming, dividing adolescence in two categories: the straight teenager (subjects with less affirmed personality, conformists, submitting to the ideals of others, with extreme type the amorphus) and the revolutionary teenager (subjects looking to break borders, from whom artists, explorers, discoverers, but also losers or „perpetual revolutionaries” are recruited).

4. Attachment: The Affectivity Component in Adolescence

Subject to the nature and the constitutional degree of the attachment, basically, three types of attachment are expressed (Miftode, V., *Teorie și metodă în asistența socială* – Iași, 1995, p. 135): secured (when the child can feel a strong and definite protection assured by parent's continuous love that keeps away all the stress, sadness and insecurity and that develops the child's courage to explore the world), unsecured or anxious (when the child is not certain of the parents' feelings, situation maintained by the parents' contradictory, uncertain, 'hesitant' behavior toward their own children) and very unsecured or ambivalent (due to the lack of a normal relationship between parents and children and particularly to the complete lack of affectivity, parental love, during their first year of life, the year of attachment formation).

5. Conflict: The Dominant Characteristic of Adolescence

Etymologically, the concept of „conflict” derived from Latin, where “confligo-ere-flixi-flictum” means “to hurt, to collide, to struggle”.

Kurt Lewin describes conflict as the effect of the opposition between two forces, between two polar aspects emerging in the internal environment of the organism: to attract and to reject. Based on the interaction of these forces, he reaches a classification, that became a classic one, of conflicts: the Attraction-Attraction (A-A) Type: it is the situation where alternatives presented to the individual are equally desirable, meaning both variants are positive; Rejection-Rejection (R-R) Type, when the subject has to choose between equally undesirable alternatives, both with negative valence; Attraction-Rejection (A-R) Type of conflict: when the purpose has both positive and negative features.

Frustration is a complex phenomenon of emotional unbalance that emerges within the personality in a transitory and relatively stable way, following the unfulfillment of a desire, the obstruction of gratifying a need, the subject's deprivation of something that previously belonged to her materially. or projectively and emotionally.

For the child, frustration is usually provoked by parents' interdictions or simple conflicts with siblings or peers. In preadolescence, profound restructuring is producing in

this area of personality, that will evolve by successively overpassing the stages of self-searching (11-14 years old), self-affirmation (14-7 years old) and self imposition. As the teenager matures, immediate reactions to frustration will become less frequent and will lose intensity, due, on one hand, to the increase of the frustration tolerance, and, on the other hand, to the educational prohibitions that will sanction, just in principle, all inadequate reactions of the teenager.

Literature describes the real „crisis” of adolescence, consisting in multiple conflicts towards parents, rebellion against interdictions imposed by adults and affirmation of contesting conduct models. Specific features of the originality crisis: when emerging, it manifest by slow and spectacular episodes; apparently, it is generated by the very ambiguity of the teenager’s status; the teenager is denied the child identity, but she is not yet recognised the capacity to fulfill adult roles.

6. Personality Social Architecture

In terms of features, personality synthesizes and communicates the semnification of behaviors, it is socially constructed of behaviors. Three components can be identified in the personality „construction”: the behavior the subject, as a distinct biological individual, brings to the social scene; semnifications that the individual himself attaches to this behavior; semnifications attached to the subject’s behavior by the others.

Personality is a bio-psycho-hystorical and cultural synthesis. Personality theories have to answer to these three questions (L. A. Pervin): what kind of person is that individual (the characteristics of the person and the relationship among them); how has the person become what she is (environment influence, history of the person becoming); why has the person evolved that specific way (what are the concrete conditions of the development of the reasons of a certain type of behavior).

7. Communication: A Human Fundamental Perspective

From a historical perspective, theories regarding communication, are based upon understanding society as being dynamic, in evolution, with various changes that depend, in time, by economic relations.

Family can be analysed from the perspective of communication patterns existing in the family, as well as such patterns are established in the family and the social environment. A society can be described through communication systems contributing to its development. Language is one of the most specific means in the world, most frequently used in human communication. It was, therefor, defined as a vehicle transporting intentions, attitudes, a simple means of transmitting information that circulates without any opposition, from one cognitive system to another.

Communication constitutes a basic precondition for all social correspondences and connections.

No social system, if organized according to the laws of a society, can be established and maintained, without changes, without relations of the type of interhuman communication. Only taking part in the communication activities, can man can become a social being – fact proved be the rich and adequate research that validate items on multiple levels and in many ways of approaching the human psychic.

8. Education

Starting from the variety of learning situations and different degrees of action intentionality, education can be objectified in three instances: formal education (referring to the totality of intended and systemic influences, elaborated within specialized institutions, in order to shape human personality), non-formal education (comprising the totality of educational influences that unfold outside the classroom or through optional or free choice activities) and informal education (including the totality of unintentional, diffuse, information that confronts the individual in the daily life and that (are not) selected, organized and elaborated from the pedagogical point of view).

“Peer Education” is a specific form of non-formal education based on positively using a peer’s potential, as seen during adolescence, when oftenly peer relationships become dominant, and the youngsters learn better one from another and get involved in sharing information, attitudes or behaviors with colleagues, that do not have a professional training as instructors, but whose purpose is education.

9. Family and Educational Models

One of the most important functions of the family consists in educating and forming youngsters in order to optimally integrating in the social life and activity. Here, within the family group, parents exercise, directly or indirectly, educational-formative influences upon their own children. The marital couple, by their entire behavioral actions system, constitutes a genuine social model that, being also the first of influences exercised by the existing social models, have a decisive influence upon children in respect of shaping their conception of life, their way of behaving and relating with regards to various norms and social values.

On the other hand, parents also exercise directly educational-modelling influences, based on a certain educational strategy, using more or less systematically and organized particular methods and educational technics.

10. Adolescence Delinquency

Deviant behavior is an antisocial form of behavior and consists of breaking individuals’ moral rules, physical integrity, social rights. The delinquent behavior is expressed by social inadequacy, aggressive behaviors directed either towards the community, the moral laws, or by destruction of material goods, violating good habits, theft, vandalism, fires.

The common social dimension of moral nature of the adolescence.

The character of this kind of conduct is individual and defers widely from one case to another, from one family to another. Behavior disturbances indicate social inadequacy. Therefore, three categories of inadequate teenagers can be identified: psychologically inadapted; sensory inadapted (sensory deficient); socially inadapted (delinquents, psychopaths, psychotics).

There are various forms of expressing behavioral disturbance: flight, vagrancy, lying, unstable behaviors (hyperactivity, negativism, aggressivity), theft, unstable emotional reactions.

It is important to point out that, although the tradition of criminality and delinquency is an important factor in certain communities, it does not appear as a singular part of their values system.

In order to understand better the phenomenon of juvenile delinquency a psychological and psycho-behavioral profile of the minor, of the teenager, is necessary. Finding the specific

features of the juvenile delinquent personality is greatly important for organizing the recovering activities of intervention towards restructuring and rebalancing the teenager's personality.

A. RESEARCH METHODOLOGY

In our research we applied a questionnaire, an interview, the method of observation, the 16PF Personality Test, and the projective test of the tree (Koch). These instruments were applied during the years between 2004 to 2007, in schools from Iasi County, to a number of 600 students studying in grades 9-12, with ages between 15 to 19 years old. The research aims to identify the role of the affectivity in the development of the teenager's personality.

The questionnaire consists of two parts: the first part asks the teenager to describe their family environment, and the second part asks them to describe the balance between expectations regarding their future and the family environment. The interview was used to identify specific particularities of each teenager regarding the development of affectivity, the level of expectancies and their relationship with the family. The 16PF Personality Test, corroborated with the Tree Test (Koch), was used to establish the level of development of the teenager's personality. The methodology we employed was used in successive stages, and the results gathered by the standardized samples (16PF), projective tests (Tree Test) and by specific samples (interview, questionnaire), were compared with information obtained by observation.

Research Objectives

The general objectives of this study regard:

Describing the dimensions of the family and social context that influence the psycho-affective development of teenagers from urban and rural environment.

Describing the mechanisms through which the affective variables/dimensions influence the structure of personality traits.

The investigation of the level of expectancy of the youngsters regarding the quality of life, in accordance with the nature of the affective climate of the origin family.

Hypothesis

The starting point of the study was the premise that the teenager's emotional balance is influenced by the quality of the family environment with all the components that it implicates; we asked what is the influence of the family upon the development of the teenager's personality, from the structural and moral aspect.

As a general-human perception, we consider that the scientific and technological progress assures a high quality of life. However, we asked ourselves to what degree the presence of the computers, the Internet, have a benefic influence upon the emotional development, as a dimension of the personality of an individual, that is running her internal shaping and structuring, such as the teenager.

One other hypothesis that we researched is considering the spiritual life from the perspective of the relationship with the church. The totality of the emotional manifestations developed within the parent-child relationship is generically expressed by the „attachment”.

Technics, Methods and Means

The technics we used are the questionnaire, the structured interview, the scientific observation and two psychological tests: the 16PF Test and the Projective Tree Test (Koch).

The first three techniques considered obtaining a viable, realistic, answer to the relationship between teenager, family and school.

This study was approached from the perspective of the attachment developed by the teenager in his origin family, as an expression of the affective relation between her and their parents.

B. QUANTITATIVE ANALYSIS AND RESULTS INTERPRETATION

The family's influence upon the development of the teenager's personality from the structural and moral points of view.

From the results we obtained, we do not find any significant connection between the teenager's appreciation in the family and the consumption of alcohol, leading to the conclusion that the teenager's appreciation does not depend on the alcohol consumption in the family. Following the interpretation of the drawings (the Tree Test) of the teenagers from monoparental families or with special family situations (validated by the 16PF Personality Test), the resulting teenager's profile is characterized by emotional unbalance, affective conflicts, relationship deficiency and adaptive difficulties in the social environment. For teenagers coming from biparental families, but with conflictual relationships between parents and children, we could not observe any disarmonic elements, that would break the normal pattern of the teenager's profile.

The teenager's social environment influences her psycho-affective development.

We wanted to find out to what extent the presence of the computer and the Internet influences the development of the affectivity, as a personality dimension.

Following the analysis of the results we obtained, we find that the majority of the teenagers can balance between the use of the computer and the Internet as an entertainment and as a communication means, without diminishing the connection with their social environment (taking part within important religious events during the year or even taking part regularly to the church services, and at the same time maintaining close contact with the group or peers and colleagues).

We will analyse the extent to which the teenager's expectations for the future are influenced by the affective climate within their origin family. The analysis of the collected information shows that the majority of the families are not focused anymore on the physical punitive aspect in order to suppress undesirable behaviors, as well as morally and emotionally, in order to increase the teenager's responsibility.

In general, the evaluated teenagers expressed their choice of the level of education they aim to, high expectations being determined either by the support and positive model offered by the family, or by the wish to escape an unbalanced, conflictual, family climate, where material difficulties and a low life level prevail.

The analysis of the three types of attachment (secured, unsecured or anxious and very insecure) shows that the emergence of a future stable adult, trusting her psycho-social capacities, is possible only by assuring the normal development of the teenager, that is the family affection and security, the stimulation of the creative attitudes, the taking over of responsibilities and individual independence encouragement.

C. STUDY CONCLUSIONS

Precarious or insufficient resources of education and professional training cannot be replaced by a good relationship with the parents with regards to the way the teenager is

seeing her future, as well as the family conflictual relationships are not compensated by the good and very good conditions of education and professional training. Optimism or pessimism glasses through which the teenager looks at the future are in fact a measure of her development, of her selfworth awareness and emotional development, that informs her level of social security. Teenagers emotionally developed within the limits of normality are those who have a stable family environment, enjoy optimal conditions to develop socially and professionally. Emotional development issues appear in cases where there are disagreements between the values promoted by the social environment of the teenager and those of the family.

In today's social and economical context, differences between urban and rural environment are sensible. In both habitation contexts, the idea and action of emigrating to find work abroad is more and more frequent. Thus, teenagers confront with changes in their family structure, changes that disturb them and redimension their affectivity and personality development.

A possible deeper study of this research theme could aim to finding the influence of the new, emo trend (associated also to states of depression, tendency to selfharming, even suicide) upon the shaping of the affectivity and personality, especially of teenagers presenting a sinuous development.

In light of these conclusions, there is a need to introduce a new element that can mediate the relation between the teenager, the family under constant structural transformation, the social and school environment, that can confer in totality a good premise for the teenager's personality development, especially that it often is perfectible.

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PIMP OR SPOUSE OF A "SEX WORKER". RELEVANCE OF MARRIAGE RELATIONS FOR THE EXISTENCE OF THE CRIME OF PIMPING, PROVIDED FOR IN ARTICLE 213 (1) OF THE CRIMINAL CODE

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Abstract

Prostitution and pimping, as human behaviors, have existed since ancient times and the criminal treatment applicable to them has born the mark of the regime that adopted it. If there were periods in which prostitution was not criminalized, pimping was almost invariably criminally sanctioned, the purpose of the regulation ranging from the protection of good morals, the rules of social coexistence to the protection of freedom and human dignity.

Given that the new Criminal Code no longer criminalizes prostitution and that many people who engage in such activity, both in the country and on the territory of some European Union states where prostitution is legal, share the money obtained with the spouse or other family members, the possibility of exempting the spouse from the category of active subjects of the crime was raised in the judicial practice.

The spouse cannot be included or excluded from the sphere of the active subject of the crime of pimping, de plano, simply by referring to their marriage to a person who practices prostitution voluntarily but by proving they obtain patrimonial benefits from the exploitation of the other spouse.

Keywords: *Prostitution, pimping, spouse, active subject*

1. The reason for the incrimination and the evolution of the criminal treatment

Pimping cannot exist without prostitution, a conclusion that follows from the definition given to the pimp as "a person who mediates prostitution, who urges or coerces someone to practice prostitution, who facilitates the practice of prostitution to ensure a source of income" [1]. Therefore, the regulations on prostitution must be taken into account in order to have a correct and complete historical perspective on the evolution of criminal treatment applicable to pimping.

The first Criminal Code, from 1864, did not criminalize either prostitution or pimping, the legislator adopting a system of regulatory inspiration according to which prostitution takes place under the supervision of the authorities as it is considered a necessary evil that must be kept under control [2].

The reglementarism adapted to the Romanian space, presupposed both collective prostitution, the one that took place in brothels, and the prostitution practiced individually with a health "card" [3]. Prior registration with the police and the Sanitary Service was required, under the condition of a certain age limit and state of health. The persons who were registered entered a regime of regular consultations, received a card representing a new "identity" and a permit to exercise this occupation.

In the houses of tolerance, the money-sex exchange was coordinated by the person who ran the business, a matron, also known as "pezevenghe", "marșandă", "macarelă / macherelă" or under the popular name of "țață". The matron's job was not stable, constant and, as a rule, it was not unique. Whether or not they hid under the guise of another profession (furriers, tailors, innkeepers), they also practiced it, at least formally. Usually, they took care of the prostitution themselves, looking for girls who had the minimum age provided by law (15 years), were sexually active, unmarried, preferably orphaned and willing to work under the care of the matron [4].

The establishment of the regulatory system was ensured on two levels: at the local level, through the urban regulation for the supervision of prostitution, and at the central level, through articles of the sanitary laws for the areas where there were no special regulations for prostitution. The most widespread form of regulation in the old kingdom of Romania was the one applied in Bucharest in 1862, modified successively until 1899, this model being adopted by most cities. In the cities of Transylvania, the same regulatory principles functioned, the models of regulations or sanitary articles being the ones circulating in the Austro-Hungarian space [5].

With the entry into force of the Sanitary and Protection Law, no. 236 of July 14, 1930, the regulatory system ended because art.305 abolished "prostitution houses, as well as any establishments or places where prostitution is practiced with women hosted or frequenting such places, (...)". At the same time, sanctions were provided "Violators of the above provisions, as well as those who exploit in any form women practicing prostitution, will be punished with a fine from 5,000 to 100,000 lei, and in case of recidivism with imprisonment up to 6 months."

Therefore, those who wanted to practice prostitution could continue to do so, but those who benefited from prostitution were punished for misdemeanor and, in case of recidivism, criminal punishments were applicable, thus laying the foundations of an abolitionist system characterized by anonymity, responsibility and the freedom to carry out this activity on one's own account.

However, a return to the old reglementarist system took place in 1943, in the context created by the Second World War, marked by massive movements of military personnel on the territory of the country. In order to prevent epidemics of venereal diseases in the army, the houses of tolerance and the occupation of their patrons were regulated. By Regulation no. 24 of 1943, the profiles of the prostitute and of the brothel owner were redefined, aiming at establishing an absolute control over this activity. The practice of prostitution in public spaces and in public places of consumption was forbidden. A medical card was introduced in which medical consultations were compulsorily recorded. Prostitution could only take place in authorized locations and a "savings book" of the prostitute was introduced, the owner being obliged to deposit at the House of Savings 10% of its daily receipts [6].

The Criminal Code of 1936 follows the same tradition regarding the non-incrimination of prostitution, its practice not being forbidden but subject only to sanitary regulations.

At the end of the 1940s, however, a re-education mission was launched aiming the elements that did not correspond to the new Marxist-Leninist morality. Decree No. 351 of 1949, later repealed in 1951, is the first measure to pave the way for the criminalization of prostitution. Prostitutes would be sent to Re-education Centers for "their adaptation to the exercise of a trade or profession and their moral recovery." The hospitalization could be made at their request or of the "Prosecutor's Office or of the administrative, social or militia

bodies", by the state authorities for a period starting from one year until the moment when the purpose of the rehabilitation was considered to have been achieved.

The next step, and the actual criminalization of the practice, was made by article 433 introduced in the Code by Decree no. 324/1957. According to this article, the punishment for the acquirement, by a woman, of the means of subsistence, from sexual relations with different men, was considered a crime and sanctioned with 6 months to 4 years of correctional imprisonment. Prostitution is beginning to be considered as the result of a backward consciousness, a form of social parasitism, foreign to the socialist mentality and close to the specific criminality of the exploiting society.

The legislation on pimping was not as tolerant, the Criminal Code of 1936 criminalizing, since its entry into force, as independent crimes, different ways of committing it, providing penalties for those who instigated and encouraged prostitution. Those provisions have over time, in part, been repealed or amended so that, on the date of repeal of the Code, the provisions of art.436 criminalized, under the name of pimping, the exploitation in any way of prostitution and trafficking in women in order to practice prostitution. At the same time, the provisions of art. 437 incriminated, as an independent crime, the giving or renting of a building, in order to practice prostitution. The provisions of art. 439 criminalized international trafficking in women for the purpose of prostitution. A series of preparatory acts carried out in order to commit the crime of trafficking in women were sanctioned in the same way as the attempt, art. 440.

The same prohibitionist view, according to which prostitution must disappear because it constitutes an infringement of human dignity, was embraced by the legislator on the adoption of the Criminal Code of 1969, art.328 criminalizing it " the act of a person who procures their means of subsistence or the main means of subsistence by having sexual intercourse with various persons for this purpose." The reason was that in communist society, trade in one's own body was considered not only profoundly immoral but also socially dangerous. Prostitution was seen as a form of social parasitism, an expression of a deeply backward consciousness, a dangerous example for young people with severe educational deficiencies, incompatible with family life and a source of crime [7].

Pimping, in its turn, was provided by art.329 and consisted, in essence, in the act of the person who urges or coerces into prostitution, facilitates the practice of prostitution or benefits from the practice of prostitution by a person, recruits a person to practice prostitution or trafficking in human beings for this purpose. Pimping is "by far the most dangerous form of social parasitism and one of the lowest, most cynical and abject manifestations of backward, perverted consciousness (...). Mention must also be made of the social danger of the pimp, who, in order to traffic in the prostitution of others, uses all the means at his disposal, from exhortation and facilitation to skillful enticements in the race or insidious constraints on the practice of prostitution. "[7].

If under the Penal code of 1936 prostitution and pimping were included in the chapter on crimes against morals, the Criminal Code of 1969 enclosed them in the chapter on crimes that affect relations on social coexistence, affecting social relations to ensure the existence of useful work.

2. Pimping in the new Criminal Code. Is the spouse of an adult who voluntarily practices prostitution an active subject of the crime?

The legislator of the new Criminal Code opted for the decriminalization of prostitution considering that the crime was outdated, both from a technical and legal point of view, in

the sense that the legal text contained errors and omissions, and from the perspective of social reality, as such acts were tolerated in the majority of cases [8]. One of the members of the drafting commission of the Criminal Code also pointed out that "the spectrum of criminal sanction paralyzes any attempt to emancipate women exploited by pimps, nullifies their chances of snatching themselves from the evil gear they entered, most of the times without guilt. When society labels you as a criminal, you cannot have the strength and courage to appeal to law enforcement, to expose the terror to which you are subjected. Decriminalization would mean a real chance for many of those women" [9].

Although the crime was abrogated, considering the intention to repress pimping, the practice of prostitution had to be defined in the Code, according to art.213 par.4 it consists of „ having sexual intercourse with different persons for patrimonial benefits for oneself or for another ”.

Pimping continues to be criminalized, but the crime is part of Chapter VII, "Trafficking and Exploitation of Vulnerable Persons", designed to protect social relations regarding the freedom and human dignity of vulnerable persons by prohibiting the exploitation of this category of persons.

According to art.213 paragraph 1 of the Criminal Code, pimping consists in determining or facilitating the practice of prostitution or obtaining patrimonial benefits from the practice of prostitution by one or more persons. Paragraphs 2 and 3 of the same article provide for aggravated variants of the crime when the determination to start or continue the practice of prostitution was made by coercion or against a minor.

Despite the fact that the legal text seems to be unambiguous regarding the persons who may be the active subject of this crime, in legal practice there have been difficulties of interpretation whether the acts of prostitution can be committed by the wife or concubine of the pimp, as well as when they take place in a country where this activity is legal. Contemporary reality shows that there are many cases of women who practice prostitution in countries where it is legal and send some of the money obtained in the country, to the husband and other family members, so the legislator's intervenience was deemed necessary to put in agreement of the content of the incriminating text with the current characteristics of the criminal phenomenon [10].

By the decision from 11.10.2008, pronounced by the Alba Iulia Court of Appeal in case no. 1495/85/2016, the matter was referred to the High Court of Cassation and Justice in order to issue a preliminary decision for resolving legal issues, asking whether "2. Pimping subsists in the form provided by art. 213 of the Criminal Code - in the manner of << obtaining patrimonial benefits from the practice of prostitution>>- when it is committed against an adult who has the capacity of concubine / wife of the defendant. "

Although The Court of Cassation and Justice rejected the referral as inadmissible, stating that "the apparent legal issue regarding the quality of the defendant's concubine / wife of an adult against whom the crime of pimping was committed in the normative ways described does not involve any difficulty of interpretation." it has acknowledged that there is no uniform jurisprudence on the raised issues [11].

It is pertinently pointed out in the doctrine that, although the wording of the referral points to the provisions of art. 213 of the Criminal Code in general, by addressing the deeds committed against an adult, the aggravating circumstance of paragraph 3 is excluded, and regarding the coercion, provided for in paragraph 2, it is clear that the offense persists regardless of the relationship between the pimp and the prostitute victim [12].

Several arguments were brought to support Alba Iulia Court of Appeal's opinion in the sense that the spouse of an adult who prostitutes voluntarily cannot be an active subject of the crime of pimping, the main reason revolving around the notion of "family" and was argued that, according to Article 325 of the Civil Code, (1) Spouses are obliged to provide mutual material support. (2) They are obliged to contribute, according to the means of each, to the expenses of the marriage, unless otherwise provided by the matrimonial agreement. (3) Any agreement providing that only one of the spouses is to bear the costs of the marriage shall be deemed not to have been written. "

However, the provisions of the same article were also invoked by opponents of the court's opinion emphasizing that "material support" and "marriage expenses" are irrelevant for the resolution of the issue of law because they do not refer, nor could refer, to amounts of money or patrimonial benefits obtained illegally. Or, as long as in our legal system, prostitution is considered in certain conditions a contravention (art. 2 point 6 of Law no. 61/1991), and the amounts of money obtained from this activity are untaxed, as such illicit, one could not talk about legally obtained income [12].

We will return to this discussion, but our opinion is that, by law, given the "letter of the law", the spouse cannot be excluded *de plano* from the category of the active subject of the crime of pimping for the simple argument that the incriminating text is limited to enumerating alternative actions of the material element of the objective side of the offense and does not provide for an active circumstantial subject, therefore *ubi lex non distinguit, nec nos distinguere debemus*.

Continuing the same line of reasoning, it is presumed that, if he had had another intention, the legislator would have expressly excluded the spouse from the sphere of the perpetrator of the crime, establishing in his case a cause of impunity, as he did in the case of other crimes, such as favoring the offender or concealing.

Beyond the letter of the law, its spirit, respectively the reason for the incrimination must not be omitted from the interpretation process.

The doctrine emphasized that if the legal object of the crime is somewhat difficult to identify in the case of the standard variant, in the manner of determination or facilitation, as long as the person practicing prostitution does so voluntarily and one does not profit from their activity, in the case of obtaining patrimonial benefits, it would obviously consist in "social relations regarding the freedom and dignity of vulnerable persons, relations that imply prohibiting the exploitation of these persons by practicing prostitution" [8].

It was also pointed out that "in an imaginary world, there could be couples in which, in good harmony and understanding, one of the partners prostitutes for mutual benefit. In the real world, things are different. Usually, cohabitation or marriage is only a guarantee of the pimp that he has total control over the partner who prostitutes. It is notorious that recruitment for prostitution is most often done through the guise of "friendship with the victim", followed by cohabitation or a marriage, both formal. In most cases, such a relationship involves, if not violence, a total dependence on the pimp partner, a trap from which victims can no longer escape. "Therefore, the legislator's will could not be to indirectly legalize acts of pimping by excluding the spouse from the sphere of active subjects of the crime [12].

However, other authors consider that the new chapter dedicated to trafficking and exploitation of vulnerable persons is justified as long as it includes only the incriminations regarding human trafficking (art. 210) and trafficking in minors (art. 211) as well as the use

of the services of an exploited person (art. 216) in order to concentrate in the Criminal Code some more important incriminations from the Special Law no. 678/2001 on preventing and combating trafficking in human beings. The inclusion in this chapter of the crimes of pimping and begging, the exploitation of begging (art. 214) and use of a minor for the purpose of begging (art. 215) has no explanation. These would have been better systematized in a separate chapter regarding crimes that affect social coexistence relations as provided in the previous Criminal Code [13].

Regardless of the vision we share in relation to the opportunity of incrimination or the reasons of criminal policy pursued by the legislator, the act of the person who determines, facilitates or obtains patrimonial benefits from the practice of voluntary prostitution by an adult represents the crime of pimping, a crime that can be committed, as shown earlier, including by the prostitute's spouse.

But does it mean, consequently, that anyone who marries a prostitute, and implicitly coexists with her, is a pimp?

As pointed out by Oradea Court of Appeal, in the referral to the High Court of Cassation and Justice, marriage relations inevitably involve a contribution to the expenses of marriage, as a permanent and unconditional burden of both spouses, and materialize in each other's contribution to ensuring the material conditions of common living. In the absence of an agreement regarding the contributory proportions, an agreement that would totally exonerate one of the spouses couldn't be stipulated, the rule established by art.325 par.2 C.civ. becomes applicable, respectively spouses are obliged to contribute in relation to each other's means. However, it is possible that, at some point, during the marriage, one of the spouses will bear all the expenses of the marriage alone, if the other is unable to pay the part of the contribution, they owe [14].

When the spouse who practices prostitution contributes to or even covers, from the money thus obtained, the expenses of marriage or buys gifts for the other husband, can one consider that the latter obtains patrimonial benefits from the practice of prostitution? If the answer is affirmative without exception, it practically means denying the prostitute's right to marry or, at the very least, exposing their spouse to the permanent risk of being prosecuted for pimping.

The same problem was raised by the French doctrine, one explaining that prostitutes share their earnings with people in the family and emotional entourage, doing so voluntarily, animated by feelings or the interest of the family. However, the courts have convicted the spouses and adult children of prostitutes for pimping, decisions that have had dramatic repercussions on their social and family life [15].

However, there is also a part of the doctrine in our country that opined in the sense that the simple cohabitation between a person and another who practices prostitution, the possible facilitation of prostitution deriving from the act of cohabitation, as well as obtaining patrimonial benefits, strictly based on and taking into account the cohabitation relationship between the two spouses do not constitute activities that can be circumscribed to the activity of pimping with criminal significance. It was shown that only if the relationship of family law, between husband and wife, hides a relationship of subordination / exploitation of the person who practices prostitution for the other, the reasons of the incrimination would subsist, namely the violation of the person's freedom to engage voluntarily in such an activity [11].

We do consider that there is no identity, and therefore the same legal treatment cannot be applied, in the situation of a couple in which one of the spouses, who cannot find a job, takes care of the household and possibly raises the children, and the other is engaged in prostitution, and of a couple in which one spouse leads an extravagant life style, far above the income they earn or even in their absence, while the other prostitutes to maintain this lifestyle, the latter case obviously constituting an exploitation of the person who practices prostitution.

In the current legislative context, which does not expressly exclude the husband from the category of the active subject of the crime, we consider emphasis should be put on the interpretation of the phrase to obtain benefits from the practice of prostitution

The term of benefit is not defined by the legislator but in the common language it has the meaning of "material gain, advantage, profit", by advantage being understood a "benefit, profit obtained in comparison to another" [1]. The specialized literature shows that by obtaining benefits, it is understood,, obtaining profits, material advantages of any kind from the practice of prostitution by another person. "[16]. Therefore, returning to the two hypothetical situations presented above, only in the second case should it be noted that one of the spouses is advantaged, benefits from the practice of prostitution by the other, and thus an exploitation relationship exists. In the first case, the practice of prostitution is the way to obtain the income with which the prostitute spouse makes their own contribution to the expenses of living together.

3. Conclusions

We consider that the current incrimination of pimping does not completely exclude the spouse of the adult who voluntarily practices prostitution from the sphere of active subject of this crime but, at the same time, we appreciate that a person cannot be charged with committing the crime of pimping for the simple fact that they are married and have a life together, with all the financial implications thereof, with a partner who practices prostitution.

Given the type of social relations whose defense should be pursued by the legislator by criminalizing pimping, namely that relating to the freedom of the person harmed by exploitation, it would be necessary to retain the commission of the crime by the spouse, only when the patrimonial benefits they get are likely to prove the exploitation of the other spouse.

The fact that education, moral values or religious beliefs prevent most of us from conceiving that there may be marriages in which, by mutual consent, one of the spouses prostitutes to contribute materially to the common life or even to provide for subsistence needs, does not mean that such marriages do not exist. However, the purpose of criminal law should not be to prescribe a certain behavior as preferable to another according to criteria borrowed from other domains, but, on the contrary, to arbitrate between a multitude of options, to create a balance by guaranteeing a legislative framework for conducting such relations in such a way as to respect the person's freedom without prejudice to others [17]. In a liberal democracy, the state and implicitly the law must remain neutral in relation to the substantial conceptions of good and evil, the role of public power not being to make citizens more virtuous but only to guarantee the exercise of fundamental freedoms [18].

If the legislator wants to defend, not certain moral values, but the person's dignity, the approach that seems to be the most effective is the one proposed by the European

Parliament Resolution of 26 February 2014 on sexual exploitation and prostitution - their impact on gender equality and the adoption a regulatory system inspired by the "Nordic Model". Such a system, implemented by Sweden, Iceland, Norway and, since 2016, by France, is based on the idea that without demand the supply dies and involves the following principles: decriminalization of prostitution, inclusion of prostitutes in social protection systems and criminalization of the purchase of sexual favors of any kind [19].

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CHILDREN'S PERSONAL DATA AND PARENTAL CONSENT UNDER THE GDPR REGULATION 679/2016

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Abstract

The European Union has been given an important role in parental consent to protect the personal data of children online through The General Data Protection Regulation. Compared to the former Directive 95/46 / EC [1], Regulation 679/2016 [2] requires parental consent before information society service providers can process personal data of children under 16 years of age. This provision is new to Europe and faces many interpretations and implementation challenges.

Keywords: *GDPR, personal data, data subject, parental consent, sensitive data, children.*

1. Introduction

The protection of personal data as a fundamental right is stated by the Convention no. 108 of the Council of Europe of January 28, 1981, currently signed by 47 countries, and represents the first binding international law-instrument recognizing the protection of individuals regarding the automatic processing of their personal data. The processing of personal data is integrated into the content of Article 8 of the European Convention on Human Rights (ECHR, 1950), guaranteeing the right of every person to respect for private and family life. [3]. The consecration of the right to the protection of personal data has strong roots in various laws enunciated over time, especially since this special category of data is closely related to the privacy of the individual. Article 8 of the European Convention on Human Rights refers to beneficiaries, with a comprehensive wording: "everyone" has the right to respect for privacy. Article 1 of the European Convention on Human Rights provides that States must provide protection "to any person within his or her competence." [3] This criterion of "competence" means that protection extends to all persons residing in the territory of a State and which the state can protect.

The Council of Europe Convention 108 [4] protects everyone, regardless of nationality or residence. This is also a fundamental rule of international human rights law. The protection given by the provisions of Regulation 679/2016 (hereinafter referred to as GDPR) applies to natural persons as human beings. Personal data is therefore data relating to identified or identifiable living persons. [5]

The right to the protection of personal data is, in this sense, a personal right that is not restricted to belonging to a certain group. Even in the former legislation, Directive 95/46 / EC in the Recital number 2 in the preamble to the Directive explicitly emphasizes that "data-processing systems are designed to serve the man" [6] and that it must, regardless of nationality or residence of natural persons, to respect their fundamental rights and freedoms.

2. The status of the Children

Children are actively present in the online environment at an increasingly young age. It is estimated that globally one in three internet users is under the age of 18. [7] In this vast

information environment, beneficiaries not only enjoy opportunities to create, to learn, to express themselves, but unknowingly disclose large amounts of personal data, risking causes damage that is difficult to repair in the future. As children represent a sensitive category of beneficiaries of personal data, and personal data is a very important resource in contemporary society, this mix leads to a very high risk of vulnerability of children, especially online. The risks to children unconsciously and completely uninformedly disclosing personal data are related to issues such as commercial exploitation and misuse of personal data through profiling, identity theft, loss of reputation and even discrimination.

Considering most relevant international instruments, the legal definition of a child or an underaged person or a minor is a person under the age of 18, unless the person has legally acquired the status of an adult before that age. A child is a human being given the whole sense of the word. For this reason, a child must enjoy all the rights of a grown-up person, including the right to the protection of their personal data. As the child is going through the process of emotional-cognitive, physical, and mental developments to become an adult, it is considered that he has not yet reached the maturity threshold necessary to be responsible for his/her actions and to be able to discern for himself/herself.

Regulation 679/2016, compared to previous legislation (Directive 95/46 / EC) expressly enshrines the rights of children regarding the processing of personal data of this category of beneficiaries. We find that both the former Directive and the Regulation do not specify the legal age of the data subject. EU Member States therefore have a non-uniform application to this aspect, alternating between the age of 13 and the age of 16. It is important to note the essential aspect of the age at which an individual / child is considered a underaged. If the general rule consecrates the legal age to 18 years, in the matter of personal data, in principle, in Romania a person can give a valid consent and therefore be considered an adult in terms of GDPR, when he/she turns 16 years old.

The first reference to the issue of children's personal data appears in the Regulation, at Recital 58, and proposes the language needed to be used in relation to them: "The principle of transparency requires that any information addressed to the public or to the data subject be concise, easily accessible, and easy to understand, and that clear and plain language and, additionally, where appropriate, visualization be used. Such information could be provided in electronic form, for example, when addressed to the public, through a website. This is of relevance in situations where the proliferation of actors and the technological complexity of practice make it difficult for the data subject to know and understand whether, by whom and for what purpose personal data relating to him or her are being collected, such as in the case of online advertising. Given that children merit specific protection, any information and communication, where processing is addressed to a child, should be in such a clear and plain language that the child can easily understand". [2]

Due to all these factors, children are seen as the most vulnerable category of internet users as they may be less able to assess dangerous situations and may be more easily misled, given their lack of awareness of the long-term consequences. [8] These specific features could easily be exploited by online merchants who collect personal data and use special techniques such as profiling, using "dynamic advertisements" tailored to the individual's profile and behavior. Thus, the child under 16 is unable to give valid consent to the processing of his/her personal data. Any processing based on this ground, under the rule of consent is not going to be valid. [9],

3. Conditions of Validity

Article 4 (11) of the GDPR defines consent as “any freely given, specific, informed, and unambiguous indication of the data subject’s wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her.” [2]

The basic concept of consent remains the same as in the former Directive 95/46 / EC and consent is still considered one of the legal grounds on which the processing of personal data must be based, in accordance with Article 6 of the GDPR. In addition to the amended definition in Article 4 (11), the GDPR provides additional guidance in Article 7 and in recitals 32, 33, 42 and 43 on how the data collector should act to comply with the main elements of the valid consent requirement expressed. Finally, the addition of specific provisions and considerations on the withdrawal of consent confirms this - the consent should be a reversible decision and give the data subject real control over his or her personal data.

Very useful in explaining the concept of consent on the GDPR Regulation is Guide 05/2020 on valid consent [10] adopted by the European Data Protection Board (EDPB), but also the case law of the Court of Justice of the European Union, as follows. The Court of Justice of the EU ("CJEU") has ruled (Case C - 61/19) [11] in a case (Orange Romania SA v. National Authority for the Supervision of the Processing of Personal Data) concerning the informed consent: what exactly does the stating of "freely expressed and informed consent" cover when processing personal data and what is the criteria for assessing such consent (e.g., retention of customer identity documents by a telecommunications collector)?

According to the Romanian Data Protection National Authority ("ANSPDCP"), Orange Romania failed to demonstrate the need for data retention, customers made an informed choice regarding the collection and storage of copies of their newsletters, and ANSPDCP imposed a fine. The CJEU has ruled that it is legitimate for a company to ask customers to provide some personal data and to prove their identity to conclude a contract. However, requiring customers to consent to the copying and storage of their identity cards was not required for the performance of the contract.

3.1 The valid Consent

A freely expressed consent implies the real, effective possibility of the data subjects to accept and, respectively, to oppose that the data belonging to them be processed for clearly determined purposes, in the absence of any constraints of any nature (intimidation, pressures, etc..) and without the risk of suffering negative consequences if he/she does not express his/her consent accordingly.

3.2 The Specific Consent

To comply with the condition of a specific consent, the Guide provides [10], inter alia, that when requesting the consent of data subjects, the controller must clearly specify the purpose of the processing (to avoid further modification or gradual extension of the purposes of processing). Secondly, the controller must separate the purposes and seek consent for each purpose (if the data processing activities pursue two or more purposes). Thus, if a controller processes data on the basis of the data subject's consent and wishes to process that data for a new purpose, the controller must request a new consent from the data subjects, as the original consent does not legitimize other new processing purposes (subject

to which further processing takes place for the purposes of scientific or historical research or for statistical purposes, in which case the Regulation allows for a number of derogations, subject to appropriate safeguards for data subjects).

3.3 The Explicit Consent

For the purposes of the Regulation, explicit consent translates into unequivocal action from the person whose personal data are to be processed. This action may consist of a written statement or any other unequivocal action. GDPR dedicates a specific article in the text of the Regulation on the processing of children's personal data and pays special attention to issues related to consent. The general provisions of the GDPR apply to any service involving the processing of personal data, in whole or in part by automated means or when personal data are part of a registration system (Article 2 GDPR). Article 3 explicitly specifies that it applies to free services provided to data subjects in the European Union by a collector or proxy not established in the territory of the EU. Most online services require the consent of a parent or legal guardian for the processing of a child's personal data based on consent up to a certain age. This is true for social networking sites as well as platforms for downloading music and buying online games.

3.4 The Informed Consent

Pursuant to art. 5 of the Regulation [2], transparency is one of the essential requirements for the processing of personal data, inherent in the principle of legality. Thus, the consent of data subjects must be expressed knowingly, and the provision of information to data subjects prior to the expression of consent is necessary to enable them to understand the nature of the processing activity and the risks to which they are exposed, in clear and accessible language.

4. Children's Consent

The GDPR aims to protect all EU data subjects. In the modern age of digital technologies and the widespread use of social networks, children, their rights, and interests must not be forgotten, as they are also part of a vulnerable group. Children need specific protection regarding their personal data, as indicated in recital 38 of the Regulation [2]. They are not as well informed about their rights as adults, and their rights thus require extra protection.

Article 8 of the Regulation specifically addresses the issue of consent and children. Where information society services [2] are provided directly to a child who must give his or her consent, the processing of a child's personal data may be lawful if the child is at least 16 years old. If a child is under the age of 16, the processing may be considered legal only when the consent is given and authorized by the child's parent or legal guardian. These requirements do not affect the general contract law in the EU Member States, such as the rules on the validity, or effect of a contract in respect of children. EU Member States can introduce laws that set a lower age threshold for these purposes: the age of a child, however, cannot be less than 13 years. It is the responsibility of the data collector to use all available technology to verify that consent is indeed given or authorized by the parent or legal guardian.

According to art. 7 of the Regulation, if the consent of the data subject is given in the context of a written statement which also covers other matters, the consent must be

presented in a form which clearly differentiates it from the other aspects, in a form intelligible and easily accessible, using clear and simple language. [2] The regulation also provides for the conditions for withdrawal of consent in the sense that the person who gave the consent has the right to withdraw it at any time, respecting the conditions and terms in which it was offered in the first place.

In practice, the withdrawal of consent must be made by a procedure contrary to the action which constituted the granting of the consent. The regulation states that: "Withdrawal of consent should be as simple as granting it." [2].

The practice highlights the fact that when the issue of consent regarding children is discussed, we are dealing with an issue that needs a specific protection of personal data. Recital 38 of the GDPR states: "Children merit specific protection with regard to their personal data, as they may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of personal data. Such specific protection should, in particular, apply to the use of personal data of children for the purposes of marketing or creating personality or user profiles and the collection of personal data with regard to children when using services offered directly to a child. The consent of the holder of parental responsibility should not be necessary in the context of preventive or counselling services offered directly to a child." [2]. Thus, we observe the application of the principle of proportionality between social values protected by expressing consent and services provided for the purpose of prevention and counseling provided to children. In the view of the provisions of paragraph 75 of the Regulation, children are included among vulnerable persons, so according to paragraph 58 of the Regulation is considered the urgent need to apply the principle of transparency in the sense that children need specific protection, any information and any communication, if processing is aimed at a child, it should be expressed in simple and clear language so that the child can easily understand it, as there is a risk that the processing will cause much more serious physical, material or moral harm than among adults. If the services of the information society are offered directly to a child who has not reached the age of 16, the processing of his/her personal data requires the consent of the parent or the legal representative. Thus, the processing is legal only if it is based on the consent of at least one parent, who exercises parental authority over the child.

Following the entry into force of the Regulation, on May 15, 2019, children under the age of 16 will no longer be able to use online services that involve the processing of personal data, except with parental consent. Examples of such services may be the use of social networks, access to online stores, the use of e-mail services, but not only.

For the given consent to be informed, the data subject should be at least aware of the identity of the controller and the purposes of the processing for which the personal data are intended. Consent should not be considered as freely given if the data subject does not really have freedom of choice or is unable to refuse or withdraw his or her consent without prejudice.

5. Conclusions

Consent remains one of the six legal bases for the processing of personal data, as listed in Article 6 of the GDPR. When initiating activities involving the processing of personal data, a controller must always consider what would be the appropriate legal basis for the intended processing.

Compared to the previous legislation, GDPR concretely outlines the rights of the most vulnerable category of data subjects in terms of personal data protection issues. The importance of obtaining a valid consent in the case of children is crucial for adequate protection, but also for a valid, legal processing. Firstly, a child's lack of maturity makes him/her vulnerable, which must be offset by an adequate level of protection. Secondly, the child's right to development can be promoted exclusively through the assistance or protection provided by other entities and / or persons. This protection belongs to the family, society, and the state.

To exercise most of their rights, children need legal representation. If the processing of a child's data has started with the consent of his or her legal representative, the child in question may, at the legal age, revoke that agreement. Children have the same rights to personal data as adults. Probably the most relevant scenario in question is the right of erasure their personal data. Its need is urgent when a person initially gave his/her consent for a certain processing when he/she was a child, without being fully aware of the risks involved.

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[3] European Convention on Human Rights https://www.echr.coe.int/Documents/Convention_ENG.pdf

[4] Convention 108 <https://www.coe.int/en/web/data-protection/convention108-and-protocol>

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[6] Directive 95/46/CE, Reason 2

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THE LEGAL STATUS OF MIGRANT WORKERS IUSTUM BELLUM SARS-COV-2

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Abstract

The SARS-CoV-2 pandemic has produced significant global changes in many areas of the economic, social and cultural life. The restrictions introduced by most countries of the world, especially regarding access to their territory, have substantially influenced a phenomenon of maximum relevance in contemporary society, namely that of migration. The pandemic has influenced most forms of migration, both regular and irregular. Through the effects that the pandemic has produced in the economic field in particular, the labor migration of third-country nationals to the European Union as well as the situation and status of migrant workers already in the territory of the Union, have been strongly affected. The article reviews the effects of the SARS-CoV-2 pandemic globally and in the European Union on migrant workers from third countries and sets out measures and solutions taken at Member State level to mitigate its impact, especially on this category of people.

Keywords: migrant workers, economic migration, family reunification, SARS-CoV-2, rights.

Introduction

2020 has marked the beginning of a new period in the evolution of migration as a whole and even more so of labor migration. This stage is referred to by experts as the "period of immobility"¹. Although overall, the pandemic has changed the traditional dynamics of global migration, reducing the cross-border mobility in the previous period pandemic has not stopped yet international migration. An example of this is the number of illegal crossings on the corridor of Central Mediterranean in the first five months of 2020 increased 3 times compared to the same period of 2019².

On the other hand, border closures and other restrictions imposed by most states have increased the risk of workers being exposed, blocking some of them in unsafe environments or depriving them of access to health, social support, jobs and income, thus increasing the vulnerability of migrants and their families. The difficulty of ensuring social distance for unregulated migrants and their families, in transit or in the countries of destination, has exposed them to a higher risk of contracting the virus.

On a more positive note, the pandemic has shown that migrants can play an important role as workers in key areas such as health, supply networks and agriculture. According to International Organization for Migration (IOM) statistics, more than 13% of service and sales workers in 7 of the 20 countries with the most SARS-CoV-2 cases are migrants³. This

¹ Solon Ardittis and Frank Laczko, Introduction – Migration policy in the age of immobility, Migration Policy Practice, Vol. X, Number 2, aprilie-iunie 2020, p. 2.

² <https://frontex.europa.eu/media-centre/news/news-release/situation-at-eu-external-borders-arrivals-down-in-first-half-of-2020-UdNxM5>, 22.04.2021

³ International Organization for Migration, Migration data relevant for the COVID-19 pandemic, iunie 2020, p. 3.

situation has led the European Commissioner for Internal Affairs to make the following remark: "Pandemic SARS-CoV-2 opened our eyes to really depend on how much our societies migration"⁴.

At the same time, we must emphasize that most Member States of the European Union (EU) and the Organization for Economic Co-operation and Development have taken measures to mitigate the effects of the SARS-CoV-2 pandemic on migrant workers and their families since the beginning of the pandemic. These measures that we present content item. Such measures could not be taken at the level of the EU legislature and executive for the simple reason that the legislative procedure was lengthy and the measures would no longer have taken effect. On the other hand, they had to be adapted to the specific situation in each country in order to produce the expected effects.

1. The evolution of migration and migration for work, at global first year of pandemic

2020 was an exceptional year in the history of migration, as many countries introduced mobility restrictions in response to the SARS-CoV-2 pandemic. In April 2020, the Pew Research Center reported that 91% of the world population lived in a country that has imposed restrictions on the arrival of people from other countries, who are neither citizens nor residents of the country of destination⁵. These restrictions remained in force in many countries after April 2020, so that on 4 January 2021, a number of 226 countries, territories and regions issued 111,879 travel measures, of which 29,057 were reported as entry restrictions and 81,822 were reported as conditions to be met for entry authorization⁶.

On the other hand, it should be noted that it is difficult to assess the full impact of the pandemic on migration in general and on migration for work, in particular, because most statistics cover only the first half of 2020. Another limitation it is driven by the work of national statistical offices, which have also been affected by the pandemic, especially in middle and poorly developed countries, which have had to cancel or postpone surveys on the subject. In this regard, it should be noted that 96% of the United Nations national statistical offices reported the cessation of data collection activities through direct contact⁷.

In this context, a first conclusion that can be drawn in terms of the evolution of global migration in general is that after years of continuous growth, it has fallen dramatically in 2020. According to statistics from the United Nations Department of Economic and Social Affairs, the number of migrants worldwide increased from 221 million in 2010, to 281 million in 2020. By mid-2020, however, the same organization estimated the number of migrants has decreased by about 2 million, which corresponds to a decrease of 27% compared to the expected increase according to the trend before the pandemic⁸.

⁴ Shada Islam, COVID-19 spotlighted European migrants' vital role; the EU must tell their story, 19 mai 2020.

⁵ Philip Connor, More than nine-in ten people worldwide lives in countries with travel restrictions amid COVID-19, Pew Research Institute, 1 aprilie 2020.

⁶ International Organization for Migration, Global mobility restriction overview. COVID-19 Mobility Impacts Update Series. Displacement Tracking Matrix, 25 ianuarie 2021.

⁷ United Nations Department of Economic and Social Affairs (UN DESA), Survey of national statistical offices (NSOs) during COVID-19. 16 decembrie 2020.

⁸ United Nations Department of Economic and Social Affairs (UN DESA), International migration trends, December 2020.

Despite these dramatic reductions, some types of migration, including labor migration, continued into 2020. Many countries have introduced exceptions to travel restrictions to ensure that workers in certain "key areas"⁹, such as health, agriculture, tourism and transport, may enter their territory.

Irregular migration had the same downward trend during 2020. The Frontex statistics, the number of detected cases of illegal crossing TO external borders of the EU declined over the year by 13%, which in absolute figures means about 124,000 people. This was the lowest number of illegal crossings since 2013. The main routes of illegal migration were recorded the same values and increasing of illegal entries or approximately 76% on the route Mediterranean Eastern, 29% in the Western Mediterranean while routes Central Mediterranean and the Western Balkans continued to record increases of 154% and 78%¹⁰.

Another conclusion that emerges from the studies of international bodies is that migrants face higher health risks during this period, mainly due to the fact that they do not have access to health insurance, live in overcrowded homes and carry out activities that cannot be performed remote. Meanwhile, workers that active ase in health care are at risk of becoming contaminated with the SARS-CoV-2 virus. Although migrant health statistics are relatively limited due to the fact that fewer Member States of the World Health Organization collect such disaggregated data (only 25 of the 53 Member States), it is possible however, the study found that the incidence of SARS-CoV-2 infection was higher among migrants than among the local population¹¹. Thus, in the case of Norway, it was found that 31% of the number of infected people came from migrants. The situation is relatively the same in the case of deaths among migrants during the pandemic, even if they were not obtained in all cases given the cause of death. These data collected from France, Sweden and the Netherlands indicate higher mortality rates among migrants during the first wave of the 2020 pandemic¹².

Based on this information, the OECD concluded that "migrants paid a higher price in terms of the incidence of SARS-CoV-2, with a higher risk of infection and a higher mortality rate, despite the fact that the average age theirs was lower"¹³. A study conducted in 82 countries, confirms previous findings suggesting that migrants are exposed to greater infection with SARS-CoV-2 and deaths among them as a result of infections is higher¹⁴.

The SARS-CoV-2 pandemic appears to have changed public attitudes to some extent. On the one hand, there has been a greater appreciation of the fact that many migrants are workers in public health services and thus they are "key workers", providing essential

⁹ European Commission , Inform #3 – Maintaining Labour Migration in essential sectors in times of Pandemic, Series of EMN-Organisation for Economic Cooperation and Development Informs on the impact of Covid-19 in the Migration Area, 2020, p. 1.

¹⁰ Frontex, Irregular migration into EU last year lowest since 2013 due to COVID-19. 8 ianuarie 2021, consultat la adresa web: <https://frontex.europa.eu/media-centre/news/news-release/irregular-migration-into-eu-last-year-lowest-since-2013-due-to-covid-19-j34zp2>, 19.04.2021.

¹¹ Organization for Economic Cooperation and Development, What is the Impact of the COVID-19 pandemic on immigrants and their children?, Policy brief, 19 octombrie 2020.

¹² Ibidem.

¹³ Organization for Economic Cooperation and Development, What is the Impact of the COVID-19 pandemic on immigrants and their children? Policy brief, 19 October 2020.

¹⁴ Sally E. Hayward (coord), Clinical outcomes and risk factors for COVID-19 among migrant populations in high-income countries: a systematic review. medrxiv, 22 decembrie 2020, p. 6.

services for the host country¹⁵. . On the other hand, there are fears that aliens are being blamed for spreading the pandemic globally, becoming a kind of "scapegoat"¹⁶. . In this regard, the Secretary-General of the United Nations, Antonio Guterres, expressed the fear that the SARS-CoV-2 pandemic will contribute to "a tsunami of hatred and xenophobia"¹⁷.

At the end of 2020, the WHO published the results of a global online survey of approximately 30,000 migrants, including refugees. When asked if they were treated worse, as well or better than in the pre-pandemic period, most answered that they did not notice a change in attitude. However, 30% of those aged between 20 and 29 said they felt increased discrimination compared to the pre-pandemic period¹⁸.

In this context, non-governmental organizations have launched communication campaigns to prevent the stigmatization of migrants and their families, and misinformation about their role in the spread of the virus. The International Organization for Migration has even issued a guidance note on addressing and countering racist discourses on SARS-CoV-2¹⁹. In addition to the measures implemented by NGOs and local authorities, there were also some measures taken at national level by state institutions. Thus, the German Anti-Discrimination Agency, noticing an increase in racist and anti-Semitic discourses in the context of the pandemic, launched an information and support campaign for potential victims.

And finally, another conclusion regarding the impact of the pandemic on the migration phenomenon is the decrease in remittances sent by migrants to their families in their countries of origin. According to statistics, 1 in 9 people depend on these remittances, helping them to meet their basic needs and pay for medicines, health insurance or children's education expenses. Migrant workers from the countries with the most SARS-CoV-2 cases, such as the United States, France, the United Kingdom, Italy and Germany, sent home about a quarter of the volume of remittances globally in 2018²⁰. . In April 2020, the World Bank estimated that remittances to low- and middle-income countries could fall by 20% compared to 2019, with absolute declines of about \$ 445 billion²¹. The World Bank subsequently revised these estimates, estimating that the absolute decrease in remittances could be \$ 508 billion²². At the same time, it is estimated that the flow of remittances to low- and middle-income countries will decrease by 14 percent in 2021 compared to the period before the pandemic²³.

¹⁵ A se vedea în acest sens Global Migration Data Portal's COVID-19, secțiunea privind procentul medicilor și asistentelor provenind din rândul migranților în țările aparținând Organizației pentru Cooperare și Dezvoltare Economică.

¹⁶ International Organization for Migration Issues Communication, Guidance to Stem Rising Anti-Migrant Sentiment in Wake of Covid-19 International Organization for Migration, p. 1.

¹⁷ International Organization for Migration UN Migration, Countering xenophobia and stigma to foster social cohesion in the COVID 19 response and recovery. Issue brief, iulie 2020, p. 2.

¹⁸ Ibidem.

¹⁹ International Organization for Migration Issues Communication, Guidance to Stem Rising Anti-Migrant Sentiment in Wake of Covid-19, 5 mai 2020, p. 2.

²⁰ International Organization for Migration, Migration data relevant for the COVID-19 pandemic, 10 martie 2021.

²¹ World Bank, COVID-19 crisis through a migration lens. Migration and Development Brief 32, April.

²² World Bank, Migration and Development Brief 33, Phase II: COVID-19 crisis through a migration lens, octombrie 2020, p. vii.

²³ Ibidem.

The overall conclusion is that in order to understand the full impact of the SARS-CoV-2 pandemic on global migration, more statistical data and adequate information are needed. In this way, appropriate policies could be adopted to counter the effects of the pandemic

2. Impact of SARS-CoV-2 on migration and migrant workers, to the European Union

The profound changes that the SARS-CoV-2 pandemic has produced globally and especially in Europe, in areas of the most varied of contemporary society, have unfortunately affected, in addition to fundamental values and principles that have underpinned the construction especially the confidence of the citizens of the Union in its ability to deal with crisis situations that sometimes arise unexpectedly. On the other hand, it has once again proved, if need be, that excessive bureaucracy within the European crisis response mechanism has long delayed the European Commission's response, as the first institution with executive powers in the Union's decision-making chain..

Critically criticized from within in the early stages of the pandemic, especially by the most affected countries (Italy, Spain, France), the European Union seems to have shaken itself the basic principle it invoked each time in times of crisis, the of solidarity, thus watering down nationalist and Eurosceptic parties and leaders who openly protest against alleged violations of national sovereignty by some decisions of the Union's institutions. This crisis has overlapped with the effects of BREXIT, which have begun to be felt, especially in trade relations between the Member States and the United Kingdom, thus undermining the foundations of pyramid construction and the principles on which European construction is based.

The impact of the pandemic on key areas for the economies of some EU countries, such as tourism, has overlapped with some of the measures taken by the European executive so that legal migration for work from third countries has been severely affected. We are referring here, on the one hand, to the significant reduction in the activity of hotels and restaurants, which employed a significant number of third-country workers, and, on the other hand, to the closure of the European Union's external borders, a measure unprecedented in its history.

Despite the fact that on 24 February 2020 the European Commissioner for Crisis Management²⁴, stated that it did not take into account the restriction of movement in the Schengen area, in the immediate future, ten states in the free movement area reintroduced internal border controls. Moreover, as of 10 March, some Schengen Member States, including Austria, Slovenia, the Czech Republic, Denmark, Poland, Hungary, followed by most other Member States, have decided unilaterally to close or total borders for foreign nationals, for reasons of preventing the spread of the SARS-CoV-2 epidemic.

Although such a measure is not provided for in the Schengen Borders Code, it has been taken by the governments of those countries on the basis of national law, most often at the same time as the state of emergency has been established. Moreover, completely ignoring the procedures provided for in the relevant European legislation, some Member States, such

²⁴ Janez Lenarcic diplomat sloven, Comisar European pentru Managementul Crizelor începând cu 1 decembrie 2019.

as Poland, the Czech Republic, Slovenia, Denmark, did not even notify the Commission of the measure taken, although they had a clear obligation to do so.

Faced with these paradoxical situations, on March 14, the President of the European Commission²⁵, openly opposes such measures, which are "not considered effective by the World Health Organization", but rather advocates for health checks at the Union's external or internal borders.

In the face of growing pressure from Member States, the European Commission has finally reacted formally by Communication 115 of 16 March 2020²⁶, recommending that the European Council take a decision on the restriction of non-essential travel by third-country nationals to the European Union for a period of 30 days, with some exceptions expressly mentioned in the document. The measures proposed by the Commission were approved the next day by members of the European Council meeting in a videoconference, on which it was agreed to facilitate the transport of medicines, food and other goods as well as the movement of European citizens returning to their country of origin.

The recommendation in the Commission Communication on restricting non-essential travel by third-country nationals to the EU did not refer to the legal basis for taking such a measure, for the simple reason that such a provision does not exist in the Union acquis. Commission motivation is that he has pursued a consistent and coordinated approach by Member States to put an end to arbitrary and abusive measures in place by then. However, we cannot fail to note that the measure proposed by the Commission to restrict the access of third-country nationals to the territory of the Union is at odds with the view originally expressed by the Head of the European Commission on the effectiveness of such a measure at internal borders. On the other hand, taking such important measures, without a legal basis in this regard, has set an extremely dangerous precedent, in a European context that is already quite complicated.

The above-mentioned measures were aimed in particular at restricting the access of third-country nationals to the territory of the European Union. However, with regard to the effects of the pandemic on migrants already in the Union, legally or illegally staying, some relevant data should be mentioned in this regard.

The incidence of SARS-CoV-2 cases among migrants was higher than among their own citizens in a number of European countries with a large number of migrants on their territory. Thus, of the confirmed cases in Norway, 31% came from migrants, 32% from Sweden (given that the incidence among the native population was 19%) and 18% from Denmark, double the incidence among the native population.. In Portugal, 24% of SARS-CoV-2 infections in Lisbon come from migrants, representing 11% of the metropolitan area. However, a special case is represented by Italy, where the incidence of SARS-CoV-2 cases among migrants was only 5%, given that the incidence rate of the local population was double²⁷. One explanation may be that in this country, a large part of the migrant population is made up of young people and their children, so they are less likely to have been symptomatic. In this regard, it should be noted that most EU Member States have

²⁵ Ursula von der Leyen președintă a Comisiei Europene începând cu 1 Decembrie 2019.

²⁶ Communication from the Commission to the European Parliament, the European Council and the Council, Covid-19: Temporary Restriction on Non-Essential Travel to the EU, COM/2020/115 final.

²⁷ Organisation for Economic Cooperation and Development Policy Responses to Coronavirus, What is the impact of the COVID-19 pandemic on immigrants and their children, 19.10.2020.

provided free access to SARS-CoV-2 treatment to all categories of migrants and their families, including those in an irregular situation.

The lack of death certificates disaggregated by origin and socio-demographic characteristics makes it impossible to assess the impact of SARS-CoV-2 on the causes of death among the migrant population. However, in some countries such as France, the Netherlands and Sweden, which have data on the origin of deceased persons, not on the cause of death, it was found that in the first months of 2020, the number of deceased persons from migrants was higher than that of the native population. Thus, in France the excess mortality among migrants was twice as high as in the similar period of 2019. In Sweden, if in the period 2015-2019 the proportion of migrants in the total number of deaths was between 12% and 14%, in the period March-April 2020 was 16%. During the same period, the number of deaths among migrants in the Netherlands was 47% higher than usual²⁸.

These situations have led the governments of many Member States to implement migrant-oriented information campaigns, through social networks or dedicated sites, to limit the spread of the virus. Such a measure was taken by the German government, which provided information on measures to prevent SARS-CoV-2 infection in languages relevant to migrants, both on its website and on an online platform²⁹.

The further development of the situation in most European Union countries affected by the pandemic has shed new and encouraging light on migration and migrants. European Commissioner Johansson's public recognition of the importance of migrants during the pandemic is innovative. Europe's need for foreign workers - highly skilled or less skilled - is well known. The contribution of migrant workers to national pension systems, which is under pressure from an aging population, is also no secret.

A report by the Joint Research Center of the European Union stresses that many complicated measures restricting the use of migrant workers put them in a positive light. While many Europeans have worked from home, a number of "essential professions" needed to ensure health and access to basic services, such as doctors, nurses, drivers, distributors, have been provided by so-called "key workers". In many cases there were migrant workers (13% of the total)³⁰. The fight against SARS-CoV-2 has therefore demonstrated the importance of migrant workers in many areas, not just highly skilled ones, the report concluded.

All these evolve and migration, and in particular when migration for work, required, undoubtedly, measures to counteract the effects of the pandemic and appropriate policies to that end.

3. The impact of the pandemic on integration of migrants in the labor market

All countries affected by the pandemic and in particular states developed in Europe such as France, Italy, Spain etc. faced a strong economic contraction, due to the complete

²⁸ Organisation for Economic Cooperation and Development Policy Responses to Coronavirus, What is the impact of the COVID-19 pandemic on immigrants and their children, 19.10.2020.

²⁹ Handbook Germany, [www.facebook.com/HandbookGermany](https://handbookgermany.de/en.html) pagină care are 200.000 de urmăritori, <https://handbookgermany.de/en.html>.

³⁰ Organisation for Economic Cooperation and Development, What is the impact of the COVID-19 pandemic on immigrants and their children?, Impact on migrants' labour market outcomes, 19 octombrie 2020, p. 21.

closure of all or part of the activities of tourism, hotels and restaurants, where the work a significant number of migrants. In the hospitality industry in EU Member States, migrant workers accounted for about 25% of total workers in 2018, in the field of security and cleaning services 21% of workers were migrants and in the retail area, the proportion of migrant workers in total employees was 12%³¹.

In some countries, such as Austria, Finland, Germany, Ireland, Luxembourg, Switzerland and Sweden, the proportion of migrant workers in the hospitality industry is even higher, at around 40%. Obviously, this category of workers was most deeply affected by the reduction in activity, with the number of unemployed increasing significantly among migrant workers compared to domestic workers. In Sweden, for example, the unemployment rate among migrant workers in mid-2020 compared to mid-2019 was 5% higher than the unemployment rate among domestic workers, which increased by only 0.8 %, in Spain the unemployment rate was higher by 5, 5% among immigrants than among native workers which grew only 0.2% in Germany the unemployment rate among migrants was higher by 3.8% than that among domestic workers who increased by 1.5% in Austria, 2.8% compared to 1.8%. This is the case in almost all EU Member States.

The conclusion that emerges from the data presented is that migrant workers represent the most vulnerable category and, implicitly, the most affected by the contracting of the labor market, for objective and subjective reasons. It should also be noted that the OECD study covered only a relatively short period of the first part of 2020, when the effects of the pandemic were not so strong.

The OECD's analysis of the employment rate in the second quarter of 2020 compared to the second quarter of 2019 shows the same discrepancy between employment among migrant workers compared to that among domestic workers. Thus, in Spain, employment among migrant workers fell by 9 % compared to that of domestic workers, which fell by only 3.2 %, in Ireland by 5.6 % compared to 3 %, in Portugal by 4, 8 % versus 2, 2 %, in Austria by 4.2% compared with 1.8% in Italy by 4% compared with 1.8%, etc³².

Migrant workers who have lost their jobs have faced an additional problem, namely the non-fulfillment of the conditions regarding the retention of the residence permit. In response to this problem, which is, however, a temporary one, many EU countries have extended the validity of residence permits or changed the conditions of extension, in order to prevent the change of the status of legally resident migrants to illegally staying migrants. In this regard, Spain, Greece, the Czech Republic and Germany have not withdrawn the permits of migrants who lost their jobs during the pandemic. Other countries such as France, Slovenia, Estonia, Italy, Ireland, Poland and Portugal have automatically extended or renewed residence permits for a certain period or, in some cases, without defining the period³³.

In countries where the validity of work permits was conditional on reaching a certain level of income, such as Austria, this level was made more flexible. Some countries,

³¹ Organisation for Economic Cooperation and Development, What is the impact of the COVID-19 pandemic on immigrants and their children?, Impact on migrants' labour market outcomes, 19 octombrie 2020, p. 21.

³² European Migration Network, Organisation for Economic Cooperation and Development, Change in the employment rate between Q2 2019 and Q2 2020, by place of birth.

³³ Organisation for Economic Cooperation and Development, Managing international migration under COVID-19, Paris, 2020, p. 3, p. 11.

including the Netherlands and Ireland, have introduced measures to extend the stay after graduation of students seeking employment³⁴.

Another measure to mitigate the impact of pandemic unemployment among migrant workers was to expand the coverage of support measures. A number of OECD Member States have changed the rules on access and the duration of unemployment benefits, which will benefit migrant workers, especially those with less stable employment contracts. An example of this is Belgium, which included SARS-CoV-2 in the "temporary force majeure" regime. As a result, migrant workers do not have to prove a certain number of days worked in order to benefit from support measures. Similarly in Spain, the requirement for the minimum length of days worked to qualify for unemployment benefits (360 days in the last 6 years) has been suspended. In Ireland, anyone who has lost their job due to the pandemic can receive unemployment benefits.

Many OECD member countries have introduced support measures for employers and businesses that are also accessible to foreigners with a start-up or self-employed visa. In the Netherlands, foreign holders of these types of visas can benefit from financial support and working capital loans. Sweden extends financial support measures for newly established businesses during the pandemic, which can also benefit foreigners³⁵.

Work permits granted to workers from third countries are often restricted to a specific sector or employer. In the context of the pandemic, some countries have lifted these restrictions or made them more flexible. Czech Republic and Finland, for example, issued permits migrant workers who have lost their work permits that allow them to change employer or field of work. In other countries, including Belgium and Spain, certain categories of migrants, including students and asylum seekers, were allowed to work without having to wait a certain period provided for in the legislation of those countries (4 months in Belgium). Ireland, France and Belgium also allowed students to work more than the maximum period required by each country's legislation.

Appropriate policies have been adopted in some EU and OECD Member States to facilitate the access to the labor market of migrant workers for so-called "essential professions", such as health workers. Italy has issued licenses for foreign doctors with studies done abroad, including in the country of origin. Belgium, Germany, Ireland and Luxembourg have facilitated the recognition of qualifications obtained abroad by healthcare staff and France has allowed the employment of the same category of workers in occupations that do not require the practice of the medical profession³⁶.

The situations presented above reflect, on the one hand, the complexity of the problems faced by the states most affected by the pandemic, but also the diversity of measures taken to mitigate its effects.

The overall conclusion is that migrants, and especially migrant workers from third countries, were the most vulnerable and affected by the effects of the pandemic. At the same

³⁴ EMN/Organisation for Economic Cooperation and Development, Impact of COVID-19 on International Students in EU and Organisation for Economic Cooperation and Development Member States, EMN Inform 2, 2020, p. 8.

³⁵ Organisation for Economic Cooperation and Development, Managing international migration under COVID-19, Paris, p. 3.

³⁶ Organisation for Economic Cooperation and Development, Contribution of migrant doctors and nurses to tackling COVID-19 crisis in Organisation for Economic Cooperation and Development countries, Policy Responses to Coronavirus (COVID-19), OECD Publishing, Paris, 2020, p. 4.

time, it must be borne in mind that many of these effects will persist after the end of the pandemic, so that the mitigation measures set out above are extended.

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THE REVIEW OF THE "BLUE CARD" DIRECTIVE - AN ARDUOUS PATH FOR THE EUROPEAN UNION

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Abstract

Third country nationals labor migration policies represent a way of solving the issues that the European Union is facing, on the one hand, in terms that the lack of labor in most Member States, especially in some vulnerable sectors, and on the other hand, in terms that the discouraging irregular migration.

The adoption of the Directive 2009/50/EC on the "Blue Card" permit¹ was a step forward in terms of establishing minimum standards and conditions relatively uniform admission to the European Union and categories of workers with high skills. Following assessments made on achieving the purpose of the "Blue Card" Directive and of it has been implemented by the Member States has become obvious need to reform it, to make it more attractive to third country nationals with high skills.

This study examines legislative aspects that have created an impasse in the negotiations on the content of the proposal and submit suggestions for compromise identified that could lead to the unblocking of the negotiation process.

Keywords: *highly skilled worker, rights, Directive 2009/50/EC, SARS-CoV-2, migration, family reunification.*

Introduction

One of the key topics that the European Union is facing for a long time, is the increase of structural deficits of skills, especially in certain essential sectors that often require a high level of knowledge and skills. These add to the demographic challenges the Union faced complicated and will increase in the coming decades, due to a rapidly aging population and a shrinking workforce.

All this will jeopardize the economic growth, innovation capacity and competitiveness of the European Union economy compared to other economies, which are more able to attract talent to their territory. Currently, 48% of migrants turn to them with a low level of education in third countries choose a European destination while 68% of those with a high level of education prefer a destination outside Europe, particularly among Member States of the Organization for Economic Cooperation and Development².

Attracting third-country nationals with high professional skills to the labor market in the Member States has been and remains one of the main concerns of the European institutions, on the one hand, but also of the Member States, which have sought to regulate national this category of workers, to fill the gaps they faced in the labor market.

¹ Directiva 2009/50/CE a Consiliului din 25 mai 2009 privind condițiile de intrare și de ședere a resortisanților din țările terțe pentru ocuparea unor locuri de muncă înalt calificate, OJ L 155, 18.6.2009,

² Document de Lucru al Serviciilor Comisiei Rezumatul Evaluării Impactului care însoțește documentul Propunere de Directivă a Parlamentului European și a Consiliului privind condițiile de intrare și de ședere a resortisanților țărilor terțe pentru ocuparea unor locuri de muncă înalt calificate, SWD/2016/0194 final - 2016/0176 (COD), p. 2.

The goal set by the European Council of 23-24 March 2000 for the European Union to become "the most competitive and dynamic economy in the world"³, the needs of employers in the Member States to find workers with different skills, the existence and real availability of labor market stocks in the Member States and the aging population⁴, are interdependent aspects that have as a point of convergence and aim, a practical solution through the Blue Card Directive - Council Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for employment of highly qualified jobs.

Legal and theoretical foundation that allowed the adoption of the Directive are: the Treaty establishing the European Community (Art. 63), the Lisbon European Council conclusions and the Hague Program⁵.

1. The context of the adoption of Directive 2009/50/EC and its weaknesses

A first attempt by the European Commission to draft a law on the entry of citizens from third countries in the EU and their access to the labor market occurred in 1999, but the proposal did not receive support Member States because it had an approach uniform for all kinds of economic activities, so it was withdrawn. The second attempt took place in 2001, after the Commission has divided the area into sectors and launched proposals for a Council Directive on conditions of entry and residence of third country nationals for employment and economic activity in freelancers⁶. This proposal was also unsuccessful because Directive 2003/109/EC on long-term residents was adopted in 2003, including the right to move and reside in any Member State for economic reasons. Finally, following pressure from Member States to adopt a common position on economic migration, the Commission drew up a Communication on the Policy Plan on Legal Migration (COM (2005) 669), which announced that In 2007 and 2009, five proposals for directives regulating migration for work will be submitted to the Council, namely highly skilled workers, seasonal workers, paid training, intra-corporate transfers and a directive governing first admission into the EU.

In 2007 the Commission launched a Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for highly qualified employment⁷. The stated aim of the proposal was mainly to make the European Union a more attractive destination for highly skilled workers in third countries, in order to contribute to economic consolidation in the Member States. The proposal aimed to regulate the conditions for entry and residence in the Union of this category of workers, a common set of rights for them and their family members, to provide solutions to the fluctuating demands of migrant workers in the labor market, to protect them from exclusion from the labor market if they become unemployed and promote circular migration between the country of destination and the country of origin. A highly publicized provision of the proposal was the right of the Blue

³ Concluziile președinției Consiliului European din 23-24 martie 2000 de la Lisabona.

⁴ https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Population_structure_and_ageing/ro

⁵ The Hague Programme: strengthening freedom, security and justice in the European Union, OJ C 53, 3.3.2005, p. 1.

⁶ Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, Brussels, 2001/C 332 E/08, COM(2001) 386 final 2001/0154(CNS), 11.7.2001.

⁷ Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment {SEC(2007) 1382} {SEC(2007) 1403} /* COM/2007/0637 final - CNS 2007/0228 */.

Card holder to work in the territory of a Member State other than the one that issued the permit, under certain conditions.

In the Explanatory Memorandum, the Commission emphasized that more generous provisions in the national legislation of the Member States are excluded, with the exception of those in bilateral agreements. However, not clear to clear the contents of the proposal if the Blue Card scheme replaces national programs for attracting highly skilled workers and will operate in parallel. In c azul the second alternative, the provision regarding the exclusion of more favorable conditions in national legislation ineffectual, Member States only had to adjust the minimum intake under c u Directive. However, maintaining Member States' national systems hinders mobility within the EU, leading to inefficient (reallocation) of labor at Union level⁸. In the context of the negotiations, the most contested provisions of the proposal were those on the replacement of parallel national systems, the conditions of admission and the level of salary that applicants must meet⁹. Finally, the Directive was adopted by the Council on May 25, 2009¹⁰, but in its content, Member States ensured the maintenance of national systems and agreed to admit migrant workers from third countries with high professional qualifications that could be demonstrated either by formal proof of qualification or by relevant professional experience, according to art. 2 of the Directive.

A first critical mention in the text of Directive 2009/50/EC refers to the fact that the definition of the highly qualified worker is not uniform across the Union, varying from one state to another. Thus, the first requirement concerns the completion of a post-secondary education program lasting at least three years or, where national law so provides, the existence of relevant professional experience of at least five years. The non-uniformity stems from the fact that the provisions of national legislation on professional experience vary from one Member State to another.

Another essential disposition of the Directive on the conditions you admission for highly skilled workers, is the minimum wage, which must be at least three times higher than the minimum average monthly wage in the Member State concerned. In order to achieve a certain uniformity at Member State level and a predictability for the business environment, we consider that the maximum wage threshold should not have been left to the discretion of the Member State so that intra-EU mobility is mainly influenced by this. On the other hand, health insurance, which represents a certain percentage of the insured's salary, could cause serious problems for States parties to Convention No. 97 of 1949 on labor migration and Convention no. 93 of the Council of Europe, both demanding equal treatment of their own citizens in this field.

Regarding the rights of the beneficiaries of the Blue Card, it can be stated that they represent a step forward in the right direction, but there are also problems of non-compliance with Convention no. 97 of ILO and with the standards established by Convention no. 93 of the Council of Europe on migrant workers. Thus, a rt. 6 of the ILO Convention no. 97 calls for equal treatment of migrants with their own citizens in terms of housing and social security and a rt. 8 of Convention no. 93 Council of Europe and prohibits "binding" a worker by an employer or territory after a period of one year while the directive

⁸ Katharina Eisele, Why come here if I can go there? Assessing the Attractiveness of the EU's Blue Card Directive for Highly Qualified Immigrants. Paper on Liberty and Security in Europe No. 60, 2013, p. 15.

⁹ Ibidem.

¹⁰ Directiva 2009/50/CE din 25 mai 2009 privind condițiile de intrare și de ședere a resortisanților din țările terțe pentru ocuparea unor locuri de muncă înalt calificate publicată în JO L 155/17 din 18.6.2009.

provides for a period of two years. Article 9 of the same Convention entitles the migrant worker, including the holder of the Blue Card, to the benefit of unemployment benefit for 3 months, unlike domestic workers who benefit from this allowance for 6 months, or, under certain conditions, even more.

Contrary to the logic of the labor market in the European Union, the Blue Card Directive provides for a limited facilitation of intra-EU mobility as a result of the Council's disagreements on this issue. Blue Card holders can move to another Member State after 18 months of receiving it but do not have an immediate right to work, having to apply for a new permit, with a maximum duration of 90 days.

The provisions on family reunification are also debatable, as long as they are more favorable than those applicable to third-country nationals who are long-term residents. In practice, Directive 2009/50/EC, which does not require a minimum period of residence and a reasonable prospect of obtaining a right of permanent residence, favors third-country nationals who have never lived in the EU over those who have lived there all their lives. In this territory by the two derogations from Directive 2003/86/EC on the right to family reunification.

It can be concluded that, although the Blue Card Directive has been an important instrument of EU labor migration policy, it has limited effects on harmonizing legislation because it sets a set of minimum standards and provides a wide margin of discretion for Member States.

In 2014, the Commission presented Communication COM (2014) 287 final¹¹ on the implementation of Directive 2009/50/EC between 2012 and part of 2013, which highlighted significant delays on the part of some Member States in transposing them into national law, as well as other shortcomings. Both from the Communication and from the 2007 European Migration Network Reports¹² and 2013¹³, it follows that a significant number of states have national policies and procedures for attracting highly skilled workers to the Blue Card system¹⁴. At the same time, it has been found that Member States with such national policies have a higher percentage of highly skilled migrants out of the total migrant workers than countries without such policies¹⁵.

During the implementation period 2012-2014, and the Member States used differently provisions of the Directive so that, of the 31 953 Blue Card issued by it or renewed 85% of these were issued or renewed in Germany¹⁶. According to the same Communication, in 2012 they were released 3. 664 Blue Cards, despite transposition delays, and in 2013 15 were issued. 261. Germany issued during this period 14. 197 Blue Cards, Luxembourg 306

¹¹ Comunicare a Comisiei către Parlamentul European și Consiliu privind punerea în aplicare a Directivei 2009/50/CE privind condițiile de intrare și de ședere a resortisanților din țările terțe pentru ocuparea unor locuri de muncă înalt calificate („Cartea albastră a UE”), /* COM/2014/0287 final */.

¹² Conditions of Entry and Residence of Third Country Highly-Skilled Workers in the EU produced by the European Migration Network, May 2007.

¹³ Attracting Highly Qualified and Qualified Third-Country Nationals to the EU by the European Migration Network, May 2013.

¹⁴ Comunicarea Comisiei către Parlamentul European și Consiliu COM (2014) 287 cu privire la implementarea Directivei 2009/50/EC, p. 4: “BE, EE, FI, EL, IT, LT, LU, SK, SI and SE have specific provisions in wider migration policies; AT, CZ, DE, ES, FR, NL and PT have separate policies targeted at highly qualified migrants”.

¹⁵ Ibidem.

¹⁶ Axel Ruppert, The revision of the UE Blue Card Directive: An opportunity to establish a higher standard of rights for labour migrants in the European Union, 2017, Aarhus Universitet, p. 19.

and France 304¹⁷. The Communication also highlighted the existence of national systems for highly skilled workers had a significant impact on the issuance of Blue Cards in some Member States. In 2012, 5,514 national permits and only one blue card were issued in the Netherlands, 3,030 against 77 blue cards in France, 1,158 against 124 blue cards in Austria and 1,136 against 461 blue cards in Spain.

2. Novelties in the proposal to reform the Blue Card Directive

In the proposal for a directive to reform the Blue Card¹⁸ The Commission has considered simplifying the conditions for admission so that the Blue Card becomes accessible to a wider group of highly skilled third-country workers.

A first change concerns the replacement of the concept of "highly qualified employment" with that of "highly skilled employment", in order to include both those with studies equivalent to bachelor's degrees in higher education and those with experience. relevant professional record of at least three years. The Commission has also proposed extending the scope of the Directive to include beneficiaries of highly protected international protection¹⁹. Refugees, holders of the Blue Card will have, from the perspective of the proposal, the same rights associated with this status, including intra-EU mobility.

Secondly, the proposal clearly states that "Member States will not issue a permit other than the Blue Card to third-country nationals for highly skilled employment"²⁰. In the hope of developing an extended system at EU level, all existing national regulations and procedures in this area will be abandoned and highly skilled workers in third countries will have no choice but to apply for the Blue Card in any of the Member States. This provision is important in terms of visibility and clarity but is not to the liking of all Member States.

Thirdly, the wage condition in the Commission proposal²¹ has been made more flexible in order to reduce disparities between Member States. The proposed limits are between 1.0 and 1.4 times the average gross salary in that state, so the maximum threshold in the proposal is lower than the minimum threshold in the current Directive. The proposal also provides for two exceptions in which the salary threshold may be lower (80% of the average gross salary) in the case of professions for which employment is low or in the case of graduates²².

A fourth change relates to limit Member State's option to make a labor market test prior to issuing the Blue Card²³. This possibility will be limited to exceptional situations, such as a high unemployment rate in that area. As long as the possibility of labor market supervision by the State of destination is strictly limited, a highly qualified third-country national who fulfills the conditions for admission, including a valid employment contract,

¹⁷ Axel Ruppert, *op. cit.* p. 19.

¹⁸ COM(2016) 378 final, Propunerea Comisiei pentru o Directivă a Parlamentului European și a Consiliului privind condițiile de intrare și ședere a resortisanților țărilor terțe pentru ocuparea unor locuri de muncă care necesită înalte competențe 2016/0176 (COD), Strasbourg, 7.6.2016.

¹⁹ Idem, art. 3, pct. 2 lit. (b).

²⁰ Idem, art. 3 pct. 4.

²¹ Idem, art. 5 pct. 2.

²² COM(2016) 378 final, Propunerea Comisiei pentru o Directivă a Parlamentului European și a Consiliului privind condițiile de intrare și ședere a resortisanților țărilor terțe pentru ocuparea unor locuri de muncă care necesită înalte competențe 2016/0176 (COD), art. 5 pct. 5.

²³ Idem, art. 6 pct. 2

may not be refused access on the grounds that another worker with the same skills is available.

Another novelty in the reform proposal concerns the possibility for the Blue Card holder to change employer even in the first two years after obtaining the permit²⁴. In this way, the free access to the labor market of the Blue Card holder will be seriously improved, as he also has the opportunity to work in parallel as a freelancer. This will not affect the possibility for Member States to withdraw or refuse the renewal of the Blue Card if the conditions for granting or renewing it are no longer met at that time.

An additional benefit of the new proposal is to facilitate access to long-term resident status. If the proposal is adopted as drafted by the Commission, the new Blue Card Directive will derogate from Directive 2003/109/EC, granting holders of this permit long-term resident status after three years of continuous residence and not after five years, as provided for in the Framework Directive. This provision influences the decision of the third-country national in choosing the state of destination, from the perspective, in particular, of the integration possibilities. However, in this case there is an additional provision, namely the possibility for the Member State to withdraw this status before the expiry of the five-year period if the third-country national becomes unemployed and does not have sufficient maintenance resources²⁵.

Finally, the proposal aims to improve the attractiveness of the EU for highly skilled workers in third countries by facilitating intra-EU mobility. Thus, the minimum stay period on the territory of the first issuing state of the Blue Card holder wishing to move to another state has been shortened to 12 months. Moreover, he can work immediately after sending the application for a new Blue Card permit²⁶. It should also be noted that the second Member State does not have the possibility to carry out a labor market test, which is only valid for the first entry into the territory of the European Union. In addition, it is not permitted to set a quota for migrant workers in this case, unlike the current directive which allows this²⁷.

Overall, the proposal can be considered ambitious as long as it reduces Member States' discretion, contains fewer restrictive criteria for the admission of this category of workers and achieves a relatively uniform admission conditions. At the same time, the limited ability of Member States to carry out a labor market test leads to the conclusion that labor migration will be more than a channel for labor market adjustment²⁸.

3. Sensitive aspects of the proposal to reform the Blue Card Directive and prospects for adoption

The Blue Card reform system proposed by the Commission remains dependent on demand in the labor market (demand-driven) as long as admission is conditional on the existence of an employment contract. According to labor market experts, labor migration will not be on an ad-interim basis, as in the past, and highly skilled workers will be an

²⁴ Idem, art. 13 pct. 1 și 2.

²⁵ Idem, art. 17.

²⁶ COM(2016) 378 final, Propunerea Comisiei pentru o Directivă a Parlamentului European și a Consiliului privind condițiile de intrare și ședere a resortisanților țărilor terțe pentru ocuparea unor locuri de muncă care necesită înalte competențe 2016/0176 (COD), cap. V, art. 20.

²⁷ Ibidem.

²⁸ Jean Baptiste Farcy, The new Blue Card proposal: Will it attract more highly skilled workers to the EU?, Université Catholique de Louvain, 2016.

important source of human capital. In this respect, the reform proposal facilitates faster access to long-term resident status.

Despite these positive elements, the Commission's proposal seems, on the one hand, too ambitious to be approved by the Member States and, on the other hand, insufficient to attract a significant number of highly skilled workers from third countries to the Union. European. The development of a common rule on migration, when these rules imply a loss of sovereignty and control over the rules of entry, was expected to meet strong resistance from Member States. The same resistance was predictable with regard to the removal of national systems for attracting highly skilled workers.

The Commission proposal for revision of Directive Blue Book came into ordinary legislative procedure, so that Group work on migration Council began debating the proposal since July 2016. The Committee on Civil Liberties, Justice and Home Affairs in the European Parliament adopted a report on the proposal and voted interinstitutional negotiations start in June 2017. the first trilogue between the Commission, the Council and those of the Parliament European held meetings in September 2017 and continued until the end. Unfortunately, the Council did not reach a compromise on the inclusion of skills and the recognition of professional experience as equivalent to studies. In January 2019, the Romanian Presidency of the Council presented a compromise solution to continue negotiations on this proposal, but no substantial progress has been made this time either. The Finnish Presidency did not mention the revision of the Blue Card Directive in its concerns about migration and asylum policies, so no progress was made until the end of that presidency²⁹.

The current European Commission, which took office at the end of 2019, has expressed concern about strengthening the opportunities for legal migration to the European Union and, in this context, the revision of the proposal on the Blue Card Directive has been listed among its priorities in Working hours³⁰.

In the proposals on the New Pact for Migration and Asylum³¹. Stresses the need to complete the negotiation process on the reform of the Blue Card Directive in the fourth quarter of 2020³², so that after a break of a year and a half, on October 5, 2020 resumed talks on this issue under the German Presidency.

At the same time, the procedure was initiated in the national parliaments of the Member States regarding the proportionality and subsidiarity of the proposed directive. The parliaments of Bulgaria and the Czech Republic have expressed concerns about compliance with these principles³³.

We will continue by presenting the most sensitive issues that have given rise to heated debates in the Council and in the negotiations with Parliament, as well as some compromise solutions presented by the German Presidency of the Council.

²⁹ <https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-jd-revision-of-the-blue-card-directive>, consultat la 28.08.2020.

³⁰ European Commission, Annexes to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2020, COM (2020) 37 final, Annexes 1 to 5, Brussels, 29.1.2020, p. 23.

³¹ Communication from the Commission on a New Pact on Migration and Asylum, COM(2020) 609 final, Brussels, 23.9.2020.

³² Roadmap to implement the New Pact on Migration and Asylum, COM(2020) 609 final, Brussels, 23.9.2020.

³³ Idem, p. 3.

Regarding the preservation of national systems in the Member States for attracting highly skilled workers as well as regarding the recognition of professional experience (so-called high skills), the European Parliament and the Council have very different approaches. Major differences of opinion between the two institutions also exist in terms of access to the labor market, long-term resident status and long-term intra-EU mobility. The last triologue took place in December 2017 and at the beginning of 2019, the European Parliament refused to resume negotiations based on the compromise proposal of the Romanian Presidency of the Council.

The general approach agreed by the Council in July 2017³⁴. Regarding the recast of the Directive, the Blue Paper considers several aspects of the Commission proposal. First site of them concern acceptance reducing the threshold salary which Member States can apply to third-country nationals and the possibility for Member States to apply the rule of a minimum wage lower for graduates and reduce the duration for which the contract of employment to six months. The Council also agrees, in principle, to the implication of admission procedures, in particular by introducing such procedures for recognized employers. The Council is also willing to allow Member States to allow Blue Card holders to carry out other activities in parallel, including self-employment, in addition to their main activity. With regard to facilitating intra-EU mobility, the Council agrees to reduce the minimum period of stay in the first state to one year. The Council also agrees with the extension of the scope of the directive, including family members from third countries of European citizens and also beneficiaries of international protection.

Following bilateral consultations with the Member States of the German presidency, there were five technical trialogues on A bordării General Council in July 2017. In late October meetings were suspended due to the pandemic develops SARS-CoV-2. Following political triologue November 25, 2020 it became obvious that a compromise with the European Parliament can only be achieved if the Council show flexibility on the issue of establishing high professional skills/high in terms of mobility. At the same time, Parliament has shown some flexibility in maintaining national systems for attracting highly skilled workers, stating that it understands the rationale for retaining them³⁵. The same flexibility was shown by the Commission in order to unblock the negotiations and reach a compromise.

In connection with the preservation of national systems³⁶, if finally the European Parliament would accept this, the Council should agree on certain aspects of compromise proposed by the German Presidency. The first of these refers to f olosirea same procedural rights for third country nationals with high expertise in both systems (the Blue Card and the national system), Member States may be able to establish provisions differentiated on substantive rights, such as access to long-term resident status. The presidency also proposes that the provisions regarding equal treatment in art. 15 of the proposal should be equally applicable to holders of the Blue Card and those of the national permit for highly skilled

³⁴ Legal migration: Council agrees mandate on new rules to make the EU attractive for highly qualified workers – Consilium, p. 1.

³⁵ Presidency, Blue Card Reform: State of play and possible way forward, Interinstitutional file 2016/0176 (COD), Brussels, 13407/20, 26 November 2020.

³⁶ Propunere de Directivă a Parlamentului European și a Consiliului privind condițiile de intrare și de ședere a resortisanților țărilor terțe pentru ocuparea unor locuri de muncă înalt calificate, COM/2016/0378 final - 2016/0176 (COD), art. 3 para 4.

workers. A third proposed compromise aimed at possibilities in the Member State quickly and easily is the national license to permit Blue Card in the same Member State without further verification of qualification, if it has already been made national license. The fourth compromise proposal is that the time in which the national permit was used before receiving the Blue Card permit be taken into account when calculating the period of stay for long-term resident status. Finally, the last proposal concerns the accompanying information on Blue Card permit which must be promoted in the same way that the national license of the national³⁷.

In our opinion, all the compromise proposals of the German Presidency of the Council are feasible and should be accepted in the Justice and Home Affairs Council, given that both the European Parliament and the Commission seem willing to accept the preservation of national systems.

With regard to competences, it was concluded from the discussions in the Council that most Member States oppose a general opening of the scope of the Directive, provided for in Art. 3 of the Commission Proposal. It could be extended only to highly skilled workers in information technology and communication for certain positions Standard International Classification of Occupations provided with professional experience comparable academic qualification.

With regard to another sensitive provision, namely the reduction of the minimum length of professional experience from five to three years, Parliament opts for a period of three years while the Council supports the maintenance of the 5-year period. The compromise solution that emerges in this case would be that the three years of professional experience have been completed in the last 7 years. We also consider this compromise proposal acceptable to the Council.

With regard to the assessment of professional competences, the German Presidency suggests some compromise proposals that would be debated and possibly accepted in the Justice and Home Affairs Council. The first of these aims the admission procedure which should include an assessment of the skills that have been acquired in order to be relevant for the specific professional activity under the Classification of Occupations. The Directive should not contain any specification as to how the assessment of professional competences will be made but, in order to ensure a certain uniformity, the assessment of competences should be done by verifying the documents submitted in the admission procedure. Finally, the last proposal would be for Member States to decide whether, in their territory, the result of the competency assessment could have binding effect outside the Blue Card admission procedure (for example, whether it would also have effects on admission to the national system)³⁸. We support the need to standardize evaluation procedures at European level in order to eliminate the variety of national regulations.

With regard to long-term mobility (Article 20 of the Commission proposal), Parliament considers this to be a key element in making the Blue Card more attractive. Its objective is to simplify procedures in the second Member State, by waiving the obligation to apply for a new Blue Card and replace it with a notification accompanied by a small number of documents to be submitted. In this regard, the German Presidency suggested adapting the provisions of the proposal to provision their mobility in the long term recently adopted

³⁷ Presidency, Blue Card Reform: State of play and possible way forward, pp.4-5.

³⁸ Presidency, Blue Card Reform: State of play and possible way forward, pp. 6-8.

Directives on students and researchers³⁹ and intra-corporate transfers, respectively⁴⁰. This would involve amending art. 20 of the proposal so that Member States decide whether to opt for an application or a notification procedure and whether other requirements should be included in the notification procedure⁴¹. In view of the two precedents invoked, we support this compromise variant proposed by the German Presidency.

the European Parliament and the Commission strongly support the possibility for the Blue Card holder to start work immediately while the Council wants the decision to be left to the Member States. The Presidency's compromise proposal is for the Blue Card holder to be able to work immediately after sending the application/notification, without prejudice to the requirements of national legislation on the exercise of regular professions. In this case, we believe that the opinion of the two European institutions should prevail.

Regarding the documents need to be presented in the second Member State for mobility, the European Parliament and the Commission want to simplify the procedure by reducing the number of documents to be submitted. The compromise solution suggested in this regard is that of granting holders Blue Card equal treatment with citizens of the Professional Qualifications of the second Member State, which we consider natural solution

Regarding unemployment, the European Parliament wants to raise the maximum period of unemployment from three to six months (Art. 14 (1) of the Commission proposal). The compromise proposal of the German Presidency is that the period of unemployment to remain at three months if those holding permit C Artea a lbastră less than two years and grow to six months consecutive for those who own C permit he book a lbastră more than two years.

According to opinion the European Parliament, perform a labor market test should be subject to a high level of unemployment in the area or that occupation or be limited to a certain part of the Member State. At the same time, the Member State must notify the Commission at least one month in advance of the intention to carry out a labor market test for the given sector or occupation, or for a specific region. The notification will be valid for the next six months and must be justified. At the same time, both the Parliament and the Commission, unwilling to allow the performance test when changing labor market by third-country nationals by the employer during the first two years of the Permit⁴². The German Presidency considers that a labor market test should only be carried out if there are disturbances in the labor market in that Member State and not "serious disturbances" as formulated in the Commission proposal. The Presidency also considers that the obligation to notify the Commission of the intention to carry out internal market testing should be excluded.

At the same time, the Presidency considers that maintaining the right of the Member State to carry out a labor market test if a Blue Card permit holder wishes to change employer in the first two years is essential. The compromise solution proposed in this case

³⁹ Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purpose of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing.

⁴⁰ Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer.

⁴¹ Presidency, Blue Card Reform: State of play and possible way forward, p. 9.

⁴² Presidency, Blue Card Reform: State of play and possible way forward, pp. 14-16.

would be that Member State - the competent authority shall take this decision - to be introduced such checks and to third country nationals who do not have C permit he book A lbastră. At the same time, the Presidency proposed that the period during which the Member State could carry out a labor market test be reduced from two years to one year. Provided that a labor market test prior employment should not be imposed and family members of the holder's book ii The blue network, thus facilitating their access to employment and integration into the host Member State. This is also the opinion the European Parliament, contrary to the Commission proposal made in art. 16 (6). We are of the opinion, however, that the provision on the obligation to notify the Commission by the Member State that decided to carry out the labor market test should be maintained, in order to eliminate possible abusive actions by the competent authorities.

During the current Portuguese presidency there were no developments on this issue so that, negotiations within the Working Group on migration, the Council and subsequently in COREPER, continue until reaching compromise. Most of the three compromise proposals could be feasible if all three European institutions – the Parliament, the Council, the Commission - show flexibility. However, we appreciate that, in the current conditions generated by the SARS-CoV-2 pandemic, the duration of the negotiations will be extended until the end of this year, so that the real chances of adopting the reformed directive will be only at the beginning of next year.

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DELICTUAL CIVIL LIABILITY FOR THE ACT OF THE MINOR OR THE PERSON PLACED UNDER INTERDICTION

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Abstract

Society as a whole is constantly changing, which has led to the creation and reshaping, over time, of the institution of civil liability in order to ensure the restoration of the social balance destroyed by causing harm. In this light, we set out to analyze the objective delictual civil liability, respectively the liability for the act of another, namely, for the act of the minor or the one placed under interdiction.

In the first part of this paper we set out to present, briefly, the legal framework and the evolution of the institution of delictual civil liability. Then, a great turmoil of doctrine and jurisprudence was represented and is represented by the substantiation of delictual civil liability, so that the main doctrinal opinions will be presented, as well as the arguments set forth over time in doctrine and jurisprudence on them.

Last but not least, in the elaboration of this paper, the evolution of jurisprudence in the matter was taken into account, and the aim was to point out certain particular situations regarding the delictual civil liability for the act of the minor or the one placed under interdiction.

Keywords: *delictual civil liability, fault, objective substantiation, prejudice, minor.*

1. Introductory Aspects

The concept of liability, regardless of the form in which it manifests itself, represents, in general, the obligation to bear the consequences of disregarding the norms of social coexistence.

The civil liability is one of the most important institutions of the Romanian law, having the purpose of offering the possibility to the injured party to repair the damage caused. Liability, according to the Civil Code, has two dimensions: contractual civil liability and delictual civil liability. The two sides of civil liability are governed by distinct rules, but pursue the same purpose, namely, the repression or deterrence of wrongdoing that infringes generally accepted social values, by forcing the offender to repair the damage suffered by the victim..

Delictual civil liability, according to the provisions of the Civil Code, is divided into subjective (direct) delictual civil liability and objective (indirect) delictual civil liability. The criterion according to which delictual civil liability was thus divided is the basis of liability. Subjective delictual civil liability is essentially an individual liability, because in the central plan lies exclusively the conduct of the person guilty of causing the damage and seeks to bring him/her to justice by committing his/her obligation to compensation.

Instead, the objective substantiation of delictual civil liability is independent of the imputability of the responsible person's conduct.

2. Evolution of Civil Liability for the Act of the Minor or of the One Placed Under Interdiction

The old civil code also provided for the objective civil liability in art. 1000, and the cases in which it intervened were given by the responsibility of the parents, teachers (elementary teachers) and principals. The old regulation did not retain the liability of the legal guardian for the act of judicial interdiction, this being currently provided together with the liability for the act of the minor. At the same time, the new regulation no longer specifically retained the liability of teachers, but is limited to the notion of "*the one obliged to supervise*".

Therefore, the current Civil Code establishes two cases of liability for the act of another, namely the liability for the act of the minor and the one under interdiction and the liability of the principal for the act of the person in charge. It has been rightly pointed out in the doctrine [1] that "*these should be interpreted strictly, in the sense that they are the only circumstances in which the liability of another can be engaged, and not of the direct perpetrator. The analogy is allowed, but within each species of indirect liability, taking care not to extend it to persons other than those covered by the new Civil Code.*" However, it should be noted that objective liability does not remove the injured party's right of choice between claiming direct liability of the perpetrator or liability for another.

The liability for the damage caused by the illicit act of the minor or of the one placed under interdiction is regulated by the provisions of art. 1372 of the Civil Code. The first paragraph of the article covers the sphere or scope, as well as the special conditions of this liability. The second paragraph states that there is no need for the existence or proof of discernment to engage in liability, and finally the last paragraph sets out grounds for exoneration of liability for the person called upon to supervise the minor or the outlaw and the conditions under which the parent or guardian of the minor may be exonerated from liability.

The doctrine stated that "*liability for damages caused by minors and outlaws eloquently demonstrates that this hypothesis of liability is subject to both the influences of family law and obligations, which are constantly changing.*" [2].

3. People for Whom Liability is Borne

According to art. 1372 alin. (1) of the Civil Code, "*The one who under the law, a contract or a court decision is obliged to supervise a minor or a person placed under interdiction is responsible for the damage caused to another by the latter persons*". Thus, it can be seen that the sphere of persons for whom liability is borne, as well as the sphere of liable persons comprises a large and diverse number of persons. Objective delictual liability can only be incurred for damages caused by any person in a state of minority or placed under judicial interdiction, even if he/she has reached the age of majority on the date of the act. [3].

3.1. The first category of persons referred to in art. 1372 alin. (1) of the Civil Code is represented by minors.

It has been noted in the doctrine [4] that the age of the minor does not matter, as long as the minor is under the age of 18, as it would not matter if he/she has limited or anticipated exercise capacity [5]. However, we consider that it is necessary to make some clarifications regarding the situation of the one who acquired the anticipated capacity to exercise (art. 40

of the Civil Code) and of the married minor (art. 39 par. (1) and art. 272 para. (2) of the Civil Code).

According to art. 39 para. (2) of the Civil Code, the person becomes of age at the age of 18. This moment is of practical importance in two respects, firstly, once the age of majority is reached, the person acquires full capacity to exercise, and secondly, the person is presumed to have discernment. Therefore, once he/she reaches the age of majority, the person is presumed to have the representation of the consequences of his/her actions and, at the same time, has the possibility to conclude single civil legal acts of disposition, thus entailing the subjective liability of the major for contractual or non-contractual damages.

The question that arises is whether objective liability can also be incurred for the act of the married minor or of the one who has acquired the anticipated capacity to exercise. Thus, as far as we are concerned, we appreciate that the answer must be categorically negative. Although it is considered in the doctrine that *through marriage the minor becomes an adult*, we consider that the expression is a plastic one, but it seeks to emphasize that the indirect liability of the parents no longer subsists. Both the provisions of art. 39 para. (1), art. 272 para. (2) of the Civil Code, as well as art. 40 of the Civil Code, do not refer to the change of the status of the person from minor to adult through marriage or through the acquisition of the anticipated exercise capacity, but about the acquisition of the full exercise capacity. In other words, by marriage or by acquiring the anticipated capacity to exercise, the minor does not become an adult. Therefore, adulthood is exclusively related to reaching the legal age.

Although, apparently, in the matter of delictual liability, it is not important to acquire the full capacity to exercise (anticipated or by marriage), the coming of age being established according to an objective legal criterion, namely age, it should not be neglected that according to art. 484 of the Civil Code, parental authority is exercised until the child acquires the full capacity to exercise.

Therefore, we consider that the objective civil liability of the parents cannot be engaged, but only the subjective one for their own act, in the case of the minor who has acquired in advance the full capacity to exercise according to art. 40 of the Civil Code or through marriage.

3.2. The second category of persons referred to in art. 1372 para. (1) of the Civil Code is represented by the judicial interdiction.

According to art. 164 para. (1) of the Civil Code *"the person who does not have the necessary discernment to take care of his/her interests, because of alienation or mental weakness, will be placed under judicial interdiction."* It can be seen that adjudication of incapacity is a necessary measure to protect the one with abolished discernment, depriving him/her of the possibility to conclude civil legal acts alone.

For the legal representation of the person placed in judicial interdiction, a guardian is appointed, and the opposability of the interdiction is realized from the date when the interdiction court decision became final, and until the appointment of the guardian, the court may appoint a special curator under art. 167 of the Civil Code [6]. In any case, from the point of view of objective delictual liability it does not matter whether the prohibited person is represented by a special guardian or curator. However, *"it should be noted that the liability in question does not exist in the situation where the perpetrator of the wrongful act*

is an adult with lack of discernment, but who is not under judicial interdiction" [7]. However, although apparently the legislator deprived the victim from protection and from the possibility to recover the damage, we appreciate that, in fact, the victim can appeal to the provisions of art. 1368 of the Civil Code, respectively to the subsidiary obligation to compensate the victim.

4. Persons Obligated to be Liable

According to art. 1372 of the Civil Code the status of liable person belongs to any natural or legal person [8] who has the obligation provided by law, established by a contract or by a court decision to supervise the minor and the persons placed under interdiction. For damages caused by the minor, *"it is the responsibility of the parents (whether the child's parentage is from or out of wedlock), the guardian, the special guardian or any other person who had the obligation to supervise the minor at the time of the act (e.g. teacher, etc.)"*[9]. In the case of adoption, the liability for the act of the adopted minor belongs to the adopter and not to the biological parents of the minor. At the same time, it does not matter in terms of objective liability whether or not the minor's parents are married, it is important to establish the parentage between the child and the parents..

On the other hand, for damages caused by the person placed under interdiction, the liability lies with the guardian or special curator until the guardian takes over the responsibility.

It is of no particular relevance whether the obligation to supervise is legal, contractual or judicial, free of charge or for a fee, long-term or temporary [10]. Thus, according to the Civil Code, the obligation to supervise the minor or the interdicted person can be established:

i. pursuant to legal provisions

The legal obligation to supervise minors falls, mainly to their parents according to art. 493 of the Civil Code, which expressly provide for this obligation: *"the parents have the right and duty to supervise the minor child"*. However, the provisions of art. 487 of the Civil Code which regulates the content of parental authority which includes the obligation of supervision, but also the other obligations of parents must also be taken into account. However, as we will show in the next section, we appreciate that the foundation of liability is given by the obligation established by art. 261 of the Civil Code, regarding the duty of raising and educating minor children.

Thus, we appreciate that both parents are responsible for the acts of the minors and are held jointly and severally liable to the victim for damages. It does not matter if the minor lives with both parents or only with one of them, if they are separated in fact or by law.

However, we consider that a clarification must be made, namely, that the parent deprived of parental rights cannot be held liable for the acts of the minor. Although art. 510 of the Civil Code provides that the forfeiture of the exercise of parental rights does not exempt the parent from the obligation to provide maintenance to the minor, we consider that this obligation cannot be extended to the obligation to compensate the injured party for the wrongful act of the minor. Moreover, if we accept that the foundation of parental liability is the obligation of upbringing and education, the parent loses the opportunity to keep in touch with the child in order to provide him or her with upbringing and education in the conditions in which he/she no longer has natural connections with the minor.

At the same time, the spouse of one of the minor's parents will not be responsible for the minor's act if there are no relations of filiation, but only of affinity.

ii. By court decision

„Thus, in special cases, by court decision, the minor may be entrusted for supervision to other persons, guardians or curators, who are liable for the damage caused. We note that, to date, our doctrine and jurisprudence have held that the guardian, curator, or other natural person or caregiver institutions who supervised persons without capacity or with limited capacity could not be required to pay compensation for damage caused by them to other persons, in the absence of express legal provisions”. [11]

iii. Pursuant to a contract

Other persons who have the obligation to supervise under a contract may be: teachers, schools, tradesmen who train minors, nannies, delinquency re-education centers, public health units where mentally ill persons are placed under interdiction, nurses, camps, etc.

5. Basis of Liability for the Act of the Minor or of the One Placed Under Interdiction

From the wording of art. 1372 alin. (1) of the Civil Code, which does not signal any distinction, it could be deduced that, in all cases, the liability is based on the non-fulfillment of the obligation to supervise the minor or the one placed under interdiction. However, for the damage caused by the minor, from the wording of art. 1372 alin. (3) Thesis II of the Civil Code it results that a distinction must be made between the situation in which the liability lies with the parents or, as the case may be, the guardian, and the situation in which the liability lies with another person who had the obligation to supervise the minor. [12]

Thus, the commitment of the parents' liability or, in the case of the minor without parental protection, of the guardian is based on the non-fulfillment of the obligation of upbringing and education, as it is retained in the provisions of art. 261 of the Civil Code, as well as of art. 134 of the Civil Code. As regards the basis of the guardian's liability for the act of the person placed under judicial interdiction, this consists in the non-fulfillment of the obligation to supervise the person placed under interdiction. However, in certain specialized works it was appreciated that the provision of art. 1372 para. (3) the second thesis of the Civil Code, is superfluous. [13]

The substantiation of liability is important, mainly in two respects. Firstly, to determine the content of the presumptions operating in favor of the victim, after proving that the general conditions of parental liability are met, and secondly, in terms of the possibility of exemption by proving that the harmful act could not be prevented. In this last perspective, it was appreciated in the doctrine that *"it is easier to prove the innocent impossibility to exercise, at a certain moment, the supervision of the minor, than to prove that all parental duties were not exercised constantly and impeccably"* [14].

Finally, we consider it is undisputed that liability is objective and therefore neither subsidiary nor ancillary to the possible liability of the perpetrator, such as when the perpetrator is a minor whose discernment is proven. The liability of the perpetrator of the prejudicial act is subjective, conditioned by the proof of guilt, while the liability for the act of another is not conditioned by the proof of guilt.

6. Conditions of Liability for the Act of the Minor or of the One Placed Under Interdiction

In order to be held liable, in the person of the minor or the person placed under judicial interdiction, the following conditions must be met cumulatively. The injured party must prove the existence of the damage, the existence of the unlawful act of the minor or of the one placed under interdiction and the existence of the causal relationship between the unlawful act and the damage. The victim must not prove the fulfillment of the condition of guilt of the perpetrator of the illicit act, because, according to art. 1372 of the Civil Code, the responsibility being an objective one, subsists even when the perpetrator, lacking discernment, is not responsible for his/her own act.

In the case of liability of the parents or guardian for the act of the minor, if the victim has proved the three conditions shown above, then he/she will benefit from three relative presumptions, respectively, it will be presumed that (i) in the execution of the obligation of upbringing and education there were deviations that generated the wrongful conduct of the perpetrator, (ii) the guilt of the parents or guardian in respect of these offenses; (iii) the causal link between the non-fulfillment of the obligation or the unsatisfactory fulfillment of the obligation of upbringing and education and the prejudicial act. As mentioned above, these presumptions are relative and can be overturned by the person called to answer. Thus, the person in charge can prove on the one hand that the child's act constitutes the consequence of another act caused in the way in which he/she fulfilled his/her duties deriving from the exercise of parental attributions - art. 1372 para. (3) thesis II of the Civil Code, and on the other hand, by proving that the conditions of liability of the person who had the obligation to supervise the minor or the one placed under judicial interdiction are met - art. 1374 para. (1) of the Civil Code.

From this last reason for exemption presented, it results that for the employment of the parents or guardian of the minor it is also necessary to meet a negative condition, respectively that at the time of the illicit act, the minor was not under the supervision of another person. In the situation where, hopefully, for example, the minor during the classes commits a prejudicial act, we consider that the teacher who had to ensure the supervision is held liable, but, if, according to art. 1372 para. (3) of the Civil Code, proves that the prejudicial act could not be prevented, the liability of the parents or guardian can intervene only subsidiary, if the conditions are met, based on the non-exercise of the obligations of upbringing and education. The solution is natural because the victim cannot be deprived of legal protection. Then, in the situation where the parents would prove that the illicit act is not the result of the defective way of fulfilling the obligation of upbringing and education, we appreciate that the victim can resort to the provisions of art. 1368 of the Civil Code.

7. Victim's Right of Option

The victim of the injury has three options at hand. A first option, can claim compensation from the person in charge of supervision. If the person liable for the supervision of the minor was a person other than the minor's parent, we appreciated that the victim can go directly against him/her, as well as against the minor's parents for failing to fulfill the obligation of upbringing and education; parents, as we have shown, having the opportunity to exonerate themselves from liability.

Then, the victim of the illicit act can claim compensation from the minor or from the one placed under interdiction, based on art. 1357 of the Civil Code, which presupposes that

the victim proves that the perpetrator acted with discernment at the moment of the damage. And finally, the third option that the victim has is to summon in solidarity both the perpetrator and the perpetrator, if in the case of the latter it is proved the existence of discernment.

8. Conclusions

The institution of delictual civil liability, respectively the objective liability for the act of another is one of the most important legislative creations meant to ensure an increased protection to the victim of the illicit act. Family relationships make their presence felt in terms of liability for the act of the minor or the person placed under interdiction, and the diversity of practical situations has always aroused interest. We hope that through this paper we have pointed out certain particular aspects that sometimes appear in practice, but which must not be overlooked and which must receive outlined solutions in accordance with the continuous development of social relations.

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ABOUT THE PROTECTION OF FAMILY MEMBERS BY MEANS OF THE RULES OF CRIMINAL LAW

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Abstract

Domestic violence is one of the most often-encountered topics in the public sphere lately, due to the many cases faced by the authorities, who most often fail to find appropriate solutions in order to stop such situations from occurring in the future.

Criminal law includes a number of provisions that are in line with international standards for the protection of family members, but it also includes a number of shortcomings, which require prompt intervention by the legislator.

There are currently a number of discussions to address these shortcomings, but without the rapid and clear involvement of responsible stakeholders and civil society, cases will increase and the judiciary bodies will continue to be powerless in some cases.

Keywords: family, protection, penal law, offenses.

1. Introduction

The family has been in the history of mankind one of the most important factors for the formation and development of human personality and that is why, in all the laws of the contemporary world, it is protected by various moral or legal norms. In Romania, special attention is paid to the protection of the family and the social relations that are established between its members, on the one hand, and between them and the existing institutions in the state, on the other hand [1].

Thus, given the importance of the family for society, the legislator considered it necessary to pay special attention to the legal framework through which family relationships are protected. In this sense, we find provisions in the Constitution, the Civil Code, the Criminal Code and other laws which include provisions governing the manner of sanctioning those who harm family relations from the perspective of criminal law.

Romanian legislation has a long history of criminalizing such acts, the texts of the law being adapted over the years according to new social realities, as well as the need to provide the judiciary with legal instruments to punish those guilty of such acts.

Even if there are numerous campaigns carried out by both state institutions and non-governmental organizations, in order to raise awareness and promote equality between family members, Romanian society still faces many crimes that can be included in this category.

2. Protecting the family by means of criminal law rules

Considering that in society there are many cases of violation of the rules established between people, on the one hand, as well as with respect to the competent institutions that must ensure a favorable climate for the life and activity of the members of the society, a series of legal norms have been established by which the shown values are protected. In the case of acts with a low degree of social danger, social cohabitation relations are protected by

non-criminal legal means, civil law, administrative law, etc., against more serious acts, these relations are also protected by means specific to criminal law. [2].

The current criminal legislation was designed to protect the interests of the family in accordance with the international treaties ratified by Romania, respectively the European Convention on Human Rights of 1950, The Convention on the Elimination of All Forms of Discrimination against Women of 1979, the Declaration on the Elimination of Violence against Women 1994, the Declaration and Platform for Action adopted in Beijing under the 1995 World Convention on Women, the Istanbul Convention on Preventing and Combating Violence against Women and Domestic Violence 2011.

According to Article 177 of the Criminal Code, a family member means:

„a) ascendants and descendants, brothers and sisters, their children, as well as the persons becoming such relatives as a result of adoption;

b) spouse;

c) persons establishing relations similar to those existing between spouses or between parents and children, if cohabiting.

In case of adoption, criminal law stipulations on family members, to the extent provided under par. (1) let. a), shall also apply to the adopted person or the descendants of the same, with respect to kin.”

By establishing the above definition, the legislator adapted the notion of family to the new social context, giving up certain concepts that existed in the past. Thus, the scope of those who benefit from the protection of the law in such cases has been widened, including those persons who establish relationships similar to those of marriage, the partners. We believe that this change is beneficial, especially since recently such crimes are common among those who have such a relationship.

It should be noted that criminal law does not define the family as a social group, but only the family members. In the criminal sense, increased protection is granted to victims who were in family relations with the aggressor both by criminalizing crimes such as domestic violence and as circumstantial elements. Being a broader notion than in civil law, the family is not limited to blood relations or cohabitation itself, but is also based on relationships based on affection. The criminal law protects both "rudimentary" family relationships and unions such as cohabitation or the situation of adoption, and in the special law on domestic violence the notion has an even broader meaning. It offers protection that is not restrictive, but at the same time is not very extensive (for example: there is the condition of living together for relationships similar to those between spouses or parents and children), whereas the family is a fundamental value for man, having the component of stability, so that family relationships cannot be extended to simple ties that seem to coincide with the meaning of the notion of family [3].

In the special part of the Criminal Code, Title I, Chapter III we find the crimes committed against a family member, respectively domestic violence where it is shown that, “If the acts set by Art. 188, Art. 189 and Art. 193– 195 are committed against a family member, the special maximum term of the penalty set by law shall be increased by one-fourth.

In case of offenses set by Art. 193 and Art. 196 committed against a family member, a criminal action may be initiated also *ex officio*. Reconciliation shall eliminate criminal liability.”

The incriminating text is an aggravation of the legal situation of the perpetrator of one of the offenses listed when the act has a family member as a passive subject.

Art. 200 includes the regulation of the crime of killing or injuring the newborn by the mother. In this respect it is shown that, "Killing of a newly-born baby immediately after birth, but no later than 24 hours, committed by a mother who is in a state of mental disorder shall be punishable by no less than 1 and no more than 5 years of imprisonment.

If the acts set by Art. 193–195 are committed against a newly-born baby immediately after birth, but no later than 24 hours, by a mother who is in a state of mental disorder, the special limits of the penalty shall range between one month and 3 years, respectively."

This specific offense is an attenuated variant of other crimes (killing, hitting, etc.), the reason for the mitigation being the mental state that the mother may have after birth and which may influence her in making such a decision.

We notice that the legislator shows that family relations do not consist only between those existing between spouses, but even between the mother and the newborn child. Based on this statement, since in the old legislation the crime was classified in another chapter, the omission of the legislator to include the father as an active subject of this crime, can be appreciated as a gap, since between the father and the newborn the same relations that the mother has with the infant exist.

These provisions show the attention that the legislator pays to family relations, as he correctly appreciated that these relations are born with the birth of the newborn, the relationship between them being fundamental for establishing and maintaining a family.

In Chapter II (Offenses against family) of Title VIII (Offenses that harm social relationships) we find incriminated in Article 376 bigamy, Article 377 incest, Article 378 family abandonment, Article 379 non-compliance with measures on the custody of a minor, Article 380 impeding access to compulsory public education.

By incriminating these crimes, the legislator sought, in addition to the protection of the family institution, the protection of the best interests of the child, including guaranteeing the interests of parents regarding children according to Article 263 Civil Code [4].

The last crime I mentioned was added by the legislator as shown in the Explanatory Memorandum to the draft of the new Criminal Code, that "is a necessity in the conditions of alarming increase in school dropout by younger students" [5].

The offenses incriminated in Title VIII, Chapter II of the Criminal Code specifically protect certain components of family life: the monogamous nature of marriage, the prohibition of sexual relations between certain relatives, the observance of the right to receive maintenance from family members who have this obligation, the observance of the parent's right to have personal relations with the minor and the observance of the right to attend compulsory public education [6].

The reason for their incrimination consists in those presented in the introductory part of this article, the legislator seeking to protect in time the interest of each person who may have the status of passive subject and who instead of being protected, would become a victim.

As we have shown above, there are in practice many cases that highlight complex situations and for the resolution of which the assistance of the judiciary and other representatives of the authorities is necessary due to the consequences that such acts have on the victims.

In addition to the crimes mentioned above, in the Criminal Code we also find aggravated circumstantial elements related to the commission of crimes against family members; these include trafficking in underage persons under Article 211 (2) (d), sexual intercourse with a juvenile in Article 220 (3) (a) and Article 220 (4) (a), Assault of a public official Article 257 (3), Tampering with testimony Article 272 (1), Revenge for cooperation with the judicial authorities Article 274, Assault on representatives of the judicial authorities Article 279 (3).

The reason for including these variants lies in the explanations I have given previously, being of major importance to protect the interests of family members if they find themselves in such a criminal context in which they are victims.

We believe that the protection provided to victims through the additional provisions we find in offenses against the person, as well as those against the family, aims to protect the family in general, because it does not relate primarily to a particular person, but to the family. In the case of crimes by which family members are protected even if they have as a special legal object the social relations related to physical, mental integrity, health or even life [7] due to the quality of the subjects, the aim is to protect the family, as it affects the social values they represent, especially in the emotional side [8].

Through the norms of criminal law, the victims of crimes that can be included in the sphere of domestic violence are protected, complementing them, including a series of provisions from special laws. Thus, we have the institution of the protection order which is of great importance, being often used in judicial practice, especially due to the fact that it is the most effective temporary measure.

The protection order is regulated by Law no. 217/2003 [9], the text of the law undergoing over time a series of changes in order to adapt to new social realities. Thus, it seeks to prevent and combat acts of domestic violence, creating the necessary framework to ensure effective protection for victims of such offences. However, if we look at the relevant international provisions and those set out in the Criminal Code, we will see that there are a number of differences.

One of these is the broad framework provided by the special law for family members as opposed to the Criminal Code, in this category including “ascendants and descendants, brothers and sisters, their children, as well as the persons becoming such relatives as a result of adoption, the spouse, the ex-spouse, siblings, parents and children from other relationships of the spouses and/of of the ex-spouses, persons establishing relations similar to those existing between spouses or between parents and children, current or ex partners, regardless of they have cohabited with the offender or not, the ascendants and descendants of the partner, as well as the their siblings, their guardian or another person exercising rights over the child and the legal representative or another person that cares for a person with with mental illness, intellectual disability or physical disability, except for those who perform these duties in the exercise of their professional duties.”

As it follows from the above, there is a major difference in the definition of the family member from the perspective of the Criminal Code, respectively of the Special Law. However, we cannot analyze the legal texts by comparison because they have different roles, the Criminal Code being a general framework for criminalizing the facts, while the Special Law is intended to ensure the implementation of prevention and urgent intervention measures.

Thus, the Special Law through the protection order temporarily protects victims from family members who commit such acts of violence, while the Criminal Code criminalizes acts that lead to death, serious physical suffering or other such consequences among those who have family relationships.

The special law provides increased protection even for certain deeds that are not clearly covered by the Criminal Code, so that, in the end, these deeds may not be the object of a crime, but during the period when the protection order was issued, an attempt was made to stop, respectively to prevent such actions in the future towards the victims.

The protection order has temporary features, being issued for a limited period of time, its judgment being made by the court with celerity. However, common problems in judicial practice include proof of acts of violence. In this sense, victims are often put in a position to prove acts of violence; however, not knowing the importance of this aspect, they omit to gather evidence if the acts were committed over time, or there are no visible traces to support their claims. Consequently, the courts are often forced to reject such requests, and subsequently the victims may face the same situation, as the merits of the case will last until it is resolved.

For example, a practical decision states that for the issuance of a protection order it is necessary to prove the state of danger by the applicant, the proof can be made by witnesses, documents or other means of proof that can prove the allegations. In the absence of evidence to support the state of danger and the need to prevent and eliminate it, such a request is unfounded. [10].

The protection order therefore appears as a temporary security measure (because its issuance is determined by the removal of the danger to the life, bodily integrity or freedom of the victim), or as a protection measure (when the custody of minor children is ordered), but it can also be an extra-criminal measure (when ordered in a divorce case) [11].

Another offense which must be taken into account and which protects the rights and interests of a family member is ill-treatment of the minor, provided for in Article 197 of the Criminal Code, and which consists in "serious jeopardy, through measures or treatments of any kind, of the physical, intellectual or moral development of an underage person, by parents or by any person under whose care the underage person is, shall be punishable by no less than 3 and no more than 7 years of imprisonment and a ban on the exercise of certain rights."

This offense is included in the chapter "Offenses against bodily integrity or health" and not in the chapter on family members, because the legal object refers only in the subsidiary to family relations, to the obligation of the parents as well as of other persons to take care of the children, mainly being protected the social relations that refer to the physical integrity or the health of the minor, respectively to the assurance of the physical, intellectual or moral development [12].

By protecting the minor, the interests of the family as a whole are protected, this includes Law no. 217/2003 which grants protection to children against parents, however in practice we rarely meet protection orders issued in favor of minors, because acts of violence do not take them into account most of the time.

From practice it results that by such acts we understand "the repeated exercise of acts of physical and verbal violence, on them or in their presence, by depriving them of food, respectively neglecting the basic needs, of affective and cognitive-behavioral development

specific to age [13]" or "by leaving minors locked inside the home, without heat, food and without light, proceeding similarly on other previous unspecified occasions [14]".

In this sense, we notice that the application of ill-treatment to the minor means the accomplishment of several acts on him, so that the crime takes place over a longer period of time. "It is generally considered that the crime of ill-treatment applied to the minor who is intrinsically a character of continuity, because the commission of a single material act does not have the capacity to meet the conditions provided by the incrimination norm [15]".

By the decision of the appeal in the interest of the law in 2009 [16] The High Court of Cassation and Justice has established that the offenses of beatings or other violence, bodily harm and deprivation of liberty will enter into ideal competition with the offense of ill-treatment of a minor, because by analyzing the elements of these crimes it was appreciated that there are certain peculiarities and that it is not possible to absorb these crimes. We appreciate that by this decision, the supreme court has shown that family relations must be clearly protected, a protection that can sometimes be considered even exaggerated, because by combining the limits of punishment can lead to sanctions that exceed those of homicide. The reason resides, as we showed in the introductory part of the present study, in the fact that such acts are very serious, as they are committed precisely by those who have the duty to take care of the victims, to give them the necessary support, the injured persons being, as a rule, in an obvious state of vulnerability.

Another crime that needs to be considered from this perspective is child pornography (Article 374 of the Criminal Code) which was revised by the legislator taking into account the old regulation (Article 325), Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography [15], including a variant that makes direct reference to family members in Article 374 (3¹) of the Criminal Code [17].

Begging is a current problem of Romanian society, there are often situations in which even members of the same family cause those around them to turn to the mercy of those around them to obtain material income. In this regard, it is shown in practice that repeated acts of causing the juvenile to repeatedly appeal to the mercy of the public in order to benefit from patrimonial benefits from this activity and which prevents the juvenile from attending the compulsory public education courses, forms the constitutive content of the offenses of exploitation of begging, provided in Article 214 (1) and (2) a) of the Criminal Code and preventing access to compulsory general education, provided for by Article 380 (1) of the Criminal Code, with the application of Article 38 (1) of the Criminal Code [18]

We must keep in mind that damages of a criminal nature cannot and must not be limited only to physical injuries, they must be extended to mental injuries, to intangible values, as the legislator must bear in mind that they often appear to be insignificant or even non-existent, which can lead to very serious consequences. [19].

Specific to these facts is, as we have shown, the protection of the best interests of the family, which is one of the pillars of society, as well as of the person who is the victim of such crimes. In the absence of a prompt response from the legislator or the authorities, it may be that the statistics go uphill, especially due to the current social context.

In this study we tried to highlight the main rules of criminal law by which the legislator tries to protect relations between family members. Without claiming to be an exhaustive analysis of the subject, we consider that through this exercise we have managed to emphasize the importance of criminal law in the protection of the family, including by

supplementing the analysis from the perspective of criminal law with that of the institution of the protection order, which is a temporary measure designed to support those affected by the commission of acts of domestic violence. Of course, there are other texts of law that criminalize such facts, but during this study we tried to subject to analysis the most important, respectively the most common crimes that may have as their subject family relationships.

3. Conclusions

The criminal legislation supports the protection of family relations, guaranteeing the protection of those who are victims of offenses that can be included in the categories listed above.

The protection of these persons is completed by a series of non-penal normative acts, as well as by the International Conventions to which Romania is a signatory. However, the Criminal Code is the main tool for ensuring the protective framework for maintaining a favorable climate within the family.

At present, a series of amendments would also be beneficial, respectively completions of the criminal legislation, in order to ensure an optimal framework for the prevention and sanctioning of those found guilty of committing such crimes.

A first change aims to include the aggressor for other forms of domestic violence, such as psychological or economic, a solution that would be in line with the issues we find in the Istanbul Convention.

There are many problems in preventing and combating violence between family members. As I mentioned, Law no. 217/2003 is not an instrument in this regard, being only an act that temporarily ensures the protection of victims. Thus, a number of additional measures should be implemented, such as monitoring bracelets, through which the aggressors would be much better monitored by the police. At the same time, wider responsibilities should be given to the police bodies involved in such cases.

Another change would be to increase the penalties for those who violate protection orders, in order to discourage the aggressors. There are many cases in practice where they violate protection orders and victims are often put in more serious situations than the initial ones.

Even the crime of ill-treatment of a minor should be re-examined, as we have shown from the brief analysis we have undertaken, the need to commit repeated acts can often raise problems, mainly on the response that the state can provide in such situations, respectively on the consequences that even some occasional acts have on the victim who is a juvenile.

We conclude by stating that the criminal legislation in Romania provides adequate protection for the family at this time, but previous proposals should be considered in order to strengthen the criminal legal framework. At the same time, a number of changes should be made, including in other sectors, to ensure the rapid reintegration of victims into society, so that they recover as quickly as possible from the trauma they have suffered.

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SOME CONSIDERATIONS REGARDING THE OFFENCES OF FAILURE TO COMPLY WITH MEASURES CONCERNING CUSTODY OF A MINOR, PROVIDED FOR IN ARTICLE 379 OF THE CRIMINAL CODE, AND UNLAWFUL DEPRIVATION OF LIBERTY, PROVIDED FOR IN ARTICLE 205 OF THE CRIMINAL CODE

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Abstract

As we all know, minors have rights and obligations and, under certain conditions expressly regulated by law, are also criminally liable. The healthy physical and mental development of a minor is always based on a healthy relationship with both parents, so parental responsibilities must be exercised regardless of whether the minor's parents live together or not, and it is in the child's best interest to maintain personal and direct relationships with both parents, which is why the national legislator has criminalised a number of acts in order to ensure respect for the fundamental rights of the minor.

Keywords: family life, failure to comply with measures concerning custody of a minor, unlawful deprivation of liberty, the child's best interest, Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

Preliminary considerations

Starting from the famous quote by the French philosopher Jean Jacques Rousseau [1] according to which “*The most ancient of all societies, and the only one that is natural, is the family.*” [2], we consider it necessary to recall that “*family*” [3] is by far the most fundamental institution found in all types of societies that have existed throughout history and is an extremely complex concept, with the right to respect for family life [4] being of interest at both European and national level, in each state.

Protection of family life concerns individual rights, with case law [5] shaped over time on this concept, not intending to develop “*an organicist and holistic view of the family*” [6].

Thus, the children's rights have evolved [7] significantly over time, being a constant concern of both European and national legislators. A particular feature of this institution concerns respect for the rights of the child if the parents do not cohabit, since, although cohabitation “*is an essential condition of family life, it is however not a sine qua non*” [8]. In this regard, the doctrine has expressed the view [9] that family life exists from the child's birth, regardless of whether the parents live together or not, and that it is in the child's best interest to maintain personal and direct relationships with both parents.

In the present approach, given that the notion of “*family life*” poses certain difficulties in practice, in particular where we refer to the upbringing and education of the minor when the parents do not live together, and the best interests of the child are enshrined globally, we wish to make a brief comparative analysis of the constitutive content of the offences of

non-compliance with custody measures, provided for in Article 379 of the Criminal Code, and unlawful deprivation of liberty provided for in Article 205 of the Criminal Code, then, in the end, we shall present some considerations of the European Court of Human Rights on the violation of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms in relation to the offence of failure to comply with measures concerning custody of a minor.

1 THEORETICAL AND PRACTICAL ASPECTS REGARDING THE OFFENCE OF FAILURE TO COMPLY WITH THE MEASURES CONCERNING THE CUSTODY OF A MINOR, PROVIDED FOR IN ARTICLE 379 OF THE ROMANIAN CRIMINAL CODE, IN RELATION TO THE OFFENCE OF UNLAWFUL DEPRIVATION OF LIBERTY, PROVIDED FOR IN ARTICLE 205 OF THE CRIMINAL CODE.

In this section, we would like to review certain elements concerning the constituent content of the offense of *failure to comply with the measures concerning the custody of a minor*, provided for in Article 379 of the Criminal Code [10] in relation to the offense of *unlawful deprivation of liberty*, provided for in Article 205 of the Criminal Code [11], because these offences are sometimes difficult to apply in practice, in particular as regards the distinction between the offense of failure to comply with the measures concerning the custody of a minor in the form provided for in Article 379(1) of the Criminal Code and the aggravated form of the offense of unlawful deprivation of liberty provided for in Article 205 para. 3 (b) of the Criminal Code, i.e., when the passive subject is a minor.

As a preliminary point, we recall that the offence of *failure to comply with the measures concerning the custody of a minor*, regulated by the Criminal Code in Article 379, is not a new institution, as the Romanian legislator is continuously concerned with “*the process of upbringing and educating a minor*” [12], which is why we find it, in almost identical form, even in the Criminal Code published in the Official Bulletin no. 55-56 of 23 April 1973 [13], which provided for an additional requirement in relation to the first regulatory mode, namely “*if the child's upbringing and education were endangered*” [14], a requirement that we no longer find in the current incrimination.

Next, a first aspect that should be mentioned is that the two offences are covered by different titles in the Criminal Code [15], so that if the offence of unlawful deprivation of liberty is found in Title I “*Offences against the person*”, Chapter VI with marginal designation “*Offences against the liberty of a person*”, the offence of failure to comply with the measures concerning the custody of a minor is to be found in Title VIII “*Offences affecting social relationships*”, Chapter II called “*Offences against the family*”.

A first distinction between the two offences therefore concerns the specific legal object protected: if the offence of failure to comply with the measures concerning the custody of a minor has as its special legal object “*social relations concerning the upbringing and education of children*” [16], the offence of unlawful deprivation of liberty has as its special legal object “*social relations relating to the protection of a person's physical liberty*” [17].

As regards the material object of the offences analysed, we note that two diametrically opposed opinions have emerged in the doctrine.

Thus, according to the majority opinion of the doctrine [18], to which we subscribe, it has been shown, in principle, that neither of these offences has a material object.

On the other hand, according to the minority view, the offence of failure to comply with the measures concerning the custody of a minor has as its substantive legal object “*the minor's natural person*” [19]. In this regard, it was held that “*the action described by the criminal provision is carried out by physically isolating the minor, who is forbidden any contact with his/her parents*”. [20]

We consider that such an approach is particularly dangerous in practice, as the offence in question clearly does not involve physical isolation of the minor which would amount to an unlawful deprivation of liberty, but only actions to prevent the minor's contact with his/her parents.

Leaving this aspect aside, some considerations must also be made regarding the subjects of the two offences. Thus, if the offence of unlawful *deprivation of liberty* may involve any natural or legal person, the offence of *failure to comply with the measures concerning the custody of a minor* may involve only the parent of the minor child or the person to whom the minor has been entrusted by law. Criminal participation is possible in all forms in the case of both offences, except that in the case of the offence of *failure to comply with the measures concerning the custody of a minor*, the co-perpetrator must have the special status required by the criminal rules in force, referred to above.

At the same time, we note that if the offence of *unlawful deprivation of liberty* can have as passive subject any living natural person, the deprivation of liberty of a minor being criminalised as an aggravated variant of the predicate offence, the offence of *failure to comply with the measures concerning the custody of a minor* has a circumstantial passive subject, namely the minor and the parent who is prevented from having contact with the minor.

Noting that both offences are committed with direct or indirect intent, we hold that for the existence of the normative modality in which the offence of failure to comply with the measures concerning the custody of a minor provided for in Article 379 para. 2 of the Criminal Code is incriminated, “*it is necessary that the prevention is carried out repeatedly, revealing a systematic behaviour of removal of the minor from his/her parent*.” [21].

We note that there are also differences in the objective side of the two offences. Thus, while the material element of the offence of unlawful deprivation of liberty consists in depriving a person of his/her liberty while he/she is still alive, the material element of the offence of failure to comply with the measures concerning the custody of a minor is achieved either by the detention by a parent of his/her minor child, without the consent of the other parent or of the person to whom the minor has been entrusted, or by repeatedly preventing either parent from having personal relations with the minor, under the terms laid down by the parties or by the competent body, by the person to whom the minor has been entrusted by a court order for his/her upbringing and education. [22]

Also, if in the case of the offence of failure to comply with the measures concerning the custody of a minor, the immediate consequence is “*the state of danger to the upbringing and education of the minor*” [23], the causal link resulting from the very materiality of the act, in the case of the offence of unlawful deprivation of liberty, the immediate consequence is “*depriving the injured person of freedom of movement, even for a short period of time*” [24], and causality must be proven.

It should also be borne in mind that the possible consent of a minor child is not such as to remove the unlawfulness of the act from the perspective of a justifiable cause, but, in relation to the provisions of Article 29 para. 1 of Law No 272 of 2004 on the protection and

promotion of the rights of the child [25] according to which “*The child capable to discern has the right to freely express his/her opinion over any matter of his/her concern.*”, the very non-existence of the material element of the offence of failure to comply with the measures concerning the custody of a minor would be questioned [26].

2 THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS ON THE VIOLATION OF ARTICLE 8 OF THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN RELATION TO THE OFFENCE OF FAILURE TO COMPLY WITH MEASURES CONCERNING CUSTODY OF A MINOR PROVIDED FOR IN ARTICLE 379 OF THE CRIMINAL CODE

Analysing the applicability of national legislation in relation to international regulations, we note that if the offence of unlawful deprivation of liberty is linked to Article 6 called “*The right to liberty and security*” of the Charter of Fundamental Rights of the European Union [27], Article 5 (of the same name) of the Convention for the Protection of Human Rights and Fundamental Freedoms of 04.11.1950 [28], Article 32 para. 1b) of Law no. 535/2004 on preventing and combating terrorism [29] etc., the offence of failure to comply with the measures concerning the custody of a minor corresponds, as related legislation, to the Convention on the Civil Aspects of International Child Abduction of 25.10.1980 [30], the Civil Code of 2009 [31], Article 8 with the marginal name “*Right to respect for private and family life*” of the Convention for the Protection of Human Rights and Fundamental Freedoms of 04.11.1950 etc.

As a result of the approach undertaken, we found that European case law has ruled that an application concerning the alleged lack of protection of an applicant's right to respect for his/her family life from the perspective of the application of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms is admissible, with the European Court of Human Rights even convicting the Romanian State for violation of this article.

Specifically, on the one hand, we note that in *Lafargue v. Romania* [32], and previously in *Ignaccolo-Zenide v. Romania* (31679/96) [33], ruling that there has been a violation of Article 8 of the Convention, the European Court of Human Rights held, in essence, that: “*B. Court Appraisal*

1. General principles 82. The Court recalls that, for a parent and his/her child, being together is a fundamental element of family life, even if the relationship between the parents breaks down,- and that those domestic measures which prevent them from doing so are an interference with the right protected by Article 8 of the Convention (see inter alia *Johansen v. Norway*, judgment of 7 August 1996, Reports of Judgments and Decisions 1996-III, pp. 1001-1002 § 52 and *Elsholz v. Germany* (GC), no. 25735/94.43, ECHR 2000-VIII).

83. The Court recalls that while Article 8 seeks to protect the individual against arbitrary interference by the public authorities, it produces an inherent surplus of positive obligations for the actual “respect” of family life. In either case, there must be the necessary goodwill to balance the interests of the individual and those of society as a whole; similarly, in both cases, the State enjoys a certain margin of appreciation (*Keegan v. Ireland*, judgment of 26 May 1994, Series A No 290, p. 19. 49).

84. Since it is a question of the State's obligation to decide on positive measures, the Court has stated on numerous occasions that Article 8 implies the right of a parent to take

his/her own measures, to group them together in the best interests of the child, but at the same time the obligation of the national authorities to come up with their own measures (see, for example, *Ignaccolo-Zenide v. Romania*, no. 31679/96.94, ECHR 2000-I, and *Nuutinen v. Finland*, no. 32842/96.127, ECHR 2000-VIII).

85. However, the obligation for national authorities to take measures to this end is not categorical because it so happens that the union of a parent with his/her children who have lived together with the other parent cannot take place immediately and needs certain provisions. Their nature and extent depend on the circumstances of each situation, but the understanding and cooperation of all those involved in the problem is always an important factor. If national authorities were to make an effort to facilitate such cooperation, an obligation for them to resort to coercive action could only be limited: account must be taken of the interests and rights, the freedoms of these persons, and certainly the best interests of children and the rights which are recognised in Article 8. If their contacts with parents jeopardise these interests or undermine these rights, it will be up to the national authorities to intervene to ensure a balance between them (*Ignaccolo-Zenide*, cited above, paragraph 94).

86. Finally, the Court recalls that this Convention must be applied in accordance with the principles of international law, in particular those relating to the international protection of human rights. (*Streletz, Kessler and Krenz v. Germany* (GC), Nos. 34044/96, 35532/97 and 44801/98. 90, ECHR 2001-II and *Al-Adsani v. United Kingdom* (GC), No. 35763/97.55, ECHR 2001-XI). As regards, more specifically, the positive obligations which Article 8 imposes on the State in relation to the reunification of a parent with his/her children, they must be interpreted in accordance with the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (*Ignaccolo-Zenide*, cited above, paragraph 95) and the Convention on the Rights of the Child of 20 November 1989.

87. The decisive point is whether the Romanian authorities, in order to facilitate the enforcement of the court's decision granting the applicant access to his/her child, have taken all the measures that could reasonably be required of them. (*Hokkanen v. Finland*, judgment of 23 September 1994, Series A No 299-A, p. 22. 58)

88. It should be remembered that in such a case the appropriateness of a measure is judged by the speed with which it is implemented. In reality, proceedings concerning parental authority and access rights, including the enforcement of the decision given to them, require urgent treatment, because the passage of time can have irreparable consequences on the relationship between the child and the father who does not live with him/her."

On the other hand, we note that in the case of *Sbârnea v. Romania* [34], and likewise in *R.R. v. Romania* (No 1) [35], the European Court of Human Rights ruled that there has been no violation of Article 8 of the Convention, referring to the same assessment criteria, stressing in essence the following: "136. (...) the public authorities have positive obligations to ensure the enforcement of rights of access and thus to protect the applicant's right to family life, the Court considers, at the same time, that re-establishing contact with the child in such delicate circumstances requires long-term efforts on the part of all concerned, including the applicant".

In other words, although the public authorities of a State have an obligation to intervene and support the parent concerned to re-establish contact with the child, the State's coercive

action is limited and geared to maintaining a balance in the given situation, with a focus on respecting the best interests of the child.

3 CONCLUSIONS

As we can see from the above brief overview, the best interests of the child are paramount irrespective of the offence referred to, that is, whether it is a typical offence or an aggravated version of another offence.

Regarding the two offences under consideration, it can be concluded that the *act of detention* can quite easily be confused with the *act of kidnapping*, so that, in practice, the legal classification of an act can be difficult to establish. It should be noted that both offences are important because of the incidence in practice of both unlawful deprivation of liberty and failure to comply with the measures concerning the custody of a minor.

We therefore consider that a careful analysis of the constituent elements of the two offences under consideration, in the light of their differences in relation to the specific factual situation, is the solution to avoid possible miscarriages of justice.

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2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

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"(1) If a parent withholds his/her minor child without the approval of the other parent or of the individual to whom the minor was entrusted under the law, he/she shall be punishable by no less than 1 month and no more than 3 months of imprisonment or by a fine.

(2) The same penalty shall apply to the act of an individual to whom the minor was entrusted by court order, to be raised and educated, to repeatedly prevent any of the parents from having personal interactions with the minor, according to the conditions agreed upon by the parties or by the authorized body.

(3) Criminal action shall be initiated based on a prior complaint filed by the aggrieved party."

[11] Article 205 of the Criminal Code, "Illegal deprivation of freedom"

"(1) Illegal deprivation of freedom of an individual shall be punishable by no less than one and no more than 7 years of imprisonment.

(2) The kidnapping of an individual unable to express his/her will or to defend him/herself shall be also deemed deprivation of freedom.

(3) If such act is perpetrated:

a) by an armed person;

b) against an underage person;

c) by jeopardizing the victim's health or health, it shall be punishable by no less than 3 and no more than 10 years of imprisonment.

(4) If such act resulted in the victim's death, it shall be punishable by no less than 7 and no more than 15 years of imprisonment and a ban on the exercise of certain rights.

(5) An attempt to perpetrate the offenses set under par. (1) - (3) shall be punished."

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"If a parent withholds his/her minor child without the approval of the other parent or of the individual to whom the minor was entrusted under the law, if the child's upbringing and education were endangered, he/she shall be punishable by no less than 1 month and no more than 3 months of imprisonment or by a fine.

The same penalty shall apply to the act of an individual to whom the minor was entrusted by court order, to be raised and educated, to repeatedly prevent any of the parents from having personal interactions with the minor, according to the conditions agreed upon by the parties or by the authorized body.

Criminal action shall be initiated based on a prior complaint filed by the aggrieved party.

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CRIMINAL LIABILITY FOR THE CRIME OF INFANTICIDE IN THE REPUBLIC OF MOLDOVA

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Abstract

The study proposed in the present article consists in clarifying the legal nature of the institution of substantial criminal law of the crime of infanticide from the perspective of the study of criminal law in the Republic of Moldova.

Keywords: *infanticide, criminal law, murder, premeditation, newborn child*

Introduction

In the context of judicial and legal reform domestic criminal law has evolved which has been imposed essential to the development of human relationships and society, which led to an adjustment of Moldova Republic legislation to the principles and norms of international law. Infanticide is incriminated in all criminal laws abroad as a specific offense, but legal content and its characteristics do not have the same structure, ranging from one state of law to another. Life is most valuable asset of being human, fundamental existence and development of the person, without which there cannot be conceived any other component such as: health, bodily integrity or freedom.

Pending the adoption of RSS Moldova Criminal Code, which was promulgated on 24.03.1961 were in force the provisions of the Criminal Code of the Ukrainian SSR, the legislature criminalizing the act of infanticide in Article 92 of the Criminal Code of RSS Moldova is known, defining the offense as „ *the baby's murder committed with premeditation by the mother during birth or immediately after his birth* ”^[1], the perpetrator being punished with deprivation of liberty for up to three years, or with a fine in the amount of up to one hundred minimum wages.

The Criminal Law of the Republic of Moldova of April 18, 2002 comes and revises the previous formula and in order not to leave room for interpretations, clearly specifies in the name of the crime, the existence of a special mental or physical condition accompanied by diminished discernment, defining the crime sanctioned by art. 147 of the Criminal Code of the Republic of Moldova as "*the murder of a newborn child, committed during birth or immediately after birth by the mother who is in a state of physical or mental disorder, with diminished discernment, caused by birth.*"^[2] In the same context, the legislator, defending social values, increases the punishment provided in the Criminal Code of the Republic of Moldova from 1961, stipulating in the new law for committing the crime of infanticide, imprisonment from 3 to 7 years.

The term *with premeditation (first-degree)*, stipulated in the previous criminal law could not justify the criminal behavior of the child murderer mother and the term should aggravate criminal liability, and not to mitigate some authors stating that „ *is difficult to understand the logic of those who, in part of the articles of the Criminal Code of 1961, chose to use the term intention or its derivatives, and in another part of the articles of this code decided to use the term premeditation or its derivatives* ”.^[3] Also, Lilia Gîrlă appreciates regarding the anterior criminal norm, that was not one of the most successful since the very presence of this condition should be considered the legal classification of

killing newborn child, and establishing that murder that was committed with premeditation, thought out in advance, determines the qualification of the newborn's death as a premeditated murder. ^[4]

We agree with the view of authorities cited, sustaining the idea that premeditation could not be taken into consideration at the structure of the criminal provision to incriminate infanticide, being conditioned by time limits of committing the crime, welcoming positive current formula, by introducing the phrase *committed by the mother who was in a state of physical and mental disorder with diminishing discernment*, caused by physiological process caused by childbirths, that can affect mental ability mother.

The need to criminalize the crime of infanticide in the current approach, was due to advances in medical sciences, given the evolution of society and the processes of the criminal system. In the past these offenses, which by their consequences were quoted a raised social risk, causes being micro and macro social, identified in dysfunctional families by maintaining relations adulterous, which led to sex random or cohabiting, followed the lack of communication between the mother and her parents, or the other members of the family, later manifested by public reproach. Nowadays qualifying this crime, could not justify the privileged treatment of traumatic situations through the prism of social conflicts arising from preexisting birth.

Thus, it was considered infanticide as a form criminalizing offenses mitigating them under art. 145 CP (Criminal Code) RM, taking into account the state of mental disorder mother. The legislator also inserted the aspect which refers to the mother's physical condition that can occur as a result of birth, current legislation taking into account the data provided by medical science, according to which there are situations when due to the birth, the woman may have manifestations that lead to the suppression of the life of the newborn baby, during the physiological process or immediately after birth.

The general legal object coincides with the special legal object ^[5], the crime of infanticide belonging to the subgroup of crimes against the life of the person, under chapter II - Crimes against the life and health of the person of the Criminal Code of the Republic of Moldova and refers not to social relations on the right to life of any person, but only to those regarding the life of the newborn.

The special legal object regarding the crime of infanticide, is represented by the social relationships regarding the defending of newborn's life ^[6], meaning it brings together all social relations whose formation, development and normal evolving are conditioned by the defense of human life, protected by criminal law ^[7].

Turning to the analysis of its constitutive content, infanticide does not differ in essence from the constitutive content of the crime of murder, the objective side comprising in its structure three sub-elements: the material element - materialized in the action or inaction likely to cause the death of the victim; the prejudicial consequence which is the death of the newborn child and the causal link between the action or inaction of the suppression of life and the immediate consequence.

The essential requirements for the existence of the crime are required to be met cumulatively, the first being that the act of killing the child takes place during or immediately after birth. The second condition is that the state of mental or physical disorder of the mother is determined by the diminution of discernment, caused by birth. The premise situation that enters the structure of the legal content of the crime, is that the active subject has given birth to a living child, and the child is a newborn.

Establishing the state of a newborn is very important both from a legal aspect, but also from the point of view of evidence administration. From the study of the science of law, two concepts were identified regarding the moment of the appearance of the person's life. The first, according to which the person's life begins from the moment of conception, and the second, which begins from the moment of birth. In the sense of the criminal law of the Republic of Moldova, the beginning of life is not that of conception, but that in which the birth takes place when a part of the body of the newborn child appears. In the criminal doctrine there is no unitary opinion regarding the limit that corresponds to the physiological signs of the notion of newborn to be legally accepted, in order to delimit the crime of murder. The specification of the state of the newborn is made with the help of some parameters characteristic of the medical sciences, according to which the morphological particularities of the fetus are highlighted, by dimensions, starting from the quantitative criteria of weight and proportions. Thus, the obstetrics issues that the normal newborn has the length of 48-54 centimeters and the weight around the limit of 2800-3500 grams. Status of the child is also made by observing the teguments to trace their blood and vernix caseosa (*vernix caseosa, also known as vernix, is **the waxy white substance found coating the skin of newborn human babies. It is produced by dedicated cells and is thought to have some protective roles during fetal development and for a few hours after birth***), which are to be collected for the bio-serological examination, skin of red color, peeling/scaling, fingernails that go beyond the fingertip, etc. ^[8]. In the first hours after birth, the child newly born presents shiny umbilical cord without demarcation, that after 24 hours, becomes flabbier by splitting ^[9].

The concept of birth is not known in any legislative act of the Republic of Moldova in this respect being released only civil acts which consists the presence of life as a person, such as the ascertain medical act, medical birth certificate or certificate declaring that sex and the age of the child when he was found. Some authors claim that, although the child does not yet have an ectopic existence, he is physiologically independent, the act of killing directed at the victim's body, constituting the act of murder ^[10], others hold the theory that the beginning of the life of the human being is precisely the act of birth, not the process of birth, *which includes the three periods : dilation; expulsion; deliverance* ^[11]. In accordance with these theories, we support the second opinion according to which the beginning of the life of the human being is precisely the act of birth.

Analyzing the notion of newborn, in order to establish the moment when this quality ceases, we notice that it is not defined in criminal law, so we used the meaning given by the medical sciences, where the notion of newborn is interpreted differently. Thereby, in pediatric is specified the time of 3-4 weeks, 28 days in neonatology, and in legal medicine is admitted the 24 hours time. To establish criteria that must be addressed for the definition analyzed, we will consider two circumstances given the timing of the birth process of the newborn body outside the mother's body and time-consuming psychological state of the mother, which lasts 24 hours from birth. Taking into account the theories presented, we will admit that the moment of cessation of the quality of newborn is the medical-legal criteria, determined by the psychophysiological state of the mother, caused by the physiological process of birth.

For the qualification of infanticide, it does not matter whether the newborn child is healthy or not, whether the child is the result of a married family or whether or not it is viable, but it must meet the quality of a person, respectively, to be born alive. The notion of

viable should not be confused with the notion of living, the first one presenting the qualities necessary for the child to stay alive, to develop ^[12], admitting there is crime of infanticide even though the victim would not survive longer than a few hours. According to the provisions of the Order of the Ministry of Health, the fetus is considered viable weighing 500 grams, and if the birth weight is not known, shall be taken into consideration the length of the body, which cannot be more than 25 centimeters and the gestation period of more than 22 weeks ^[13]. In a unanimously accepted opinion by the local criminal doctrine, the newborn child, product of conception is the one who reached the validity, meaning the weight of 1000 grams, and when the weight is not known, the body length is taken into account, which is over 35 centimeters and gestational age, over 28 weeks ^[14].

The material element of infanticide is described in the local criminality norm, with the help of an open criminal content, which does not describe the ways in which the victim's life is suppressed ^[15]. Using this technique, it is considered that, from an objective point of view, the crime of infanticide is committed by any material activity performed by the mother, which can manifest itself as an active activity - *action*, or by omission, as a passive attitude - *inaction*.

Active infanticide can be achieved through various actions capable of causing the death of the newborn child, which are of minimal intensity, taking into account the fragility of the victim. The actions frequently encountered in judicial practice can be: strangulation by hand; suffocation by applying soft bodies; strangulation followed by the application of strikes ^[16], or by drowning the newborn in different ways. In relation to the wide range of possibilities that can determine the time of death of a person, I find that it is problematic to adopt certain absolute rules, but we will consider medical scientific data, which take into account two distinct situations, the first being the clinical death that is characterized by the cessation of the functions of the respiratory and circulatory systems, and the second, which is brain or biological death, when the cessation of metabolism and the occurrence of real death, of cadaveric changes due to the action of environmental factors on the corpse ^[17].

Passive infanticide is committed by abandoning the newborn in unfavorable places, not tying the umbilical cord, the mother's refusal to feed the child, not wrapping him when the temperatures are low. Some authors claim that the crime of infanticide cannot be committed by inaction, promoting the idea that the inaction of not taking measures to care for the victim, followed by victim's death, is to be classified according to art.163 CP RM (Criminal Code of Moldova Republic), respectively the crime of endangerment ^[18]. We cannot agree whereas murder can be achieved also by passive attitude, when the author was forced to intervene to remove the cause of the death, in this case the mother, who has a special obligation to act in order to ensure the life of the newborn after birth, an activity resulting not only from the legal obligation given by the kinship relations, but also resulting from the provisions of art. 15 paragraph 4 within the Law of the Republic of Moldova on the rights of the child ^[19] and art. 53 of the Family Code of the Republic of Moldova.

The time of committing the crime is an element that must be taken into account in the qualification of the incriminated deed, this being characterized by two situations conditioned by the concrete time of committing, respectively: during birth and immediately after birth. The initial moment of the period is the beginning moment of the newborn's life. The final moment is when the expulsion of the body ended, even if it was not separated from the maternal organism by cutting the umbilical cord and the placenta was not removed. The time period immediately after birth must be interpreted chronologically, according to

morphophysiological criteria ^[20]. The final moment of this period is marked by the expiration of the 24-hour period from the beginning of the birth, until it is presumed that the signs of the recent birth are still on the victim's body.

The defining sign of the subjective side of the crime is the physically or mentally disturbed state in which the mother is. In reference to this, the direct intent of the crime author is difficult to identify, taking into account the specific disorder caused by birth, „it is perceived as a state on the verge of irresponsibility, being under the influence occurring criminal intention.” ^[21] Others authors added that „concept of disorder caused during birth does not refer to normal mental state, but to the nature psychopathological disorders, meaning psychopathological states consecutive birth.” ^[22]

Conclusions

The current regulation contains an updated approach to the crime under investigation, in line with scientific criteria in the medical field; the crime under investigation is expressed by any action or inaction caused to the newborn that would result in biological death; when configuring the material element, the action or inaction must take place during or after birth; in order to survive the crime, the mother must be under the influence of physical or mental disorders that affect her discernment to the verge of irresponsibility.

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CONSEQUENCES OF GENDER-BASED VIOLENCE IN THE FAMILY ENVIRONMENT AND THE SOLUTIONS ADOPTED IN LATIN AMERICA AND EUROPE TO COMBAT THE FEMINICIDE PHENOMENON

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Abstract

In recent times, the dynamic succession of feminist movements and the information presented in mass media, has been the necessary impetus for raising awareness in the issue of violence against women, in the family environment.

Gender-based violence, like any form of violence against women, committed by spouses, partners, ex-spouses, or ex-partners, remains one of the greatest challenges of our societies and is part of the global strategy to eliminate and prevent violent deaths of women.

Although the European Union has made considerable efforts for achieving the goals set by Istanbul Convention, during the Covid-19 pandemic, the number of femicides has increased, significantly, and taking into account that the Rule of Law requires that states are obliged to promote policies that guarantee women adequate protection against any form of violence, through this article, we will emphasize the need to strengthen the legal framework and identify new strategies/legal instruments designed to ensure and respect the rights of victims of gender violence, in the current context.

Keywords: *femicide, gender-based violence, Covid-19, domestic violence, equal rights for women and men*

Introduction

Through complex historical and political processes, gender violence has been recognized, progressively, as the manifestation of a social fact rooted, religiously, in male-dominated culture.

Before the advent of the European Union, European leaders had long sought to find the means to ensure equal rights for women and men, but this goal became a fundamental value of the European community only through the Treaty of Rome, signed on March 25, 1957, that entered into force on January 1, 1958.

Following the adoption of the Convention on the Elimination of All Forms of Discrimination against Women^[1] and feminist movements, organized globally, the United

^[1]The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted and opened for signature by the United Nations General Assembly by Resolution 34/180 of December 18, 1979 entered into force on September 3, 1981, according to the provisions of art. 27 (1) and ratified by Romania on January 7, 1982. The C.E.D.A.W. defines, for the first time, the forms of discrimination to which women are

Nations has recognized gender-based violence as a violation of human rights, and since the 1980's and 1990's this problem has become a priority.

Gender-based violence was openly mentioned only in 1992, in the text of General Recommendation no. 19 of the United Nations, where it has been defined as a form of violence that has its origins in the structural inequalities between men and women.

Since then, in various countries of the world, there have been occasional approaches and campaigns to develop specific practices: In Europe and the United States against rape and domestic violence, in Africa, on mutilation, in Asia, against sexual slavery, and in Latin America on torture and rape.

The definition of gender-based violence has made it possible to set up a single conceptual framework by recognizing all these practices as an expression of the same global phenomenon, so that, in 1993, the United Nations Declaration on the Elimination of Violence against Women also emphasized state responsibility for prevention and condemnation of acts of violence against women.

Since the Plan Action that was developed in 1997 and promoted by the World Health Organization, the phenomenon of gender-based violence has become even more visible.

Following the publication of the Charter of Fundamental Rights of the European Union^[2], which stated that equality between women and men must exist in all areas, but also after the international conference "Violence against Women: Zero Tolerance", promoted by the European Commission, in Lisbon in 2000, European Union-funded programs to combat violence against children, young people and women, have also been set up.

Later, several Council of Europe initiatives and publications paved the way for a specific convention on violence against women, and on 11.05.2011 in Istanbul, the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence adopted the Convention^[3], that entered into force in 2014. Since then, the Istanbul Convention has been the reference framework for the prevention of gender-based violence.^[4]

The Istanbul Convention recognizes, above all, the social, historical and cultural dimension of the phenomenon of violence against women, understood as a result of the persistent asymmetry of power between men and women, respectively, as a product of patriarchal culture.

Domestic violence, whether physical, sexual, psychological, or economic, is just one of the many forms of gender-based violence recognized by the Convention.

The Convention establishes an internal and external monitoring process, through the G.R.E.V.I.O. (Group of Experts on Action against Violence against Women and Domestic Violence) a body within the Council of Europe responsible for drawing up evaluation reports on legislative and other measures taken by the Member States to effectively prevent gender-based violence.

exposed. The text of the Convention is available here: <https://anes.gov.ro/wp-content/uploads/2018/07/Conventia-asupra-eliminarii-tuturor-formelor-de-discriminare-fata-de-femei-cedaw.pdf>

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^[3] Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence available here: <https://rm.coe.int/168046253e>

^[4] For example, the 2007-2013 Daphne Program to Prevent and Combat All Forms of Violence, Especially Physical, Sexual and Psychological Violence against Children, Young People and Women.

In June 2017, in the context of the signing of the Convention by the European Union itself, the issue of violence against women took on new dimensions, with the European Parliament deciding to get involved in adopting policy measures to combat violence against women through national strategies/action plans and reports, assessment to help identify problems and effective solutions in the fight to combat this phenomenon.

Observing these, we note that one of the key elements in eradicating gender-based violence is political and legislative action which, now more than ever, requires the attention and intervention of the legislator, as the Covid-19 pandemic is a global factor in the expansion of the *femicide* phenomenon.

In this regard, the European Parliament, in its Resolution^[5] from 21.01.2021 urged Member States to continue analyzing data on the prevalence and reporting of all forms of gender-based violence, as well as the consequences for children, to aid services for the identification of women at risk, to provide gender-sensitive training for health workers as well as front-line police officers, as well as members of the judiciary. It also called on the Member States to share national innovations and best practices in tackling gender-based violence to better identify and promote effective practices.

Thus, in the context of the pandemic, the European Parliament calls on the Member States to ensure a coordinated approach between governments, public services, and the private sector to update protocols for victims of gender-based violence, to help them obtain assistance, report crimes, and access health services, as well as to encourage witnesses to report such crimes.

The European Parliament also called on the European Commission to draw up a European Union protocol on violence against women in times of crisis and emergency to prevent violence against women and to support victims of gender-based violence during emergencies periods, such as the Covid-19 pandemic, stressing that this protocol should include essential victim protection services.

From the recommendations issued by the European Parliament previously, we could see that women in the European Union do not have the same degree of protection against violence against them, due to different policies and regulations for acts of violence.^[6]

However, any form of violence against any person is a violation of his/her dignity, physical and mental integrity, human rights and the principles of a democratic society, and for its policies to combat gender-based violence to be effective, the European Union needs comprehensive, up-to-date and comparable data and to get a complete picture of gender-based violence.

Given this situation, the European Parliament has also ordered a survey on the prevalence and dynamics of violence against women and other forms of interpersonal violence in the European Union, to be coordinated by Eurostat and the results of which will be presented in year 2023, advancing at the same time the following recommendations:

- Campaigns to raise awareness, inform and support domestic and gender-based violence, in all its forms, such as: physical violence, sexual harassment, cyber-violence and sexual exploitation, in particular with regard to new prevention measures. create;

[5] European Parliament resolution of 21.01.2021, available here: https://www.europarl.europa.eu/doceo/document/TA-9-2021-0024_EN.html

[6] European Parliament resolution from February 25, 2014 with recommendations to the Commission on combating violence against women [2013/2004 (INL)], available here:

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- Provide flexible emergency warning systems to encourage reporting in coordination and cooperation with recognized and specialized women's organizations;
- Collaborate with technology platforms in the scope of the Digital Services Act to address illegal online activities, including online violence against women and girls, in all its forms, as the Internet has been widely used since the beginning pandemic for work, education and entertainment and will continue to be used.^[7]

1.1. Gender-based violence committed within the family environment, in the internal regulation

Violence against women is a complex phenomenon, but also a subdomain of criminological research in several countries, and to understand and combat it, we must relate to the context of social and cultural norms in which it develops.

Reality reveals that the family becomes, subtly, a hostile environment for the physical and mental integrity of the subjects who are part of it and is a major problem for various legal systems around the world, there is still no effective public policy, which can minimize or prevent this phenomenon.

The European Union defines gender-based violence as „any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.”^[8]

Within the family, gender-based violence is a constantly expanding phenomenon, but its severity is not known, as the number of women who choose to disclose the violence, they are subjected to is very low.^[9]

Because one of the main causes of female mortality is domestic violence, to combat this phenomenon, in Romania, the following legislative package applies:

- The Draft Law for amending and supplementing Law no. 286/2009 regarding the Criminal Code;
- The Draft Law for amending and supplementing Law no. 135/2010 on the Code of Criminal Procedure;
- The Draft Law on amending and supplementing Law no. 202/2002 on equal opportunities between women and men, republished, with subsequent amendments and completions;
- The Draft Law on amending and supplementing Law no. 217/2003 on preventing and combating domestic violence, republished, with subsequent amendments and completions;
- Law no. 211/2004 on some measures to ensure the protection of victims of crime;

^[7] European Parliament resolution from January 21, 2021, available here: https://www.europarl.europa.eu/doceo/document/TA-9-2021-0024_EN.html

^[8] European Parliament resolution from November 26, 2009 on the elimination of violence against women, available here: https://www.europarl.europa.eu/doceo/document/TA-7-2009-0098_RO.html

^[9] In a study conducted by Paternity Center for Equality in 2003, it was found that almost half of the Romanian population is unaware of the existence of any legal instrument regulating domestic violence, and 80% is the percentage of victims who have never resorted to specialized institutions. According to the same study, one in four Romanians does not consider that acts of physical violence in the family are very serious acts. For more details, see Domestic violence and female crime. Study of the National Institute of Criminology, Bucharest, 2004, op.cit. page 6, available here: <http://criminologie.org.ro/wp-content/uploads/2015/08/Violenta-domestica-Studiu.pdf>

- Order no. 383/2004 of the Minister of Labor, Social Solidarity, and Family regarding the approval of quality standards for social services in the field of protection of victims of domestic violence;

- Order no. 384/306/993/2004 of the Minister of Labor, Social Solidarity and Family, of the Minister of Administration and Interior and of the Minister of Health for the approval of the Cooperation Procedure in the prevention and monitoring of cases of domestic violence;

- Order no. 304/385 / 1,018 / 2004 of the Minister of Administration and Interior, of the Minister of Labor, Social Solidarity and Family and of the Minister of Health regarding the approval of the Instructions for the organization and functioning of the units for preventing and combating domestic violence;

- Law on social assistance no. 292/2011;

- Government Decision no. 49/2011 for the approval of the Framework Methodology on prevention and intervention in multidisciplinary and networked teams in situations of violence against children and domestic violence and the Methodology of multidisciplinary and interinstitutional intervention on children exploited and at risk of exploitation through work, child victims of human trafficking, as well as Romanian migrant children victims of other forms of violence on the territory of other states;

- H.G.R. no. 1056/2012 on the approval of the National Strategy for preventing and combating the phenomenon of domestic violence for the period 2013 - 2017 and the Operational Plan;

- Law no. 30/2016 for the ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence, adopted in Istanbul on 11 May 2011;^[10]

- Government Decision no. 177/2016 on the organization and functioning of the National Agency for Equal Opportunities between Women and Men;

- Draft Joint Order on the establishment and operation of integrated emergency services in case of sexual violence (MoH and MMJS).^[11]

In the Romanian Criminal Code, the notion of a family member is harmonized with the one already enshrined by Law no. 217/2003 for preventing and combating domestic violence, but also with existing regulations in other European criminal codes.^[12]

^[10] By adopting Law no. 30/2016 Romania has become the 14th state to ratify the Istanbul Convention on preventing and combating violence against women and domestic violence. In May 2016, the instrument of ratification was submitted to the Council of Europe and the Convention entered into force in Romania on September 1, 2016. The Istanbul Convention is the first international document to note that domestic violence and violence against women is a violation of human rights and a form of discrimination. The Istanbul Convention proposes mechanisms to guarantee the protection of victims, to raise awareness of the effects of this phenomenon, to prevent and combat all forms of violence and to introduce sanctions for acts of mental and physical violence, harassment, etc.

^[11] Monitoring report on the state of implementation of the Operational Plan for the implementation of the National Strategy for preventing and combating the phenomenon of domestic violence for the period 2013-2017, available here: <http://anes.gov.ro/wp-content/uploads/2017/09/RAPORT-DE-MONITORIZARE-STRATEGIE-Violenta-in-familie-2016.pdf>

^[12] Statement of reasons regarding the agreement of the provisions of Law no. 286/2009 on the Criminal Code, as subsequently amended and supplemented, by the decisions of the Constitutional Court, Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on strengthening certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings, Directive 2014/42 / EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instruments and

In its content, the notion of family members includes ascendants and descendants, brothers and sisters, their children, persons who have become such relatives by adoption, spouses, persons who have established similar ties to their spouses or between parents and children, that they live together.^[13]

Domestic violence is regulated separately in the Romanian Criminal Code (art. 199) and constitutes an aggravated form of crimes against life or bodily integrity.^[14] Thus, committing a crime of violence against a family member appears, in the current regulation, as an aggravating factor for the offenses of murder, manslaughter, assault or other violence, bodily injury and death-causing injuries.^[15]

In the previous regulation, the manslaughter committed against a family member („against a spouse or a close relative”) was considered a specific type of murder, and the crime of assault, other violence or bodily injury, committed against a family member were aggravated forms, but, in the case of offenses of grievous assault and death-causing injuries, the commission of such acts, against a family member does not aggravate criminal liability, possibly constituting an element of judicial individualization of the punishment.

Thus, in the current legislation, the scope of this aggravating circumstance has been extended to all offenses for which it is justified.^[16]

Globally, at least one in seven homicides and more than a third of homicides committed against women are committed by spouses, partners, ex-spouses, or ex-partners. Such a consequence is usually the culmination of a long history of abuse.^[17]

One of the main problems in the process of understanding, preventing, and sanctioning forms of violence against women and its inevitable outcome, *feminicide*, is closely linked to the availability and, above all, the unavailability and heterogeneity of information.

In most countries, including Romania, there is no frequent systematization and publication of statistics on gender violence, especially cases of *feminicide*, treated as a consequence of gender violence.^[18]

proceeds of crime in the European Union, available here: <https://www.senat.ro/legis/PDF%5C2009%5C09L260EM.pdf>

^[13] Art. 177 Romanian Criminal Code

^[14] Statement of reasons regarding the agreement of the provisions of Law no. 286/2009 on the Criminal Code, as subsequently amended and supplemented, by the decisions of the Constitutional Court, Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on strengthening certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings, Directive 2014/42 / EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instruments and proceeds of crime in the European Union, available here: <https://www.senat.ro/legis/PDF%5C2009%5C09L260EM.pdf>

^[15] Idem

^[16] Idem

^[17] Stöckl H., Devries, K., Abrahams N., Campbell J., Watts C., Moreno G., *The global prevalence of intimate partner homicide: a systematic review*, 2013, available here: [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(13\)61030-2/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(13)61030-2/fulltext);

^[18] The European Parliament resolution from February 25, 2014 containing recommendations to the Commission on combating violence against women established that gender-based violence should be considered (as already indicated in Directive 2012/29 / EU of the European Parliament and of the Council of 25 October 2012 laying down minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220 / JHA) violence against a person because of that person's gender, gender identity or gender expression, or disproportionately affecting persons of a certain gender. It can cause physical, sexual, emotional and psychological harm to the victim, as well as economic loss, and can include violence in close relationships, sexual violence (including rape, sexual assault and harassment), trafficking in human beings,

The only studies conducted in Romania on the phenomenon of *femicide* were the publications of researcher E. Balica: *Studies focused on Femicide* (2017), *Femicide in Romanian immigrant communities* (2018) and *Intimate Femicide* (2018). In these studies, *femicide* is defined by the Romanian researcher as: „killing a woman by an intimate partner”. The partner is defined, in a broad sense, to include: husband, partner, boyfriend, ex-husband, ex-partner and ex-boyfriend.

The statistical records of the General Inspectorate of the Romanian Police don't provide enough information, and the annual reports of the Prosecutor's Office attached to the High Court of Cassation and Justice includes information on the number of victims of homicide, without specifying whether it is a wife or husband.

Currently, the only institution that has collected data on *femicide* phenomenon, in Romania, is the Institute of Sociology of the Romanian Academy.

1.2. *Femicide*, a phenomenon in continuous expansion in Latin American countries and Europe

Violence against women is based on an inequality that, until recently, was legitimate and still is in some parts of the world.

A study^[19] conducted by the European Union Agency for Fundamental Rights (FRA) found that 33% of women in the European Union^[20] are victims of physical and/or sexual violence, 24% have suffered physical and/or sexual violence. partner and 55% suffered sexual harassment.

According to the same study, in Romania between 20% and 29% of women said they were subjected to physical and/or sexual violence, 20% of young women aged 18-29, faced cyber-harassment and 75% of qualified or leading women have been subjected to sexual harassment during their lifetime.

Another study^[21] found that in the United States, there is a high rate of female mortality, based on gender-based violence, and approximately 45% of women and 5% of homicides were committed by a partner. life, while in the UK in 2009, 54% of women and 5% of homicides were committed by a life partner. Similarly, in South Africa, between 1999 and 2009, about 50% of women were killed by a life partner.

However, one of the regions with the highest rate of female mortality based on gender-based violence is currently Latin America.^[22] For this reason, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have thoroughly developed the concept of due diligence to guarantee women's rights,

slavery and various forms of harmful practices. , such as forced marriages, female genital mutilation and so-called "honor killings". For more details, see: European Parliament resolution from February 25, 2014 with recommendations to the Commission on combating violence against women, available here https://www.europarl.europa.eu/doceo/document/TA-7-2014-0126_EN.html?Redirect

^[19]Violence against women: an EU-wide survey, March 2014, available here: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2014-vaw-survey-main-results-apr14_en.pdf;

^[20]In the Pacific Region, the percentage reaches 70%.

^[21] Abrahams N., Mathews S, Martin L, Lombard C., Jewkes R., *Intimate partner femicide in South Africa in 1999 and 2009*, Plos Medicine, 2013, available here: <https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1001412>;

^[22] Territories where the rate of violence against women reaches, year by year, very high values: Panama, Colombia, Peru, Bolivia, Brazil, Guatemala, Mexico, Ecuador, El Salvador, Uruguay, Costa Rica, Dominican Republic, Paraguay, Nicaragua, Argentina, Venezuela, Puerto Rico

emphasizing the importance of ensuring dignified treatment of victims and their families and overcoming obstacles to access to justice.

Forms of domestic violence against women have been described in the Istanbul Convention, but it does not explicitly recognize *feminicide*.

Feminicide was defined in the Belém do Pará Convention^[23] as: „any act or conduct, gender-based, that causes woman's death, injury or physical, sexual or mental distress, both in public and in private.”^[24]

The notion of *feminicide* was first used in 1976 by Diana Russel at an international meeting using it to refer to „the killing of women by men because they were women.”

Since then, the term has been taken over in English *femicide*, in French *le fémicide*, in Spanish *feminicidio*, in Italian *feminicidio*, in Portuguese *feminicídio* etc., but its meaning has changed over time.

In Europe, the term *feminicide* began to be used following the debates organized by the Academic Council on the United Nations System (ACUN) and following the COST Femicide across Europe project in 2016 which brought together researchers from 27 European countries, including Romania to identify concrete ways to define *feminicide*, to identify common indicators and to conduct research on the factors underlying this phenomenon.

In some European countries (e.g. Austria, Denmark, Germany, Poland, Serbia, Turkey), there is no term *feminicide* and no statistical information is available. In Croatia, the notion of *feminicide* appeared in the late 1990's, in publications.

In France, cases of *feminicide* are reported by the media, and since 2014 the word *feminicide* has been defined in the French dictionary Le Petit Robert as: „killing a woman or a girl because she is a woman.”

In Italy, the notion of *feminicide* has been circulating since 2004, but in the last decade, due to social, political, and feminist movements, the term has been used extensively by the media to raise awareness. In 2012, the debate on whether to incriminate or not the *feminicide* as an autonomous crime was abandoned because was raising constitutional issues.

In Portugal and Spain, violence against a partner is not classified as an autonomous crime, being provided as an aggravating factor in some crimes.

We have very little evidence about *feminicide*, although we know that it is a major cause of premature female mortality, globally and is the consequence of cruel forms of violence against women who are raped, threatened, beaten, abused daily, psychologically abused, denigrated, deprived. of economic independence, controlled, harassed and ultimately killed.

While *feminicide* has a special meaning in some countries and in others we do not find any mention of this phenomenon, in many Latin American countries *feminicide* appears as a

^[23]Convenția de la Belém do Pará, available here: <https://www.oas.org/en/CIM/docs/Belem-do-Para%5BEN%5D.pdf>

^[24] European Parliament resolution from October 11, 2007 on the murder of women (feminicide) in Mexico and Central America and the role of the European Union in combating this phenomenon (2007/2025 (INI)), available here: <https://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2007-0431&language=RO>

crime, autonomous^[25], severely punished, or as aggravating^[26], by amendments to the Criminal Code or by special laws.

Regarding the legal object of *feminicide* crime, it concerns the social relations regarding the right to life, to which is added the social relations regarding bodily integrity, health, but also freedom or sexual integrity.

The typical behavior is to kill a woman in unequal power relations based on sex.

The active subject of the *feminicide* crime is the victim's spouse or partner, some states also imposing the condition that the perpetrator and the victim have lived together, and the passive subject, any female person, regardless of age or health status.

The establishment of *feminicide* as an autonomous crime (for example Colombia, Brazil^[27], Peru) has been a relevant advance in Latin America, which, in the light of various constitutional and international provisions, has sought to implement this type of crime, protect women's rights and prevent gender-based violence.

States that have chosen to criminalize *feminicide* as an autonomous crime have also imposed harsh sanctions. For example: in Costa Rica, the penalty for the *feminicide* crime is imprisonment from 20 to 35 years, in El Salvador, imprisonment from 20 to 35 years or 30 to 50 years, in its aggravated form, in Guatemala, imprisonment from 25 to 50 years, in Mexico prison from 40 to 60 years and Nicaragua, imprisonment from 15 to 20 years, and when the event takes place in public, imprisonment from 20 to 25 years, etc.^[28]

The legislator excluded the application of justifying circumstances in the case of *feminicide* crimes.

Unlike the general homicide, in *feminicide* case, the typicality of the act consists in: the victim shows signs of sexual violence of any kind, has suffered infamous injuries, abuse, mutilation, before or after the suppression of life, there are previous data of threat, harassment by the subject active, the victim's body was exposed in public, etc.

Many Latin American governments have already implemented measures to reduce gender-based violence in the current context of the Covid-19 pandemic.

However, these actions were either not taken in time or are not effective, if we follow the social initiative platform *femicidio.net* which made an x-ray of violence against women, from a global perspective.

In Europe, detailed information databases have been developed to observe the extent of the *feminicide* phenomenon (e.g. Italy, the United Kingdom, Spain and Serbia). However, the data is often based only on statistics, which provide very limited and inconsistent information for the true extent of this phenomenon.

The European Parliament Resolution of 11 October 2007 on the murder of women (*feminicide*) in Mexico and Central America and the role of the European Union in combating this phenomenon [2007/2025 (INI)] stated that the punishment or eradication of *feminicide* is an obligation and must constitute a priority for any rule of law.

[25] Bolivia, Brazilia, Columbia, Costa Rica, El Salvador, Mexic, Peru și Republica Dominicană etc.

[26] Chile, Ecuador, Guatemala, Honduras, Nicaragua și Panama, etc.

[27] Brazil ranks 5th in the top countries with a high rate of violent female mortality, with a crime of *feminicide* at 90 minutes. For more details see: Augusto C.B., *Feminicide in the Brazilian Penal System*, Revista del Postgrado en Derecho de la UNAM Nueva Epoca, nr. 9, December 2018, available here: <https://revistas-colaboracion.juridicas.unam.mx/index.php/rev-posgrado-derecho/article/viewFile/35793/32722>

[28] Juan Pablo Cavada, Pamela Cifuentes. *Tipificación del delito de femicidio en Latinoamérica*, Asesoría Técnica Parlamentaria, iunie 2019, available here: https://obtienearchivo.bcn.cl/obtienearchivo?id=repositorio/10221/27378/1/BCN_Tipificacio_n_del_femicidio_en_Latinoame_rica_2019.pdf

Thus, at the Euro-Latin Joint Parliamentary Assembly and at the European Union-Latin America and the Caribbean meeting in Lima in May 2008 on combating and punishing *feminicides*, it was agreed that, in cooperation with local institutions and organizations, implement awareness-raising actions on violence against women.

In this regard, the European Parliament's Resolutions develop a comprehensive strategy aimed at the joint implementation, by the European Union and its partners, of actions and efforts to eliminate and prevent violent deaths of women, wherever they occur.^[29]

To this end, one of the important objectives was for states to review their existing policies and adopt comprehensive reform strategies to prevent, protect and punish cases of violence against women. But for the European Union's policies to combat gender-based violence to be effective, it needs comprehensive, up-to-date, and comparable data.

Anyhow, the effectiveness of legal instruments and policy initiatives can only be analyzed in the light of women's willingness to report their abuse and trust in state authorities.

Therefore, for the effective prevention of gender violence, we appreciate that a multidisciplinary approach is required to work with professionals, organizations, and institutions in order to develop optimal solutions to combat the phenomenon of *feminicide*, in the current pandemic context.

The states cannot yet provide clear answers and solutions to this scourge, nor to the prevalence and dynamics of violence against women, but currently Eurostat is conducting a study at EU level and its results will be presented in 2023.

1.3. Solutions adopted in Latin America and Europe to combat the phenomenon of *feminicide*

Declarations of the rights of gender-based violence victims, without guarantees and without the means to enforce them, are insufficient.

We believe that more than a social understanding of violence against women is needed and an effective set of policies to combat *feminicide*, recognized as a global phenomenon by the European Parliament in 2007.^[30]

The experience of Latin American countries shows us that, in addition to criminal sanctions, it is essential to eliminate the causes of this violence and prevent them by adopting comprehensive measures to combat this phenomenon (legislative, educational, socio-cultural, health and labor).

Among the solutions adopted to combat the phenomenon of *feminicide* were:

- Allocation of financial and human resources for the implementation of policies, measures, and development of cooperation programs with NGOs and civil society;
- Creating a body responsible for coordinating, implementing, monitoring, and evaluating policies and measures, collecting and analyzing data, but also disseminating them;

^[29] Assassination of women in Mexico and Central America European Parliament resolution from October 11, 2007 on the assassination of women (feminicide) in Mexico and Central America and the role of the European Union in combating this phenomenon [2007/2025 (INI)]

^[30] In 2007, the European Parliament proclaimed the obligation of every rule of law to promote policies to protect women against discrimination, violence and feminicide, starting with raising awareness among the authorities and society about the seriousness of the problem. At the same time, the European Parliament called for continued respect for women's instruments on human rights and human rights.

- Collection of detailed and relevant statistical data, at regular intervals, on all forms of violence against women;
- Research and studies on the causes and effects of the phenomenon, frequency, and data on the conviction of aggressors;
- Providing the information collected to the G.R.E.V.I.O., in order to stimulate international cooperation and allow an international comparison;
- *Femicide*, as an autonomous crime;
- Configuring an aggravating factor;
- Application of national procedures for victims of crime;
- Access to justice through WhatsApp media, smart pages, with agents trained in dealing with such cases, online, to facilitate complaints, given that the victim is often under the control of the aggressor.
- Appropriate coercive measures for the aggressor;
- Reanalyzing the conditions for granting firearms possession permits;
- Administrative warning issued by the police officer, ex officio;
- In Italy, monitoring by electronic labeling has also been extended to personal injury and serious threats against the spouse. (Article 612 (2), Italian Criminal Code).

Presently, policies to combat gender-based violence, as well as the judiciary systems, continue to ignore the last cried out in despair of women's, victims of violence acts committed by husbands, partners or ex-spouses and ex-partners, who, not infrequently, lead to a fatal outcome and, as we can see, some solutions are confusing, partial and inadequate, and the rules are not effective and able to counteract the mechanisms for justifying violence against women, even more in the context generated by the Covid-19 pandemic.

Conclusions

Statistics and polls do not specifically detect risk factors for violence against women, and this is a very complex issue, in the view of the fact that EU policies to be effective, is needed: comprehensive, updated and comparable data.

It should be noted that one of the most dangerous mechanisms that cause gender violence is the intergenerational transmission of violence, which can be activated both by attending domestic or private violence, but also by personal experience, by repeatedly accepting acts of violence.

Studies show that men learn to act violently, and women learn to tolerate acts of violence. For this reason, we believe that educational programs, prevention and awareness-raising policies are essential for understanding the consequences of indifference and acceptance behaviors regarding acts of domestic violence.

In this regard, we note the need to improve the legal framework with effective coercive measures and sanctions, allocate appropriate resources for the development of assistance and protection programs and strengthen the national system by developing guidelines on intervention and accountability of staff and authorities' institutions with responsibilities in preventing and combating gender-based violence.

In summary, we appreciate that it is necessary to draw the legislator's attention for:

- empowering the staff of the authorities and institutions with responsibilities in preventing and combating gender-based violence;
- policies for the prevention of domestic violence in the sense of creating support centers, with resources and specialized staff;

- protection policies for victims of gender violence, respectively guaranteeing priority access to housing, economic support, training, employment, etc.;
- educational programs that contribute to the change of mentalities, implementation of programs that include the issue of gender violence, including that of domestic violence;
- the effective application of the Audiovisual Media Services Directive 2010/13 / EU;
- awareness of the fact that domestic violence against women is a risk variable in terms of health, but also the fact that domestic violence is a consequence of *feminicide*, a phenomenon greatly aggravated by the current pandemic context;
- providing support to organizations working with victims of domestic violence or promoting awareness-raising or training in the field of combating domestic violence.

DOMESTIC VIOLENCE AGAINST WOMEN AND THEIR IMPACT ON FAMILY LIFE

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Abstract

In the last thirty years, domestic violence has been of particular political and social interest because within the family system social changes are understood as the evolution of individuals and can be correlated with the evolutionary tasks of the family group, understood as a system.

There are two types of events related to the evolutionary tasks of the family group, understood as a system: predictable events (marriage, childbirth, etc.) and unpredictable events (separation, divorce, illness, death, etc.).

Unpredictable events are those that lead to subsequent changes in the family group, with profound changes in socio-economic status, and the difficulties generated by unpredictable events require the implementation of mechanisms for adaptation and problem solving.

The protection order is considered an effective tool for the protection of victims of domestic violence, but also a remedy for other, collateral situations, such as violent behavior against children.

Through this article, we will try to emphasize the fact that, in order to make the inter-institutional mechanisms in the field of prevention of domestic violence more efficient, it is necessary to implement other measures, other than the temporary detachment, from the family system, of the parent with violent behavior.

Keywords: *domestic violence, women's rights, health, family, violation, equal opportunities*

The importance of this topic

Domestic violence can be abuse of a partner in an intimate setting or in a family reality. This type of violence is perpetrated repeatedly and the intimidation of the partner is used continuously in order to be able to control it in any form. Domestic violence can be perpetrated on anyone, regardless of gender, age, ethnicity, but most often has devastating effects on females and is caused by men. [1]

We decided to choose this topic because there are many issues that are not sufficiently addressed by the authorities, institutions, associations, respectively by society as a whole, considering that the restriction of women's rights in the family (the right to equal participation of women in life public, political and social rights, women's right to health

^[1] Casa Ioana – ”Working with women and children experiencing domestic violence and family homelessness”, p. accesată la data de 04.05.2021 și disponibilă la <https://casaioana.org/about-domestic-violence/> ;

protection, women's right to compensation for family work, women's right to free choice of profession, women's right to employment, etc.) [2] will continue to exist for a long time, and with it and violence against family members will certainly not diminish.

However, no one can really know (whether we are talking about family members, close friends, relatives, or neighbors) to what a person who receives insults, severe sexual or verbal aggression, beatings, and the like is subjected to every day. violence, but also reproaches, all culminating with negative and long-lasting effects on the behavior, physique and psyche of the aggressor. Thus, we will exemplify explanations of what domestic violence means, of how many types it can be and how it can deprive in a continuous form the person aggressed of certain rights and freedoms. Moreover, we will discuss the main ways and how the authorities, associations can provide help to vulnerable people, who are subject to domestic violence, but also the legal framework in force.

We will also have in the foreground the current elements of this form of violence in the current context of the coronavirus pandemic, but also specific cases, such as a decision of the European Court of Human Rights, from 2020 on how to which have systematically violated certain rights and freedoms of a female person. As a benchmark in scientific research, we will start from the problems that the authorities have faced over time, what we could bring new and what we could do to reduce the number of cases of domestic violence and especially cases of affecting the mental health of the child in the family, how we can help him get over what he has seen and felt constantly throughout the torture he has been subjected to.

General aspects of domestic violence

At the 4th UN World Conference on Women. Held in Beijing on February 4-5, the issue of violence against women was discussed as one of the most important meetings held under the auspices of the United Nations. At this conference, it was decided through 189 representatives of the states, after long discussions, to adopt the General Declaration and an important platform for Global Action. [3] Moreover, it was recognized by the UN. the fact that they are constantly violating and seriously infringing on fundamental rights and freedoms, equality, development, but also ensuring peace when there is any form of aggression / violence against women. This situation has been called by the O.N.U. an inequality, which is represented exactly by the power relations between women and men, which have existed and will exist for a very long time from now on. [4]

Thus, at national level, Law no. 217 of May 22, 2003 for the prevention and combating of domestic violence, published in the Official Gazette no. 948 of October 15, 2020. In art. 3 stipulates that: "domestic violence is that which occurs / occurs in a family or domestic environment or between spouses / partners or even ex-spouses / partners, regardless of whether this implies whether or not the aggressor lives with the victim and represents any

²[1] ASIED – "Drepturile femeii în România", p. accesată la data de 04.05.2021 și disponibilă la <http://www.justitie493.ro/drepturile-femeii-in-romania/>

³] „Beijing Declaration and Platform for Action, The Fourth World Conference on Women, 1995”, p. accesată la data de 16.02.2021 și disponibilă la <https://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf>;

⁴] Centrul Național de evaluare și promovare a stării de sănătate – *Analiză de situație*, p. 2, p. accesată la data de 16.02.2021 și disponibilă la <https://insp.gov.ro/sites/cnepss/wp-content/uploads/2016/01/Analiza-de-situatie-2015-7.pdf>

form of action or inaction and which is intentional by economic, social, sexual, verbal, psychological, cyber and spiritual violence.”^[5]

We can observe that the act committed with intent on the person can be manifested in several forms, and violence does not only mean the action of actually hitting someone, but it can take different forms and which affects the entire marital home, whether we are talking about a spouse or children involved in that relationship. All types of domestic violence are very common, some of the most serious being those of a physical and psychological nature, which can often have serious negative consequences on a person's life. Violence against women can have long-term effects, such as on the state of health by the fact that she needs constant medical care, going as far as infirmities or even the death of the victim. Violence also affects the mental health of victims, and the constant abuse and disorder received from the aggressor can lead to inappropriate behavior and perhaps suicide attempts.

Moreover, among the consequences of domestic violence we can mention the affectation of professional, economic and social life, because the victim will be constantly deprived of liberty, marginalized by friends, relatives who can not understand and gradually isolated from society. ^[6]

In fact, the victim can also be the child who witnesses all the scenes of violence received from the aggressor applied to the vulnerable person and which can have serious and long-lasting consequences on his behavior, physique and health. Among them we can mention: alcohol or drug abuse, unwanted pregnancies, disabilities, dubious social relationships, behavioral disorders, certain diseases developed over time; all these being the results of a study conducted by the World Health Organization that was conducted on students in 2012, in Romania. ^[7]

We believe that domestic violence, which is present at both national and global levels, has serious consequences first and foremost on the victim and secondly on society and the state. The fact that domestic violence is increasingly present among families of all kinds, results in negative consequences on existing areas / environments, high spending on health care, and the solution is to get involved constantly and continuously through campaigns. and actions to limit such domestic violence.

The legal framework of domestic violence

Since the twentieth century, several treaties, conventions, laws and documents of great importance have been adopted on the international stage with the aim of raising awareness of the abuse to which women are subjected, as well as the provision of measures in this regard by creating several help options they can turn to. All this only gave women the chance to have a normal, non-violent life and to make them stronger for the future, to be able to overcome the inhuman treatments they were subjected to by their partner and at the same time, an emphasis on was placed on the defense and promotion of their rights and freedoms throughout the world.

^{5]} LEGEA nr. 217 din 22 mai 2003 (*republicată*) pentru prevenirea și combaterea violenței domestice, publicată în MONITORUL OFICIAL nr. 948 din 15 octombrie 2020, art. 3, p. accesată la data de 16.02.2021 și disponibilă la <http://legislatie.just.ro/Public/DetaliuDocument/44014>

^{6]} Centrul Național de evaluare și promovare a stării de sănătate – *Analiză de situație*, p. 5, p. accesată la data de 16.02.2021 și disponibilă la <https://insp.gov.ro/sites/cnepss/wp-content/uploads/2016/01/Analiza-de-situatie-2015-7.pdf>

^{7]} Ibidem;

Therefore, we will highlight only certain documents / normative acts that we consider of interest, taking into account that over time many have been adopted in this regard. The international community enjoys a wide range of legislation in this area, that of domestic violence.

By Resolution no. A / RES / 54/134, DIN 17 December 1999, UN General Assembly established that November 25 be dedicated as the International Day for the Elimination of Violence against Women, which was welcomed and implemented by several countries in the world, even Romania by organizing promotion campaigns. At national level we can mention that between 25.11-10.12.2021 the campaign "We are building an orange world! We stop violence against women! ", A campaign that was actually initiated at European level by the Soroptimist International Federation. [8]

Perhaps one of the most visible and specific documents on violence against women is the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) adopted by the Committee of Ministers of the Council of Europe on 7 April 2011. was signed by a number of 32 states, of which Romania on June 27, 2014, in Strasbourg. [9] This convention has a very strong resonance on the international stage because it clearly states that there is some form of discrimination and a violation / abuse of human rights when there is a form of domestic violence or violence against women. At the same time, the convention introduces criminal sanctions for those acts of mental and physical violence, psychological, genital mutilation, sexual harassment, rape, abortion, in order to protect as much as possible the victims who are subjected to these horrors, and implicitly to combat all forms of [10] Romania, by signing this act, has undertaken to take all necessary measures to prevent and combat in any form the phenomenon of violence and not to take into account differences related to sex, age, religion, political or religious orientation, all persons / victims being treated equally. In this regard, the main state authorities and institutions for the implementation of the Convention were brought together. [11] What interests us is that Romania managed in 2016 to become the 14th member to ratify the Istanbul Convention, which marked the beginning of a new era in the fight against women's aggression. [12] managed to be amended and supplemented by the Romanian Parliament on June 18, 2018 two draft laws that were developed by the Government of Romania, Law no. 202/2002 on equal opportunities and treatment between women and men and Law 217/2003 on preventing and combating domestic violence. [13]

[8] Moloman, Lazăr și Asociații - "*Ziua internațională pentru eliminarea violenței împotriva femeii*", autori Cristian JURA și Adelina DOBRE, 25.11.2020, București, p. accesată la data de 17.02.2021 și disponibilă la <https://www.juridice.ro/480644/ziua-internationala-pentru-eliminarea-violentei-impotriva-femeii.html> :

[9] Convenția Consiliului Europei privind prevenirea și combaterea violenței împotriva femeilor și a violenței domestice - Council of Europe Treaty Series - No. 210, p. accesată la data de 17.02.2021 și disponibilă la <https://rm.coe.int/168046253e> ;

[10] Proiectul de lege privind ratificarea Convenției de la Istanbul, aprobat de Executiv, 23 septembrie, p. accesată la data de 17.02.2021 și disponibilă la <https://gov.ro/ro/guvernul/sedinte-guvern/proiectul-de-lege-privind-ratificarea-conventiei-de-la-istanbul-aprobat-de-executiv> ;

[11] Ibidem;

[12] "*A fost depus instrumental de ratificare de către România a Convenției de la Istanbul*" – Asociația Transcena, p. accesată la data de 17.02.2021 și disponibilă la <https://transcena.ro/a-fost-depus-instrumentul-de-ratificare-de-catre-romania-a-conventiei-de-la-istanbul/>;

[13] Agenția Națională pentru Egalitate de Șanse între Femei și Bărbați (ANES), p. accesată la data de 17.02.2021 și disponibilă la <https://anes.gov.ro/semnarea-conventiei-de-la-istanbul-de-catre-romania-la-data-de-27-06-2014-la-strasbourg/> ;

The latter law refers to the provisional protection order, in accordance with art. 52 of the Istanbul Convention.

Thus, we believe that the normative acts in Romania have been readapted according to the requirements of the Istanbul Convention. The competent authorities have taken all necessary measures to comply with the requirements of the Convention, through active and passive involvement in society, awareness of the seriousness cases of domestic violence, as well as the existence of the efforts of the police bodies in the permanent supervision and monitoring of the victims of domestic violence.

Also an equally important document on our national stage and which has recently been adopted is the National Strategy on promoting equal opportunities between women and men and preventing and combating domestic violence for the period 2018-2021 as well as the Operational Plan which has its purpose is to implement it, which is another way to combat and prevent violence against women, as it is adapted according to the international legislation in force. It is worth mentioning that the implementation of the Strategy will have the National Agency for Equal Opportunities between Men and Women, an Agency that was involved in the issue of reducing cases of domestic violence, Romania being the country with a high percentage for this type of violence.^[14]

Referring to the above-mentioned normative acts, we can say that at least the national legislation has adopted or at least tried to implement the provisions of the Istanbul Convention, a Convention with a resounding voice on women's rights and thus reducing domestic violence against them.

Critical opinion on the Romanian legislative changes?

At first sight, with the signing of the Istanbul Convention by our country in 2014 and implicitly taking all necessary steps to be able to ratify it in 2016, which happened, meant a modernization and a normalization of women's rights in the end. and their freedom. But were all these steps of the Romanian authorities sufficient for the national legislation to respect it and to fully integrate it on the international level?

We consider that there are sufficient dysfunctions and aspects that we must keep in mind, referring here to the normative acts mentioned above. For example, how many people have asked themselves how many centers or shelters are needed in our country to protect as many people as possible who are being assaulted ?, or rather how many do we have in the country at the moment? And these centers are also addressed to children in the family?

In order to answer this question we must mention art. 23 of the Istanbul Convention, which refers to shelters and which provides that *“shelters shall be set up to assist victims who are subjected to aggression, especially those concerning children and women, which shall be easily accessible to provide them with accommodation. sure, all these legislative measures being taken by the parties, measures that are absolutely necessary. ”*, but also art. 25 which provides for the creation of centers to support victims of sexual violence.^[15]

^[14] Strategia națională privind promovarea egalității de șanse între femei și bărbați și prevenirea și combaterea violenței domestice pentru perioada 2018-2021 și a Planului operațional privind implementarea strategiei naționale privind promovarea egalității de șanse între femei și bărbați și prevenirea și combaterii violenței domestice 2018-2021”, p. accesată la data de 18.02.2021 și disponibilă la https://violentaimpotrivafemeilor.ro/wp-content/uploads/2018/06/5003-20171026_StrategiNat_pilonVD.pdf;

^[15] Convenția Consiliului Europei privind prevenirea și combaterea violenței împotriva femeilor și a violenței domestice - Council of Europe Treaty Series - No. 210, p. accesată la data de 17.02.2021 și disponibilă la <https://rm.coe.int/168046253e>;

Currently, in Romania there would be a number of 60 centers throughout the country where you can practically live for 3 months and come to the aid of mothers abused by their husbands and their children, but what is annoying and serious is the fact that in 6 counties there is still no social center where women who are molested by their husbands can take shelter, although we have assumed this obligation through the Convention. In this sense, in the following we will discuss a case tried at the ECHR, against the Romanian state.^[16] Moreover, the problem is that these centers have few places to live, and the victims are not encouraged to seek help.

Therefore, we believe that the authorities need to take urgent action to ensure an appropriate number of centers that victims could turn to, but they cannot do so because they do not have them and especially to encourage them to take this step towards a life of care. normal family.

Secondly, we refer to the violation of the protection order by the aggressor, another problem of the Romanian state that is not in accordance with the international legislation to which our country is a party and whose provisions should have been implemented and respected by our authorities.

The latter is defined by Law no. 217/2002, which according to art. 38, para. 1 represents *“the possibility of issuing a protection order, of a provisional nature, but also with the existence of measures and prohibitions against the family member who through an act of violence endangered the life, physical or mental integrity and freedom of the person concerned; and which the latter may apply to the court for the immediate removal of the danger, the request for a protection order.”*^[17]

We can see from the text of the law that the issuance of such a legal act, respectively a protection order will be made when there are good reasons for its issuance, the existence of acts of violence committed repeatedly and without any change for the better the person who committed the act, for which reason he will be subject to the measures and restrictions imposed by the authorities. It should be mentioned that with the amendment of Law no. 183/2020, changes were made to art. 32 of this law, which stipulates that *“by violating the protection order will constitute a crime and will be punished by imprisonment from 6 months to 5 years.”*^[18]

By amending the said Law, important changes were made for the protection of persons who were subjected to domestic violence, measures that apply both in case of violation of the measures of issuing the protection order and the provisional protection order, but also changes by the fact that victims are they will automatically provide an ex officio lawyer, provided that in the past they were only provided with one on request.^[19]

^[16] *Câte adăposturi le oferă statul femeilor abuzate de parteneri?* – Europa FM, Știri din 07.03.2018, p. accesată la data de 18.02.2021 și disponibilă la <https://www.europafm.ro/zece-mineri-de-la-cariera-rosiuta-au-intrat-in-greva-foamei/> ;

^[17] LAW no. 217 of May 22, 2003 (* republished *) for preventing and combating domestic violence, Published in the OFFICIAL GAZETTE no. 948 of October 15, 2020, Chapter IV Protection Order, Section 1 Competence and substantive conditions for issuance, Art. 38, para. 1, p. Accessed on 22.02.2021 and available at <http://legislatie.just.ro/Public/DetaliiDocument/44014> ;

^[18] LAW no. 183 of August 19, 2020 regarding the amendment of Law no. 217/2003 for preventing and combating domestic violence Published in the OFFICIAL GAZETTE no. 758 of August 19, 2020, art. 32, p. Accessed on 22.02.2021 and available at <http://legislatie.just.ro/Public/DetaliiDocumentAfis/229246> ;

^[19] From today, higher penalties for those who violate protection orders. How far can the maximum punishment be reached - MediaFax, author Eduard POPESCU, 22.08.2020, p. Accessed on 22.02.2021 and

These changes were absolutely necessary especially in the current context of the coronavirus pandemic, in which the number of cases of domestic violence has increased dramatically, but also the number of people killed as a result of its violation. Thus, the Romanian Police reported that since March last year, ie 2019, compared to the same month last year, the number of domestic violence crimes has increased by a percentage of 2.3%, which is very painful for families who have struggled during this difficult time.^[20]

As a result of the pandemic period, the state of emergency and the alert to which most countries in the world are subjected, family members are somehow obliged by society to live in private and to observe measures of social distancing, and as a result misunderstandings between partners and more. The measure of issuing protection orders at the time of existence and finding an imminent danger also by amending Law 183 made it possible for the police to issue these orders, on the spot and with the supervision of the person who is subject to domestic violence.^[21]

We can believe that by issuing protection orders more easily and quickly, which is facilitated through criminal investigation bodies, they provided victims with security and help in times when they felt helpless and lost. We cannot say that by amending Law no. 183/2020 no changes were taken for the better and which were absolutely necessary to reduce and toughen the punishments on the aggressors in accordance with international law, but these measures were not enough if we look at what is happening in our country. We support this fact by the existence of the large number of cases of domestic violence, but also by the irresponsibility and lack of empathy on the part of the police for not constantly supervising and verifying the home, the victim and implicitly the perpetrator of the crime.

Thus, taking into account that since the beginning of 2020 there have been no less than four cases of domestic crime and that have resulted in violation of protection orders, we propose that they be given greater importance by the authorities and with the verification daily use of the victim's home or, implicitly, the aggressor in order to be able to observe the victim's behavior and / or intention in the near future.

We propose that the dialogue between the aggressor and the person authorized to verify it, ie the police officer be of the same sex as him (usually male), and the discussions with the victim (usually women) to take place as well. according to its sex. We thought about this option because in the first situation the aggressor can talk in a different way with the policeman, he can reveal things and maybe even future actions he wants to commit, seeing in the criminal investigation body a friend to whom it can be revealed, and in the case of females things get complicated.

The details of the physical and sexual assault to which a woman has been subjected cannot be discussed with a male police officer or officer, so that circumstances may serve to issue the protection order, to understand the danger to which she and her family is exposed, may remain unknown, as well as the measures pursued by issuing the protection order, such as: leaving the home where the aggressor lives with the victim, keeping a certain distance

available at <https://www.mediafax.ro/justitie/de-azi-pedepse-mai-mari-far-aceste-masuri-protectie-victimele-violentei-in-familie-19516053> ;

^{20]} For victims of domestic violence, isolation is dangerous - DOR, author Oana SANDU, 22.03.2020, p. Accessed on 22.02.2021 and available at <https://www.dor.ro/pentru-victimele-violentei-in-familie-isolarea-e-dangeroasa/>

^{21]} Ibidem;

between the victim and the aggressor and many other absolutely necessary measures in depending on each situation.

We are of the opinion that the above should certainly be provided for in national law, taking into account the fact that at present these protection orders can also be issued provisionally by criminal investigation bodies. We know from judicial practice that criminal investigation bodies are seen as saviors by victims, they constantly seek the attention and empathy of law enforcement, considering that they are the only saviors, especially when their lives are endangered, hence the need to hearing / listening of persons involved to be performed by AGENTS OF THE SAME SEX. If we take into account the principles that police officers must respect, but also their code of ethics, they must act in legality, impartiality, equality, transparency, availability, in the public interest, with professionalism, respecting the confidentiality of the profession they he exercises it, with loyalty to the institution where he is employed, with respect for both citizens and superiors with respect for individual rights and freedoms, but also with moral integrity adapted to the society in which we live.^[22]

Therefore, we can observe that the interest towards the citizens must occupy a primordial place in the activity carried out by the law enforcement bodies, respecting the rights and freedoms of each one, but also impartially in cases where the situation requires it, without endangers the health of the person to whom it is addressed. What is worrying is that the coronavirus pandemic has meant that people living under the same roof have to stay together much longer, and if before there were slight misunderstandings, now they have intensified and as a result have degenerated into crime. of domestic violence, an action that in extreme cases leads to murder. The fact that many citizens were left without an active job from which to support their family, especially among men, only led to frustrations, divergences, quarrels, more and more frequent due to shortcomings, respectively. the lack of financial resources for daily food, the payment of utilities or installments, all these combined have only paved a safe and precise path to the gates of an unwanted world by any woman who does not deserve to be subjected to any kind of domestic violence, or that we are talking about repeated insults, verbal violence, harassment, excessive jealousy, beatings, continuous beatings, rapes and even death.

Case Study: Stump vs. Romania. ECHR conclusions

At European level, in the fight against domestic violence, an emblematic landmark is the case of Buturugă vs. Romania.^[23]

The applicant, Gina Aurelia Buturugă, complained to the European Court of Human Rights, citing Articles 5, 6 and 8 of the European Convention on Human Rights, of the ineffectiveness of the criminal investigation into domestic violence, showing that personal security had not been ensured. appropriately and criticizing the authorities' refusal to examine her complaint about her ex-husband's breach of correspondence.

She argued that the authorities did not approach the case as a case of domestic violence, but as a simple case of violence, not conducting the investigation with due diligence,

^{22]} Ministry of Internal Affairs, Directorate for the Registration of Persons and Database Administration - Code of Ethics and Deontology of the police officer, p. Accessed on 22.02.2021 and available at http://depabd.mai.gov.ro/cod_etica_si_deontologie.html ;

^{23]} Disponibility here: [https://hudoc.echr.coe.int/spa#{%22fulltext%22:\[%22buturuga%22\],%22 document collectionid%22:\[%22GRANDCHAMBER%22,%22CHAMBER%22\],%22itemid%22:\[%22001-200842%22\]}](https://hudoc.echr.coe.int/spa#{%22fulltext%22:[%22buturuga%22],%22 document collectionid%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-200842%22]})

remaining passive, even the protection order issued by the court was implemented late and in an incomplete manner.

According to the applicant, the police did not immediately communicate the contents of the order to her ex-husband, and during the validity of the order, the authorities ignored the abusive behavior of the ex-husband, who allegedly tried to intimidate and harass her.

In this case, the Court noted that States have a positive obligation to establish and effectively implement a system of repression of all forms of domestic violence, to provide victims with sufficient procedural safeguards and recalled that, although the main purpose of Article 8 of the Convention is to protect the individual against the arbitrary interference of public authorities, positive obligations may be imposed on the state, inherent in the effective observance of the rights it guarantees.^[24]

The Court insisted on the special diligence required for the processing of domestic violence complaints and considered that the specificity of acts of domestic violence recognized by the Istanbul Convention must be taken into account in the context of domestic proceedings. In the present case, the internal investigation carried out by the national authorities did not take this specific into account.

It was also mentioned that, both in domestic and international law, the phenomenon of domestic violence is not perceived as limited only to acts of physical violence, but includes, among others, psychological violence, harassment^[25], or cyber-violence, recognized as an aspect of violence against women and which can take various forms, including breaches of privacy, intrusion into the victim's computer and taking, sharing and manipulating data and images, including intimate data.

Thus, the Court held that the applicant's allegations that her ex-husband had improperly intercepted, consulted and saved her electronic communications were not, on the merits, examined by the national authorities. They did not take any procedural steps to gather evidence to establish the facts or their legal status.

The Court, noting that the authorities had shown excessive formalism in excluding any connection with the facts of domestic violence which the applicant had brought to light, without taking into account the various forms that could be adopted of domestic violence, also concluded that the investigation of acts of violence was erroneous and no substantive examination of the complaint concerning the breach of the secrecy of correspondence is closely linked to the alleged acts of domestic violence.

Thus, the Court held that there was a violation of positive obligations under Articles 3 and 8 of the Convention, and the Romanian State was obliged to compensate it with non-pecuniary damage in the amount of 10,000 Euros.

So it all started in 2013, when the woman was hit and threatened to be killed by her husband, at which point she filed a complaint with the evidence of what she claimed, and eventually divorced. of the aggressor, in 2014. Because she took all the necessary measures to distance herself and protect herself from her husband, he continued to hurt her by violating her correspondence as I said above. , he harassed her on the street and constantly threatened to hurt her. What is really painful and out of place is the fact that the authorities in Tulcea filed the files concerning the aggressor, without taking any criminal action against

^{24]} For more details see *Söderman v. Sweden*;

^{25]} See, *mutatis mutandis*, the case of *TM and CM* against the Republic of Moldova;

him.^[26] Due to these injustices against women, she told the ECHR that she did not feel protected throughout the investigation, that the necessary measures for the crime of domestic violence were not respected and taken, which is why the Romanian state had to be liable for a violation of Article 3 and Article 8 of the Convention.^[27]

Lack of empathy and reaction from the national authorities in the case Buturugă vs. Romania, indicates the need to improve the way of investigating the causes of all forms of domestic violence, as they, in addition to not conducting constant checks on the victim, did not support her and did not try to give her protection, manifested an excessive formalism in excluding any connection with the acts of domestic violence that the plaintiff brought to light, and the consequences could be irreversible, culminating in the death of the victim.

Violence against women undermines women's fundamental rights, and these widespread forms of abuse, although systematically reported to the authorities, are not properly investigated, thus seriously and continuously violating the right to life, dignity, access to justice, equality. of chances, etc.

Conclusions

We believe that during our presentation we managed to capture some aspects related to domestic violence from its definition to national and international legislation, but also the elements that need to be changed. In addition to the international conventions that provide the foundation for the protection of victims of domestic violence, there is a need for exemplary involvement of national authorities and a change in outdated practices.

For example, discussions with victims, who are often women, could be used by police (same-sex agents) to give them confidence and empathy, aspects that can contribute to a full establishment. of all the elements of fact, but also in establishing the types of aggression to which they were subjected.

We also appreciate that special attention should be paid to the way in which national agents and officers inform the victim about the dangerous situations that may arise after the issuance of the protection order, in case of waiving the protection order. Last but not least, we believe that more campaigns are needed to prevent and combat domestic violence, not only in the months when it is in the spotlight worldwide.

In conclusion, we propose that criminal investigation bodies first abandon excessive formalism in domestic violence cases and take measures in line with the specifics of domestic violence acts referred to in the Istanbul Convention, which, as the ECHR has ruled (in the case of Buturugă v. Romania), must be taken into account in the context of internal procedures in order to ensure their efficiency.

^{26]} Romania, convicted at the ECHR in a case of domestic violence. A woman complained that the authorities did not protect her from her aggressive husband - Digi 24, 11.02.2021, p. Accessed on 23.02.2021 and available at <https://www.digi24.ro/stiri/actualitate/justitie/romania-sentenced-to-surrender-in-a-case-of-domestic-violence-a-woman-complained-that-the-authorities-did-not-protect-her-from-her-aggressive-husband-1258663>;

^{27]} Ibidem.

THE STATE'S INTERFERENCES IN THE SPHERE OF RELIGIOUS FREEDOM BASED ON ART. 9 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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Abstract

*The European Convention for the Protection of Human Rights and Fundamental Freedoms, in Article 9, proclaims that everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in worship, education, practice and observance. Freedom to manifest one's religion or belief may not be subject to restrictions other than those provided for by law which, in a democratic society, constitute measures necessary for public safety, protection of order, **health**, public morals, rights and freedoms of others.*

Based on this article, the signatory states undertake to respect the freedom of thought, conscience and religion of all persons under their jurisdiction. But often the interests of the state are different from those of the person, so there are cases when member states of the convention violate this article, including, there are cases when states impose by law some more unfavorable rules, exercising illegal interference that does not is provided for in the articles of the above-mentioned Convention.

However, according to paragraph 2 of art. 9 of the Convention, Member States are allowed to interfere in the exercise of freedom of thought, conscience and religion only as a necessary measure for public safety, the protection of order, health, public morals, the rights and freedoms of others.

The European Court often leaves a margin of discretion to the state, ie it is up to the state to impose a certain point of view through a law, in a certain situation, and to decide for itself whether the interference is legal and necessary. . However, by its judgments the Court exercises its control by giving an affirmative or negative answer regarding the state's interference in the exercise of religious freedom. If the state imposes a law, it must be necessary and legal in a democratic state, but if the interference is contrary to the Convention, the Court by its judgments, exercising its control, determines whether or not the interference was necessary, the judgment being binding. executed.

Recently, the issue of state interference in church affairs, especially during the 2020 pandemic, has been brought into discussion in the public space, by banning the participation of citizens in public acts specific to each denomination, especially during the Easter holidays.

By this study we do not intend to accuse or claim that the state has committed or not an interference, this fact being the exclusive competence of the ECHR, but we want to clarify, in light of the relevant legislation and jurisprudence, what are the state's such interferences are allowed to the state and under what conditions the state can intervene and limit religious freedom.

Keywords: religious freedom, interference, religious manifestations, ECHR,

1. Interference provided by law

Interference according to the Explanatory Dictionary of the Romanian Language is an intervention in the problems of a person (natural or legal) or in the life of a state, tending to undermine freedom and independence of action and to impose a certain point of view [1]. Regarding this study, we will discuss only the manifestations that constitute an interference by the state in the affairs of a person or a group of people who are closely related to each other with common ideas, worship, education, practices and rituals, the same beliefs or religion.

According to Article 9, paragraph 2, of the Convention, the freedom to manifest one's religion or belief may not be subject to restrictions other than those provided by law which, in a democratic society, constitute necessary measures for public safety, protection of order, health, public morals, the rights and freedoms of others.

According to the Court, as long as the thinking, the conception appropriate to a certain religion, the consciousness regarding certain personal or social values remain in the inner forum of the individual, they cannot be subject to limitations by the state authorities. Paragraph 2 of art.9 authorizes limitations only on a single guarantee offered by paragraph 1, namely the freedom to manifest one's religion or beliefs. So the European Court of Human Rights admits the interference of the state in a democratic society, in which several religions coexist within the same population, where it may be necessary to balance this freedom, limitations capable of solving interfaith problems and ensuring respect for each other's beliefs [2].

As the European Court has also ruled in principle, "the fundamental character of the rights guaranteed by art. 9 parag. 1 is individualized by the way of formulating the provisions regarding their limitations. Unlike the second paragraph of art. 8, art. 10 and art. 11, para. 2 in art. 9 concerns only the freedom to manifest one's religion or beliefs. The text starts from the premise that, in a democratic society, one or more religions coexist among the same population, so it appears necessary to accompany this freedom with the limitations of conciliation and to ensure respect for the beliefs of each person "[3]

Such restrictions may apply to civil servants, they may be subject "legally" to certain restrictions on the manifestation of beliefs and religion, given the justified duty "legally" to maintain discretion [4]. Therefore, art. 9 cannot be invoked by an official who is reproached with the fact of a public statement of a political nature contrary to his duty to maintain discretion, this being a neutral behavior that must be manifested by a state representative.

In order for the state's interference in the exercise of the freedom of manifestation of religion and beliefs to appear as justified, as I said earlier, it must meet those conditions that are inscribed in art. 9 parag. 2. The interference must be instituted by the state authorities, having an internal legal basis, ie to be provided as such in the national law. Such interference may be that religious denominations are required to register, or the obligation to submit annual activity reports.

However, the Convention imposes not only the mere existence of regulations, but also the very quality of the law in question, which must be sufficiently accessible and predictable, ie be stated with sufficient precision, so that any individual, even by recourse to the knowledge of a specialist expert, to be able to order his social conduct. In order to meet these requirements, the domestic norm must provide protection against any arbitrary infringement by public authorities of the rights and freedoms guaranteed by the Convention

precisely by defining the limits and modalities of exercising the prerogative of the possibility of restricting the exercise of these rights and freedoms. [5]

The Court acknowledged that the level of precision of national law, which in any case cannot predict all the hypotheses, depends, to a large extent, on its content, the field in which it applies, and the number and status of those for whom it is intended. [6] She pointed out that many national regulations, out of the need to avoid excessive rigidity and to adapt to changing social situations, can use, by force of circumstances, more or less ambiguous wording; the interpretation and application of such texts depends on practice. [7]

Applying these principles, the European court considered that the ban imposed on those sentenced to severe imprisonment to attend religious service and to receive a visit from a priest by a joint instruction adopted by the Ministry of Justice, the General Prosecutor's Office and the Supreme Court of Justice of a State, an "internal" and unpublished document, constitutes a violation of the provisions of Article 9 of the Convention, as such regulation does not correspond to the notion of "law" within the meaning of the Convention; it does not have the qualities that it imposes on a law. [8]

Also, in *Hassan and Tchaouch v. Bulgaria*, the Court found that the contested regulation did not set out any substantive criteria for registering changes in leadership in the case of internal split or antagonistic claims with the Government's Religious Affairs and Confession Directorate. of legitimacy, operated within a religious denomination. Moreover, it did not offer any procedural guarantee, such as an adversarial debate before an independent body against the arbitrary exercise of discretion conferred on the executive, which was such as to lead to the conclusion that interference in the internal organization of that community and, implicitly, in the exercise of the applicants' freedom of religion, it is not "provided for by law" within the meaning of the Convention, precisely because it was not a law which fulfilled the qualities which it required. [9]

On the contrary, the European Court ruled that the obligation imposed on the applicants, elected as representatives of the people in parliament, to take the oath of parliament on the Gospel, provided that the constitution of the state concerned guaranteed religious and religious freedom, the state being declared secular. restriction that does not appear necessary in a democratic society. Indeed, she considered that it was contradictory that the exercise of a mandate regarding the representation in parliament of the different conceptions about the organization of society should be subject to the condition of adhering, in advance, to a certain vision of the world. [10]

If, according to settled case-law, the European Court of Human Rights has ruled that the Contracting States may be granted a certain margin of discretion in deciding on the necessity and extent of interference by public authorities in the exercise of the right to manifest religion and belief, she pointed out that this margin is always subject to European control, that is, precisely to the control of the Court. This control concerns both the qualities and purpose of the law under which the interference is exercised and the decisions to apply national legal provisions by the competent state authorities, even when they emanate from independent domestic jurisdictions.

The European Court's duty is precisely to investigate and determine whether the measures taken at national level are justified and whether they are proportionate to the aim pursued. In order to determine whether those requirements are met, the European court must consider that there is a fair balance between the requirements of the protection of the rights and freedoms guaranteed by the Convention and the conduct alleged against the applicant

by the national authorities by taking measures to interfere with the exercise of the freedom to exercise religion and beliefs of a person, in the exercise of his power of control, the Court shall examine the contested national decisions on the basis of the whole case. Also, the proportionality of the interference with the legitimate aim pursued by its adoption must be appreciated also in view of the fact that it must correspond to an urgent social need.

In the case of the Metropolitan Church of Bessarabia and Others v. Moldova, in which the applicants alleged that the refusal of the State authorities to recognize the church constituted an infringement on their religious freedom and the freedom of expression of the religion which they embraced, the Government argued in essentially, that the requested recognition would have the consequence of producing a real schism within the metropolitan church of Moldova and "would risk producing serious consequences for the independence and territorial integrity of the young Republic of Moldova" [11]. The Government also stated that, although it did not recognize the applicant church, the State authorities acted in a spirit of tolerance, allowing it to operate. The European Court noted that, according to the national regulations regarding religious cults, only the cults recognized by the government decision can be practiced on the territory of the Republic of Moldova; they have legal personality, can produce and sell specific objects of worship and can hire employees. Also, according to the same regulations, associations that pursue in whole or in part a religious purpose are subject to the obligations arising from the legal provisions regarding worship. In those circumstances, the Court held that, in the absence of recognition, the applicant church could neither organize nor function, and the tolerance invoked by the Government could not be regarded as a substitute for legal recognition, which alone would confer cult status. It therefore concluded that the refusal of the State authorities to recognize the applicant church had such consequences as to the exercise of freedom of religion that it could not be regarded as proportionate to the aim pursued; as such, it did not appear necessary in a democratic society.

On the other hand, in a case in which the applicant alleged that the prohibition on wearing the Islamic headscarf in higher education institutions constituted an unjustified violation of her right to freedom of religion, in particular the right to manifest her religion, the Court pointed out that, when addressing the issue of wearing the clothing accessory in question in the social context of Turkey, the impact of wearing this symbol, perceived or presented as a religious obligation to be imposed on persons, cannot be ignored; who do not understand to wear it; Thus, in assessing the necessity of that restriction on religious freedom suffered by the applicant, the protection of the 'rights and freedoms of another' and the 'maintenance of public order' in a country where the majority of the population manifested a deep attachment to women's rights and the secular way of life, adheres to the Muslim religion. Therefore, a limitation in this matter can be considered as responding to an "urgent social need" that seeks to achieve legitimate goals, especially since this religious symbol has acquired in recent years, in Turkey, a political dimension [12].

The European court also noted that in Turkey there are extremist political movements that seek to impose their religious symbols and their conception of society on the rules of religion on the whole of society. It decided that each Contracting State may, in accordance with the provisions of the Convention, take a stand against such political movements, depending on its historical experience. [13] In the present case, the legislation at issue is in the same context; it is a measure intended to achieve the legitimate aims mentioned above and to protect pluralism in university institutions. The primary motivation for banning the

wearing of religious insignia in universities is given by the principle of secularism; the values of pluralism, respect for the rights of others and, in particular, equality between men and women before the law are likely to justify the assessment of the competent authorities in the sense that it would be contrary to these values to accept the wearing of religious insignia in university premises, including the Islamic scarf. [14]. Therefore, taking into account the margin of appreciation available to the contracting states, the European Court concluded that the contested regulation, which places the wearing of the Islamic headscarf in restrictions, appears to be justified and proportionate to the aims pursued, thus being a measure. "Necessary in a democratic society."

Therefore, the control exercised by the Court regarding the proportionality of the interference of the state authorities in the exercise of the freedom to manifest one's religion or of one's beliefs takes into account the concrete situation in each case.

Paragraph 2 of Article 9 of the Convention strictly indicates that the freedom to manifest one's religion or belief "may not be subject to any restrictions other than those provided by law which, in a democratic society, constitute measures necessary for public safety, law enforcement, of the health, public morals, rights and freedoms of others", thus all the member states of the Convention are obliged to comply and bring their domestic legislation in accordance with the provisions of the above-mentioned Convention.

2. The legitimate aim pursued

The objective set by the Member States is to respect the rights and freedoms of the person declared in the Convention, by respecting the provisions of the Convention to which they are party, so the contracting countries tend to standardize their domestic law with that of the Convention. In a democratic society, according to Article 1, *"The High Contracting Parties recognize to any person under their jurisdiction the rights and freedoms defined in Title I of this Convention" including the other provisions of the Convention and its Additional Protocols. And according to the preamble to the Rome Convention of 4 November 1950, the signatory Governments, members of the Council of Europe, Considering the Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly on 10 December 1948; Considering that the purpose of this declaration is the universal and effective recognition and enforcement of the rights which it sets out; Considering that the aim of the Council of Europe is to achieve a closer union between its members and that one of the means is to defend and develop human rights and fundamental freedoms; Reaffirming their deep attachment to these fundamental freedoms, which are the very foundation of justice and peace in the world and whose maintenance is essentially based, on the one hand, on a truly democratic political regime and, on the other, on a common conception and respect for human rights from which they derive; Determined, in their capacity as governments of European states animated by the same spirit and having a common heritage of political ideals and traditions, respect for freedom and the rule of law, to take the first steps to collectively guarantee certain rights set out in the Universal Declaration, The provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms have been agreed "[15].*

Thus, in order to achieve the purpose proposed by the High Contracting Parties under Article 19 of the Convention, a European Court of Human Rights has been established, functioning permanently to ensure compliance with the commitments arising for the States Parties to this Convention and its Additional Protocols.

We have indicated above the purposes of the High Contracting Parties out of a desire to justify the link between purpose and interference. Achieving this goal often requires some state leverage or as it is also called in the legal literature coercive force of the state. The State may by various legal means restrict the religious freedom declared by the Convention only for public safety, the protection of order, health, public morals, the rights and freedoms of others.

The necessary condition in a democratic society requires the Court to determine whether the interference in question corresponded to an overriding social need, whether it was proportionate to the legitimate aim pursued and whether the reasons relied on by the national authorities were relevant and sufficient. In order to decide on the existence of such a need and on the means of action to be taken, the Contracting States enjoy a certain margin of appreciation, but this margin is accompanied by a European control over both the law and the decisions that apply it, even when they come from an independent court. It is therefore for the Court to decide, as a last resort, whether or not a 'restriction' infringes the freedom of religion guaranteed by Article 9 of the European Convention.

The absence of a uniform conception in European countries of the requirements of "protection of human rights" when it comes to attacks on religious beliefs widens the margin of appreciation that contracting states have when regulating freedom of expression in areas likely to offend intimate personal beliefs related to morality or religion [16].

The Court's role in exercising its power of review is not to replace the competent domestic courts, but to review, from the point of view of Article 9, the decisions which they give on the basis of their discretion. Accordingly, the Court cannot confine itself to examining whether the respondent State used its power in good faith, carefully and reasonably, but must examine the interference at issue in the light of all the circumstances of the case, including the tone of the allegations against the applicants and the context in which they were made. It is for them to determine whether the interference challenged before it remains "proportionate to the legitimate aim pursued" and whether the grounds relied on by the courts to justify it appear to be "relevant and sufficient". The Court must be satisfied that the internal authorities have applied rules in accordance with the principles enshrined in Article 9 on the basis of an acceptable assessment of the relevant facts.

3. The need for interference in a democratic society

The need for the state to get involved in the affairs of religion and in the exercise of the right to religious freedom is expressed by the fact that both civil society and the entire population of the state need this, because it is an absolute necessity for the state and all its citizens. Interference is imposed by the State at the request of the dominant power, without neglecting the minority, for the fulfillment of the purposes stated in the constitutions of the member States of the Convention.

Freedom to manifest one's religion or belief may not be subject to restrictions other than those provided for by law which, in a democratic society, constitute measures necessary for public safety, the protection of order, health, public morality, rights and freedoms. to others, thus the necessity declared by the Convention is something useful, opportune for the state and for its future.

The obligation of this norm makes the Court by its judgments show us the importance of interfering in the exercise of religious freedom in a democratic state.

The European Court has admitted that the prohibition imposed by university regulations to wear the Islamic scarf, a port declared contrary to the constitution of the state in question, by an accessible jurisprudence, by its Constitutional Court, considered by the supreme administrative jurisdiction of the same country as incompatible with fundamental principles of the republican state, constitutes an interference in the freedom of manifestation of religion which had a legal basis in domestic law. [17]

Secondly, the interference of state authorities in the freedom to manifest their religion and beliefs must correspond to a legitimate aim given by the protection of order, safety, public health or the protection of the rights of other persons. From this point of view, it should be noted that the European jurisdiction has always recognized that states have the power to control whether a movement or an association, under the pretext of conducting religious services, actually pursues goals that prove harmful to the population or that bring violation of public order and security. [18]

In another aspect, interference must prove necessary in a democratic society, that is, in a society based on the pluralism of ideas and beliefs, the tolerance of all religions and currents of opinion, in which the debate of different conceptions of the world and life has place in a framework given by the neutrality of state authorities.

The former Commission in its practice decided that the repression of the initiators of the movement to reconstitute a fascist party in Italy, by applying criminal penalties under national law, could be considered a necessary measure in a democratic society to ensure public security and protect the rights of others. people [19]. With the same motivation, it was considered in accordance with the provisions of art. 9 parag. 2 engaging in the criminal prosecution of members of a political group acting to reintroduce National Socialist ideology in Austria [20].

The Commission considered that the interception by the penitentiary authorities of a work which, although of a religious and philosophical nature, included chapters devoted to martial arts, is a measure which may be considered necessary in a democratic society for the protection of the rights and freedoms of others [21]

She also appreciated that, even in the hypothesis in which a certain religion prescribes to its faithful the wearing of the turban, the obligation imposed on motorcyclists to wear a helmet over the turban is a justified measure within the meaning of the terms of art. 9 parag. 2 of the Convention [22], as it acknowledged that, even if a person serving a custodial sentence considers that the obligation to clean his cell is contrary to the prescriptions of the religion he practices, this measure must be considered as necessary to maintain public health in the place of detention. [23]

The legal prohibition of a religious ceremony in a certain archeological site can be considered, due to the risks of public protests, as necessary in a democratic society to ensure security and public order. [24]

The Commission decided that the restriction of the use of a place for a religious service, ordered by the local town planning service, which initially had another destination mentioned as such in the authorization to acquire that building, could be considered an interference in the exercise of religious freedom. However, the contracting states are recognized a considerable margin of appreciation in the field of urbanism, due to the need, in a modern society, to adopt legislation that would prevent an archaic development of localities. Therefore, the plaintiff cannot invoke the provisions of art. 9 in order to evade the

application of urban planning norms, so that the contested limitation appears to be necessary in a democratic society. [25]

Likewise, the imperatives related to the organization of the school system may cause state authorities to disregard the religious freedom of a teacher who refuses a certain schedule to practice his religion, since he has committed himself without making any reservations about the schedule; nothing prevents him from giving up the activity he has engaged in. [26]

The case-law of the European Court applying its principles to situations in which it had to rule, for example, in a case in which the applicant, who had been born into an Orthodox family but had long been a Jehovah's Witness, argued that the multiple convictions for the proselytism he suffered from the Greek judicial authorities is a violation of his right to manifest his chosen religion, the Court held that the criminal sanctions applied were based on the provisions of a national law prohibiting, in principle, abusive proselytizing and that, when the national courts established the applicant's criminal liability for the alleged crime, they merely reproduced the relevant legal provisions, without specifying sufficiently how he had tried to persuade others to adopt his faith by abusive means. Thus, the Court considered that the extent to which the justification for his conviction corresponded to an overriding social need had not been established and that, as such, the impugned sanction did not appear to be proportionate to its legitimate aim, - a democratic society "for the protection of the rights and freedoms of other persons.

Conclusions

According to the jurisprudence, which is very rich, compared to religious freedom, the position of states has both a positive and a negative aspect, the negative aspect is expressed by the obligation of states not to infringe this freedom, and the positive obligation of states can include: the obligation to ensure that detainees have the opportunity to practice their religious duties and to come into contact with a representative of that religion; the obligation to provide detainees with food in accordance with the precepts of the religion to which they belong.

Thus religious freedom according to the Convention and the jurisprudence of the European Court of Strasbourg is protected regardless of the cult or religion of the person, regardless of how the person exercises his cult, the person having the right to manifest his religious freedom or belief either individually or collectively, in publicly or in particular, through worship, education, practices and the performance of rituals.

The only exception being paragraph 2 art.9 of the Convention, namely, the freedom to manifest one's religion or beliefs may not be subject to restrictions other than those provided by law which, in a democratic society, constitute necessary measures for public safety, protection of order, health, public morals, the rights and freedoms of others.

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