UNIVERSITY OF PITESTI
FACULTY OF ECONOMIC SCIENCES AND LAW

Journal
LEGAL AND ADMINISTRATIVE STUDIES
REVISTA DE STUDII JURIDICE ŞI ADMINISTRATIVE

Year XVIII, No. 2 (21) – 2019

e-ISSN: 2344-6900
ISSN-L: 1583-0772

Publishing House C.H. BECK
Bucharest 2019

Journal
LEGAL AND ADMINISTRATIVE STUDIES
e-ISSN: 2344-6900
ISSN-L: 1583-0772
No.2 (21), Year XVIII, 2019

Type of journal: scientific/academic
First appearance: 2002
Publication frequency: two numbers per year
Edition: English

The name of issuing institution
UNIVERSITY OF PITEŞTI
Faculty of Economic Sciences and Law
Editorial address: Avenue Republicii no. 71, Piteşti, code 110014, Argeş county
Tel/fax: +400348.453.400
E-mail: **jlas@upit.ro**
Web-site: **www.jlas.upit.ro**

Publishing House
C.H. BECK SRL
Address: Str. Serg. Nuţu, no. 2, Sector 5, Bucharest
Tel.: 021/410.08.47
Fax: 021/410.08.48
E-mail: **redactie@beck.ro**
Web-site: **www.beck.ro**

EDITORIAL BOARD

Executive editorial board

CONTENTS

SHOULD THE SAME JUDGE HEAR OVER AGAIN A CASE WHEN IT IS REFERRED BACK FOR RECONSIDERATION? COMMENTS ON NEW VERSION OF ARTICLE 386 § 5 OF POLISH CIVIL PROCEDURE CODE. **7**
Aleksandra PARTYK

EVOLUTION OF THOUGHT AND ROMANIAN JURIDICAL SCIENCE AND THE DEVELOPMENT OF SOCIETY **24**
Andreea RÎPEANU

DEFINITION AND ANALYSIS OF THE ESSENTIAL ELEMENTS OF THE OBLIGATION **41**
Dumitru VĂDUVA

BRIEF CONSIDERATIONS ABOUT THE RIGHT TO EDUCATION AND THE ARTIFICIAL INTELLIGENCE **58**
Marius VĂCĂRELU

THE SERVICES OF GENERAL ECONOMIC INTEREST AND THE RIGHT TO A HEALTHY ENVIRONMENT WITHIN THE EUROPEAN UNION **68**
Viorica POPESCU

EXERCISE OF THE RIGHT OF HAVING PERSONAL RELATIONS WITH THE CHILD IN THE EVENT OF DISAGREEMENT BETWEEN PARENTS. PRACTICAL ASPECTS OF THE ROMANIAN COURTS **78**
Georgeta-Bianca SPÎRCHEZ

DECISIONS RULED IN THE INTEREST OF THE LAW BY THE HIGH COURT OF CASSATION AND JUSTICE – "CURATIVE REMEDY" FOR THE DIVERGENT LEGAL PRACTICE **87**
Iulia BOGHIRNEA

ABOUT THE TIME OF FORCED EXECUTION **99**
Emilia MATEESCU

NATIONAL ANNUAL SESSION OF STUDENTS SCIENTIFIC COMMUNICATIONS "*EVOLUTION OF STATE AND LAW IN THE POST-ACCESSION PERIOD*", PITEȘTI, 19.04.2019 - Award-winning papers

THE CHILD'S RIGHT TO DIGNITY **114**
Liliana GOLOGAN

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
No.2 (21), Year XVIII, 2019, pp.7-23

SHOULD THE SAME JUDGE HEAR OVER AGAIN A CASE WHEN IT IS REFERRED BACK FOR RECONSIDERATION? COMMENTS ON NEW VERSION OF ARTICLE 386 § 5 OF POLISH CIVIL PROCEDURE CODE.

Aleksandra PARTYK[1]

Abstract:

The paper analyses changes that have been implemented to the Polish civil procedure regulations. The text focuses on the new version of article 386 § 5 Polish Civil Procedure Code, as it overturns a well-established principle that if a judgment was set aside and a case was referred back for reconsideration, the case was heard by a different panel. According to the new version of the provision if a judgment is set aside and a case is referred back for reconsideration, the case is heard and determined by the same formation of judges, unless this is not possible or would cause undue delay in the proceedings. This current state of regulations can cause discouragement both on the part of the parties and on the part of the judge. It may have a very negative effect on the society as it may lead to the decline of the trust into courts. The author suggests changes in the law.

Key words: *Polish civil procedure; fair trail; judge; case sent back for reconsideration.*

[1] **PhD., Andrzej Frycz Modrzewski Krakow University [Krakowska Akademia im. Andrzeja Frycza Modrzewskiego]; e-mail: apartyk@afm.edu.pl.**

INTRODUCTION

Poland belongs to the family of countries which, unlike the states that use common law, base their legal system on codified provisions. One of the most important Polish acts that pertain to the civil cases is the Code of Civil Procedure (*Kodeks postępowania cywilnego*; hereinafter CCP). The act has been implemented by the Act of 17th November 1964 and came into force on the 1st January 1965[1].

Since the moment of enacting CCP onwards, many amendments have been introduced to it. The code has been incessantly changed. Several modifications have been significant[2]. Some of the amendments have been deemed reasonable by Polish lawyers, while some of them – not. Unfortunately a certain portion of the amendments have resulted in corruption the civil procedure. Although through the years the regulations of the Polish Civil Procedure Code have been changed many times, it has been a long time since Polish civil lawyers were put into such huge alert as they are now. This state stems from both the large number and the magnitude of amendments that were enacted to the CCP by the Act in 4th of July of 2019[3]. Most of the newly changed provisions have just gone into force on 7th of November 2019, while other ones were implemented earlier, on the 21th of August 2019. The majority of the amendments constitutes a challenge that every Polish civil lawyer has to face immediately. As nearly 300 articles have just been changed, it may be said that the CCP is now completely different than it was just a few days ago.

Despite the few month *vacation legis* of the act, it is commonly stated that not many lawyers and their clients are prepared for such a great overhaul of the civil procedure regulations. This state of affairs is

---

[1] Rafał Mańko, "The Unification of Private Law in Europe from the Perspective of the Polish Legal Culture", *Yearbook of Polish European Studies*, Vol. 11 (2007-2008): 118.
[2] Ernestyna Niemiec, "The nature and the dynamism of civil procedure – rights, rules and judges – comparison between common law and civil law systems", *Internetowy Przegląd Prawniczy TBSP UJ,* Vol. 10 (2017): 48.
[3] Journal of Laws 2019.1469.

due to many factors, among them we should firstly emphasize the great number of amended regulations. The main problem, nevertheless, is different: the changes introduced have, to a large extent, been criticised already at the legislative stage as they are very controversial. It is voiced by many lawyers that the enacted amendments are probably only partially sensible. Besides, various lawyers have already pointed out the defects of the changes in law. Some of them believe that certain new provisions in CCP are even inconsistent with the fundamental rules of Polish legal system. In this regard it is sometimes stated that some new solutions adopted in the Polish civil procedure violate the right to a fair trial – stipulated both in art. 45 of the Polish Constitution and in art. 6 of the European Convention on Human Rights[1]. Last but not least, the practitioners and theorists of law agree that in many areas the new regulations are trimmed and may cause a lot of confusions in practice. Therefore it is often said that CCP in the newly changed version may cause a lot of serious problems in the act of judicial process.

Of course, we must not forget that some of the newly introduced solutions are right and deserve to be approved. For instance the introduction of the institution of abuse of procedural law (article 4(1) CCP) is assessed positively [2].

At present, nevertheless, it is difficult to predict whether the judicial process in civil cases conducted on the basis of the new provisions will be more effective and fairer than were before the changed rules have gone into force.

Given the framework of this text, it is obviously not possible to discuss every controversial issue, every questionable (or prompt) provision. Hence, I would like to focus on one of the most debatable changes in civil procedure regulations: the new version of article 386 § 5 CCP. According to it if a judgment is set aside and a case is referred back

---

[1] Agnieszka Góra-Błaszczykowska, *Ekspertyza na temat projektu ustawy o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw – druk sejmowy nr 3137*, https://www.sejm.gov.pl/Sejm8.nsf/opinieBAS.xsp?nr=3137 (access: 12.09.2019 r.), p. 6.

[2] Such regulations may help court to stop the "bummer" parties from prolonging the trial with impunity, as the court may use some sanctions that are listed in article 226(2) CCP.

for reconsideration, the case is heard and determined by the same formation of judges, unless this is not possible or would cause excessive delay in the proceedings. The regulation is placed in a part of appeal proceedings' chapter. It refers to the court's composition of lower instance to be holding a case which is referred back to it.

I would like to deeply analyse the provision in the new version as it is extremely controversial not only to the judges, but also to attorneys at law and their clients. It is also very controversial for the academics. Until the 7th of November 2019, according to article 386 § 5 Polish Civil Procedure Code, if a judgment was set aside and a case was referred back for reconsideration, the case was heard by a different panel. The previous rule had come into force on 1 July 1966[1]. The modified provision stipulated that if the court have held the ruling in the first instance, and the appeal court decided to overturn the judgment, the court that was to work on the case for the second time, was always in a different personal composition than it had been earlier. That meant that if one judge heard the case and stated their opinion in the ruling, while the appeal court recognised the need to refer the case back for reconsideration to the court of first instance for judgment, it has never been judged by the same judge (judges) twice. The rule has now been changed. At the moment as a rule the panel of judges will be the same as it was in the first hearing of the case. Only in exceptional cases may it be changed. Therefore it must be highlighted that the amended regulation turn the established principle upside down.

In the paper I would like to analyse the new version of the regulation and shed light on the crucial questions to be tackled. The provision is very important not only for the academics, but also for the practitioners as the composition of the court is one of the most important issues in the civil procedure. It should be answered if the reconsideration of a case held by the same judge (judges) means violating the right to court, as the parties have already found out what the view on the case a judge (judges) had while holding it for the first time. Therefore it must be clarified if the new rule of Polish civil procedure is admissible in the light

[1] Journal of Laws 1996.43.189.

of constitutional and international conventional regulations. I would like to answer the posed question and examine if the change that the Polish Lawmaker has just implemented can do harm to the legal system or may it have a positive effect.

MAIN ASSUMPTIONS OF POLISH CIVIL PROCEDURE

When starting to reflect on this subject, for the sake of clarity, the very main assumptions of the Polish civil procedure should first be presented. Although the general rules are not listed in the CCP, the judicature and the doctrine have worked them out[1]. They should be mentioned in this part of the paper as it may facilitate the understanding of the issues raised thereafter.

The parties that take part in the civil cases have equal rights. Both the plaintiff (the party initialising the case) and the defendant (the party sued by the plaintiff) who are on opposite sides of the dispute are able to submit statements and motions[2]. The Polish civil procedure is based on adversarial principle, what means that the parties should gather the evidence in their favour. From ~~a~~ the practical point of view it means that the more they are involved in the case, the greater the chance is that they win, as presenting favourable evidence for them may effect in obtaining an expected outcome for them[3]. The plaintiff is treated as a host of the case, as it is their task to properly present the claim. The defendant, the opposite of the plaintiff, is also able to take active part in the case, as he or she should present the answer for the complaint and has right to

[1] Katarzyna Bagan-Kurluta and Piotr K. Fiedorczyk, *Evidence in Civil Law – Poland* (Maribor*:* LexLocalis, 2015), 1.

[2] The CCP distinguishes two different procedures: litigation and non-contentious proceedings, what let different types of cases by properly held. In the litigation proceedings there appear plaintiffs and defendants. In the paper I have focused on the type of proceedings as it is more frequently used in cases than non-contentious proceedings.

[3] Bagan-Kurluta and Fiedorczyk, *Evidence in Civil Law – Poland,* 3; Maciej Rzewuski, "Adversarial character of civil appeal proceedings – selected issues", *Zeszyty Naukowe KUL*, Vol. 3 (2017): 109.

defend against the plaintiff's claims. In turn, in Polish civil procedure the court rarely admits evidence which has not been presented by a party, according to art. 232 CCP. In practise it means that the lack of the evidence initiative is usually a disadvantage for the parties since the court is only exceptionally looking for evidence that is crucial to the case[1].

The trials in civil cases are usually public; however on some occasions they may be held in camera[2].

The Polish legislator assumed that civil cases should be two-instance. The rule is based on the constitutional principle. Pursuant to art. 45 para 1 Constitution of the Republic of Poland everyone shall have the right to a fair and public hearing of their case, without undue delay, before a competent, impartial and independent court. In turn, according to art. 178 para 1 Constitution court proceedings shall have at least two stages. It was emphasised by the Supreme Court in judgement held on 3 October 2014 in the case V CSK 590/13[3] that the principle of two instances of judicial proceedings is one of the important elements determining the content of the right to a court. However, it was emphasised that, the rule does not mean that each decision should be issued in a two-instance procedure, but that the two instances of proceedings themselves should be ensured for parties who may exercise their right to appeal[4].

---

[1] Rzewuski, "Adversarial character of civil appeal proceedings – selected issues", 109.

[2] It may be mentioned that the change in law that has just took place recently let more judgements be held without it being public. The modification in law has been linked with the need to fasten the length of trials. The time will show if the amendments in this context will have a positive impact on the limitation of lengthiness before the courts. However it must be noticed that public hearing the case is one of the rules that are stipulated in the cited art. 45 of Constitution, so the newly regulated provisions are very controversial from that point of view.

[3] LEX No 2674370.

[4] Aneta Łazarska, *Sędziowskie kierownictwo postępowaniem cywilnym przed sądem pierwszej instancji* [Judicial direction of civil proceedings before the court of first instance], (Warszawa: Wolters Kluwer, 2013), 70.

JUDGEMENTS IN APPEAL COURT

As it was indicated above, the CCP stipulates that the parties may appeal judgements that have been ruled in the court of first instance. Therefore if a judgment in a civil case is delivered in a court of first instance, the parties may appeal to a court of higher instance within a specified time limit[1]. However, the right to claim the appeal in only limited to those who did not get the favourable holding. It is stated that the condition for challenging the decision in civil proceedings depends on the fact of a legal interest in writing the appeal. The legal interest in challenging a decision, referred to as *gravamen*, is therefore the harm consisting in the difference, unfavourable to the party, between the demand made by the party and the operative part of the decision, resulting from the comparison of the scope of the demand and the content of the decision[2]. Therefore the party is not able to successfully claim the appeal if they have already won in the court of first instance.

In Polish civil procedure, the appeal court adjudicates on the merits, what means that it examines the entire case, and not only the appeal filed by the dissatisfied party. It is connected with the rule of full appeal[3]**.** According to art. 378 § 1 CCP the appellate court hears a case insofar as it is subject to appeal. But at the same time, the court shall

---

[1] Pursuant to art. 367 § 1 CCP a judgment of the court of the first instance may be appealed to the court of the second instance. The time limit for the appeal is stipulated in art. 369 CCP. See: Aleksandra Partyk, 'Środki odwoławcze' in *Kodeks postępowania cywilnego. Postępowanie procesowe. Komentarz*, ed. Olga M. Piaskowska (Warszawa: Wolters Kluwer, 2019), 953-955.

[2] For example such statement was presented by the Supreme Court in judgement of 14.11.2016 in case I PZ 19/16, LEX No 2186567.

[3] See: Aleksandra Partyk, „Wpływ prawomocnego skazania na wyrok sądu w sprawie o niegodność dziedziczenia. Glosa do wyroku Sądu Apelacyjnego w Katowicach z dnia 21 stycznia 2019 r., I ACa 576/12" [Impact of a Non-appealable Verdict of Guilty on a Court's Judgment in a Case Concerning the Unworthiness of Inheritance. Commentary to the Judgment of the Court of Appeal in Katowice of 21 January 2019, I ACa 576/12], *Studia Prawnicze. Rozprawy i Materiały* No 1 (2019): 216-217.

consider *ex officio* the possible invalidity of proceedings[1]. There is a limited catalogue of circumstances in which the invalidity occurs. According to art. 379 CCP proceedings shall be null and void:
1) if a case did not qualify for legal action;
2) if a party did not have the capacity to be a party to and conduct court proceedings, did
not have a representative authority or a legal representative, or if an agent of a party was
not duly authorised,
3) if an action concerning the same claim between the same parties brought at an earlier
date is pending, or if a non-appealable judgment has already been issued in such action,
4) if the composition of the court of trial was not in accordance with relevant legal
regulations or if a case was heard in the presence of a judge who was subject to exclusion
by operation of this Act[2],
5) if a party did not have a chance to defend their rights,
6) if a district court adjudicated a case which falls under the jurisdiction of a regional
court notwithstanding the value of the matter at issue.

---

[1] Anna Machnikowska and Anna Stawarska-Rippel, "The Principles of Civil Procedure in Poland in the Twentieth Century. Doctrine, Drafts and Law in a Comparative Perspective", *Comparative Law Review*, Vol. 2 (2016): 152; Aneta Łazarska, *Sędziowskie kierownictwo postępowaniem cywilnym przed sądem pierwszej instancji,* 70-71.

[2] It should be mentioned that in the judicature it was voiced that the breach of the previous provision of Article 386(5) CCP was not covered by the consequences provided for in Article 379(4) Code of Civil Procedure), so it meant that the proceedings was not null and void even if the same panel of judges examined the case twice. The statement was clarified by [2] Supreme Court judgement of 6 April 2004, I CK 647/03, LEX No 585675. However, this case-law view does not mean that it is appropriate for a judge to re-examine a case when it is send back for reconsideration.

It is stated that the court is not able to apply a broad interpretation in assessing whether a particular condition qualifies as a ground for invalidity.

Pursuant to art. 382 CCP the court of the second instance shall adjudicate on the basis of materials gathered in the course of proceedings in the first instance and in appellate proceedings.

The decisions of the appellate court may be various, as not every appeal is deemed to be persuasive[1]. The court of second instance may, according to art. 385 CCP, dismiss an appeal in case if it was not well-founded. On the other hand the court may accept the appeal. In such a case the court of the second instance shall change the contested judgment and adjudicate on the merits of the case (art. 386 § 1 CCP). Besides that, the appeal court is able to set aside the judgment and refer the case back to the court for reconsideration. Pursuant to art. 386 § 2 CCP if proceedings are established to have been invalid, the court of the second instance shall set aside the contested judgment, annul the proceedings insofar as they are invalid and refer the case back to the court of the first instance for reconsideration. In turn, according to art. 386 § 4 CCP, the court of the second instance may set aside a contested judgment and refer the case back for reconsideration only if the court of the first instance did not adjudicate on the merits of the case or if the issuing of a judgment requires the entire evidentiary hearing to be repeated. Such holdings should not be ruled if the appellate court could adjudicate on the merits of the case.

The substantive nature of the appeal proceedings means that the court of second instance aims to remedy the errors committed by the court of first instance. In this sense, the appeal proceedings are an extension of the proceedings conducted before the court of first instance[2]. It is emphasized that the article 386 § 4 CCP, which provides for the competence of the court of second instance to issue a cassation decision

---

[1] Partyk, 'Środki odwoławcze' in *Kodeks postępowania cywilnego. Postępowanie procesowe. Komentarz*, 1003-1012.

[2] Court of Appeals in Łódź judgement of 30 November 2018, I ACa 1736/17, LEX No 2625568.

in the event that the court of first instance does not consider the essence of the case or when the issuance of the judgment requires taking evidence in its entirety, must therefore be interpreted as an exception[1]. Of course, in some cases it is impossible for the appellate court to conduct the entire taking of evidence. In judicature it is highlighted that the consequence of not examining the merits of the case are such that it is necessary to set aside the judgment and refer the case back to the court of first instance for reconsideration. Otherwise, the parties would only be provided with a single substantive instance[2].

THE COMPOSITION OF COURT WHILE RECONSIDERING THE CIVIL CASE

As I have already stated, if a judgment is set aside and a case is referred back for reconsideration, the case is heard and determined by the same formation of judges, unless this is not possible or would cause excessive delay in the proceedings. The new rule differs from the previous one totally. Before the law was changed the court ruled the case as a different panel.

The reasoning behind the amendment was that other judges should not be held liable for miscarriages of justice and should not rule in cases in which another judges had given a defective judgment. Such a thesis cannot be fully accepted. It is necessary to clearly condemn such situations in which a decision is made in an ill-considered manner only to 'get rid of the case'. However, it cannot be assumed that, as a general rule, referring back cases for reconsideration is due to such attitudes on the part of judges adjudicating at first instance courts. Only in few cases does this happen. As a general rule, the annulment of a judgment is not due to

[1] Court of Appeals in Szczecin judgement of 3 July 2019, I ACa 157/19, LEX No 2719948.

[2] Court of Appeals in Warsaw judgement of 22 May 2019, V ACa 455/18, LEX No 2689772.

the fact that the judge deliberately neglects to carry out their duties properly[1].

In the current legal situation, the case may be heard in a different composition of judges than previously, but this depends on the occurrence of special circumstances. These are: the inability to designate the same court to hear the case or the assumption that referring the case to the same court had the effect of prolonging the length of the trial. Of course if the judge does not work in the court any more, it is obvious that they are not able to work on the case and other judges must rule in the case. Besides, the same will happen when the judge who previously heard the case, is on a long sick-leave. Then the case sent back for reconsideration may be assigned to another judge. Similarly, the same may happen when the judge (who previously ruled in the case) was later delegated to work in another court of law. But such cases are not very common. It must therefore be assumed that, as a general rule, as long as the judge sits in the court, he or she will be obliged to re-examine the case once it has been "designated" to them. It may mean that if the case is twice sent back to the lower instance court, the same judge will work on it until they either issue a verdict that will be not-appealable or stops working in the court of first instance.

We may imagine a plenty of different circumstances that may lead to the reconsideration of a case. For example, such event may occur when the party has died just before the trial and the court was not aware of that fact and ruled a judgement. In such a case the appeal court must send the case back for reconsideration as it may mean that the late party's successors were not able to actively take part in a case. Moreover in the second trail of the same case the judge may make some serious mistakes what in some occasions may lead to the next sending the case back for reconsideration. It may happen when, for example, the judge violates the right for one of the parties to defend in court (art. 379 point 5 CCP). But even if the mistakes that have been made while proceeding the case do

[1] Partyk, 'Środki odwoławcze' in *Kodeks postępowania cywilnego. Postępowanie procesowe. Komentarz*, 1013-114.

not mean that the judge/court work badly, for every single person the need to sending the case back for reconsideration can cause discouragement.

As the newly changed Article 386(5) CCP may be analysed from different points of view, I will present it focusing on different factors. I will show what it may practically mean to the parties, to the judges and to the society.

THE PARTIES POINT OF VIEW

Firstly I will analyse if it is a proper solution for the parties to have their case heard by the same judge (judges) when some substantive or procedural mistakes have led to the reconsideration of their case.

It was stated that art. 386 § 5 CCP in the previous version both guaranteed objectivity during the trial of cases, and influenced the perception of the court by the parties and the public[1]. Unfortunately the same is not true as the provision has been changed. The rule stating that the same judge (judges) holds the case even if it was sent back for reconsideration, may be very inconvenient for both of the parties.

In my opinion neither the party that was interested in reconsideration of the case or the one that was not interested in it, may be glad when they find out that the case will still be held by the judge (judges) that have already ruled the verdict in the first instance. The author of appeal (that was successful) may not be sure if the judge will change their previous statements and held a verdict that is, for example, completely different than the previous one. Besides, the party that was not appealing (as they won in the first instance) may also be not sure if the judge (judges) will change their mind.

It was emphasized in the literature of the subject that this situation violates the right of a party to a fair trial that is guaranteed either by article 6 European Convention on Human Rights or Polish Constitution.

[1] Tadeusz Zembrzuski, „Glosa do uchwały Sądu Najwyższego z dnia 23 sierpnia 2006 r., III CZP 56/06" [Gloss to the resolution of the Court of Appeal of 23 August 2006, III CZP 56/06], *Rejent,* No 12 (2007): 165.

Both the acts emphasise the importance of the right to a fair trial. It was said that newly changed art. 386 § 5 CCP harms generally accepted expectations as to how the trial should be conducted if it is to be just[1]. Unfortunately, this position should be accepted[2].

Besides, from a psychological point of view, for both of the parties, the judge who easily changes their attitude towards the case, may not be considered the right person to fill this position. The situation may be inconvenient. This may have a very negative impact on the perception of the judiciary by the parties, especially as it may lead to the situation in which the parties will feel powerless in court.

THE JUDGE'S POINT OF VIEW

Is a judge interested in reconsidering the case? Of course not. It is obvious that every judge does not feel comfortable when the higher instance court points out any mistakes to them. Moreover, when the judge is appointed to hear the same case for the next time, they will fill uneasy. They may have the feeling that they are being forced to rule against their will and conscience. Judges may therefore be discouraged from adjudicating on such cases, especially if they do not agree with the deficiencies pointed out by the court of higher instance. The above situation may have a very negative impact on the comfort of judges' work. In the literature it is pointed out that such a situation will compromise the independence of the judges themselves[3]. According to art. 178 para 1 of Constitution judges, within the exercise of their office,

---

[1] Agnieszka Góra-Błaszczykowska, *Ekspertyza na temat projektu ustawy o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw – druk sejmowy nr 3137*, https://www.sejm.gov.pl/Sejm8.nsf/opinieBAS.xsp?nr=3137 (access: 12.09.2019 r.), 6.

[2] Partyk, 'Środki odwoławcze' in *Kodeks postępowania cywilnego. Postępowanie procesowe. Komentarz*, 1014.

[3] Góra-Błaszczykowska, *Ekspertyza na temat projektu ustawy o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw – druk sejmowy nr 3137*, 4.

shall be independent and subject only to the Constitution and statutes. So does the commented regulation not violate this standard?

In my opinion, as a judge has presented their point of view once while ruling the case, they are no longer a neutral arbitrator[1]. When a judge voices their statements to the parties, they actually opt for a version of one side of the process: either they believe certain statements and testimonies, or they see others to be credible. In the course of the judgment, the judges "reveal" their beliefs. A judge, after having given judgment and drawn up a statement of reasons for their decision, shall disclose his or her attitude towards the case to the parties and to the representatives and the public. If they rehear the case, it would be difficult for them to "admit" that they have previously made a mistake, e.g. by establishing a factual defect in the case.

The only benefit of the changed art. 386 § 5 CCP is that the judge who hears the case for the second time already knows the case and the parties as they have ruled it once and it may be faster for them to rule the case for the next time. However, this kind of "advantage" does not outweigh the numerous negative effects that have been pointed out.

THE SOCIETY'S POINT OF VIEW

We must remember that the judgments and the behaviour of the judges are closely monitored by the whole society. As it is truly stated that *"a judge acts on behalf of the society*"[2], we should also analyse if from citizens' point of view the newly changed art. 386 § 5 is a proper solution. I believe that it is not.

The society should look upon judges as persons with the highest possible qualifications. However, we should bear in mind than when the case is referred back for reconsideration, such a decision may be seen as an example of the ineptitude of a particular judge. Of course not every

[1] Partyk, 'Środki odwoławcze' in *Kodeks postępowania cywilnego. Postępowanie procesowe. Komentarz*, 1014.

[2] Beata Stępień-Załucka, "Disciplinary Liability of a Retired Judge on the Example of Selected Countries", *Legal and Administrative Studies,* No 1 (2019): 8.

case has to be heard for the second (third, etc.) time because of the courts' mistakes. But it doesn't change that, usually the external observers may perceive any retrial of a court case as a conclusive evidence of malfunctioning of the judicial system. In such a case for those people who will learn that in the second holding of the case still the same judges are involved and may completely change their mind – the court will appear as an institution of very unstable rules. The situation may result in a decline in citizens' confidence in the courts and judges, and such a phenomenon is not desirable in the democratic country. After all, judicial mechanisms should rather be aimed at strengthening the public's conviction that the courts act fairly and that judges rule each case independently and in accordance with their own convictions. Therefore, it should be recognised that the new Article 386 § 5 CCP may have a negative impact on the social perception of judges and courts in Poland. However, this kind of situation is obviously detrimental.

CONCLUSIONS

When we are thinking about the court, we focus on the rules it should be linked with. One of the most important principles: the independence. should be taken into account. An independent court with hard-working impartial judges is a guarantee of security for both parties and the State. If people believe that their case will be held lawfully, they will respect the judgements even if they do not agree with their defeat in court. In the literature, it is noted that the judge is to direct the proceedings in such a way that the principle of impartiality is not violated[1]. Therefore I doubt that the newly changed provision of art. 386 § 5 CCP is a step in–the right direction. I am convinced that the new regulation intervenes in the crucial rule of fair trial too much. We should remember that the burden of creating such normative solutions that will

[1] See Aneta Łazarska, Sędziowskie kierownictwo postępowaniem cywilnym przed sądem pierwszej instancji, 119.

implement constitutional principles, including the right to a fair trial, rests on the legislator[1].

The rule that judges will be hearing cases on and on, until the non-appealable verdict will be held, should be therefore criticised. As it was presented, the balance between the positive and negative effects of the change in the law seems to be unequivocally detrimental. Art. 386 § 5 CCP may be seen as a legislative trap set by the lawmaker that will surely "hit" everybody involved: the parties, the court, the society and in the end: the State. Hence the return to the previous version of art. 386 § 5 CCP is much desirable. The above is justified by the need to take care of the highest standards guaranteed by the Constitution and the European Convention on Human Rights.

BIBLIOGRAPHY

Books

1. Bagan-Kurluta, Katarzyna, and Piotr K. Fiedorczyk. *Evidence in Civil Law – Poland.* Maribor: LexLocalis, 2015.
2. Łazarska, Aneta. *Sędziowskie kierownictwo postępowaniem cywilnym przed sądem pierwszej instancji [Judicial direction of civil proceedings before the court of first instance]*. Warszawa: Wolters Kluwer, 2013.
3. Piaskowska, Olga Maria ed. Kodeks postępowania cywilnego. *Postępowanie procesowe. Komentarz.* Warszawa: Wolters Kluwer, 2020.

Journal Articles

1. Machnikowska, Anna and Anna Stawarska-Rippel. "The Principles of Civil Procedure in Poland in the Twentieth Century. Doctrine, Drafts and Law in a Comparative Perspective", *Comparative Law Review*, Vol. 2 (2016).

[1] See Aneta Łazarska, Sędziowskie kierownictwo postępowaniem cywilnym przed sądem pierwszej instancji, 22.

2. Mańko, Rafał. “The Unification of Private Law in Europe from the Perspective of the Polish Legal Culture”, *Yearbook of Polish European Studies*, Vol. 11 (2007-2008).
3. Niemiec, Ernestyna. “The nature and the dynamism of civil procedure – rights, rules and judges – comparison between common law and civil law systems”, *Internetowy Przegląd Prawniczy TBSP UJ,* Vol. 10 (2017).
4. Partyk, Aleksandra. „Wpływ prawomocnego skazania na wyrok sądu w sprawie o niegodność dziedziczenia. Glosa do wyroku Sądu Apelacyjnego w Katowicach z dnia 21 stycznia 2019 r., I ACa 576/12” [Impact of a Non-appealable Verdict of Guilty on a Court’s Judgment in a Case Concerning the Unworthiness of Inheritance. Commentary to the Judgment of the Court of Appeal in Katowice of 21 January 2019, I ACa 576/12], *Studia Prawnicze. Rozprawy i Materiały,* No 1 (2019).
5. Rzewuski, Maciej. “Adversarial character of civil appeal proceedings – selected issues”, *Zeszyty Naukowe KUL*, Vol. 3 (2017).
6. Stępień-Załucka, Beata. “Disciplinary Liability of a Retired Judge on the Example of Selected Countries”, *Legal and Administrative Studies*, No 1 (2019).
7. Zembrzuski, Tadeusz. „Glosa do uchwały Sądu Najwyższego z dnia 23 sierpnia 2006 r., III CZP 56/06” [Gloss to the resolution of the Court of Appeal of 23 August 2006, III CZP 56/06], *Rejent*, No 12 (2007).

Legislation (website)

1. Góra-Błaszczykowska, Agnieszka. Ekspertyza na temat projektu ustawy o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw – druk sejmowy nr 3137, https://www.sejm.gov.pl/Sejm8.nsf/opinieBAS.xsp?nr=3137 (access: 12.09.2019 r.).

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
No.2 (21), Year XVIII, 2019, pp. 24-40

EVOLUTION OF THOUGHT AND ROMANIAN JURIDICAL SCIENCE AND THE DEVELOPMENT OF SOCIETY

Andreea RÎPEANU[1]

Abstract:

The ancient Romanian law, as Dimitrie Cantemir stated as well, was ius non scriptum, that is an unwritten law. More bound forms of political-juridical thinking with laic character started to appear, both in Moldova and in the Romanian Country, towards the middle of XV century, when, promoting a policy of consolidation of feudal state and of a more focused centralisation, under the conditions of constituting a religious organisational unity, the lords leading the state, with the support and through Church, introduced written legislation, the same on the entire Romanian territory.

Key words*: juridical principles; political-juridical thinking; societ; development; state.*

THE ROMANIAN LAW IN THE PERIOD OF IX-XVII CENTURIES.

Evolution of thought and Romanian juridical science are closely related to the development of society. In this study, referring to the period prior to constituting law as science, we shall deal with the ideas and conception of some significant personalities of the time. We shall focus on their juridical, as well as political thinking, both expressed in documents and

[1] **Senior Lecturer PhD, Faculty of Law, Ecological University of Bucharest, e-mail: andreea.ripeanu@yahoo.com**

legislations, that had an important role in the development of Romanian juridical science.

The period of IX-XIV centuries is characterised by the assertion of Romanian people, as distinct personality from an ethnical perspective, with own political organisation and juridical norms. The ancient Romanian law, as Dimitrie Cantemir stated as well, was *ius non scriptum*, that is an unwritten law.

The existence of Romanian unwritten law, with a strong identity, was acknowledge as well by our neighbours, calling it in the official documents, drafted in Latin, *ius valachicum*.

In the Romanian chancelleries, the law is known as *The Custom of Ground* or *The Law of the Country*[1], with the same disposals for all Romanian countries.[2]

Therefore, the name of *Law of the Country* means at the same time its territorial, unitary nature, since it is the law of a country, of a territory inhabited by the same Romanian population.

The Law of the Country is a Romanian creation, generated by the lifestyle of ancestors, developed by Romanians under the conditions of organisation in collectivities and feudal political formations.[3]

In order to define the sphere of enforcement of the *Law of the country*, one shall rely on the assertions of Nicolae Bălcescu:

The Law of the Country substituted as well the political constitution and of civil register and of criminal register. The Law of the Country is an inclusive law system, of a society politically organised in countries,

---

[1] The expression of *Law of the Country* presents the best the contents of Romanian juridical custom.

[2] Romanians have called these norms, *law*, having the signification of *unwritten norm*, signification explained by Nicolae Noica, in *Romanian philosophical saying* (Bucharest: Scientific and Encyclopaedic, 1970), 174, coming from the Latin *re-ligio*, that is *inner law with faith and consciousness*, since *law* at Romanians means as well *religious faith*. Christian law influenced the moral contents of the consciosness of Romanians since their ethnogenesis. Therefore, when *nomocanons* (church laws) appeared, in the XV century, Romanians called them *God's laws* or the *Laws of God*.

[3] The juridical norms related to the organisation of principality and voivodeship represent the beginning of *public law* in the Romanian Countries.

including all norms of unwritten law that rule the organisation of states on local and central level, the juridical regime of property, the juridical status of individuals, the organisation of family, the successions, contracts, collective liability in criminal and tax field, repression of criminal acts and judging trials.

These norms of law must be construed and enforced in conformity to the principles of equity, since in the Romanian conception[1], justice is equity.

It must be considered that during all this period the Romanian feudal law had a strong religious nature, and also that unwritten law predominates comparatively to written law.

More bound forms of political-juridical thinking with laic character started to appear, both in Moldova and in the Romanian Country, towards the middle of XV century, when, promoting a policy of consolidation of feudal state and of a more focused centralisation, under the conditions of constituting a religious organisational unity, the lords leading the state, with the support and through Church, introduced written legislation, the same on the entire Romanian territory.

During the following period, that lasted until the end of the XVI century, when feudal immunities started to be limited, and lord force to consolidate, the feudal law includes juridical principles more and more systematised and crystallised.[2] Naturally, the juridical thought registers evolutions, as well the base of which cannot dispense with the legislative, unwritten or written background, certain in terms of contents and accurate as formulations.

In this respect, *the Precepts of Neagoe Basarab to his son Teodosie* (1519-1520) may be considered the first attempt of theorizing the policy of centralised feudal state. With a double character, laic and religious, the work contains elements of public law (receiving messengers, military organisation, rules concerning the organisation of war etc.), for the

---

[1] Based on the Romanian principle, according to which, the law system is conceived by Celsus as, *ars boni et aequi*, where *bonus* is the social wellbeing which refers to the protection of social values, and *aequi* is equity.

[2] From a doctrine perspective. Traian Ionaşcu and Mircea Duţu, *History of juridical sciences in Romania* (Bucharest: Academia Română, 2014), 17.

explanation of which the author declares himself partisan of the idea of authority of lord power for the substantiation of which he used the religious argument.

In the same XVI century, it is noticed a beginning of differentiation between canonic law and laic law, between church law and royal law, being focused distinctions, both practical and theoretical, between public and private law. On their turn, the by-laws of Saxon borough included own regulations.

These include *Statuta iurium municipalium saxorum* (1583), juridical masterpiece which, inspired from Roman and German law, was to satisfy the new desires of urban economy in full development from Saxon towns. The drafting of *bylaws* was preceded by a juridical activity rather intense, carried out by the humanists of the era, one of them being Johannes Honterus from Braşov. In this two juridical works, he supports the substitution of feudal law with a new Roman ruling, based on humanism, which may correspond to the needs of municipal bourgeoisie in formation.

Also, in the same period, some principles of natural law are also established. Thus, in Transylvania, in the *Tripartitum of* Ştefan Werböczi - 1517[1], code of laws appearing immediately after the peasant war headed by Gheorghe Doja[2], it is defined the notion of „people", including only the aristocrats, and the notion of „populace", assigned to non-aristocrats, to the peasants constituting the majority of Romanians. By this act, the Romanians are completely excluded from the political life of Transylvania. Distinction was made between law and customs, between church and laic law, between law, justice and jurisprudence, between public law and private law and even between natural law and positive law. By its contents, the *Tripartitum* occupies an intermediary place between written and customary law, being a codification of both forms of law in force in such era. *The code* has an introductory part, *prologus,* which includes a range of

[1] The original title is *Tripartitum opus iuris consuetudinarii inlycti Regni Hungariae partiumque adnexarium.*

[2] He was a small Szekler nobleman from Transylvania, who led the peasant revolt against great Hungarian owners (magnates) of ground from 1514, which bears his name.

juridical principles and three parts widely corresponding to tripartite division of law in the law of individuals, goods and actions, division used by Romanian jurisconsults in the presentation of their juridical system. The third part deals with the law and local customs of Transylvania.

In the XVII century in the writings of great scribe aristocrats and mainly in the works of historians, elements of laic thought appeared theoretically substantiating the restriction of lord prerogatives and the increase of the role of great aristocrats, by consolidating the political power of manorial council, by control of state apparatus by the great aristocracy, through the organisation of military forces under the heading of great aristocrats, by their consolidation of feudal exploitation etc. It was simultaneously acknowledge, in a more restricted form, however, the role of Ottoman suzerainty, in the life of Romanian Countries. For instance, Grigore Ureche (1590-1647), partisan of aristocrat regime, supported the need of written laws with a view to restrict central power and secure the political power of great aristocracy, declaring himself however an adversary of Ottoman power.[1] A similar conception we encounter at Miron Costin 1633-1691 and Ion Neculce 1672-1745 in Moldova, as well as at Constantin Cantacuzino 1650-1716 in the Romanian Country.

The feudal law of these times is characterised by beginnings of codifications, founding their expression in the juridical monuments of XVII century, firstly, in the codes of laws of Vasile Lupu, *Romanian book of learning* (1646) and Matei Basarab, *Rectification of law* (1652), both being an original arrangement of Roman – Byzantine law to the realities of Romanian life. Acknowledging as sources of law, the law and customs, the *Book* …. makes a difference between world law, *ius humanum* and God law, *ius divinum* and the law of human nature, *ius naturale*. The first concept corresponds to positive law, the second to the canonic law, whereas the third, to the idea of natural law. It makes an important step on the line of development of Romanian juridical thought, approaching, although only implicitly, issues of a classical juridical importance: principles of enforcement of laws, rights and obligations of individuals,

---

[1] *Annals of the Country of Moldavia*, 2nd edition, managed by P.P. Panaitescu (Bucharest: Academia, 1959).

patrimony, field of obligations, successions, institutions of criminal law etc.

The second law, *Rectification of law*, has the same contents as the *code of laws* of Vasile Lupu, to which it is added a part of canonic law from Byzantine law.

Feudal laws by excellence, these codes provided for the inequality of individuals in front of law in a pyramidal medieval society, focused on multiple vassalage relations, consolidating, simultaneously, a state heading when the lord aspired more and more obviously to the position of Byzantine autocratic.

THE THEORY OF EQUITY, RELY THE ELABORATION OF CODES IN THE CENTURIES XVIII-XIX.

The crisis of aristocratic regime determines the occurrence of new forms of government, of absolute monarchy, supported by lords such as Şerban Cantacuzino (1640-1688)[1] and Dimitrie Cantemir (1673-1723)[2].

An important contribution to the development of juridical science in this period was that of the patriotic lord and great scribe Dimitrie Cantemir, representative cultural personality of his era who, by his wide and multilateral activity, as well as by these advanced, laic and humanistic ideas, was one of the most important European science people. Referring to his works that include as well researches in the field of juridical sciences[3], we should outline the signification of his contribution by knowing the history of Romanian law, the scientific value of his theories and the manner of presenting it[4]. Partisan of the ideas of the school of equity,

---

[1] He was the lord of Romanian Country between 1678 and 1688.

[2] He was lord of Moldavia (March-April 1693; 1710-1711) and great scribe of Romanian humanism.

[3] Such as, *Description of Moldavia -Descriptio Moldaviae* (Bucharest: Academy, 1973). Works of erudition about the origins of Romanians from Moldova, Muntenia and Transylvania, written between 1714 and 1716, at the request of the academic society in Berlin.

[4] Roman origin of ancient law; receiving the Romano-Byzantine law; hereditary nature of lordship and of succession to lord seat, supporting an enlightened monarchy relied on

supporter of the state of law, where the lord himself is subject to laws and justice, for the sake of the people, protector of law and justice towards the people and predecessor of illuminism, Dimitrie Cantemir considered necessary the evolution of people by culture, with a view to provide the social evolution and preparation of the conditions for the achievement of reforms with a view to improve the situation of peasants. Dimitrie Cantemir supported from a historical perspective the traditions of hereditary monarchy in the Romanian Countries, the subordination of aristocrats to central power and the independence of the country towards the Ottoman Power, proving that the tribute which the lords of Moldavia agreed to pay to Turks was only a sign of rendering, not a tribute of submission.[1] The absolute monarchy, *the lordship that dominates alone*, regarded by Dimitrie Cantemir in the form of European enlightened absolutism, was not however a monarchy of divine law, since, in his conception, the lord had to observe law and consider the *voice of vulgus* and the *whispers of herds*. Consequently, he conceived political history as a succession of monarchies, led by the laws of nature, with periods of ascension and regress.

These ideas were reflected in Romanian written law at the end of XVII century and the beginning of XIX century.[2]

Absolute monarchy, in the form of enlightened absolutism, was supported by the annalists of the time[3], in their works.

During the period of division of feudalism (end of XVIII century – first half of XIX century) primary were the norms of the *customs of ground*, the norms of feudal law, as well as the written norms. In parallel, it was developed the action of codification of law, being removed the regional and municipal particularities. There were however enforced as well the norms included in the *charters* and *lord establishments*, with

---

equity; origin of high dignities; suzerainty and position of Romanian Countries in international relations.

[1] Ionaşcu and Duţu, *History of juridical science in Romania*, 20.

[2] *Register of laws* (1780) and *Code of Calimach* (1817).

[3] Ion Neculce and Mihail Cantacuzino.

respect to financial organisation, the organisation of courts, procedure of judgement[1], adoption[2], alienations of premises, gypsy servants[3] etc.

The rulings of Fanariot lords included juridical norms concerning the state organisation and social structure.[4] They included advanced measures, with respect to the organisation of administration, by introducing the waging of state officers and mainly with respect to tributes, with a view to remove the abuses concerning the determination and collection of it.[5]

Register of laws (1780) of Alexandru Ipsilanti, elaborated in Greek and Romanian, reflects some authoritarian ideas concerning the state heading, equally taken over from Byzantine law (*Basilicans*) and from the *customs of ground* and included in the scope of defence of the privileges of feudals and their power (consolidation of ownership) a range of improvements concerning the concerning the court organisation and judgement procedure.

The civil code of Moldavia (1817) of Scarlat Calimach, having as source of inspiration *the Austrian Civil Code* (1808) and maintaining some feudal traits, reflects the beginnings of division of feudalism and constitution of capitalist relations. It provides a wide juridical frame, which materialises the newest requirements of juridical and political thought.

The Law of Caragea (1818), having as source of inspiration the *custom of ground, Basilicans and Register of Law*, although it provided for the feudal relations and even the rests of servitude, it included as well few

---

[1] *Charter of Alexandru Ipsilanti* in the Romanian Country from 1775.
[2] *Charter of Alexandru Moruzi* in Moldovia from 1800.
[3] *Catholic charter* in Moldavia from 1785.
[4] *Establishments of* Constantin Mavrocordat from 1740 in the Romanian Country and 1743 in Moldavia.
[5] *Manual of laws* of Mihail Fotino (Photinopoulos), written in neo-Greek, in three different draftings (1765, 1766, 1777), it may be characterised as code of laws, treaty and legislative codification meant to be adopted as legislation in the Romanian Country. It included excerpts from *Basilicans* and from other Byzantine collections adapted to Romanian social realities. Meant to become an official *Code*, *the Manual from* 1766 was used in Romanian Country and Moldavia only as simple private collection of Byzantine law. In its drafting from the year 1777, where it is paid a special attention to the *customs of ground*, it served to the drafting of the *Register of laws*.

new disposals, due to some sporadic influences of the *Code of Napoleon* (1804).

A characteristic of bourgeoisie ideology was the modern concept of *illuminism* which, following the instauration of a *national state* and the creation of a *national society*, included all fields of social life. Therefore, *illuminism* represented a political-cultural formula corresponding to the needs of renewal of feudal state and of adjustment of it to the new economic development. *The new formula* intended to prevent the revolutionary subversions, that had taken place in England and France and to shape the medieval institutions in the spirit of the new social-economic requirements and bourgeois claims.

The only solution was the *enlightened absolutism*, meant to modernise, by reforms, *a state crushed by social contradictions*.[1] The enlightened absolutism claims new concepts and positions opposite to state and justice. The monarch exercises the prerogatives in virtue of equity (and not divine), based on a *contract* concluded with its people, to whom it has to provide *happiness*.

In its first form, illuminism developed in our country as a wide progressive movement, the beginning of which was noticed in the *Transylvanian School*, by its representatives: Samuil Micu (1745-1806), Gheorghe Șincai (1753-1816), Petru Maior (1761-1821) and Ion Budai-Deleanu (1760-1820). They criticised the feudal structure and the exploitation of peasants by aristocrats and bourgeois, supporting the need of acknowledgement of equal political rights for the Romanians from Transylvania. Their program claims, besides the elimination of bondage[2], equal rights for all inhabitants, political emancipation of Romanians, by acquiring the status of *constitutional nation*[3] and not *tolerated.* Such claims relied, both on equity, and the right of Romanians resulting from their number and proportion of duties incumbent upon them opposite to the state.

---

[1] Ionaşcu and Duţu, *History of juridical science in Romania*, 23.
[2] This was as well one of the objectives of reformist policy of Iosif II.
[3] State component.

On the same line, by *Supplex Libellus Valachorum* from 1791, Romanian bourgeois from Transylvania asked for being instated in full citizenship rights, equal rights with *constitutional nations*, proportional representation in the political life of the country. This report was grounded, both on historical arguments, proving the authority of Romanians opposite to all the other nations of the country and juridical (constitutional)[1] based on which one asked for proper rights in public life. We notice that these aren't *new rights* but a *reinstate in the prior status* (*restitutio in integrum*).

In this context, it must be outlined the contribution of the first Romanian author of juridical treaties, Vasile Vaida (1780-1835), who, in the three volumes approaching Transylvanian civil law and his history (1824-1826)[2], proved to be the partisan of the ideas of Latin school, by the historical-juridical arguments brought in favour of Roman origin and continuity of Romanians from Transylvania, as well as their claims and social and national rights.

In juridical plan, a first manifestation of illuminism takes place in the form of spreading the theory of equity, on which it shall rely the elaboration of codes in the centuries XVIII-XIX. It will influence as well the activity of the jurists of the time, such as: Petre Depasta, Greek annalist of Constantin Mavrocordat; Toma Cara, translator of the books of Armenopol from 1804 and author of the tree parts of *Pandects* (including the law of individuals); Andronache Donici, representative of the new rationalist-metaphysical thinking, of the centuries XVII-XVIII and author of the famous juridical manual, used as an authentic code of laws, until the adoption of the *Code* of Scarlat Calimach; Damaschin Bojinca, personality with a wide juridical culture; Christian Flechtenmacher[3], one of the main authors of the *Code* of Calimach.

An important thinker of such times, in the Romanian Country, was also Naum Râmniceanu (1764-1839) who, under the influence of the French Revolution and Illuminism, supported the annulment of privileges,

---

[1] Romanians were the most numerous nation and with the highest number of duties.
[2] It was considered the *first treaty of civil law* drafted by a Romanian.
[3] He considers that the development of national culture is a decisive factor for social and political emancipation.

equality of all citizens and their representation in the Public Assembly, by deputies, equal rights to learning, as well as the other *illuminated nations of Europe*.

The illuminist conception entailed other important juridical demarches as well. Therefore, the report of the Moldavian middle bourgeoisie, from 1822, entitled *Carbonaro Constitution*[1] reflected the influence of the ideology of lights and of the ideas of Montesquieu, preoccupation to enforce equal rights for all categories of aristocrats, as well as the maintenance of feudal relations in agrarian economy. *The report* included almost accurate translations of the *French declaration of rights*[2]. As for state organisation, the conception of authors relied on the restriction of the lordship powers and acknowledgement of the law of Public Assembly, as representative body of aristocracy of all categories, of effective heading of the country.

Based on the same illuminist ideas and with a view to develop juridical education, the bourgeois conceptions about the state were amplified; it was gradually created a scientific terminology; the juridical notions were advanced and works with high scientific level were published. Therefore, the main characteristics of juridical sciences in the century XVIII – the beginning of the century XIX-lea consisted in the preoccupation of spreading juridical knowledge and creating a Romanian legislation according to the requirements of Romanian people. Consequently, during the lordship of Constantin Mavrocordat (1711-1769)[3] more consolidated forms of studying law appeared, and during the times of

---

[1] Whose main author was Ionică Tăutu (1798-1830), social-political thinker from the beginning of XIX century in Moldavia, partisan of the ideas of French Revolution and active participant to the political fights, being speaker of middle and small aristocrats and thus a predecessor of forty-eighters.

[2] Law of property, freedom of consciousness, individual freedom, equality in front of law etc.

[3] In the Romanian Country, he reigned six times: September 1730 - October 1730; 24 October 1731 - 16 April 1733; 27 November 1735 - September 1741; July 1744 - April 1748; c. 20 February 1756 - 7 September 1758 and 11 June 1761 - March 1763 and in Moldavia four times: 16 April 1733 - 26 November 1735; September 1741 - 29 June 1743; April 1748 - 31 August 1749 and 29 June 1769 - 23 November 1769.

Ioan Gheorghe Caragea (1812-1818)[1] it was constituted a position of Latin and jurist professor occupied by Nestor Craiovescu[2], author of a law course, highly appreciated by contemporaries.

The Charter from February 1816, of constitution of the position of *professor of laws teaching this science to those who want to learn it*, included significant recitals, *since the science of law, both for judges, and for those summoned and eventually for all people is useful, as one which, based on a natural principle, stands as the most healthy support for humanity*.

The Fanariot lords, like bourgeois, to whom juridical attributions were assigned, knew the Byzantin and occidental legislations in original.

During the same period, it was manifested as well the wish of juridical specialisation on superior schools.[3]

The development of capitalist relations influenced the development of the process of systematising the law on subjects. Thus, at the *College from Saint Sava*, Constantin Moroiu[4] (1837-1918) was teaching Roman law[5], criminal law and commercial law, and at Mihăileană Academy from Iaşi it was made the proposal to present during the classes the public legislation and private legislation of peoples. Between 1839-1840, Petru Câmpeanu[6] (1809-1893) sustained for the first time a course of public law and theory of law, and Gheorghe Costaforu (1821-1876), the first rector of the University of Bucharest, professor of civil law, published, in the form of a magazine, *Historical Magazine*, including studies of civil law.

---

[1] Former Fanariot lord of Romanian Country he became famous for the first *Code of laws* from Walachia bearing his name, *Caradja Legislation*.

[2] Erudite aristocrat from Romanian Country, knowing the laws of the country and Roman-Byzantine law.

[3] In this respect, in 1817 Gheorghe Bibescu and Barbu Ştirbei went to Paris, followed in 1820 by the brothers Filipescu, Bălăceanu, Racoviţă, and the sons of Dinicu Golescu left to Switzerland.

[4] Pioneer of national education, he was officer of Royal Army, with degree of captain. He participated to the Russian-Turkish war against Ottoman Empire. He was one of the most important masons from Romania and also a very active philatelist.

[5] Deemed right of the country.

[6] Of Transylvanian origin, professor of philosophy, successor of Eftimie Murgu.

At the beginning of the century XIX the political-juridical conceptions of the era encountered their expression in the *Organic Rules*, introduced by tsarist occupation, in 1831 in the Romanian Country and in 1832 in Moldavia. They were considered by specialists our first constitution, since the state organisation relied on the principle of separation of powers in the state. Thus, the legislative power is entrusted to the Public Assembly, the executive power – to the lord, elected for life, and the court power – to county courts, independent bodies. Also, one stipulated measures concerning the organisation of the profession of lawyer. By the document entitled *Science of collectivity* dated 30 September 1831, published in the *Official Gazette*, it was issued the registration certificate of Ilfov Bar[1], further turned into the Bar of Bucharest.

During the revolutionary year 1848, the juridical science expressed the basic ideas of the political acts of revolution concerning the state and law.

Thus, Nicolae Bălcescu (1819-1852) criticised acerbically the existent social-juridical structures, supporting the need of a new and modern constitution, state suzerainty, equal rights of states. In this respect, he supported with legal arguments, the right of Romanian principalities to independence towards the Ottoman Empire, proving that the so-called *Capitulations* were in fact, treaties of alliance, based on which suzerain power was to provide to Romanian Countries military protection and support.[2]

By its form and contents, *the Proclamation from Islaz* (9/12 June 1848) was above all political acts of the times, being considered an authentic constitution. Among the *social-economic claims*, recorded in the program of Romanian revolution we state: observance of the principles concerning freedom and equality; putting peasants in possession of lands,

---

[1] An *authentic Board of lawyers*, subscribed by the Great Logothete of Justice Iordache Golescu, where are mentioned 22 lawyers *ranged at the Divans from Bucharest*, see Mircea Duţu, *History of Bar of Bucharest* (Bucharest: Herald, 2006), 50 and the following.

[2] Ionaşcu and Duţu, *History of juridical science in Romania*, 28.

with or without compensation; removal of feudal privileges; overall tax contribution.

As for the *rights of people and citizens,* one drafted a range of petitions concerning: removal of feudal ranks; abolishment of bondage; political equality of all citizens of any nationality; securing the rights and freedoms of citizens; elaboration of democratic reforms in administration, justice and army; enforcement of the principle of justice and equality in exercising public functions.

As for the *modernisation of political life*, the program of Romanian revolution, includes a range of principles characteristic to bourgeois constitution: constitutional monarchy; separation of powers in the state; ministerial responsibility; inamovibility of judges; equality of all citizens opposite to laws; institution of national guards.

An important representative of this period of national renaissance, who expressed his convictions, both in his scientific, historical and legal works, and in the reforms' program targeting a modern state organisation, was Mihail Kogălniceanu (1817-1891). In this respect, he stated that social evolution may be achieved by reforms, as well as by the spread of culture. In the revolutionary program entitled *Desires of national party of Moldavia* (Iaşi, 1848), drafted by him, measures and reforms were included finding continuation, in the juridical form, in the *Constitution Project for Moldavia*, document to which he had as well a significant contribution: removal of any ranks and personal or birth privileges; equality in civil and political rights; *Public Assembly* to include all states of society; lord elected by all states of society; ministerial responsibility and of public officers; individual freedom, of domicile and press; equal and free school education; incorporation of jury for political, criminal and press cases; introduction of civil, commercial and criminal bourgeois registers; removal of beat to death and beat; reform of county courts, inamovibility of judges, removal of county courts and special commissions; freedom of cults; political rights for all inhabitants of Christian religion; gradual emancipation of Jewish; secularization of monasteries' fortunes; new norms concerning policy and prisons; measures for removal of corruption.

Innovative political and juridical conceptions were presented as well by the lord Alexandru Ioan Cuza (1859-1866), jurist. With Mihail

Kogălniceanu will incorporate the modern Romanian state, creating a range of reforms such as: agrarian reform (putting peasants in possession of lands), electoral reform based on qualification (but with a lower qualification), reform in education; modern state organisation, development of national institutions, unification and modernisation of legislation by adoption of civil code, criminal code, code of civil proceedings, code of criminal proceedings.

In parallel, the social-economic and national claims of Romanians from Transylvania in the revolutionary year 1848, were sustained with strong juridical arguments by Avram Iancu[1], *Rake of mountains (1824-1872)*, being himself a good knower of law. In this respect, on 20 December 1850 he bequeath all his movable or immovable fortune, *as support for the incorporation of an Academy of Laws, strongly believing that the fighters with the weapon of law may impose the rights of the nation*.[2]

A remarkable Romanian politician, historian, philosopher and jurist, university professor, Simion Bărnuţiu (1808-1864) was one of the main organisers of the revolution of 1848 in Transylvania. He participated to the *National Meeting from Blaj* on 18/30 April 1848 and in May 1848. He conceived and shared his famous manifest *Proclamation from March* 1848, presenting his principles, previously formulated, starting with 1842, about Romanian nation and the fate of Romanians from Transylvania. His social claims were indissolubly related to acquiring independence and suzerainty of Romanian nation, acknowledgement of the nationality of Romanians, observing the principles of equal rights of all nations living in Transylvania. He was a partisan of national-idealist theory of equity putting it in accordance with the requirement of the era, using it in the scope of satisfying the desires of social and national release of Romanians from Transylvania, as well as democratic organisation of Romanian

[1] He was head in fact of the Motilor Country in the year 1849, leading the army of Transylvanian Romanians, in alliance with Austrian Army, against Hungarian revolutionary troupes under the heading of Lajos Kossuth.

[2] Dr. Ioan Fruma, "About Transylvanian juridical spirit", *Transylvania Magazine*, Organ of Astra, Sibiu, no.2 (1944): 101.

national state. In his works, *Dereptulu naturale privatu* (1868) and *Dereptulu naturale publicu* (1870), defining equity as *primitive fontana and conditioning validity of all positive law*, he elaborated the practical precept according to which, *any honourable and noble man cannot observe but that positive law corresponding to a national law*.

As professor at the Mihăileană Academy (1855-1860) and then at the University of Iaşi (1860-1864), Bărnuţiu educated people with new thinking, people who further on asked for democratic reforms, universal vote, expropriation of aristocrat and monasteries' properties.

CONCLUSIONS

The Romanian modern state, before becoming an institutional reality, was imagined as a political project, of entire generations of tourists, thinkers, political people. This project was outlined in the XVIII century. He continued in the XIX century, when the juridical and political thinking created a program of reforms and national emancipation, which outlines the project of modern Romanian state. In this respect, the programs of the revolutions from 1821 and 1848, as well as of secret political societies, between the two revolutions contributed to the clarification of the political project.

In conclusion, we may assert that, in the first half of XIX century, the Romanian society developed progressively, looking for new models and forms of organisation. Between the reforming theoretical activity (reform projects, reports) and social-political action (revolutions, secret societies), the official reform programs only accelerated the achievement of this political project.

BIBLIOGRAPHY

Books

1. Academia Română. *History of romanians*. Bucharest: Univers Enciclopedic, 2015.
2. Cantemir, Dimitrie. *Historia moldo-vlachica* (History of Moldavia and Wallachia). Bucharest: Academia Republicii Socialiste România, 1983.

3. Cernea, Emil. *Romanian state and law history*. Bucharest: Universitatea din Bucureşti, 1976.
4. Duţu, Mircea. *History of Bar of Bucharest.* Bucharest: Herald, 2006.
5. Iorga, Nicolae. *History of Romanian.* Vălevii de Munte: Datina românească, 1925.
6. Iorga, Nicolae. *History of Romanians, Revolutionaries*, Vol. 8. Bucharest: 1938.
7. Iorga, Nicolae. *Studies on the Romanian Middle Ages*. Bucharest: Ştiinţifică şi Enciclopedică, 1984.
8. Ionaşcu, Traian and Mircea Duţu. *History juridical sciences in Romania*. Bucharest: Academia Română, 2014.
9. Rîpeanu, Andreea. *Romanian state and law history*. Bucharest: Universul Juridic, 2011.
10. Rîpeanu, Andreea. *Romanian state and law history*. Bucharest: Universul Juridic, 2012.
11. Rîpeanu, Andreea. *Romanian state and law history*. Bucharest: Cermaprint, 2015.
12. *Tratat de istoria dreptului românesc*, I, II, Bucharest: Academiei, 1984.

Journal Articles

1. Fruma, Ioan. "About Transylvanian juridical spirit", *Transylvania Magazine*, Organ of Astra, Sibiu, no.2 (1944): 101.

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
No.2 (21), Year XVIII, 2019, pp. 41-57

DEFINITION AND ANALYSIS OF THE ESSENTIAL ELEMENTS OF THE OBLIGATION

Dumitru VĂDUVA[1]

Abstract

The new Civil Code does not define the obligation, but the "content of obligations", thus the doctrine has assumed the task of defining it.

In the absence of the legal definition of the obligation, normatively is not very clear the shape of the notion of obligation specific to the civil law, leaving room for confusions, at least between the legal obligations and the technical obligations, inexistent in the Roman law, where the term of obligation was not used to name other types of constraints different than the ones resulted from legal acts and actions.

For instance, the seller's obligation to inform the buyer is a legal or a contractual obligation?

To explain the obligation is very useful the analysis of its defining elements.

Key words: *obligation; Civil Cod;, civil agreements; right; doctrine.*

INTRODUCTION

The new Civil Code does not define the obligation, but the "content of obligations" (Art 1164). In the absence of a legal definition, the doctrine has assumed this role.

[1] **Lecturer Ph.D., University of Pitești, Faculty of Economic Sciences and Law, Pitesti (Romania), email: dumitru_vaduva@yahoo.com.**

In doctrine, starting with the Roman law until nowadays there have been numerous definitions given to the obligation, the essential differences being determined by the specific means of explaining the obligations used by the two well-known currents, subjective and objective, in the legal thinking, as well as by the concepts of the unity and duality of the obligation.

1. DEFINITION OF THE OBLIGATION AFTER THE ENTRANCE INTO FORCE OF THE NEW CIVIL CODE

In the absence of the legal definition of the obligation, normatively is not very clear the shape of the notion of obligation specific to the civil law, leaving room for confusions, at least between the legal obligations and the technical obligations, inexistent in the Roman law, where the term of obligation was not used to name other types of constraints different than the ones resulted from legal acts and actions.

For instance, the seller's obligation to inform the buyer is a legal or a contractual obligation?

The substance of the legal rules of obligation is that organizing the *simple obligations*, also named by the doctrine "the regime of obligations" (Title III-VIII of Book V). From them we can deduce the notion of obligation, as well as the subjective and unitary idea to which the actual legislator remained faithful.

Book V also organizes the sources of obligations: the legal act and actions. The entire ensemble of rules formed by the legal regime and the sources of obligations reveal the notion of obligation in *its extended meaning* [see Pct. 1.2]. By correlating the rules of the simple obligation with the ones of the extended obligation one can see that the fulfilment of the obligations is placed under the watch of the public authority only if they *rise from the sources or models* established by the law.

1.1. THE LEGAL DEFINITION OF THE CONTENT OF OBLIGATION

In the first text of the law of obligations, the legislator has stated the *content of the obligation*, globally seen as a legal relation. According to Art 1164, having as marginal title "*the content of obligations*" [also the Polish Civil Code has defined the obligation in its Art 2 Title 1. The Polish legislator does not define the obligation neither by legal relation, nor by a legal connection, but by the fact of the debtor's engagement] "*the obligation is a legal relation in the virtue of which the debtor is held to provide a service for the creditor, the latter one being entitled to receive the owed performance*".

Thus, even from the first text is stated the subjective and unitary feature of the obligation, a personal connection of the debtor, held by a debt, its reverse being the creditor's right to claim, entitled to performance.

1.2. THE DEFINITION OF OBLIGATION IN THE DOCTRINE

In the absence of the legal definition of the obligation, the doctrine has emphasized its defining elements.

1.2.1. SOME AUTHORS DEFINE THE OBLIGATION ACCORDING TO THE RULE STATED BY ART 1164 OF THE NEW CIVIL CODE

According to a definition, the obligation is the legal relation between two individuals, a creditor and a debtor, in the virtue of which the creditor may claim from the debtor a service or an abstention[1] (Turcu, 2011).

1.2.2. OTHER AUTHORS ADD THE CONSTRAINT TO THE RELEVANT ELEMENTS STATED BY ART 1164

According to a definition, the obligation is the legal relation in which a party, named creditor, is entitled to pretend from the other part,

[1] I. Turcu, *Vânzarea în Noul Cod civil* (Bucharest: C.H. Beck, 2011).

named debtor, to perform the service or services for which he is indebted, under the sanction of the coercion of the state (Pop *et al.*, 2012)[1].

A similar definition states that the obligation is a legal relation based on which the debtor is required to perform a certain service for the creditor, who, in case of non-compliance, shall be entitled to use certain means of coercion of the state (Vasilescu, 2012)[2].

1.3. OUR DEFINITION

The law organizes multiple behaviors required for an individual. Some of them have as effect the birth of obligations, in their technical meaning, other generate options, faculties, legal or conventional debts etc.

Thus, the *technical obligations* are similar to the *legal* ones, by certain elements: *a*) a certain behavior is required (for the civil obligation – a performance; for the legal obligations – a behavior); *b*) the state sanction for non-compliance; these elements reveal the mandatory feature of the behavior, namely imposed over the will of the individual in case of non-compliance. Otherwise, they are distinguished by *specific elements*; we are being interested only in selecting those of the technical obligation.

1.3.1. WHICH ARE THE DEFINING ELEMENTS OF THIS LEGAL CONSTRUCTION NAMED *OBLIGATION*?

These elements are rationally deduced starting from the finality of the obligation. Which is the utility of the obligation justifying the attention offered by the legislator by placing it under legal protection? Its finality is the imposition of a behavior, namely the performance of a material service. For the achievement in favor of a person of a material real result, of the performance of the service, it is necessary for a person

---

[1] L. Pop and I.F. Popa and S.I. Vidu, *Tratat elementar de drept civil, Obligațiile* (Bucharest: Universul Juridic, 2012).

[2] P. Vasilescu, *Drept civil. Obligațiile* (Bucharest: Hamangiu, 2012).

to be legally subjected, namely to be required over his will (using legal force) the need to perform that service (debt).

In order to define the obligation, we must see it as it is, namely only as a legal relation between a creditor and a debtor, ignoring the extended meaning of the obligation, including the source of the relation and its material finality, the performance of the service.

Thus, *the obligation itself* is a relation between the creditor and debtor placed under the supervision of the law, namely a relation with legal force, which makes the debtor fell constraint to perform the service owed to the creditor, knowing that he risks being compelled at the request of the latter one and be forced to carry it out.

1.3.2. Simplifying, the obligation, regarded in itself is a link connecting with legal force the debtor and the creditor, referring to an object (patrimonial service), hence, being a transition between source and performance (Ghestin *et al.*, 2004)[1].

Considering the specific elements above mentioned we define the obligation as the legal relation between two determined individuals, namely between their patrimonies, in the virtue of which one of them, the debtor, is held to perform a service in the benefit of the other party, the creditor, which he may claim or obtain by constraint, using the public force.

Since 1937 in the French doctrine was announced a trend of objectivizing the legal relation. Then, as well as now, more often, it was supported the idea that the obligation is a legal relation between two individuals, in the same time being a connection between the patrimonies of the two parties, thus alleviating its personal feature (Gaudement, 2004)[2].

---

[1] J. Ghestin and M. Billau and G. Loiseau, *Le régime des créances et des dettes* (Paris : LGDJ, 2004).

[2] E. Gaudement, *Théorie générale des obligations* (Paris: Dalloz Press, 2004).

2. THE ANALYSIS OF THE DEFINING ELEMENTS OF THE OBLIGATION

From the definition of the obligation it results that its defining elements are: the legal connection between the debtor and another person; the performance; the debt; the constraint.

The obligation is a "legal relation" (A) between at least two persons determined at its birth (B)

A. THE OBLIGATION IS A LEGAL RELATION (A1) AND CORRELATIVELY IS A SOURCE OF THE RIGHT TO CLAIM (A2)

A1. THE OBLIGATION IS A LEGAL RELATION.

As it has been earlier mentioned, etiologically the obligation derives from the Latin verb "*ligare*" – to connect. From centuries this word expresses the essence of the obligation, namely the legal situation of the debtor, legally, not morally or religiously, connected person to a certain behavior in the favor of another person.

The explanation of the legal limitation of the *bound* debtor's natural freedom in favor of another person, namely the creditor, the latter one having a power exceeding the normal limits because it is extended over the debtor's freedom, is found in the bases of the obligation.

Since the ancient Roman law, individuals were guided by ethical principles: to not cause damage for another person and to give everyone what he deserves, namely the principle of the proportionality of exchanges. Translating into law this principles, for centuries the law protects the patrimony of individuals by engaging the *liability* of the offender, *forcing* him (legally bounding him) to compensations; respectively, it protects the economic trades, equivalent and useful, forcing to perform (legally bounding) the person, who under the conditions stated by the law, has promised the creditor for a service.

A2. CORRELATIVELY, THE OBLIGATION, THE LEGAL CONNECTION, IS A SOURCE OF THE PERSONAL RIGHT

There is no obligation in itself and for itself than in theory, to surprise a necessary hypostasis for its explanation. The obligation exists only to serve as source of a personal right.

The objective law sanctions those legal situations (legal acts and actions in their limited meaning) offering to the creditor a personal right. When between two persons it is created such situation stated by the law one of them, the debtor, shall be legally bounded by the other person, the creditor, this new situation representing a subjective right for the latter one, consisting in the prerogative of pretending and obtaining the performance of a *practical result* which must be offered by the debtor through his activity: the compensation to which he is compelled to, in the virtue of engaging the liability for the damage caused; or *the performance of the service* promised for the achievement of the equivalent and useful economic trade, under the conditions stated by the law. The *material effect of the obligation*, obtaining *practical results* from the debtor's activity is *the finality*, thus *the reason of the existence* of the notion of obligation.

To achieve the *material effect* it is necessary the legal construction named *obligation*, because the law attaches to it a *legal effect*, the compulsoriness, namely the debtor is compelled (bound) to perform.

B. THE OBLIGATION IS A LEGAL RELATION BETWEEN TWO PERSONS

In its essence, the obligation is a relation between two persons, debtor and creditor, in opposition to the real right which, in its essence, is a connection between a person and an asset, with certain particularities in the area of the real right over another person's asset.

On the other hand we distinguish the area of obligations from that of the legal obligations for which it is not created a relation between determined persons. Both are mandatory, but the latter ones do not have subjects determined at their birth, creditor and debtor.

For instance, “the duty to comply with the rules of behavior stated by the law or the customs and causes no prejudice by his actions or inactions for the rights or legitimate interests of other individuals” (Art 1349 Para 1 of the Civil Code). This rule translates in law a social relation whose main object is the statement of the *general duty for all individuals* to comply with the right or even *legitimate interest* of other individuals. Both the general duty and the obligation are mandatory. In opposition with the obligation, the first is not a relation, a connection, between two determined persons and does not generates a right to claim in the patrimony of a person. It is actually the recognition of the opposability of the *erga omnes* effect of all subjective rights and legitimate interests.

Finally, it is useful to mention that beside the obligation there are other legal relations mandatory between determined persons. These must be distinguished from the obligation based on other criteria.

There are at least 10 types of legal relations: contractual relations, filiation, marriage, alliance, kinship, adoption, paternity, instance, nationality etc., all of these being, as well as the obligation, legal relations between two persons determined in the moment of its creation.

These, or certain effects of them, are distinguished from the obligation based on their object. They do not compel to a performance, but to a behavior. For instance, the contractual relations have as specific element the generation of technical obligations. Also, it generates other effects: e.g. the obligation to information, the obligation to not reveal any information obtained from the conclusion or performance of the contract etc. Same, the legal relation between the spouses generates mandatory behaviors: fidelity, mutual help etc. For all these examples, the behaviors are duties, some conventional, some legal, not technical obligations.

In contrast, the relation between the creditor and debtor represents the *subjective right* of the first to claim an economic service; correlatively, the engagement of the second one to perform that service, named *debt*.

3. THE DEBT (DEBITUM).

3.1. NOTION – *THE SITUATION OF THE DEBTOR TOWARDS THE PERSON FOR WHOM HE IS COMPELLED TO PERFORM A SERVICE IS CALLED DEBT*

The debtor is compelled to perform the obligation, namely is indebted, as well as any other person bounded by the duty to comply with a legal obligation. If he performs his debt, namely if he complies with his duty both persons shall be released from their obligations. The regime of indebting a person is not identical with that of the debtor's duty, but their legal situations are similar, this is why for a good differentiation we must characterize the debt.

For the debtor, to be compelled to perform a service is synonymous with being *indebted*.

The debt is the same thing both for the debtor and creditor, but has different *meanings* (a) and *legal nature* (b) for each of them.

a) *Economically*, for the debtor the burden of performing a service is enlisted in his account as a *passive element, debt (-)* (*debere*, to have less), being a value which must be removed from the patrimony in exchange of a service provided, for instance, the transfer of a right, construction works, medical services, legal assistance etc.

Correlatively, the same burden of performing the service, seen from the perspective of the one receiving it is called *claim*, because until its chargeability (performance) it credits the debtor, thus it is enlisted in the creditor's patrimony as an *active element (+)* because it is being added.

b) The legal nature of the services is different for each of the two subjects.

From the debtor's perspective, of the debt to which he is bound to, the obligation *is not an asset*, but a *legal relation* between two subjects having as object the debtor's activity, economically ratable, which must be *personally performed*. This is why, until its performance, the debt is an *incorporeal* asset.

Only in the moment of its performance it is materialized into an asset, a transferred asset, a work performed etc. Being a personal incorporeal asset it cannot be *assigned to* a third party.

Correlatively, *for the creditor* the claim *is an asset*, an economic value. For him, economically, having an asset worth 1000 RON is the same thing as having a claim worth 1000 RON, thus he can assign it as any other asset. In this meaning, the Strasbourg Court has raised the claim to the rank of object of the right to property, stating that this right, to claim, is an asset according to Art 1 of the Protocol 1 of the ECHR if the debt is well established and can be chargeable.

3.2. PROVISION OF SERVICES, OBJECT OF THE DEBT (OBLIGATION)

a. The debtor's activity, object of the obligation, is named using the general notion of provision of services

This, as object of the debt, delimits the restriction of the debtor's freedom and correlatively of the extension of the creditor's power over the first one's freedom. Essentially for the obligation itself is the fact that a person is subjected, bounded to another person, but this statute is neither limited, nor perpetual, because it is not slavery, but it is generated by the very provision: a service, the creation or transfer of a right.

b. As element of the obligation, precisely as its object, the provision is, in the moment of its generation, a forecasted activity (by the parties or by the law), which is about to be performed, thus its existence is incorporeal, it is not an asset. The provision of services is forecasted by the parties when the debtor has voluntarily engaged, or by the law for his civil liability. The fact that the performance is attached to the parties of a contract does not disinterest the legislator. It is verified by the categories of object and cause, by the theory of the abuse of the law or by fraud in a certain particular obligation.

After its performance, the provision of services represents the material effect of the obligation. By accomplishing the obligation the debt shall be extinguished, only now the benefit shall be materialized into an asset, the debtor's patrimony being diminished with a value: the

creation or transfer of a right (*to give*), of a service, an action (*facere* – to do), an abstentation (*non-facere* – not to do).

c. The conditions for the performance

Being an object of the obligation, the performance, an economic activity to which the debtor is bounded to, his freedom being limited within its boundaries, must be *certain and possible*, because it can also be future if its future existence is insured. It is not an obligation the engagement of a person to perform a symbolic gesture or to be affectionate, because these have no *economic value*. Also, letters of intent are not obligations because are not an economic engagement.

d. Extinction of the debt

If the debtor voluntarily performs his obligation it shall be extinguished. The debtor shall be free.

Being mandatory, the debt paid it is considered to be performed and cannot be refunded, even if the creditor's title is not enforceable, as for the claim to which the right of action has been prescribed.

e. Using the debt as criteria, we differentiate between obligations and legal duties

Both of them translate the mandatory feature, the need to provide a service, but the latter ones (duties) are not debts because their performance may also be non-patrimonial and may not represent a personal right in the creditor's patrimony, cannot be assigned, culprit etc. For instance, legal provisions regarding the obligation to offer first aid, of fidelity between spouses, to submit a tax statement etc., are not debts for the debtor, but *duties* of the person.

4. CONSTRAINT (OBLIGATIO) AND LIABILITY

The voluntary performance of the debt, normal situation met in most relations, extinguishes the obligation. In this case, the obligation between the two parties has been reduced to its stage as debt.

The voluntary non-performance of the debt brings the obligation to the stage of conflict, in which the recalcitrant debtor is sanctioned by the imposition of the performance over his will, by *constraint*.

4.1. CONSTRAINT AS STRUCTURAL ELEMENT OF THE OBLIGATION

The doctrine has emphasized the idea according to which the obligation does not represent only the legal relation between two persons, but also a *legal duty stated and sanctioned by the law* (Poumarêde, 2012)[1].

Unlike the moral rule, which stated an inner sanction, the legal rule is accompanied by an exterior rule, whose application is ensured by the use of public force. For this reason, the obligation is, besides *duty*, the first element, and the *constraint*, the second one.

The notion of obligation does not include in its structure the technique for the performance of the obligation, but only the *sanction*, a mechanism allowing the constraint of the debtor to perform in nature, of if in impossibility, the performance by equivalent for non-performance.

The sanction is an *element* of the obligation, its specificity being the fact that the application of the sanction is *a prerogative of the right to claim.*

4.2. HISTORICALLY.

The constraint has evolved from physical to the one applicable for the debtor's patrimony.

In the classic Roman law the obligation itself contained both elements: the *debt* and the *sanction* for its non-performance. Romans did not know the subjective law, or the right to claim, thus the sanction of the debtor for non-compliance, which was directly applied, without the intervention of the public force, because the obligation itself contained the element of sanction. The mechanism used for the obligation to contain the sanction is nowadays operable by conventional guarantees. The debtor *engaged* himself to perform the debt by *guaranteeing with his*

[1] Gaudement, *Théorie générale des obligations*

own person, thus the non-performance of the debt had as effect the use of the guarantee, the creditor thus becoming the owner of the debtor's person.

In the final phase of evolution of the late Roman law (byzantine) was prohibited the direct performance (private) of the debtor. Thus, the creditor had to address to justice for sanctioning the debtor. Regarding the structure of the obligation, the Romans considered that the right to claim = debt + responsible action. We must recall that in the Middle Age the subjective right was already a known concept.

4.3. THE PREROGATIVES OF EXERCISING THE CONSTRAINT

The legal force of the obligation, *constraining the debtor to perform his debt,* knowing that it he refuses he risks the engagement of the responsibility and the sanction by forced execution, translates the legal force of the right to claim of *the creditor, the power to pretend the performance* (a) *and to request the public authority the coercion for receiving the forced execution* (b) *in nature or as compensations, as an effect of engaging the responsibility* (c). In the absence of the legal force of the obligation, for instance for an obligation for which has been prescribed the right of the creditor to action or to performance, the obligation exists due to the debtor's debt, which is valid, its performance extinguishing the obligation. The absence of the legal force makes inefficient such obligation because the creditor does not have the prerogative of constraining the debtor to perform.

a) The right to performance, offer the creditor the prerogative to request from the debtor the payment of his debt and, if he refuses, the prerogative to use the *coercion*.

The *right to performance* is divided into *a right to ask for the performance of the obligation* and *a right to act in justice*, both being material rights.

- The *right to ask the performance* is a material right connected to chargeability. It can be defined as the right to ask for the immediate

performance of the obligation without being forced to comply with a deadline or to expect for the fulfilment of a condition precedent (The effectiveness of the claim depends on the debt security. A debt security having enforceability offers the creditor the right to directly sue the debtor. Thus, the debt shall be ascertained by a court decision or by a notary public's act. In exchange, the debt ascertained by a document under private signature, even if chargeable, does not offer the right to directly sue the debtor, even if the parties conclude to such power. It must be verified by a judge, the public power, by a legal action, in order to become enforceable).

- In opposition, *the right to sue* is the right to submit a legal action with the purpose of obtaining the performance of the obligation. The legal action is defined by Art 31 Para 1 of the new Civil Procedure Code, as being the right of the owner of a claim to be heard by a judge who will rule if it is grounded or not; and for the opponent, it is the right to debate on the extent to which the claim is grounded. From this legal definition, it results that *the action* is an autonomous right, different than the object of the claim: it is someone's right ask for a rule on the merits, which can be qualified as a procedural subjective right (The *action* is different both from the *material right*, to which it offers the sanction, as well as from the *demand in justice* which represents a materialization of the action: the judge shall rule if the claim is grounded or not, without the existence of an action to represent a prejudice of the trial. The same, the action cannot be synonymous with the demand which, by materializing the action, can be submitted without the plaintiff to really have a right to sue).

b) *Constraint* is a notion specific to obligation translating a species of the legal sanction resulted from the obligation's legal force, which must not be mistaken with the binding force, as principle of the contract.

In general legal relations, the violation of the mandatory behavior entails the liability and sanction for the perpetrator. For the obligation, the refuse of the performance of the debt is sanction with the forced execution by constraint.

No obligation can exist without constraint otherwise the debt would by a simple moral connection. For instance, the political promises or initiation of the negotiations for the conclusion of a contract does not represent an engagement of the parties. In the absence of a legal mandatory obligation, the constraint is not possible. The law states for the negotiations only a legal duty, assuming that the negotiations be carried out with *bona fide* (Art 1183 of the new Civil Code). Both generate moral obligations, an engagement of honor linking the politician to the person for which he undertook.

The right to constraint shall be performed by the coercion of the public authority.

The right to constraint is stated by Art 1516 Para 2 Pct 1 of the Civil Code, according to which *if the debtor does not perform his obligation (duty) or is in delay, the creditor is entitled to request the forced execution of the obligation by coercion*.

c) Responsibility. Performance by equivalent.

The voluntary non-performance of the debt entails the responsibility of the debtor, and by this filter, being found guilty of non-performance he shall be sanctioned with the forced execution by coercion.

The forced execution by coercion shall be performed in nature for instance, the collection of the object which should have been delivered by the debtor. If the enforcement in nature is impossible, the performance shall be made by a financial equivalent (damages, more specifically and suggestively, compensatory damages). This latter form of enforcement by constraint does not changes the obligation, but just its object, subrogating the initial object with a sum of money representing the equivalent of that object, this obligation being possible to be performed, because the patrimony of the person is responsible for the patrimonial passive (Art 2324 new Civil Code).

5. THE ACTUAL CONCEPTION ON THE NOTION OF OBLIGATION

5.1. IF THE DEBTOR DOES NOT PAY HIS DEBT, THE CREDITOR HAS THE POWER TO ASK THE PUBLIC FORCE TO CONSTRAINT THE DEBTOR TO PERFORM

The engagement of the debtor's liability for non-performing his debt within the contentious between the creditor and debtor is solved by a decision, but this contentious relation is not based on a relation different than the one of the debt, as in the Roman law where the performance on the debtor was based on the accessory agreement of guarantee by which the debtor personally engaged himself in case of non-performance answering with his own person.

In the new Civil Code, as well as in the old one, the decision for convicting the debtor to pay damages for non-performing his debt is given based on the unique connection on which the debtor is bounded, of his debt. By his decision, the judge confirms the debt to which the debtor is bounded by and forces him to perform it by equivalent. The decision does not extinguish the legal connection based on which the debtor is bounded, in order to generate a new one.

Therefore, the new Civil Code maintains the subjective and unitary conception of the obligation. In our domestic law, the obligation absorbs the debtor's debt and the constraint in *a single relation* (legal relation of obligation), having a *subjective* feature.

In our opinion there is no difference of essence between these two theories. What is important is the fact that all authors agree on the essential elements of obligation, on the fact that the obligation is an relation organized by the law, consisting in the debtor's duty to have a certain behavior, to perform the service, its voluntary non-performance allowing the activation of another element of the obligation, the constraint, which offers the creditor the right to ask the public authority to use the force in order to obtain his performance.

5.2. ALSO, WE MUST NOTE THAT THOUGH THE OBLIGATION REMAINS IN THE NEW CIVIL CODE AS A *PERSONAL AND SUBJECTIVE* RIGHT, THERE ARE CERTAIN ASPECTS OF OBJECTIFICATION SUCH AS THE REGULATION OF TAKING OVER THE DEBT.

It is true that it is necessary the agreement of the creditor, but this cessation is more flexible, unlike the former technique, to which it took the place, delegation of the debt. It thus tends not only that the claim to be a transferable asset, but also the obligation, thus mitigating the personal feature of the obligation.

But, it did not go all the way by recognizing for the debtor the right to force the creditor to accept the cessation of the debt, using the German law model.

Are being maintained the aspects related to objectification, empowerment of the obligation from the former Civil Code: the movement of claims, the liability not being personal, but patrimonial, thus one can say that the obligation is not just a relation between persons, but also between their patrimonies, mitigating the subjective feature of the obligation.

BIBLIOGRAPHY

Books

1. Gaudement, E.*Théorie générale des obligations.* Paris: Dalloz Press, 2004.
2. Ghestin, J. and M. Billau and G. Loiseau. *Le régime des créances et des dettes.* Paris : LGDJ, 2004.
3. Pop, L. and I.F. Popa and S.I. Vidu, *Tratat elementar de drept civil, Obligațiile.* Bucharest: Universul Juridic, 2012.
4. Turcu, I. *Vânzarea în Noul Cod civil*. Bucharest: C.H. Beck, 2011.
5. Vasilescu, P. *Drept civil. Obligațiile*. Bucharest: Hamangiu, 2012.

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
No.2 (21), Year XVIII, 2019, pp. 58-67

BRIEF CONSIDERATIONS ABOUT THE RIGHT TO EDUCATION AND THE ARTIFICIAL INTELLIGENCE

Marius VACARELU[1]

Abstract:

In the last years the new technology of Artificial Intelligence forced humanity to think much more about its future, because the simple idea of a stronger intelligence than the human mind become from a science-fiction novel a possibility and almost a reality.

This change can occur in a very short period of time, shorter than any other transformation that humanity has ever experienced. In this huge wave of changes, education and the right to education are beginning to play a central role in society, because the challenges that artificial intelligence brings can only be understood through the paradigm of population education. The text that we bring to your attention is trying to formulate some ideas about this legal and social relationship.

Key words: *The Right to Education; Artificial intelligence; Public Law; Transformations; Adaptation; New Paradigm.*

INTRODUCTION

Each generation of humanity has its specific terms from the point of view of scientific analysis. The centuries have always differed in the light of the concerns of those who were scientists, especially in relation to the ability of political leaders to understand and support them in their endeavours.

[1] **Lecturer PhD, National School of Political and Administrative Studies, Bucharest (Romania), email: marius333vacarelu@gmail.com.**

The invention of printing in 1456 allowed for the faster spread of scientific ideas and concepts, changing over time not only the way in which young people were trained in those needed for psychic and professional development, but also the relationship between the political class and the governed. The latter were after the advent of printed books better informed about the progress made in other countries, and wanted to apply the successful models in their territories.

The emergence of the transmission of messages through which allowed the emergence of a new paradigm of education and relations between the state and the citizen. In the first years of their appearance, the radio and television stations also fulfilled important educational functions – through conferences held by great intellectuals, by programs of popularizing the science, of the different technological concepts that appeared in the 19th and 20th centuries, so necessary for the development of industrial capacities of states, etc.

The human mind worked just as well in the following years, first creating the magical network of the internet, and after almost half a century a new form of intelligence, almost similar to the human mind. From this moment, it is obvious that the legal challenges brought by the new technologies are unique, new and – maybe – almost impossible to regulate.

1. It is strange that, in the study and teaching of history, so little attention is paid to the history of technology. Political and constitutional history, economic history, naval and military history, social history – all are well represented and adequately stressed. The history of technology is neglected in comparison yet, in a sense, it lies behind them all. Technology is all around us: we live in a world in which everything that exists can be classified as either a work of nature or a work of man. There is nothing else. We are concerned here with the works of man, which are based on technological and, to some extent, aesthetic factors. It is a sobering thought that every man-made object of practical utility has passed through the process of conception, testing, design, construction,

refinement, to be finally brought to a serviceable state suitable for the market[1].

Technological advance through history predates the recent *digital era* and *computers* to previous centuries that saw radical change in political and social beliefs, as well as the spread of political power and material wealth through changing technological development in society[2].

The industrialization of the west and east of the global is a story of social and economic development that took divergent paths driven by geography and local regional power that grew with technological. It is generally accepted that the term "Industrial Revolution" refers to the period from the 1770s to the middle of the 1870s, where technological change enabled humanity to harness mechanical and electrical forces for its own endeavours. As a result, there were many changes in manufacturing and production methods, and working practices, which created new modes of transportation and provided a new kind of infrastructure for much of society[3].

If we want to express in a synthetic formula the whole history of humanity, we could say that this is in fact the continuous flight of each one of us to ensure an easier life, and in this sense the improvements in the standard of living have been made exclusively by the technologies we created.

2. At the same time with the discovery, adaptation or creation of different technologies, man had to live in increasingly dense demographic communities, and as a result of this process of concentration of people appeared moral norms and then legal norms. If the moral norms had a wider applicability, but also a more precise formulation of the prohibitions, the science of law took thousands of years to reach the useful clarifications of the capacity of understanding of

---

[1] Ian McNeill (ed), *An Encyclopaedia of the History of Technology* (Routledge: 2002), 1.

[2] Mark Skilton and Felix Hovsepian, *The 4th Industrial Revolution. Responding to the Impact of Artificial Intelligence on Business* (Palgrave Macmillan: 2018), 3.

[3] Mark Skilton and Felix Hovsepian, *The 4th Industrial Revolution. Responding to the Impact of Artificial Intelligence on Business* (Palgrave Macmillan: 2018), 4.

the majority of the people of a human community. The moral could be expressed in simple words, but the legal norm had from the beginning the disadvantage of interpretation, because it came to the world only after setting a minimum system of implementation, which was from the beginning subject to the fluctuations brought by the power struggles.

The moral norm was clearer, but less cases of human life were applied, while the system of law was forced – in relation to the needs of local and state power – to extend into almost all sectors of human life. As a result of this expansion, the powerful states and localities created population control systems, which were expressed in different forms, of which the most powerful was the fiscal one. The fiscal pressure of the political-administrative power was often a cause of impoverishment of the population, which had to undertake several activities to avoid the oppression produced by taxes, and the technological development was the surest method of growth. A new technology first brought an increase in the income of the creator / owner / use, and that acquired patrimonial advantage allowed him access to a higher economic and political class, less vulnerable to fiscal pressure.

Governments that understood the former as a larger group of wealthy citizens bring more peace of mind to their policies than those who feared the people. Understanding the benefit of prosperity was difficult, but more complicated was finding ways by which this political-economic desire could be achieved. However, the beginning of the second millennium drew the right line of development of nations, this being education, and in this sense we noted that starting with the thirteenth century in Europe, universities were created that would ensure the growth prospects of nations. Time led – with all the difficulties raised by dictatorial or incompetent governments – to the generalization of the need for education, which turned into law recognized by lawmakers.

As is often the case in human life, the need to educate the population was made aware even by dictatorial regimes when they faced more democratic states. The latter were less aggressive, benefiting from a greater degree of freedom in economics and thinking, which produced more effective technologies not only in the civilian industries, but also in the weapons industries, and these military advances allowed the

democracies to resist or to defeat the armies of the states led by dictators. The technological imbalance was correctly understood as having causes in the development of education, although only the emphasis on education was not sufficient: for a harmonious development of a society, a functional relationship is needed between protecting the rights of citizens and promoting a well-funded education system.

3. The generalization of the idea of education was achieved in the second half of the nineteenth century, and since the first world war it has not been contradicted anywhere.

International flows of goods and services, capital and people have intensified, a phenomenon prompted by technological progress and falling transport costs, as well as improvements in communications, leading to both commodity and factor price convergence.

The generalization of education was accompanied by a decrease in its costs for elementary levels, as well as a decrease in the price of books. The prints have exploded in the field of beauty, and the profits obtained here have allowed the publishers to support some of the scientific publications, thus contributing to the spread of patents and technological patents. Over time, economic development has made most technologies cheap and accessible to almost anyone on the planet, in relation to increasing the storage capacity of information brought by the invention of computers.

This size of storage spaces is corroborated with the figure of over 4.39 billion Internet users registered at the end of 2019, who have access in one form or another to the huge numbers of the virtual world space: 2.5 quintillion bytes created per day[1]. Suddenly, science was given access to the largest library possible, the human intellect being able to develop in a way never before. But this huge amount of information has made

[1] Bernard Marr, *How Much Data Do We Create Every Day? The Mind-Blowing Stats Everyone Should Read*, available at https://www.forbes.com/sites/bernardmarr/2018/05/21/how-much-data-do-we-create-every-day-the-mind-blowing-stats-everyone-should-read/, consulted on 29 November 2019.

possible the creation / aggression of a new form of intelligence, unique in the evolution of humanity, namely artificial intelligence.

4. Artificial intelligence creates problems in all areas of human life, because it is based on a huge amount of information, impossible to assimilate into a single human brain. In this situation, it is not surprising the decision of a go champion (strategy game popular in China and Japan) to abandon the competitions, considering that human intelligence can no longer cope with the artificial one[1].

If artificial intelligence has reached the stage where it can defeat the human mind in sports competitions - in fact, these are fantasy models applied in a fixed scheme, regulated by different federations – it will be important to imagine what strategies the countries want develop to control this new form of "thinking".

For our text, however, it is important to understand what the consequences are on the learning processes and the legal norms that regulate the education systems of the developed countries, because they will face the first with the consequences of this new form of intelligence – and the poorest states will apply later the techniques that have been successful.

Artificial intelligence already has a heavy influence on individuals and societies, and we need to develop critical perspectives on artificial intelligence issues. If teachers are trained in artificial intelligence use, it will help prevent technology abuses. Importantly, for artificial intelligence to make a real contribution to academic success, and for all students, the teacher's role remains as central as ever, perhaps more than ever. Because intelligent robots will transform tomorrow's workplaces, children should begin preparing for the new reality as early as primary school. The technology players must not be allowed to have the only say in all this. We have seen that artificial intelligence has

[1] Anthony Cutbertson, *World champion go player quits because AI has become too powerful*, available at https://www.independent.co.uk/life-style/gadgets-and-tech/news/go-player-world-champion-quits-ai-deepmind-lee-se-dol-a9222116.html, consulted on 29 November 2019.

penetrated all the education spheres, in the form of intelligent books, web browsers, education apps, and learning platforms, to name a few. The question therefore arises: what is our vision for the schools of the future? Will the technology giants be in sole charge of the ways that artificial intelligence is used for learning? Or will students and teachers be able to ask questions and provide clear, constructive, responsible, and ethical guidelines for how technology is used[1]?

5. The legal framework of artificial intelligence has to answer concretely some difficult questions.

First, the degree of its permeability must be established in school systems, more precisely, at what age should students have access to this new technology? The question is especially important, because used from a very young age, certain skills needed for the adult will be installed later (or maybe never), because the young student will rely exclusively on artificial intelligence in solving all current situations.

The answer to this question is very important, in relation to a particular aspect present in this century, namely the penetration and deterioration of the functioning of computer systems (hacking). What will happen to a person who is taught very early to rely on artificial intelligence when this technology is altered by the action of malicious people?

We consider that the best answer to this question is that of the restricted use of artificial intelligence, it being necessary to first form those adult skills. Internet addiction is today considered a mental illness[2], and it is installed on any person, regardless of their level of education. In this situation, it is quite easy to predict that young students will quickly become dependent on artificial intelligence, and as a result the perception

---

[1] Thierry Karsenti, *Artificial intelligence in education: The urgent need to prepare teachers for tomorrow's schools*, available at http://www.karsenti.ca/v27_n01_a166.pdf, consulted on 29 November 2019.

[2] Christina Gregory, PhD, *Internet Addiction Disorder*, available at https://www.psycom.net/iadcriteria.html, consulted on 29 November 2019.

of reality will be altered, implicitly the quality of social, economic, political relations, etc.

For this reason, I believe that establishing an age threshold close to that of the civilian major could prevent more negative consequences of a psychic nature. The human personality must be formed in most of its cadres without the intervention of cars, precisely in order to be able to acquire the responsiveness in the event that they fail or cease to function.

The second problem to be regulated by lawmakers is that in no country is access to the most advanced technology the same: the highly developed cities economically always have an advantage in competition with the other localities of the country. In this situation, it is necessary that the legislation provides for ways to achieve / maintain equal opportunities for all students in a country; and if this imperative is not met, the company will be fractured in relation to the access to technology and the jobs created based on it.

The third problem that the legislators have to consider is that of exams and competitions for access to the best schools and universities in a country. It is obvious that there can be no equal competition between a young man who has used artificial intelligence and one who has not had access to it only sporadically, and this difference would make a competition not give equal chances to the candidates. Even if life reveals that the family and school environment we have experienced in the first years is important, the consequences of accumulating major gaps between students in relation to the use of artificial intelligence can lead to negative effects not only at the time of admission to universities, but also afterwards, in adult life.

The principle of neutrality and the principle of equal opportunities and treatment become in the new technological equation more important than ever, because too strong social stratification will ultimately lead to the accumulation of tensions in the national communities that can lead to violent disturbances of the state order.

CONCLUSION

There is no doubt that the problem of the relation between education and artificial intelligence is a complex and delicate one, and in this respect we must observe that all other technologies invented by humans were under their total control. If, in relation to the total control exercised, there were numerous criticisms and problems in the implementation of those technologies, the ability of artificial intelligence to store knowledge at a higher level of the human mind, as well as self-reproduction, makes the differences between countries and individuals within some communities emphasize social dissatisfaction.

In relation to the demographic situation of the planet, the race for resources and the accumulation of dissatisfaction with governments, the uncontrolled use of artificial intelligence can pave the way not only for great economic progress, but also for very harsh dictatorships, which will strictly dominate their citizens precisely through manipulation of this new technology. The education and the legal framework that organizes it will have to respond to the emergence of a new style of competition between young people of different ages, as well as between different groups of adults who are not adapted to the new technologies.

The failure of a society begins with the failure of education, and the first concern of the legislators must be to promote a level as close as possible between the educational units of the countries, bringing it as close to the typology of the elite schools. Thus, artificial intelligence becomes a factor that would favour the flattening of the pyramid of values towards its upper part, which is very difficult and – in relation to the whole history of humanity – never before.

BIBLIOGRAPHY

Books

1. McNeill, Ian (ed). *An Encyclopaedia of the History of Technology*. Routledge: 2002.

2. Skilton, Mark and Felix Hovsepian. *The 4th Industrial Revolution. Responding to the Impact of Artificial Intelligence on Business*. Palgrave Macmillan: 2018.

Articles in an online journal

1. Cutbertson, Anthony. *World champion go player quits because AI has become too powerful*, https://www.independent.co.uk/life-style/gadgets-and-tech/news/go-player-world-champion-quits-ai-deepmind-lee-se-dol-a9222116.html;
2. Gregory, Christina. *Internet Addiction Disorder*, https://www.psycom.net/iadcriteria.html;
3. Karsenti, Thierry. *Artificial intelligence in education: The urgent need to prepare teachers for tomorrow's schools*, http://www.karsenti.ca/v27_n01_a166.pdf;
4. Marr, .Bernard *How Much Data Do We Create Every Day? The Mind-Blowing Stats Everyone Should Read*, https://www.forbes.com/sites/bernardmarr/2018/05/21/how-much-data-do-we-create-every-day-the-mind-blowing-stats-everyone-should-read.

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
No.2 (21), Year XVIII, 2019, pp. 68-77

THE SERVICES OF GENERAL ECONOMIC INTEREST AND THE RIGHT TO A HEALTHY ENVIRONMENT WITHIN THE EUROPEAN UNION

Viorica POPESCU[1]

Abstract:

The insurance of a high level of life in a healthy environment represents one of the public objectives assumed by the European Union. The European life model can be achieved only in accordance with the development of the services of general interest, including of the economic ones. The evolution of the needs and expectations of the users have imposed more and more obligations both for public authorities as well as for private suppliers in areas such as transportation, communications, energy and natural gas. The quality of the services of general economic interest shall be analyzed including in relation with the means in which the human's fundamental rights, among which is enlisted the right to a healthy environment.

The current study aims a brief analysis of the means in which the European Union having the support of the judiciary, tries to insure the compliance of the European citizens' rights by the providers of services in this extremely sensitive area of environmental protection.

Key words: *services of general economic interest; environment; fundamental rights; European Union; European Court of Human Rights; Court of Justice of the European Union.*

The adoption of the Lisbon Treaty[1] has allowed the insurance of a better protection of the services of general interest within the European

[1] **Lecturer PhD, Faculty of Economic Sciences and Law, University of Pitesti, counselor, Pitesti (Romania), email: vioricapopescu@gmail.com**

Union, given their role in the achievement of the European lifestyle model.

The importance of the services of general economic interest resides also from the Treaty on the Functioning of the European Union, which in Art 14 states that they have the role in promoting social and territorial cohesion within the Union.

Unlike the national legislation which preponderantly uses the term of public services[2], the communitarian legislation has replaced this term with the one of services of general economic interest[3]. These are not defined as such nor by the Treaty nor the secondary legislation.

Nevertheless, it has been stated that the services of general economic interest comprise the commercial services and the non-commercial services which are the object of certain obligations of public service, especially because of the general interest they serve. The services of general economic interest are economic activities generating results for the general public use which the market would not provide (or would provide in other conditions regarding the quality, safety, accessibility, equal treatment or universal access) without public intervention. The public service obligation is imposed on the provider by way of an entrustment and on the basis of a general interest criterion

---

[1] The Lisbon Treaty has been published in the Official Journal of the European Union No C83/ 30 March 2010 and is available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2010:083:FULL&from=EN accessed on 29 November 2019

[2] See also the definition given by Prof Paul Negulescu, according to which the public service is "an administrative organism created by the state, county or commune, with determined competences and powers, with financial means originating from the general patrimony of public administration, laid at the public's disposal to satisfy with regularity and continuity a general need, to which the private initiative could provide only a limited and intermittent satisfaction" – Paul Negulescu, *Tratat de drept administrativ* (Bucharest: Romanian United Press, 1925), 621

[3] The only exception is the one from Art 93 of the TFEU in the area of transportation, where the phrase "public service" is being used.

which ensures that the service is provided under conditions allowing it to fulfil its mission[1].

PRINCIPLES GOVERNING THE SERVICES OF GENERAL ECONOMIC INTEREST

The principles of the Union regarding the services of general economic interest in the meaning of Art 16 of the TFEU especially includes:

- The essential role and discretionary wide competences of national, regional and local authorities regarding the provision, functioning and organization of the services of general economic interest so that it can better answer the users' needs;
- The diversity existing at the level of different services of general economic interest and the differences between the needs and preferences of the users, which may result from different geographic, social or cultural circumstances;
- A high level of quality, safety and accessibility, equal treatment and promotion of universal access and users' rights[2].

The principle of the access for all citizens to services of general economic interest it is also mentioned by Art 36 of the Charter of Fundamental Rights of the European Union[3].

The White Paper on services of general interest mentions the following principles: universality, continuity, quality, accessibility and consumer protection[4].

---

[1] See also the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A Quality Framework for Services of General Interest in Europe, published in the Official Journal of the European Union COM (2001) 900 final

[2] Protocol on the services of general interest of 13 December 2007, published in the Official Gazette of Romania, No 107/12 February 2008

[3] Charter on Fundamental Rights of the European Union available at https://fra.europa.eu/en/charterpedia

[4] White Paper on services of general interest – Communication from the Commission to the European Parliament, The Council, The European Economic and Social

THE RIGHT TO A HEALTHY ENVIRONMENT

Given the fact that the satisfaction of the general interest represents the purpose of the establishment of these services, they must permanently adapt to social desiderates including the one on environmental protection[1].

The right to a healthy environment, without any pollution is a fundamental human right stated by the Charter of the Fundamental Rights of the European Union[2].

The European Court on Human Rights has stated that the right to a healthy environment is included within the notion of compliance with the right to family and private life, as it is mentioned by Art 8 of the Convention[3], which states that:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

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".

The performance of efficient and of high-quality services of general interest guaranteeing the wellbeing of the citizens represent one

---

Committee and The Committee of the Regions Brussels, 12.5.2004, published in the Official Journal of the European Union COM (2004) 374 final

[1] Communication from the Commission – Services of general interest in Europe, published in the Official Journal of the European Union 2001/C 17/04

[2] Art 37 of the Charter of Fundamental Rights of the European Union states that "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development".

[3] European Convention on Human Rights has been adopted in Rome on 4 November 1950 and is available at https://www.echr.coe.int/Documents/Convention_ENG.pdf, accessed on 2 December 2019

of the purposes of the European Union mentioned by the Green paper on services of general interest[1].

In the process of providing services of general interest, the public authorities, but also the private companies have the obligation to constantly adapt to economic, technological and social aspects. Among these obligations it is the one of not polluting the environment. The requirements for environment protection shall be integrated within the definition and application of the Union's policies and actions, especially for the promotion of sustainable development[2].

The European Union's legislation in the area of environment includes the protection of human health among its objectives, in accordance with Art 35 of the Charter of the Fundamental Rights of the European Union. Human health is mentioned expressly by some of the most important legislative documents of the European Union in the area of environment, such as the Framework-Directive on waste (2008/98/EC)[3], Framework-Directive on Water (2000/60/EC)[4] and the Directive (EU) 2016/2284 on the reduction of national emissions of certain atmospheric pollutants[5].

Environmental and economic considerations are complementary, greening the economy, including the services of general economic interest by reducing the environmental costs through a more efficient use of the resources while the new ecological technologies and techniques generate new jobs, giving a new impulse to the economy and strengthening the competitiveness of the European industry.

Moreover, a series of services such as transportation, energy, gas, urban planning must be reshaped in order to insure a perfect balance

---

[1] Green paper on services of general interest, published in the Official Journal of the European Union COM/2003/0270 final, available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52003DC0270&from=RO, accessed on 2 December 2019

[2] Art 11 of the TFEU, published in the Official Journal of the European Union C326/47 of 26 October 2012

[3] See Art 13

[4] See the definition of "pollution" stated by Art 2 Para 33

[5] See Art 1

between the satisfied public need, the need for development and the important effects upon the environment.

ENVIRONMENTAL PROTECTION IN THE VISION OF THE COURT OF JUSTICE OF THE EUROPEAN UNION AND OF THE EUROPEAN COURT ON HUMAN RIGHTS

Because the European Union considers the environment as being the system supporting our lives and it represents a common patrimony, and its preservation, protection and improvement represents a European common value, the communitarian legislation in the area of environment have established a common framework of obligations for public authorities and rights for the public[1]. In this meaning was adopted the Aarhus Convention on access to information, public participation in decision-making and access to justice on environmental matters[2].

The European legislation in the environmental area includes the legislation contributing to the fulfilment of the following political objectives in the area of environmental protection stated by Art 191 of the TFEU:

- The preservation, protection and improvement of environmental quality; the protection of public health;
- The prudent and rational use of natural resources;
- The international promotion of measures designed to counterattack the environmental issues at a regional or worldwide scale and especially the fight against climatic changes.

This legislation creates a wide range of obligations which the competent authorities of the Member States shall have to fulfil, being relevant for significant categories of decisions, acts and omissions within their responsibility.

---

[1] Notices from European Union Institutions, Bodies, Offices And Agencies – Commission Notice on access to justice in environmental matters, published in the Official Journal of the European Union 2017/C 275/01

[2] The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, published in the Official Journal of the European Union L 124/4

Within the European Union, the litigations related to the violation of the right to a healthy environment have been solved either by the Court of Justice of the European Union or by the European Court of Human Rights, in relation to the competence of each court.

Regarding the Court of Justice of the European Union, it provides the unitary interpretation of the primary and secondary European legislation, and given the fact that this legislation represents a separate and autonomous legal order, the Court has approved and drafted in this area certain general principles, such as the principle of equivalence and effectiveness in order to define and support it. Moreover, based on the Aarhus Convention, the Court has decided in matters such as:

- Access to justice;
- The active procedural quality for the protection of material rights;
- The applicability of the jurisdictional control[1].

The European Court of Human Rights has ascertained the violation of the right to a healthy environment in the process of performing the economic activities and compelled the Member States to compensations. In this meaning, we mention the following cases:

- Application 6586/03 – Brânduşe *v* Romania – strong olfactive pollution, even if it did not affect the plaintiff's health, but given the duration for which he had been subjected represents a violation of Art 8 of the ECHR, because his health quality had been affected in a way which harmed his private life[2];

- Application Lopez Ostra *v.* Spain, Para 51, the Court concluded that the serious damages brought to environment may affect the

[1] Application C-243/15, LZ II – the CJEU has established requirements regarding the active procedural quality for applications exceeding the area of application of the secondary legislation of the European Union based on Art 47 of the EU Charter of Fundamental Rights corroborated with Art 9 Para 2 of the Aarhus Convention in case of decisions, acts and omissions for which shall apply the provision mentioned by Art 6 of the Aarhus Convention regarding public participation; Application C-41/11, Inter-Environment Wallonie.

[2] Application 6586/03 – Brânduşe *v.* Romania, available at https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-2698080-2947397%22]}, accessed on 2 December 2019

wellbeing of an individual and may deprive him of the use of his house causing serious prejudice to private and family life, without seriously endangering the health of the concerned person[1];

- Application Hatton and others *v.* The United Kingdom, Para 96, the Court reiterated that every individual has the right to respect for his or her house and the violation of this right can be materialized not only by material or corporal prejudices, but also by immaterial damages, such as noise, emissions, smells or any other forms of inferences. If the violation is serious, the person may be deprived of the right to respect of his or her domicile, but that he or she cannot enjoy the comfort and pleasure generated by his or her domicile[2].

CONCLUSIONS

The right to a healthy environment represents not only a fundamental right of the European citizen, but also in the same time an obligation of the authorities and providers from the private sector of services of economic interest.

The improvement of the quality of these services cannot be achieved outside the communitarian policies insuring the environmental protection and thus, a sustainable development within the Member States.

The protection of the fundamental rights of the European citizens is supported not only by the European Union's primary and secondary legislation, but also through judicial organisms such as the Court of Justice of the European Union and the European Court of Human Rights. The judicial practice of these two organisms in the area of environmental protection has the role to an essential safety net for citizens against any form of abuse coming from public authorities within the Member States.

---

[1] Application Lopez Ostra *v.* Spain, available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57905%22]}, accessed on 2 December 2019

[2] Application Hatton and others v. The United Kingdom is available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-61188%22]}, accessed on 2 December 2019

In an economy based on knowledge and technology, the public authorities within the European Union have the obligation to provide efficient, innovative and flexible services of general public interest comprising values such as quality, safety and compliance with users' rights.

BIBLIOGRAPHY

Books

1. Negulescu, Paul. *Tratat de drept administrative*. Bucharest: Romanian United Press, 1925.

Legislation

1. Lisbon Treaty, published in the Official Journal of the European Union, C83/30 March 2010
2. Treaty on the Functioning of the European Union published in the Official Journal of the European Union, C326/47 of 26 October 2012
3. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A Quality Framework for Services of General Interest in Europe, published in the Official Journal of the European Union COM (2001) 900 final
4. Protocol on the services of general interest of 13 December 2007, published in the Official Gazette of Romania, No 107/12 February 2008
5. European Charter on Fundamental Rights
6. White Paper on services of general interest – Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and The Committee of the Regions Brussels, 12.5.2004, published in the Official Journal of the European Union COM (2004) 374 final

7. Communication from the Commission – Services of general interest in Europe, published in the Official Journal of the European Union 2001/C 17/04
8. European Convention on Human Rights, adopted in Rome on 4 November 1950
9. Green paper on services of general interest, published in the Official Journal of the European Union COM/2003/0270 final
10. Framework-Directive on waste (2008/98/EC)
11. Framework-Directive on Water (2000/60/EC)
12. Directive (EU) 2016/2284 on the reduction of national emissions of certain atmospheric pollutants
13. Notices from European Union Institutions, Bodies, Offices And Agencies – Commission Notice on access to justice in environmental matters, published in the Official Journal of the European Union 2017/C 275/01
14. The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, published in the Official Journal of the European Union L 124/4

Case Law

1. Application C-243/15, LZ II. Ruled by the Court of Justice of the European Union
2. Application C-41/11, Inter-Environment Wallonie, ruled by the Court of Justice of the European Union
3. Application 6586/03 – Brânduşe *v.* Romania ruled by the ECHR
4. Application Lopez Ostra *v.* Spain, ruled by the ECHR
5. Application Hatton and others *v.* The United Kingdom, ruled by the ECHR

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
No.2 (21), Year XVIII, 2019, pp.78-86

EXERCISE OF THE RIGHT OF HAVING PERSONAL RELATIONS WITH THE CHILD IN THE EVENT OF DISAGREEMENT BETWEEN PARENTS. PRACTICAL ASPECTS OF THE ROMANIAN COURTS

Georgeta-Bianca SPÎRCHEZ[1]

Abstract:

This study mainly examines how the Romanian courts have handled cases that essentially concerned the rights of the parent separated from the child. The selected jurisprudential examples aim to ensure a balance between the interests of the child and those of the parent where the child does not live permanently, revealing that there may be situations where the child's interest prevails over that of his parent. Thus, the magistrates of such cases based their decisions on criteria such as: the age of the minors, their health status, the parent-child distance, the structure of the parent-child relations, the minimization, as far as possible, of the changes in the life program of the children, concluding, in most cases, that the active involvement of both parents has undeniable benefits for the child's development. In court cases, which involved solutions to limit the relations between a parent and his minor child, the judge of the case, in order to ensure the positive obligation of the State to guarantee the right to family life imposed by international documents, had to apply the proportionality standard.

Key words: *rights of the parent separated from the child, best interests of the child, visitation schedule, family life*

[1] **Assistant Lecturer, PhD., Transilvania University of Brașov, Faculty of Law, Brasov (Romania), email: georgeta-bianca.spirchez@unitbv.ro.**

INTRODUCTION

In accordance with article 401 of the Civil Code[1], the parents separated from their children have the right to have personal relations with them, and in case of disagreement between parents, the manner in which this right is exercised is determined by the guardianship court.

According to art.17 paragraph 3 of Law no.272/2004 concerning the protection and promotion of the rights of the child[2], the exercise of this right may only be limited in cases where the court decides in this regard, considering that there are solid reasons for endangering the physical, mental, intellectual or moral development of the child.

Law no. 272/2004 indicates, in art.18, the practical modalities of achieving personal connections between parents and their children, as follows:

- meetings of the child with the parent;
- visiting the child at his habitual residence;
- hosting the child, for a certain period, by the parent with whom the child does not habitually live, with or without the supervision of the manner in which the personal relations are maintained, according to the best interests of the child;
- correspondence or another form of communication with the child;
- transmission of information to the child regarding the parent who has the right to maintain personal relations with the child;
- transmission by the person with whom the child lives, of information regarding the child, including recent photographs, medical or school evaluations, to the parent who has the right to maintain personal relations with the child;

We must also consider, in accordance with Article 20 of the Constitution of Romania[3], the fact that the provisions of national law

---

[1] Law no. 287/2009 republished in the Official Gazette of Romania, Part I, no. 505/July 15, 2011, as subsequently amended and supplemented

[2] Republished in the Official Gazette of Romania, Part I, no.159/March 5, 2014, as subsequently amended and supplemented

[3] Revised by Law no. 429/2003; the text of the revised Romanian Constitution was published in the Official Gazette of Romania, Part I, no.767/October 31, 2003

invoked must be interpreted also by reference to the treaties regarding the fundamental human rights, to which Romania is a party. Specifically, we will refer to Article 8 of the European Convention on Human Rights, under which the European Court of Human Rights has decided that the possibility of the parent and the child to enjoy each other's company is a fundamental element of family life, and the national measures that hinder this possibility are an interference with the right protected by article 8 of the Convention[1].

In this regulatory context, we propose below, to carry out a jurisprudential examination to reveal the reasoning of the courts and the criteria considered by them during the settlement of such requests aimed at the parent's right to receive adequate measures from the State to be with his child.

CRITERIA CONSIDERED BY THE COURT IN THE APPLICATIONS CONCERNING THE RIGHTS OF THE PARENT SEPARATED FROM HIS CHILD

The right of the parent to have personal connections with his minor child is recognized considering the best interest of the child.

In accordance with art.2 para. 2 of Law no. 272/2004, "the best interest of the child is confined to the child's right to normal physical and moral development, socio-affective balance and family life". Also, article 2 paragraph 6 of this normative act indicates the issues to consider in determining the best interest of the child:

- the needs of physical, psychological development, education and health, security and stability and belonging to a family;
- the opinion of the child, according to the age and degree of maturity;

[1] see, in this regard, the available Guideline regarding Article 8 of the European Convention on Human Rights available [Online] http://ier.gov.ro/wp-content/uploads/2019/04/Ghid_art_8_31.12.2018.pdf

- the child's history, considering, in particular, situations of abuse, neglect, exploitation or any other form of violence against the child, as well as potential risk situations that may occur in the future;

- the ability of the parents or persons that will take care of the child's growth and care to meet his practical needs;

- maintaining personal relationships with the persons to whom the child has developed attachment relations.

As rightly indicated in the doctrine[1], the application of the principle stated in a practical factual situation involves contextual evaluations and assessments, involving the child in any administrative or judicial proceedings concerning him. Therefore, in the summary[2], three categories of criteria were retained according to which decisions should be made regarding children: the needs of the child, his opinion, according to the age and maturity, and the ability of the parents to meet the needs of the child. In addition, we will refer to some specific examples, extracted from the practice of the Romanian courts, concerning the visitation program established by the court.

OPTIMAL VALORISATION REGARDING THE RIGHT OF THE PARENTS AND THEIR MINOR CHILDREN TO MAINTAIN PERSONAL RELATIONS

The first aspect that we intend to address is that of the (in)opportunity of limiting the right of one parent to have personal connections with the minor only at the other parent's home, respectively only in the presence of the other parent.

In consideration of such cases, the courts[3] considered the purpose of the visitation schedule – that is to maintain a stable and normal

[1] E. Florian, *Dreptul familiei. Ediția a 4-a* (Bucharest: C.H. Beck, 2011), 11-12

[2] O. Ghiță and S. Cercel, „Interesul superior al copilului", *Revista română de drept privat* no.3 (2018): 135.

[3] Bucharest Court of Appeal, Civil Section III and for cases involving minors and family, Decision no.143 / 15.02.2016, available [Online] in the database www.rolii.ro

affective connection between the child and the parent to whom the child does not have a habitual residence.

From this perspective, in some situations, conducting the visitation schedule at the child's residence may prove inefficient for strengthening parental ties, intervening conflicts between parents of the minor, creating a tense climate, the strained relations of the former partners having detrimental effects on the child's development.

These may be, therefore, grounds for the judges to appreciate that maintaining a visitation schedule of the minor in such conditions "is devoid of purpose and proven to be an unsatisfactory formula in terms of development of a normal relation between the parent and his child", stealing away the child's ability to express himself naturally and to develop his own perception of the character and qualities of the parent with whom he does not reside.

Such a conclusion applies whenever the relations with the parent from which the child is separated do not endanger the physical, mental, moral or social development of the child, otherwise, the limitations are legitimate, and may be disposed with the establishment, concomitantly, of a counselling plan and monitoring, the purpose being the restoration of natural relations.

Moreover, in addition to those mentioned above, it is necessary to allow the connections of the parent separated from his child to have a reasonable frequency and to allow the parent's presence at different stages of the child's life, that are important - such as religious holidays, birthdays, vacations, this because the development of strong parent-child relation depends on the time spent together[1].

In this analysis plan, we note that in achieving a balance between the interests of the child and the parent who does not live permanently with him, the courts consider that the established schedule does not

[1] Bucharest Court of Appeal, Civil Section III and for cases involving minors and family, Decision no.1708 / 11.13.2014, available [Online] in the database www.rolii.ro

disorient or burden the child, following the maintenance of a stable and predictable schedule for the child[1].

Special attention is given to this aspect when the child's parents live in different countries, perhaps at considerable distances because and because an excessive movement of the minor from one country to another in a short period of time can lead to his exhaustion and confusion[2]. In such circumstances, the visitation schedule must be carried out in compliance with the principle of regularity and with the responsibility of the parent interested in maintaining personal relations, meaning that he should organize his personal schedule and come to the country to spend time with his child. As regards the child's movement abroad in order to keep in contact with his parent, special legislation on free movement should also be considered, so that the required formalities to be ensured, with precise determination of the destination, the purpose of the visitation and the person accompanying the minor[3].

Of course, the child's health problems, along with his age, are relevant and justify the possible limitations imposed in his visitation schedule, being, for example, the case of children who have a strict diet, or maybe a medical treatment that needs to be followed rigorously and it is advisable to avoid excessive travel or a disturbing lifestyle[4].

A particular analysis is that when the court was entrusted to rule on the exercise of the parent's right to personal connections, in the form of visits to the penitentiary, where he was incarcerated[5]. In this case, the judicial control court based its decision on arguments related to the impact that such visits would have on the minor while retaining,

---

[1] Bucharest District 2 Court, Civil Section, Civil Sentence no.7784 / 2016 available [Online] database www.rolii.ro

[2] Bistrita Court, Civil Section, Civil Sentence no.2426 / 07.06.2016, available [Online] in the database www.rolii.ro

[3] Bucharest Tribunal, Civil Section III, Civil Sentence no.1995 / 18.05.2016 available [Online] in the database www.rolii.ro

[4] Bucharest Tribunal, Civil Section V, Civil Sentence no.2929A / 21.07.2016 available [Online] in the database www.rolii.ro

[5] Iasi Tribunal, Civil Section I, Civil Sentence no.1006 / 22.06.2016 available [Online] in the database www.rolii.ro

however, that "it is not the responsibility of the custodial parent to bear the difficulties, the expenses related to the personal connections of the non-custodial parent with the minor, especially when these difficulties are imputable to the non-custodial parent."

CONCLUSIONS

The harmonious development of the child implies the presence, in his life, of both the maternal and paternal figures. Therefore, the affection of both parents is an element of balance in the child's life, contributing to the creation of a positive climate of development. In this respect, following the separation of parents, maintaining contact with the parent with whom the habitual residence was not established is essential for the preservation of the mutual attachment.

Examining the provisions relating to the rights of the parent separated from the child, in the specialized literature[1] the idea that "the legislator thought the recognition of this right as a natural consequence of the fact that the loss of the quality of a husband does not imply the loss of the quality of a parent" is very suggestive. Where the parents do not cooperate for the child's well-being, so as to ensure the parent at whom the child does not have his residence, a regularity of the meetings, the role of the courts intervenes, which, of course, will decide taking into account the particular circumstances of each case court, following the observance the European principle of proportionality/fair balance between the rights of the child and those of his parent.

Essentially, this means that any interference in family life must be provided by law, to pursue a legitimate aim, namely to be justified as necessary in order to achieve the legitimate interest pursued, ie to identify relevant and sufficient reasons, of such a nature to justify this interference.

---

[1] A. Drăghici, *Protecția juridică a drepturilor copilului* (Bucharest: Universul Juridic, 2013), 170.

However, the ones representative for the line of thinking that the magistrates should follow in such cases are stated in a case decision[1] as follows: "The intervention of the court does not have to be a rigid one, in terms of establishing in a formalistic manner all the aspects relating to the conduct of the relations between the divorced parents and their minor children, but, taking into account the degree of availability of the parents, the level of training and education of the parents, they must also allow them the freedom to intervene and shape the schedule, in order to achieve harmonious relations, based on mutual trust and respect. "

BIBLIOGRAPHY

Books

1. Drăghici, A. *Protecția juridică a drepturilor copilului*. Bucharest: Universul Juridic, 2013.
2. Florian, E. *Dreptul familiei. Ediția a 4-a.* Bucharest: C.H. Beck, 2011.

Journal Articles

1. Ghiță, O. And S. Cercel. „Interesul superior al copilului”. *Revista română de drept privat* no.3 (2018).

Case law/Jurisprudence

1. Bucharest Court of Appeal, Civil Section III and for cases involving minors and family, Decision no.143/15.02.2016, available [Online] in the database www.rolii.ro
2. Bucharest Court of Appeal, Civil Section III and for cases involving minors and family, Decision no.1708/11.13.2014, available [Online] in the database www.rolii.ro
3. Bucharest District 2 Court, Civil Section, Civil Sentence no.7784/2016 available [Online] database www.rolii.ro

[1] Constanța Tribunal, Civil Section I, Civil Sentence no.590/17.05.2016 available [Online] in the database www.rolii.ro

4. Bistrita Court, Civil Section, Civil Sentence no.2426/07.06.2016, available [Online] in the database www.rolii.ro
5. Bucharest Tribunal, Civil Section III, Civil Sentence no.1995/18.05.2016 available [Online] in the database www.rolii.ro
6. Bucharest Tribunal, Civil Section V, Civil Sentence no.2929A/21.07.2016 available [Online] in the database www.rolii.ro
7. Iasi Tribunal, Civil Section I, Civil Sentence no.1006/22.06.2016 available [Online] in the database www.rolii.ro
8. Constanța Tribunal, Civil Section I, Civil Sentence no.590/17.05.2016 available [online] in the database www.rolii.ro

Legislation

1. Romanian Civil Code, Law no. 287/2009 republished in the Official Gazette of Romania, Part I, no. 505 / July 15, 2011, as subsequently amended and supplemented;
2. Law no.272/2004 concerning the protection and promotion of the rights of the child, republished in the Official Gazette of Romania, Part I, no.159/March 5, 2014, as subsequently amended and supplemented;
3. Constitution of Romania Revised by Law no. 429/2003; the text of the revised Romanian Constitution was published in the Official Gazette of Romania, Part I, no.767/October 31, 2003.

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
No.2 (21), Year XVIII, 2019, pp.87-98

DECISIONS RULED IN THE INTEREST OF THE LAW BY THE HIGH COURT OF CASSATION AND JUSTICE – "CURATIVE REMEDY" FOR THE DIVERGENT LEGAL PRACTICE

Iulia BOGHIRNEA[1]

Abstract:

The Romanian legislator inspired by the French legislation, has stated in 1861 the legal institution of the appeal in the interest of the law, for the first time in the Romanian legal system.

This institution has been adopted out of the necessity for a unitary application of the law resulting from the general principle of the law namely the principle of legality, the decisions of the High Court of Cassation and Justice issued in the interest of the law becoming true guidelines in matters of principle, which were resolved matchlessly by the national courts.

Key words: *appeal in the interest of the law; legislative unification; High Court of Cassation and Justice; decisions of principle.*

The High Court of Cassation and Justice insures the unitary interpretation and application of the law, being followed by all the other courts, according to its competence, as it is stated by Art 126 Para 3 of the Romanian Constitution and in this meaning the legislator has created

[1] Lecturer PhD, University of Pitesti, Pitesti; Postdoctoral researcher, "Acad. Andrei Rădulescu" Legal Research Institute of Romanian Academy, Bucharest (Romania), email: iuliaboghirnea@yahoo.com

the legal institution of the appeal in the interest of the law as an "a posteriori remedy" for a divergent judicial practice[1].

The doctrine[2] has stated that the "interpretative decisions, by which is canceled for the future the freedom of the courts to have a different reading of the text than how it was interpreted by the supreme court, have a special importance, not just by the value of the legal arguments brought by the High Court of Cassation and Justice in its reasoning, but also by that in the application of that normative provision another interpretation shall not be possible, which shall insure the jurisprudential uniformity, much needed in a democratic state".

1. THE HISTORY OF THE INSTITUTION IN THE ROMANIAN LAW[3]

The appeal in the interest of the law was institutionalized in France by Art 3 of the Law on 1st December 1790[4] regarding the establishment of the Tribunal of Cassation.

In the Romanian Principalities, the Prince Alexandru Ioan Cuza enacted on 12ve January 1861[1], the Law for the establishment of the

---

[1] Gheorghe Boroi et al., *Noul cod de procedură civilă, Comentariu pe articole, vol. I. Art. 1-526, Art. 1-526* (Bucharest: Hamangiu, 2013), 1007

[2] Andreea Tabacu, *Drept procesual civil*, 2nd Edition (Bucharest: Universul Juridic, 2014), 356. In the same line of ideas, a procedure having as effect the jurisprudential unity of interpretation, the Court of Justice of the European Union in Luxembourg, through the preliminary ruling (Art 267 of the TFEU and Art 150 of the Euratom Treaty) has the mission to provide "the only authentic interpretation of the law of the European Union"; Ioana-Nely Militaru, Dreptul Uniunii Europene, 3rd Edition revised and amended (Bucharest: Universul Juridic, 2017), 284; Ioana-Nely Militaru, *Trimiterea prejudicială în faţa Curţii Europene de Justiţie*, (Bucharest: Lumina Lex, 2005), 31 and next.

[3] Dan Lupaşcu, *Recursul în interesul legii în proiectele noilor coduri de procedură civilă şi penală* (Bucharest), http://www.juridice.ro/90109/recursul-in-interesul-legii-in-proiectele-noilor-coduri-de-procedura-din-romania.html

[4] Ion Deleanu and Valentina Deleanu, *Hotărârea judecătorească* (Arad: Servo-Sat, 1998), 402

Court of Cassation and Justice, which states in Art 13 that "*The Public Ministry, on his own or in partnership with the department of justice, shall appeal the misinterpretation of the law before the Court of Cassation, the adopted decisions and the acts of the other courts in civil matters, even when these shall not be appealed by the interested parties, but only for the interest of the law and after the expiration of the deadline for appeal. The decision of cassation, which shall be issued for this case, shall have no effect for the persecutors which have not appealed in cassation the challenged decision of the lower court*". This enactment has represented a real judicial transplant, through which the institution of the appeal in the interest of the law in France was implemented in our country[2].

This provision was also used in subsequent laws of 1905 (Art 13) and 1910 (Art 11).

Later, Art 12 of the Law of 17 February 1912 for the Court of Cassation and Justice continued to preserve the appeal in the interest of the law[3], stating that "*The Public Ministry, alone or in partnership with the department of justice shall appeal for the misinterpretation of the law, before the Court of Cassation the ruled decisions and the acts of the other courts in civil matters, even when these shall not be challenged by the interested parties, but only for the interest of the law and after the expiration of the deadline for appeal. The decision of cassation which shall be ruled for these cases shall have no effect upon the parties".*

Starting with 1936, the appeal in the interest of the law was stated also for criminal matters, being inserted provisions regarding this institution in the Code of Criminal Procedure. Regarding the other

---

[1] The Law for the establishment of the Court of Cassation and Justice was published in the "Official Gazette of the Romanian Country" (Wallachia), No 18/24 January 1861 and in the "Official Gazette of Moldavia", No 88/23 January 1861.

[2] Laura-Cristiana Spătaru-Negură, *Exporting law or the use of legal transplants, publicat în Challenges of the Knowledge Society Proceedings* (CKS) (Bucharest: Pro Universitaria, 2012), 812, http://cks.univnt.ro/cks_2012_archive.html

[3] Provision stated by Art 21 of the Law on the Court of Cassation and Justice on 20 December 1925; Sorin Popescu and Dan Lupaşcu, *Sistemul judiciar din România*, 2nd Volume (Bucharest: Universul Juridic, 2008), 477 and next.

matters, the regulation remained mentioned by the Law No 539/1939 for the High Court of Cassation and Justice[1].

By adopting the Constitution of 1948[2], Art 90 states the obligation for the Supreme Court to supervise "*the activity of the courts and judicial organs, according to the law*". Thus, the Decree No 132/1949 on the judicial organization[3] has repealed the provisions regarding the appeal for the interest of the law. Subsequently, the Law No 5/1952 for the judicial organization states that the Supreme Court supervises the judicial activity of the courts[4] by: *ruling upon the requests for correction and the guidelines provided to courts*, based on their judicial practice, regarding the fair application of the laws (Art 41).

The appeal in the interest of the law shall be again stated starting with 1993, when provisions regarding this institution are reinserted in the codes of procedure and in the Law No 56/1993 on the Supreme Court of Justice[5].

By changing the text of Art 329 of the Code of Civil Procedure, by the G.E.O No 138/2000 on the modification and amendment of the Code of Civil Procedure, the decisions of the High Jurisdiction ruled in the interest of the law were no longer to be mandatory for the courts, as stated by the previous form the Code of Civil Procedure.

---

[1] Published in the Official Gazette of Romania, No 159/13 July 1939.

[2] During the meeting of 13April 1948, the Great National Assembly has voted the Constitution of the Romanian Popular Republic (Law No 114/1948), with an unanimity of 401 votes. The Constitution was promulgated by the Decree No 729 of 13 April 1948 of the Temporary Presidency of the Romanian Popular Republic, signed by its President, Constantin-Ion Parhon and by its Secretary, G.C. Stere, countersigned by the President of the Council of Ministries, PhD Petru Groza and by the Ministry of Justice, Avram Bunaciu. It has been published in the Official Gazette, Part 1, No 87bis/13 April 1948 and entered into force on the same date.

[3] The document has been issued by the Minister of Justice and published in the Official Bulletin of the RPR No 15/2 April 1949.

[4] Sorin Popescu and Dan Lupaşcu, *Sistemul judiciar din România*, 477

[5] Published in the Official Gazette of Romania, No 159/13 July 1993

Part of the doctrine of that time[1] has emphasized that the removal of the mandatory feature of these decisions is a welcomed modification in accordance with the constitutional provisions according to which "justice is performed according to the law" (Art 123, Constitution of the 1991), as well as with the provision according to which the judge cannot rule based on general provisions and regulations upon a case subjected to trial (Art 4 of the old Civil Code). The interpretation given must be imposed by the value of the arguments brought by the Supreme Court of Justice in motivating the decision[2] and the prestige of the one who pronounces it[3], the obligatory character not existing in other laws of continental law nor in Romania until 1948[4].

But, by the adoption of the Law No 219/2005 on the approval of the G.E.O No 138/2000 on the modification and amendment of the Code of Civil Procedure, Art 329 of the Code of Civil Procedure completed with Para 3, stating that "*The ruling issued to legal matters subjected to judgement shall be mandatory for the courts*"[5], thus returning to the binding nature of these decisions.

---

[1] Viorel-Mihai Ciobanu, Gheorghe Boroi and Marian Nicolae, "Modificările aduse Codului de Procedură civilă prin Ordonanţa de Urgenţă a Guvernului nr. 138/2000", *Dreptul Magazine* no. 2 (2001); I. Deleanu and V. Deleanu, *Hotărârea judecătorească*, 413

[2] Mihaela Tăbârcă, *Codul de procedură civilă. Comentat şi adnotat cu legislaţie, jurisprudenţă şi doctrină* (Bucharest: Rosetti), 385

[3] Ciobanu, Boroi and M. Nicolae, "Modificările aduse Codului de Procedură civilă prin Ordonanţa de Urgenţă a Guvernului nr. 138/2000"

[4] Despina Fruth-Oprişan, *Puterea judecătorească şi independenţa judecătorului*, Juridica Collection (Bucharest: Scripta, 2003), 101

[5] By Decision 1014/8 November 2007 published in the Official Gazette of Romania, Part 1, No 816/29 November 2009, the Constitutional Court has rejected the exception of non-constitutionality of Art 329 Para 3 of the Code of Civil Procedure, exception waived ex officio by the Mureş County Court – Civil Section in the application no 758/102/2007. The Court has stated that by the Decision No 528/2 December 1997, published in the Official Gazette of Romania, Part 1, No 90/26 February 1998, has rejected the exception of non-constitutionality of Art 25 Let d) and Art 31 of the Law of the Supreme Court of Justice No 56/1993 (currently repealed by the Law No 304/2004 on the judicial organization), stating that: "*The principle of submitting the judge only to the law, according to Art 123 Para 2 of the Constitution (Art 124 Para 3 of the revised*

It has been shown in the legal literature[1] that this measure to return to the previous solution "*can only be benefic, because it can efficiently contribute to the achievement of the aimed purpose by the use of the appeal in the interest of the law*".

2. THE CURRENT REGULATION IN ROMANIA

If in the old regulation this institution was registered among the extraordinary means of appeal, though without meeting all the characteristics[2], in the new codes, civil[3] and criminal[4], it is being treated within the group of procedures drafted to insure a unitary judicial practice. These decisions of the High Court of Cassation and Justice are "interpretative, constant and unitary solutions"[5].

Art 514 of the Code of Civil Procedure, namely Art 471 of the Code of Criminal Procedure state that shall have procedural quality the *general prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice*, ex officio or upon the request of the Minister of

---

Constitution), does not have and cannot have the meaning of different application and even contradictory of the same legal provision, exclusively depending on the subjectivity of the interpretation belonging to different judges. Such conception would lead to the preservation, even on the ground of the judges' independence, of some solutions which could represent a violation of the law, which is inadmissible because the law being the same, its application cannot be different, so that the firm idea that the judge cannot justify such consequences". Also, the same decision has stated that "*The insurance of the unitary feature of the judicial practice is also imposed by the constitutional principle of equality between citizens in front of the law and of the public authorities, thus including the judicial authorities, because this principle would be seriously harmed if in the application of one and the same law the solutions of the courts would be different and even contradictory*".

[1] Ioan Leş, *Tratat de drept procesual civil* (Bucharest: C.H. Beck, 2008), 774

[2] Ciobanu, Boroi and Nicolae, "Modificările aduse Codului de Procedură civilă prin Ordonanţa de Urgenţă a Guvernului nr. 138/2000", 20

[3] Art 514-518 of the new Code of Civil Procedure, modified and republished in 2015

[4] Art 471-474[1] of the new Code of Civil Procedure

[5] Laura-Cristiana Spătaru-Negură, *Dreptul Uniunii Europene – o nouă tipologie juridică* (Bucharest: Hamangiu, 2016), 157

Justice, the *Board of the High Court of Cassation and Justice*, the *boards of the courts of appeal*, as well as the *Romanian Ombudsman*.

Unlike the old regulation, we ascertain that the legislator has expanded the area of the authorities compelled to notify the High Court of Cassation and Justice with an appeal in the interest of the law.

These public authorities have the duty to ask the High Court of Cassation and Justice to rule upon "matters of law which have been solved differently by the courts", the appeal in the interest of the law being accepted "only if it is proven that the matters of law representing the object of the trial were solved differently by definitive judicial decisions, which shall be annexed to the request" (Art 515 of the Code of Civil Procedure, namely Art 472 of the Code of Criminal Procedure).

Regarding the notification, the panel of the High Court of Cassation and Justice shall rule by a decision, which shall have no effects upon the examined judicial decisions, nor upon the situation of the parties of those trials (Art 517 Para 1 of the Code of Civil Procedure, namely Art 477 Para 1 of the Code of Criminal Procedure).

The legislator has preserved, for both codes, the mandatory feature of solving the matters of law subjected to judgement for all courts, from the date of publishing of the decision in the Official Gazette of Romania, Part 1, date from which shall be applicable for all pending litigations (Art 517 Para 4 of the Code of Civil Procedure, namely Art 477 Para 3 of the Code of Criminal Procedure).

Art 516 Para 1 of the Code of Civil Procedure, namely Art 473 Para 1 of the Code of Criminal Procedure state that the appeal in the interest of the law shall be trialed by a panel of 25 members, being: the president or, in his absence, one of the VPs of the High Court of Cassation and Justice; presidents of sections of the HCCJ; 20 judges, of whom 14 judges from the section/sections which has/have competence regarding the matter of law which has been solved differently by the courts and 2 judges from the other sections.

The president of the HCCJ, namely one of its VPs shall be the president of the panel.

If the matter of law is of interest for two or more sections, the president or, where appropriate, one of the HCCJ's VPs shall establish

the number of judges from the interested sections who shall be part of the panel, the other sections being represented by 2 members.

When the matter of law is outside the competence of any of the HCCJ's sections the president or, where appropriate, one of its VPs shall appoint 5 judges from its sections (Art 516 Para 1 of the Code of Civil Procedure).

To draft the report, the president of the panel shall appoint 3 judges to draw it up on the appeal in the interest of the law, rapporteurs who do not thus become incompatible (Art 516 Para 5 of the Code of Civil Procedure, namely Art 473 Para 4 of the Code of Criminal Procedure).

The report shall comprise the different solutions given to the matter of law and the arguments on which are based, the relevant jurisprudence of the Constitutional Court, of the European Court of Human Rights or of the Court of Justice of the European Union[1], and if necessary, the legal doctrine as well as the opinion of the specialists consulted on the differently solved legal issues. Also, the reporting judges shall draft and reason the project of the solution proposed for the appeal in the interest of the law (Art 516 of the Code of Civil Procedure, namely Art 473 Para 6 of the Code of Criminal Procedure).

The appeal in the interest of the law shall be motivated in front of the panel, where appropriate, by the general prosecutor from the Prosecutor's Office attached to the High Court of Cassation and Justice or by another prosecutor appointed by the first, by the judge appointed by the Board of the HCCJ, namely by the court of appeal or by the Ombudsman or one of his representatives.

The appeal in the interest of the law shall be subjected to judgement in maximum 3 months from the registration of the notification of the court. The meeting shall be attended by all judges of the panel, and

[1] For more details about the European Union, see also Elise-Nicoleta Vâlcu, *Drept comunitar institutional*, 3rd Edition revised and amended (Craiova: Sitech, 2012), 24-25; Elise-Nicoleta Vâlcu, *Procedura accelerată şi procedura preliminară de urgenţă. Proceduri de judecată specifice formei de cooperare la nivel Uniunii Europene*, Law Study, suppliment (2016).

the solution shall be adopted by at least two thirds of the total number of judges from the panel, with no abstentions from voting.

The decision of the HCCJ shall be given only in the interest of the law, the rule being stated by Art 517 Para 2 of the Code of Civil Procedure, namely Art 474 Para 2 of the Code of Criminal Procedure, "the decision shall be ruled only in the interest of the law and shall have no effects upon the examined judicial decisions, nor regarding the situation of the parties of those litigations", in the meaning that the definitive judicial decision cannot be changed if the solution of the HCJ is "contrary to the one established after the examination of the appeal in the interest of the law"[1].

The decision in the interest of the law shall cease its application at the date of the modification, repeal or ascertainment of the non-constitutionality of the legal provision which was the object of the interpretation, as stated by Art 518 of the Code of Civil Procedure, namely Ar 471[1] of the Code of Criminal Procedure.

In the application Mosteanu et others v Romania, the European Court of Human Rights restates the fact that the national judges, both from the sections of the HCCJ, as well as from the inferior jurisdictions have the obligation to align with the jurisprudence established by the Joint Sections of the Supreme Court of Justice, because the fact that these sections gather provides a special authority to the decisions of principle issued by this jurisdiction, without harming the rights and the duties of the national judges "to absolutely independent examine all specific cases brought to their attention"[2].

---

[1] Mihaela Tăbârcă and Gheorghe Buta, *Codul de procedură civilă, Comentat şi adnotat cu legislaţie, jurisprudenţă şi doctrină*, 2nd Edition revised and amended (Bucharest: Universul Juridic, 2007), 1028

[2] Application 33176/1996 Morosanu et al. V Romania, ECHR Decision ruled definitive in 2003, https://jurisprudentacedo.com/Mosteanu-si-altii-contra-Romaniei.html

Regarding the legal nature of the appeal in the interest of the law, in the judicial literature there is an opinion according to which this is considered a secondary source of law[1].

CONCLUSION

The Romanian legislator has appealed to this procedure to unify the judicial practice, first using the "curative treatment" through the procedure of the appeal in the interest of the law (1861), to then add a "preventive treatment", to avoid the case-law divergence, through the preliminary ruling procedure (2010), both being remedies for the cancellation of the divergent case-law, "applied" by the High Court of Cassation and Justice, by virtue of the constitutional role it plays.

BIBLIOGRAPHY

Books

1. Boroi, Gheorghe, et al. *Noul cod de procedură civilă, Comentariu pe articole, vol. I. Art. 1-526, Art. 1-526*. Bucharest: Hamangiu, 2013.
2. Deleanu, Ion and Valentina Deleanu, *Hotărârea judecătorească*. Arad: Servo-Sat, 1998.
3. Fruth-Oprişan, Despina. *Puterea judecătorească şi independenţa judecătorului*. Juridica Collection. Bucharest: Scripta, 2003.
4. Grigore-Rădulescu, Maria-Irina. *Teoria generala a dreptului*. Bucharest: Universul Juridic, 2014.
5. Leş, Ioan. *Tratat de drept procesual civil*. Bucharest: C.H. Beck, 2008.

[1] Maria Năstase-Georgescu and Simona Th.-Livia Mihăilescu, *Drept constitutional si institutii politice* (Bucharest: Moroşan, 2009), quoted by Maria-Irina Grigore-Rădulescu, *Teoria generala a dreptului* (Bucharest: Universul Juridic, 2014), 130

6. Militaru, Ioana-Nely. *Dreptul Uniunii Europene*, 3rd Edition revised and amended. Bucharest: Universul Juridic, 2017 .

7. Militaru, Ioana-Nely. *Trimiterea prejudicială în faţa Curţii Europene de Justiţie*. Bucharest: Lumina Lex, 2005.

8. Năstase-Georgescu, Maria and Simona Th.-Livia Mihăilescu. *Drept constitutional si institutii politice*. Bucharest: Moroşan, 2009.

9. Popescu, Sorin and Dan Lupaşcu. *Sistemul judiciar din România*, 2nd Volume. Bucharest: Universul Juridic, 2008.

10. Spătaru-Negură, Laura-Cristiana. *Dreptul Uniunii Europene – o nouă tipologie juridică*. Bucharest: Hamangiu, 2016.

11. Spătaru-Negură, Laura-Cristiana, *Exporting law or the use of legal transplants, publicat în Challenges of the Knowledge Society Proceedings* (CKS). Bucharest: Pro Universitaria, 2012, http://cks.univnt.ro/cks_2012_archive.html.

12. Tabacu Andreea, *Drept procesual civil*, 2nd Edition. Bucharest: Universul Juridic, 2014.

13. Tăbârcă, Mihaela and Gheorghe Buta. *Codul de procedură civilă, Comentat şi adnotat cu legislaţie, jurisprudenţă şi doctrină*, 2nd Edition revised and amended. Bucharest: Universul Juridic, 2007.

14. Tăbârcă, Mihaela. *Codul de procedură civilă. Comentat şi adnotat cu legislaţie, jurisprudenţă şi doctrină*. Bucharest: Rosetti.

15. Vâlcu, Elise-Nicoleta. *Drept comunitar institutional*, 3rd Edition revised and amended. Craiova: Sitech, 2012.

16. Vâlcu, Elise-Nicoleta. "Procedura accelerată şi procedura preliminară de urgenţă. Proceduri de judecată specifice formei de cooperare la nivel Uniunii Europene", *Law Study*, suppliment (2016).

Journal Article

1. Ciobanu, Viorel-Mihai, Gheorghe Boroi and Marian Nicolae, "Modificările aduse Codului de Procedură civilă prin Ordonanţa de Urgenţă a Guvernului nr. 138/2000", *Dreptul Magazine* no. 2 (2001)

Article in a online magazine

2. Lupaşcu, Dan. *Recursul în interesul legii în proiectele noilor coduri de procedură civilă şi penală*. Bucharest:

http://www.juridice.ro/90109/recursul-in-interesul-legii-in-proiectele-noilor-coduri-de-procedura-din-romania.html

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
No.2 (21), Year XVIII, 2019, pp. 99- 113

ABOUT THE TIME OF FORCED EXECUTION

Emilia MATEESCU[1]

Abstract:

Forced execution represents an area that can give rise to controversy even in the most unequivocal legal rules.

The time of forced execution is an element of validity of the acts of forced execution.

Presumed to exist as a condition of validity, the time of forced execution is in fact a variable element that needs to be analysed.

The time of forced execution dealt with in the paper refers to the days and the time frame in which the forced execution can be performed.

Key words: *forced execution; time; validity condition; time frame; days.*

INTRODUCTION

Forced execution is the second stage of civil action or civil trial. At this stage, it is characteristic of the debtor's constraint by the legal means in order to restore the law and the rule of law violated by the forced execution itself[2].

Unlike the Roman law in which the forced execution was of penal nature and the debtor was considered a delinquent who was liable with

[1] **PhD student, Faculty of Law, University of Craiova, Craiova (Romania), email: emiliamateescu@gmail.com.**

[2] Viorel Mihai Ciobanu, Traian Cornel Briciu and Claudiu Constantin Dinu, *Civil procedural law Civil execution law Arbitration Notarial law* (Bucharest: National, 2013), 511

his/her person for the debts not honoured, the current law establishes an element of validity in which the forced execution can be performed.

Thus, the constraint of the debtor and the achievement of the creditor's right is subordinated to a very wide range of conditions, explicit or implicit, on which the validity of the execution act itself depends. In certain hypotheses, subsidiary to the forced execution act, the fulfilment of the conditions depends on the achievement of the creditor's right.

One of the requirements of the validity of the forced execution is the time during which the forced execution is carried out, referring this time to the proper meaning of the time, respectively that of duration, period, measured in hours, days, etc., which corresponds to the performance of a forced execution action.

REGULATION OF THE TIME OF FORCED EXECUTION

The Civil procedure code from 1864 regulated the time of forced execution in art. 385 and 386 according to which *No execution can be done before 6.00 and after 20.00. The execution started may continue on that day or in the following days. The forced execution will not be possible at other times than those mentioned, nor in the non-working days established according to the law, except in the urgent cases in which the execution can be approved by the president of the executing court.*

At present, these texts have a relative topicality, considering that the number of forced execution files to which the 1864 Code is still applicable is decreasing.

The critique of the texts was of a practical nature resulting from the situation of those enforceable titles that required the forced execution to take place on non-working days[1]. These situations were not regulated at all. The text provided for the possibility of requesting the approval of

[1] It is the case of the execution of judgments regarding minors, in which their observance meant that the forced execution would be done on a non-working day.

the president of the court only in urgent cases, which meant invoking and possibly proving the urgency.

The new Civil procedure code[1] solves a part of the shortcomings of the old procedure. Thus, by art.684 called marginally ***The time during which execution is carried out*** it is provided that (1) *No act of execution can be done before 6.00 or even after 20.00. (2) The enforced execution shall not be possible at other times than those mentioned, nor in the non-working days, established according to the law, unless it is otherwise stipulated by the court decision placed in execution or the urgent cases in which the execution can be authorized by the executing court, by the decision given under the conditions of art. 680 paragraph 2. (3) As an exception, the execution started may continue on the same day, but not later than 22.00, and in the following days, under the conditions provided in par. (1).*

So, the novelty elements[2] and completion to the old regulation refers to the mention that in the situation where by the same enforceable title it is ordered that the execution be done at other times than those mentioned or in non-working days, it will be done under the enforceable title. It remains the possibility that, in urgent cases, the forced execution by the president of the court may be authorized.

An exception of continuation of the forced execution is established, on the same day, after 20.00 but not later than 22.00, following which it will be performed in the following days from 6.00 to 20.00.

ELEMENTS OF TIME OF FORCED EXECUTION

Thus, the time of forced execution represents the legal period, days or time frame, within which the forced execution can be performed.

---

[1] Law no. 134/2010 on the Civil procedure code published in the Official Gazette no. 545 of 3 August 2012, republished

[2] Viorel Mihai Ciobanu and Marian Nicolae coordinators, Flavius Baias et al., *The new Civil Procedure Code commented and annotated Vol II art 527-1.134* (Bucharest: Universul Juridic, 2016).

The rule contained in art. 684 Civil procedure code includes the following elements:

a) The forced execution can be done only in the time frame between 6.00 - 20.00.

No forced execution may be done earlier than 6:00 or after 20:00.

From this rule art.684 Civil procedure law establishes three exceptions in which the forced execution will be possible:

- in the situation where through *court decision enforced* other hours of the forced execution are provided outside the time interval 6.00 - 20.00.

For example, in the case of the execution of judgments regarding minors in which the enforceable title could provide for the minor to spend the time interval 19.00 - 7.00 at one of the parents, in which case it is required that any forced execution shall take place within this time frame.

In order to avoid any doubt, it is necessary to add that the time of Romania will be taken into account when setting the hours and the time frame.

- In an exceptional situation, the execution started may continue on the same day, but not later than 22.00, and in the following days, under the conditions provided in par. (1).

The exceptional situation is the one that allows the deviation from the time frame rule 6.00 - 20.00. From the drafting of the text it follows that the exception may refer to the execution of the forced execution started before 20.00 but which cannot be stopped at this time for reasons arising from the natural way of doing things. In these situations, the text allows to be beyond 20.00 with a maximum of 2 hours, to continue the forced execution in the following days within the time frame established by the general rule 6.00 - 20.00.

From here the question arises whether the forced execution will last strictly from 6.00 to 20.00 on the following day, or could, for an exception, be continued until 22.00.

The answer to this question could only be determined in relation to a concrete forced execution situation.

The relevant example may consist of a forced execution situation of forced pursuit of unripe fruits and rooted crops.

According to art.796 et seq. of Civil procedure code *the pursuit of the unripe fruits and the rooted crops can only be done in the 6 weeks before their ripening and will be preceded by a two-day order before the pursuit. However, the seizure can be done at any time. The pursuit of these fruits will be done through the mediation of a bailiff, who will proceed with their sequestration and the appointment of a receiver-manager, chosen according to the rules applicable to the actual movable pursuit. The receiver-manager will have the duty to store, harvest and store the fruits or crops. The bailiff will decide, as the case may be, to sell the fruits or crops as they are rooted or after they are harvested.*

In practice, one can meet the situation in which the harvesting of fruits should be done only with the presence of the bailiff who will draw up a record of findings in this regard.

In the hypothesis of the fruits represented by cereals and some very large areas sequestered and harvested, the forced execution activity can last several days from 6.00 to 20.00 hours and even after this hour, taking into account the urgency of harvesting in a certain time frame. This time frame can be determined by the atmospheric conditions, sometimes unfavourable to harvest or, on the contrary, favourable only for a few days, insufficient to harvest the entire surface.

In such conditions, the forced execution may be continued after 20.00 but not later than 22.00.

Pursuant to art.684 par.1 of Civil procedure code, the next day, the forced execution will continue between 6.00 and 20.00. However, *under exceptional circumstances, the execution started may continue on the same day, but not later than 22.00*.

In other words, if the exceptional situation is found at 20.00 by the bailiff, then the forced execution may continue after this hour but not later than 22.00.

The same solution would be required in the situation of seizure of other movable property, in case of the suspicion that they could disappear until the next day.

A legal application of the provisions of art.684, par.2 is foreseen in the matter of forced handover of buildings being regulated by the provisions of art.898, par.4 Civil procedure code according to which *execution in the manner of immovable property forced handover may continue on the day of its commencement even after 20.00, as well as in the following days, including non-working days, if it has not been completed due to an opposition to execution by the debtor or another person or if the operations to be performed to complete the forced execution could not be performed until 20.00.*

Thus, in conditions of opposition to the forced execution, or non-completion of the operations, this text allows the bailiff to go beyond 20.00 in carrying out the forced execution acts but does not set the maximum time until the procedure can be continued[1].

By not establishing the maximum hour until the forced execution can be carried out and having a special rule nature in the matter of the immovable property forced handover, the bailiff will be able to continue the procedure as long as it is necessary to complete the forced execution, without being limited to any final hour[2].

- the forced execution can be done at other times than 6.00 - 20.00 or on non-working days in the urgent cases approved by the executing court, by the decision given under the conditions of art. 680 paragraph 2.

Urgent cases are those situations that require immediate or without delay resolution.

The hypothesis of such situations is that the enforceable title does not already provide for the possibility that the forced execution will take place in a different time frame than the one provided for in paragraph 1 or in non-working days, or, if it provides for a time frame outside the one mentioned above, the urgency claims another time frame or non-working days.

---

[1] Evelina Oprina and Ioan Gârbuleț, *Theoretical and practical treatise on forced execution Volume I. General theory and executive procedures according to the new Civil Procedure Code and the new Civil Code* (Bucharest: Universul Juridic, 2013), 451

[2] Ciobanu and Nicolae coordinators, Baias et al., *The new Civil Procedure Code commented and annotated Vol II art 527-1.134*

By this exception, the lawmaker sought to cover all those situations in which the legal time or daily limits could constitute an insurmountable impediment in the forced execution.

Such a situation is conditional on proving the urgency in carrying out the forced execution act under the judicial control of the court granting the writ of execution.

From a procedural point of view, the request for approval of the forced execution at a different time frame than the one stipulated by art.684 par.1 Civil procedure code will be formulated under the conditions of art.680 par.2 Civil procedure code according to which *in the case of enforceable titles other than judgments, at the request of the creditor or of the bailiff, filed with the application for approval of forced or separate execution, the competent court will authorize the entry in the places mentioned in par. (1). The court pronounces, in an urgent manner, in the council chamber, with the summons of the third party who owns the property, by an enforceable decision which is not subject to any appeal.*

From the wording of the text and the hypothesis of the request addressed to the court, it follows that the request by which the court is requested to approve the forced execution to take place at other times or in non-working days will be judged urgently, in the council room, without summoning the parties, and will be solved by enforceable decision not subject to any appeal.

The request can be made both by the bailiff and the creditor. In case the request is formulated together with the request for approval of the forced execution, the request will be formulated by the bailiff and will have annexed the forced execution request made by the creditor.

b) Forced execution will not be possible on non-working days, established according to the law.

Per a contrario, forced execution can only be done on working days.

Given the provision of the law, it is necessary to determine what is the content of the notion of *non-working days, established according to the law*. As sometimes the Civil procedure code also operates with the

notion of *days of public holiday*, it is also necessary to determine the content of this notion.

According to the legislative history, by non-working days, established according to the law, it is understood those working days that were established by law as non-working days[1].

Regarding the notion of public holidays, this is contained in the Labour Code[2] called the Public Holidays. Public holidays are those working days for which the legislator has established that they are non-working and public holidays, expressly mentioning them in the law. By the same normative act, it is provided the possibility of establishing new non-working days by Government decision only for the personnel from

---

[1] The establishment of non-working days was achieved over time through Government Decisions or Emergency Ordinances, which could not lead to the conclusion that the word law is used in the sense of a normative act.

[2] Law no. 53/2003 Labour Code, republished, provides in art. 139

(1) The non-working public holidays are:

- January 1st, and 2nd;
- January 24th - Unification Day of the Romanian Principalities;
- Good Friday, the last day of Friday before Easter;
- first and second day of Easter;
- May 1st;
- June 1st;
- first and second day of Pentecost;
- Assumption of Mary;
- November 30 - St. Andrew the First-Called, Protector of Romania;
- December 1st;
- first and second day of Christmas;
- two days for each of the 3 annual religious holidays, declared as such by legal religious cults, other than Christian, for the persons belonging to those religious cults.

(2) The granting of the free days is done by the employer.

(3) The free days established according to par. (1) for persons belonging to legal religious cults, other than Christian ones, is granted by the employer on days other than the public holidays established according to the law or of annual rest holidays.

(4) Until the 15th of January of each year are established, by Government decision, for the personnel working in budgetary system, the working days for which days off are granted, days preceding and/or succeeding to the public holidays in which no one works, provided in par. (1), as well as the days when the not taken working hours are recovered.

the budgetary system, thus legitimizing the possibility of establishing non-working days by another normative act outside the law.

It should be noted that public holidays are at the same time non-working days.

In addition, there may be situations of declaring by law some days as non-working days that have an impact on the time of forced execution.

From the establishment of the non-working days and the public holidays, it results, *per a contrario*, that all other calendar days are working days in which the forced execution can be performed.

All of the above lead to the conclusion that the weekends (Saturdays and Sundays) are working days, in which the forced execution can be done, provided they are not also pubic holidays or declared non-working days, according to the law.

Another aspect, different from the provisions of the Civil procedure code, with incidence in the matter of the type of forced execution is contained in art.55 of Law no. 188/2000 regarding the bailiffs who state that *forced execution acts are performed during the displayed work schedule and if the drafting of an act does not suffer delay for objective reasons, it may also be performed outside the working program.* According to art. 83 of the Regulation implementing the Law no. 188/2000[1] *the office* (n.n. the bailiff) *operates on all working days, ensuring in urgent cases the possibility to perform the requested documents, also outside working hours, as well as during non-working days.*

Therefore, according to the law on the organization of the activity of the bailiffs, the activity of forced execution is subordinated to the specific stipulated in the Civil procedure code being able to be carried out both on working days and on non-working days or outside of the program hours.

[1] Order of the Minister of Justice no. 210 of 5 February 2001 for the approval of the Regulation implementing the Law no. 188/2000 on bailiffs

From the rule that forced execution cannot be done on non-working days, the Civil procedure code establishes exceptions in which the forced execution can be done on non-working days, too:

- Unless otherwise stipulated by the court decision enforced.

- In the urgent cases in which the execution can be approved by the executing court, by the decision given under the conditions of art. 680 par. 2 Thus, the urgency could be justified and authorized the execution in non-working days in the hypothesis of an enforceable title that can be put into execution by the seizure of a movable good (motor vehicle) that can be identified by the executing court only in non-working days because on the other days it is in transit.

In addition to the general exceptions provided by art.684 Civil procedure code there are other situations provided by the Civil procedure code that can be included in the category of exceptions to the general rules.

- In the situation provided by art.898 par.4 Civil procedure code according to which *execution in the manner of immovable property forced handover may continue on the day of its commencement even after 20.00, as well as in the following days, including non-working days, if it has not been completed due to an opposition to execution by the debtor or another person or if the operations to be performed to complete the forced execution could not be performed until 20.00.* The possibility of continuing forced execution on non-working days without any special approval from the executing court or without being provided for in the enforceable title is an exception to the general rules.

- in the case of movable property forced sale, the provisions of art.760 Civil procedure code provide that *(1) the auction sale shall be made at the place where the seized goods are located or, if there are good reasons, at another place. (2) Where official fairs are commonly recognized and held in the locality at least once a week, the sale of cattle shall be made compulsory in those fairs, within the days and hours of the fair, even if the fairs would fall on non-working days or of the public holiday, without the approval of the executing court.*

Therefore, for forced sales of cattle, when there are official, recognized and weekly fairs, it is established the obligation for the sale to

take place on days and times when fairs are taking place, even if these are non-working days or public holidays.

- in the case of forced sale of fruits and crops art. 799 par. 3 Civil procedure code provides that the sale *shall be done on the days, at the hours and in the place decided by the bailiff, preferably on non-working days and on fair days, either on the spot, or in the fair.*

In this situation a preference is set for the day of sale for non-working days.

From the way of drafting the last two exceptions, it follows that the legislator gave preference to the specificity of each activity of forced execution in relation to the variable time, working day or public holiday.

Indeed, the forced sale will have higher chances of being realized in the event of organization on non-working days or public holidays, since in such days the buyers are free and can go to fairs where they could buy movable property.

SCOPE. SANCTION

By the scope of the time of forced execution is understood the acts of forced execution that fall under the norms that regulate this matter.

Section 2 of Civil procedure code named The carrying out of acts of forced execution regulates in art. 673 Civil procedure code, which is the moment of transition to forced execution, after which the acts of forced execution can be performed *unless otherwise provided by law, the acts of enforced execution may be performed only after the expiry of the term shown in the order or, in the absence thereof, in the one stipulated in the decision by which the execution was approved.*

From this perspective it can be observed that the Civil procedure code considers acts of forced execution all those acts that follow the expiry of the term shown in the debtor's order or, in the absence of the order, the one stipulated in the decision of approval of the forced execution.

Another clue to find out the acts of forced execution to which art. 684 of Civil procedure code is represented by the provisions of art. 679

of Civil procedure code. They regulate the finding of the acts of forced execution and the content of the report of findings, in which are compulsory mentions regarding the date and time of drawing up the act (letter f)).

Therefore, the mentions regarding the time of forced execution are applied to the acts of forced execution found by the report.

It is only natural that the acts of forced execution which stipulate the obligatory mention of the time at which they were drawn up or the date can be verified subsequently whether or not they comply with the legal provisions in this matter.

The sanction applicable to non-compliance with art.684 Civil procedure code is provided by art.686 Civil procedure code according to which non-observance of the provisions of art.684 Civil procedure code attracts the cancellation of the execution.

Therefore, the non-observance of the provisions regarding the execution of the acts of forced execution in the time frame 6.00 - 20.00 or the execution of the acts on non-working days, without being incident the exception situations, will cause the cancellation of the forced execution.

The sanction of the express nullity can be invoked by the person interested in the cancellation of the act, his/her injury being presumed. Failure to invoke the sanction in due time will result in the party losing the right to invoke it.

As a result of the invocation of the sanction in which it is presumed the injury, the party interested in keeping the contested enforcement act will be able to prove the opposite, respectively, that no harm has been caused to the one invoking through the irregularity invoked[1].

CONCLUSIONS

The time of forced execution is a condition of validity of the acts of forced execution and a sensitive component in the execution practice.

---

[1] Ciobanu and Nicolae coordinators, Baias et al., *The new Civil Procedure Code commented and annotated Vol II art 527-1.134*

Failure to know its exact limits or the applicability of the legal norms leads to the avoidance of forced execution acts on days that create the appearance of non-working days, as is the case on weekends.

Also, the continuation of the forced execution at times other than those established as a general rule will lead to the cessation of the forced execution operations and the difficulty of the forced execution as a whole.

What is important in the matter of forced execution time are two elements: the purpose of forced execution and the reason for legislating a forced execution time.

The purpose of forced execution is the achieving of the right recognized by the enforceable title to the creditor. This right is protected by law and can be patrimonial (property law, etc.) or non-patrimonial (right in the matter of family relationships, etc.).

The Constitution of Romania states in art.44 par.2 that *private property is guaranteed and protected equally by law, regardless of the owner.*

As a result, the State has the obligation that, through the procedural means made available to the holder of the right of property, to protect their property right. This aspect is found in the forced execution by regulating the possibility that the forced execution will be done on all working days and by exception also on the non-working days if the achievement of the creditor's right in the factual situation of the forced execution claims it.

The same reasoning also applies to non-patrimonial rights as they also enjoy the same legal protection.

From this perspective, regulating the time of forced execution under the aspect of the hours when the forced execution can be done and the days when the forced execution cannot be done appears as a restriction on the creditor's possibility of achieving his/her right only under certain temporal conditions or with additional approvals from the enforcement court.

Given that forced execution is a proceeding against the debtor's assets, it is clear that the purpose of time restraint and limiting the creditor's right is to protect the debtor.

The considerations of such protection could be found in social aspects. In most cases, non-working days are both public holidays and religious holidays. The restriction for these days could be considered as an application of respecting the religious freedom of the debtor and of the sacredness with which the individual invests the religious holidays.

Regarding the hourly limitation of the forced execution for the time between the hours 20.00 - 6.00, this appears as a protection of the family life of the debtor and of his/her mental integrity given that generally in the interval shown the people used to have a sleep program.

As forced execution often involves, several times, going to the debtor's home or other locations where the debtor could be present and has the right to be present, in theory and in the absence of restraint, it would be possible for the forced execution to take place exclusively at night, which could be far from ensuring the protection and effectiveness of the debtor's rights.

The middle ground chosen by the legislator, including the limitation of forced execution on certain time frames on the calendar day, seems to be balanced in relation to the purpose of forced execution but also to the protection of fundamental rights and freedoms.

It follows from the present paper that the solution adopted by the legislator is not capable of restricting the creditor's right in view of all the exceptional situations in which it is allowed to continue the forced execution during the whole time frame of the day and even during non-working days.

BIBLIOGRAPHY

Books

1. Ciobanu, Viorel Mihai and Traian Cornel Briciu and Claudiu Constantin Dinu. *Civil procedural law Civil execution law Arbitration Notarial law.* Bucharest: Național, 2013.
2. Ciobanu, Viorel Mihai and Marian Nicolae, coordinators, Baias Flavius et al. *The new Civil Procedure Code commented and annotated Vol II art 527-1.134.* Bucharest: Universul Juridic, 2016.

3. Oprina, Evelina and Ioan Gârbuleț. *Theoretical and practical treatise on forced execution Volume I. General theory and enforcement procedures according to the new Civil Procedure Code and the new Civil Code.* Bucharest: Universul Juridic, 2013.

Legislation

1. Romanian Constitution
2. Civil Procedure Code
3. Law no. 134/2010 on the Civil procedure code, republished
4. Law no. 53/2003 on Labour Code, republished
5. Law no. 188/2000 on bailiffs, republished
6. Order of the Minister of Justice no. 210 of 5 February 2001 for the approval of the Regulation implementing the Law no. 188/2000 on bailiffs

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
No.2 (21), Year XVIII, 2019, pp. 114-133

THE CHILD'S RIGHT TO DIGNITY

Liliana GOLOGAN [1]

Abstract:

The child means any person who, under the law of his country, has not yet reached the required age to assume responsibility for his acts in a particular field.

From the etymological point of view, the term "child" comes from the Latin term childhood which means "who does not speak". The convention defines in art. 1 the child as "any human being under the age of 18 years, except in cases where the law applicable to the child sets the age limit under this age".

In the same sense, art. 4 lit. a) of Law no. 272/2004 regarding the protection and promotion of the rights of the child, which defines the child as "that person who did not reach the age of 18 years and did not acquire full exercise capacity, according to the law. Therefore, it turns out that two conditions must be cumulatively met, namely: the person has not reached the age of 18, the person has not acquired full legal competence. According to art. 38 paragraph (2) Romanian Civil Code.

Key words: *child; right to dignity; forms of violation of the child's dignity*

INTRODUCTION

The child means any person who, under the law of his country, has not yet reached the required age to assume responsibility for his acts in a particular field. [1]

[1] Student, Faculty of Economic Science and Law, University of Pitesti, Pitesti (Romania). Paper coordinated by Senior Lecturer Ph.D. Andreea Drăghici, Faculty of Economic Sciences and Law, University of Pitesti. Email: lili.gologan@yahoo.com.

From the etymological point of view, the term "child" comes from the Latin term childhood which means "who does not speak". The convention defines in art. 1 the child as "any human being under the age of 18 years, except in cases where the law applicable to the child sets the age limit under this age".

In the same sense, art. 4 lit. a) of Law no. 272/2004 regarding the protection and promotion of the rights of the child, which defines the child as “that person who did not reach the age of 18 years and did not acquire full exercise capacity, according to the law. Therefore, it turns out that two conditions must be cumulatively met, namely: the person has not reached the age of 18, the person has not acquired full legal competence. According to art. 38 paragraph (2) Romanian Civil Code.

THE PERSON BECOMES OF AGE AT THE AGE OF 18 YEARS.

As stated in actual law, any person has legal personality by the fact of his existence, without this being conferred upon him as a result of the existence of discernment. Therefore, although deprived of discernment, as a result of a legal presumption, the child is recognized as a subject of law, being able to participate, insofar as the law allows him to social-legal life. The existence of discernment is essential, however, for the exact definition of the term child. The legislator presumes that at the age of 18 people acquire discernment, as a result of full psychic maturation, implicitly acquiring full exercise capacity. It is actually the moment when we stop discussing about the child and we witness the appearance of the adult with all the manifestations that this statute presupposes.

Rule inserted in art. 38 paragraph (2) Romanian Civil Code. - behaves and exceptions in the sense in which we are interested, namely the loss of the minor's status before acquiring the majority (acquiring the

---

[1] Andreea Draghici, *Protectia Juridica a Drepturilor Copilului* (Bucharest: Universul Juridic, 2013), 19.

major status by the conclusion of the marriage and as a result of the approval by the guardianship court). [1]

It also requires attention and the notion of anticipated legal competence of the child. Thus, for it to operate, two conditions must be met: first, it is about the rights of the child, and second, the child must be born alive, the Romanian legislation, unlike the French one, does not require the condition of viability. Thus the term of anticipated legal competance has a very precise legal significance, this indicates that the conceived child may already acquire certain rights, but these will not become effective unless the child is born alive. On the contrary, these rights will disappear retroactively if the child is not born alive, the embryo being practically considered to have never existed legally, so it was never a holder of rights, which obviously means that neither it cannot transmit them.

The need to extend the special protection granted to the child was stated in the Geneva Declaration of 1924 on the rights of the child and in the Declaration of the Rights of the Child, adopted by the UN General Assembly on November 20, 1959, and was recognized in: Universal Declaration of Human Rights, Pact international law on civil and political rights (in particular art. 23 and 24), the International Covenant on Economic, Social and Cultural Rights (especially art. 10), the applicable statutes and instruments of specialized institutions and international organizations concerned with the welfare of the child. .[2]

The Declaration of the Rights of the Child of November 20, 1959, is a resolution of the General Assembly of the United Nations - Resolution 1386. It wishes to have the protection of the child stated in the Geneva Declaration of 1924 on the Rights of the Child.

The Declaration of the Rights of the Child in 1959 was the basis for the adoption in 1989 (30 years later) of the Convention on the Rights of the Child. This, was ratified by Romania by Law no. 19/1990, published in M. Of. No. 314 of June 13, 2001.

---

[1] Draghici, *Protectia Juridica a Drepturilor Copilului*, 9-11

[2] http://www.unicef.ro/publicatii/conventia-cu-privire-la-drepturile-copilului-2/

The theme of child and childhood became, in particular, after the adoption of the United Nations Convention on the Rights of the Child, a constant presence both in the current political discourse, as well as in scientific, cultural, educational etc., at international, regional and national level. .

Thus, international alliances of non-governmental bodies (of sociologists, psychologists, social workers, lawyers, etc.) have been established, which pressed the governments to respect the rights of the child. With the help of mass media, international public opinion is sensitized in relation to the dramatic situation of children in different corners of the world.

Following these international concerns regarding the situation of the child, the International Declaration on the Survival, Protection and Development of the Child (from September 30, 1990) was adopted as well as an Action Plan.

At the national level, especially in the decade following the ratification of the United Nations Convention on the subject, states have been forced to adopt various legislative measures and social policies aimed at improving the implementation and respect of the rights of the child. In some countries, including Romania, specialized institutions were created at national and local level meant to monitor the implementation and respect of the rights of the child.

Thus, the Law no. 272/2004 regarding the protection and promotion of the rights of the child, which defines the child as "that person who has not reached the age of 18 and has not acquired the capacity to exercise the conditions of the law".

The effects of the concern declared to respect the rights of the child are controversial. There is a fear, shared by children from different countries and by some specialists, that the discourse on the child and his rights is used only to justify the dependence on adults and the marginalization of the child. *In situations suitable for adults, the child is not yet considered insufficiently mature intellectually to form a point of view and a qualified option*, for example, regarding political rights and the possibility to participate in political elections. At the same time, at ages below the limit set by the Convention some children may be married

and others, even under 18 years of age, are criminally liable, being granted the same criminal treatment as adults. "*We can be criminals at 14, choose a professional career at 14, we can marry at 16, but we can not vote until 18,*" the child observes in Austria.

Other points of view also appreciate that the current discourse on the rights of the child deepens the child dependence of adults. "*The status of the child is reduced by that of the potential citizen, by the developing human being, different from the human being."* A similar opinion is shared by Alexandra (16 years old) from Romania: "*At school, teachers consider that their age and experience are above any right that the student has*".[1]

BRIEF HISTORY OF THE CHILD'S POSITION IN SOCIETY

Sociology studies show that at the shelter of the wave of private life, of the natural obligation, of the absolute rights of the family (the father) on children, from Roman times to the late Middle Ages, children were abandoned in large numbers throughout Europe, by parents from all social categories. By the end of the eighteenth century, children could still be sold by their parents and a 7-year-old could be executed for theft.
In opposition to the image we have today about childhood, care and protection, the history of childhood is a nightmare from which we have only just begun to wake up. The more we go back in history, the lower the level of care for the child, the higher the likelihood that they will be killed, abandoned, abused and sexually abused.

Basically, by the beginning of the 20th century, children were treated and considered as an extension of their parents, without having rights per se.

The mentality that has dominated and still dominates is that of the identity of interests between parents and children. The idea that minors

---

[1] Doina Balahur, *Protectia drepturilor copilului ca principiu al asistentei sociale* (Bucharest: ALL BECK, 2001), 3-5.

might have rights, and that these rights could be substantially different from those of adults, is a recent acquisition of the thought of socio-legal practice. Only in the second half of the twentieth century in the constitutional laws of Europe and North America began to appear explicit regulations regarding the child and his rights.

By the middle of the twentieth century most European laws included regulations regarding parental rights and obligations towards their minor children, the positive obligation of the state to intervene in different forms, under certain circumstances. In this way, the "absolute" rights of the parents (of the parents, usually) over the children are related, they are balanced by obligations whose fulfillment can be supported and taken over, in certain circumstances, by the state or body mandated by them.

There are great variations in the European laws regarding the recognition of equal rights of women and men in the exercise of parental protection. For example, in England only in 1973 was the equality of rights of the woman with the man in the exercise of parental rights and obligations recognized.

Thus, today the child can no longer be sold, killed, abused, etc., by those who are supposed to take care of it, rather than bearing the risks of breaking the law. However, the stereotype of the child is an extension of the parents, it still persists. The most common form of manifestation is the belief that only the parents, or the community, are the ones who know what is best for the child, what is in the best interest of the child. The individualization of the child in the relations with the family, the recognition of the vulnerability and the special needs of protection and protection of the child, were enshrined by regulation of the rights of the child.

With the sanction in the international legislation of the violation of human rights, at the end of the 9th century of the 20th century, the child acquires (in law) the status of person, of human being who by the mere fact of birth benefits from rights that must be guaranteed and respected. [1]

---

[1] Balahur, *Protectia drepturilor copilului ca principiu al asistentei sociale*, 16-17.

THE RIGHT TO DIGNITY

Rights, as a social, fundamental institution, represent the faculty of the subject to claim *(facultas agendi*). In law this faculty belongs only to the human being, to the physical seed in its individuality and through a legal fiction, under certain conditions and groups of persons (legal or legal person).

The first condition, therefore, to hold rights is to be "recognized as a human being" as a person. The recognition of children as the (physical) person distinct from their parents was one of the "discoveries" of the late twentieth century. It is related to the contribution of psychology and neurobiology studies and research, to the evolutions of the human rights movement after the World War Two. [1]

In the New Civil Code in Book I, Title II, Section 3, entitled Respect for the private life and dignity of the human person, in article 72 the right to dignity is regulated: *(1) Everyone has the right to respect for his dignity. (2) Any prejudice against the honor and reputation of a person is prohibited, without his consent or without respecting the limits provided in art. 75.* [2]

The right of dignity with reference to the dignity of the child in particular, is regulated in Law no. 272/2004, respectively article 33: (*1) The child has the right to respect his personality and individuality and cannot be subjected to physical punishments or other humiliating treatments or (2) The disciplinary measures of the child can be established only in accordance with the dignity of the child, without being allowed under any reason the physical punishments or those which are in relation to the physical, mental or emotional development of the child.*[3]

Through tradition (common, to a large extent, to all societies), raising children was conceived as a natural obligation of princes and

---

[1] Balahur, *Protectia drepturilor copilului ca principiu al asistentei sociale*, 12.
[2] NCC
[3] Law no. 272/2004

family. According to the general rule, which actually establishes one of the oldest traditions, the family is the one who owes protection and care to the child, being responsible for the fulfillment of the obligations of growth and maintenance. In such a tradition, it is almost natural for the child's relations with society to be mediated by the family.

Respecting the dignity of the child is a principle stipulated in the enumeration of Law no. 272/2004, as long as today the legal situation of the child has evolved from the Aristotelian conception according to which "the child is an undetermined being" to its recognition as being with a capacity in permanent evolution, with the prerogatives to participate actively in the legal-social life.

Today he is no longer regarded as "an extension of his parents", but as a distinct person, to whom all the rights inherent to any human being are recognized. The dignity of the child is attached to it, the society having the obligation to protect and respect it just like any adult.

Article 72 of the Civil Code provides that "every person has the right to respect for his dignity". As the right to dignity is part of the category of personality rights, recognized from the moment of birth, it results that this right is implicitly acknowledged to the child, regardless of his legal situation from birth or other criteria. The facets of dignity are innumerable, which is why the attitudes to it are varied.

In other words, a clear definition of what is "the right to dignity" cannot be given, given that the social manifestations of the person are multiple. In the case of the child, it manifests itself both within and outside the family, especially in an institutionalized educational setting. Those who must ensure the respect of the child's right to dignity (parents, guardians, educators, teachers) may, unfortunately, be those who willfully or without prejudice to this right.

Another right, closely linked to the right to dignity, is the right to one's own image, which implies that everyone is prepared to oppose the disclosure by any means of the elements of their life and to reproduce their image without their consent. The right to one's image involves two sides: a public and a private, intimate one. Thus, the participation in the public debates of the child up to 14 years of age is made only with the written consent of the child and of the parents or legal representative.

Children cannot be used in this way by those who care for them, in order to obtain patrimonial benefits. The protection and guarantee of the child's right to their own image belongs to the National Audiovisual Council, which monitors the way of the audiovisual programs.

In this respect, the Decision no. 220/2011 regarding the code of regulation of the audiovisual content that aims to protect the public image and the intimate, private and family life of the child, in the audiovisual programs. Thus, the decision establishes a series of prohibitions that protect the right of the child to his own image.

The decision also refers to the services of programs and the protection of the child, restrictions in the programming of the broadcasting of the programs and, at the same time, measures to alert the public on the content and the possible effects that the respective productions can have on the children in order to protect the person's dignity, modesty and morality. public, Law no. 196/2003 regarding the prevention and combating of pornography establishes special measures for the prevention and combating of pornography, penalizing and contraventionally sanctioning the acts of involvement of minors in any actions of pornographic nature that would undermine the dignity of the child. The dignity of the child can be attained by any form of exploitation regardless of its nature, whether it is exploitation through work, sexual, in order to obtain material advantages, sale, trafficking of children, etc., all these forms of exploitation will be analyzed later. [1]

APPLICATIONS OF THE PRINCIPLE OF RESPECTING THE DIGNITY OF THE CHILD

One of the applications of the principle of the dignity of the child refers to the "physical punishments" or corporal punishments. Thus in art. 28 of Law no. 272/2004 stipulates that "the child cannot be subjected to physical punishments or to other humiliating and degrading treatments". Also, in par. (2) it is stipulated that "the disciplinary measures of the

[1] Draghici, *Protectia Juridica a Drepturilor Copilului*, 61-62.

child can be established only in accordance with the dignity of the child, without under any circumstances the physical punishments or those which are related to the physical, mental or emotional development of the child" .

These corrections can be applied both in the family and at school. In the latter case, given that the child may be exposed to the public (classmates, school, etc.) during their application, the effects on attaining dignity may be much deeper, sometimes irreversible. That is why the Committee on the Rights of the Child states: "children do not lose their rights when they pass through the school gates". The education must be carried out in a way that respects the inherent dignity of the child. Education must also be conducted in a manner that respects the strict boundaries of the discipline and promotes nonviolence in schools. The use of corporal punishment does not respect the dignity of the child nor the strict limits of the school discipline, so it is necessary that the schools be receptive and respect from all points of view the dignity of the child. [1] Corporal punishment is generally defined as any form of physical punishment meant to cause pain or discomfort. This refers especially to hitting children with a hand or an object, but it may also involve acts of a nature other than physical, for example threats, which have the same end result - humiliation of the child.

By the provisions of art. 48 paragraph (2) of Law no. 272/2004 the corporal punishments are prohibited within the instructional-educational process, the child having the right to be treated with respect by the teachers. Also, art. 489 C.civ, prohibits in turn the physical punishments that are capable of affecting the physical, mental or emotional development of the child. Regarding the disciplinary measures taken by the parents regarding the child, they must respect the dignity of the child. Failure to respect the dignity of the child by acts of nature that cause him physical pain, to affect his emotional state can lead to sanctions such as: decay of parental rights (art. 508 C.civ.). Moreover,

[1] Draghici, *Protectia Juridica a Drepturilor Copilului*, 57-58

such an attitude can throw the person who commits such acts in the area of criminal law for offenses such as ill-treatment of minors.

Humiliation, beatings, sexual exploitation, neglect are forms of ill-treatment because they hurt the child's integrity and dignity, even if the effects are not visible. In most cases, as a result of one or more violence committed on the child, it can manifest certain disorders of the general state and of the psycho-affective and social development, having to identify certain specific indices of these states.

It is about the tendency to isolate, certain states of nervousness and anxiety, emotional disturbances, lack of concentration, a feeling of devotion, lack of respect for oneself. [1]

Thoughts about aggression, disrupting his attention, or sadness and withdrawal may occur, which may result in decreased involvement and communication, low self-confidence, easily frightened, irritable or agitated. It cannot cope with seemingly easy situations. He becomes either submissive or in turn irritable, aggressive and violent. The convictions he draws from violence: that he is not good, that he is not loved, can be installed so deeply that they remain preserved all their life and can influence their self-esteem to decrease sharply. Frequently subjected to alertness and fear, a child redirects his cognitive resources to ensure a minimum of emotional management, lowering even his intelligence. "[2]

According to the ECHR, states must also conduct effective investigations into allegations of ill-treatment or loss of life, regardless of whether the facts were committed by state agents or private individuals. An investigation is effective if, when receiving complaints from victims or their successors, states implement a procedure that can lead to the identification and dismissal of those responsible for acts of violence that violate either Article 2 or Article 3 of Convention.

The ECHR has analyzed complaints about corporal punishment as a form of disciplinary measure, mainly under Article 3 of the

---

[1] Draghici, *Protectia Juridica a Drepturilor Copilului*, 60

[2] https://adevarul.ro/life-style/parinti/violenta-educatia-copilului-efectele-cumplite-bataia-dezvoltarii-copiilor-1/index.html

Convention. In cases where the measure has reached the level of severity provided for in Article 3, the ECHR has found that the treatment has violated this provision. When they do not reach the severity threshold provided for in Article 3, corporal punishments may, however, fall within the scope of Article 8, as part of the right to physical and moral integrity. However, to date, the ECHR has not found any violation of Article 8 in substantive cases regarding corporal punishment. The use of corporal punishment in the state schools may also represent a violation of the parents' rights to raise their children according to their philosophical convictions, provided in Article 2 of Protocol no. 1 the Convention.[1]

The Beijing rules also prohibit corporal punishment for juvenile detainees, precisely to respect their dignity. Romania is registering from this point of view among the European states whose legislation prohibits physical punishments on the child, which is absolutely natural, if we think that the Criminal Code sanctions the aggression against a person, qualifying it as an offense.

Not to prohibit the physical punishments on the child would mean to recognize him a lower status on the scale of human beings, all the more as he needs additional protection through his vulnerability.

Violent behavior towards minors seriously affects the stability and relationships of family life. As it has been shown, there are also situations when the parent needs to act, in the interest of the child's education, with exigency and even with severity, but only with the respect of a precise limit: not to endanger the health, the physical and intellectual or moral development of the child. Everything that exceeds these limits becomes a dangerous act for the minor and must be sanctioned. Ensuring compliance with the principle of child dignity also aims to respect the right enshrined in art. 22, that is, the child's right to protect his public images and his intimate, private or family life.[2]

---

[1] *Manual de drept european privind drepturile copilului* (Agenția pentru Drepturi Fundamentale a Uniunii Europene și Consiliul Europei, 2015), 123.
[2] Draghici, *Protectia Juridica a Drepturilor Copilului*, 61

OTHER FORMS OF VIOLATION OF THE CHILD'S DIGNITY

SEXUAL ABUSE. HUMAN TRAFFICKING AND CHILD PORNOGRAPHY.

Child sexual abuse can take many forms, including harassment, touching, incest or rape. Child sexual abuse can occur in different environments, including homes, schools, placement institutions, churches, etc. Children are particularly vulnerable to acts of sexual abuse, as they are often under the authority and control of adults and have less access to the mechanisms through which they can lodge complaints.

In EU law, Directive 2011/93 / EU - largely reflecting the approach of the Lanzarote Convention - aims to harmonize the minimum criminal sanctions granted by Member States for various offenses of sexual abuse of children. In accordance with Article 3 of the Directive, Member States must take criminal law measures to ensure the sanction of various forms of sexual abuse, including the determination of children to attend sexual activities or sexual abuse and to engage in sexual activities with children. The Directive provides for greater penalties when acts are committed by persons in a position of trust over particularly vulnerable children and / or by the use of coercion. Furthermore, Member States must ensure that criminal prosecution of child abuse suspects occurs automatically and that persons convicted of sexual abuse offenses are prevented from engaging in professional activities that involve direct or regular contact with children.

DOMESTIC VIOLENCE AND NEGLECTFUL BEHAVIOR

Many cases of domestic violence include allegations of sexual abuse, usually the mothers filing complaints with the ECHR regarding the fact that the state has failed to properly pay the obligation to provide protection against injury, according to the Convention. Domestic violence cases raised problems from the perspective of articles 2, 3 and 8 of this Convention. States must respect their positive obligations to take effective measures to combat domestic violence and to carry out effective

investigations in the case of credible domestic violence or neglect of children.

Example: In Kontrová / Slovakia case, the applicant had been repeatedly physically assaulted by her husband. She had filed a complaint with the police, but had withdrawn it later. Then her husband threatened to kill the children. A relative reported this incident to the police.

However, a few days after the incident, the applicant's husband fatally shot the two children and killed himself. The ECHR has ruled that every time the authorities are aware of or should be aware of the existence of a real and immediate risk that threatens the life of a certain person, the state has positive obligations under Article 2 of the Convention. In this case, the Slovak authorities should have been aware of such a risk, by virtue of pre-existing communications between the applicant and the police. The positive obligations of the police should have involved recording the applicant's criminal complaint, starting a criminal investigation and starting the criminal prosecution. But the police did not fulfill their obligations, and the direct consequence was the death of the applicant's children, being violated in article 2 of the Convention. [1]

Example: The Eremia case / Republic of Moldova concerns the complaint made by a mother and her two daughters regarding the fact that the authorities did not offer them protection against the violent and abusive behavior of their husband and father. The ECHR found that, despite being aware of abuse, the authorities did not take effective measures to protect the mother from domestic violence. He also considered that, despite the negative psychological effects on the daughters who witnessed their father's acts of violence against their mother in the family home, very few measures were taken, or even none, to prevent such behavior from recurring. The Court found that the Moldovan authorities did not properly fulfill their obligations under Article 8 of the Convention. [2]

---

[1] CEDO, Kontrová/Slovacia, no. 7510/04, 31 May 2007.
[2] CEDO, Eremia/Moldovia Republique, no. 3564/11, 28 May 2013.

FORCED LABOR

In EU law, slavery, servitude, forced or compulsory labor are prohibited (Article 5 (2) of the Charter of Fundamental Rights of the EU). The employment of children is also prohibited (Article 32 of the Charter). Directive 94/33 / EC is the main legal instrument prohibiting child labor.

Often, in cases of forced labor among children, victims of child trafficking are involved. Directive 2011/36 / EU on the prevention and control of human trafficking recognizes forced labor as a form of exploitation of children (Article 2 (3)). Children trafficked for the purpose of forced labor are protected under the directive, in the same way as victims of trafficking for other purposes.

Article 4 of the Convention prohibits in absolute terms all forms of slavery, servitude, forced and compulsory labor. The ECHR defines "forced or compulsory labor" as "the work or service that is obtained from any person under threat of a punishment against the will of the person concerned and for which the person has not volunteered." The service includes, in addition, the "obligation" of the "servant" to live on the property of another person and the impossibility to change the situation ". Therefore, service is an aggravated form of compulsory labor.

Example: Case C.N. and V./France[1] refers to the complaints regarding forced labor of two sisters of Burundian origin. After their parents died, they were taken to France to live there with their aunt and her family. They were housed for four years in the basement of the house, under conditions that, according to the applicants, would have been very bad. The older sister did not go to school and spent all her time doing household chores and taking care of her disabled son. The younger sister went to school and worked for her aunt and her family after class hours, after the time required to do homework. Both sisters filed a complaint with the ECHR, claiming that they were kept in harassment and subjected to forced labor. The ECHR found that the first applicant was indeed forced to work, because she had to work seven days a week,

[1] CEDO, C.N. and V./France, no. 67724/09, 11 Octobre 2012

without pay and without leave. Moreover, she was kept under conditions of servitude because she had the feeling that her situation was permanent, with no possibility of change. The ECHR also found that the state did not fulfill its positive obligations, because the legal framework in force did not offer effective protection to the victims of compulsory labor. Regarding the procedural obligation to carry out an investigation, the ECHR considered that the requirements provided for in Article 4 of the Convention had been met, because the authorities were rapidly conducting an independent investigation, in order to lead to the identification and punishment of the persons responsible. The ECHR rejected the accusations of the second applicant regarding forced labor, on the grounds that she was able to go to school and that she was given the necessary time to do her homework. [1]

CHILD PORNOGRAPHY AND THE LURE OF CHILDREN FOR SEXUAL PURPOSES

Pornography is defined as: "(i) any material that visually presents a child who is involved in explicit, actual or simulated sexual behavior; (ii) any representation of the genital organs of a child mainly for sexual purposes; (iii) any material that visually presents any person who appears to be a child involved in explicit, actual or simulated sexual behavior, or any presentation of the sexual organs of a person who appears to be a child, primarily for sexual purposes; or (iv) realistic images of a child involved in sexually explicit behavior or realistic images of a child's sexual organs, mainly for sexual purposes. "

Article 5 of the Directive introduces for the EU Member States the obligation to take all necessary measures to ensure that the production, purchase, holding, distribution, dissemination, transmission, supply, supply or provision with intent of child pornography, as well as obtaining for knowingly accessing this type of content, they are punished.

---

[1] *Manual de drept european privind drepturile copilului*, 127-129

Example: In the Söderman v Sweden case, the court was referred to a girl whose stepfather tried to film her while she was taking a shower. She claimed that the Swedish legislative framework did not adequately protect her privacy. The ECHR considered that the state has a positive obligation to create a legislative framework that would provide adequate protection to victims such as the applicant. As the case refers only to an attempt to film the applicant, the ECHR considered that such a legislative framework should not necessarily include criminal sanctions. Regarding the factual situation, the ECHR considered that the applicant did not benefit from effective criminal or civil remedies that would protect her against her stepfather's attempt to film her, finding a violation of Article 8 of the Convention. [1]

CHILDREN BELONGING TO MINORITIES

The causes solved by the ECHR, which specifically refer to violence against children belonging to minority groups - outside the context of trafficking in human beings and forced labor - are few. They mainly target school segregation and discrimination.

Example: In the case of the Center for Legal Resources, on behalf of Valentin Câmpeanu / Romania[2], an NGO submitted a request on behalf of a Roma ethnic boy who died in a state institution. He was HIV positive and had a severe intellectual disability. The conditions in the institution where the house was terrible were: there was no heating, no sheets or clothes, no support from the staff, etc. In the absence of any relatives close to the victim, an NGO has filed in its name an action regarding the violation of the rights enshrined in articles 2, 3, 5, 8, 13 and 14 of the Convention. The Grand Chamber decided that, in the exceptional circumstances of the case (the extreme vulnerability and the absence of any close relatives of the Roma youth), the NGO had the procedural quality to represent the deceased applicant. On the merits, the

[1] CEDO, Söderman/Sweden, no. 5786/08, 12 November 2013
[2] CEDO, Centrul de Resurse Juridice în numele lui Valentin Câmpeanu/Romania [GC], no. 47848/08, 17 July 2014.

ECHR has found a violation of Article 2, in material terms. The national authorities were found responsible for Mr. Câmpeanu's death, because they had placed him in an institution where he had died due to food, housing conditions and poor medical care. The ECHR has found the violation of article 2 also under the aspect of the fact that the Romanian authorities had not carried out an effective investigation of Mr. Câmpeanu's death. [1]

The boundary between the dignity of the minor and his fragility, with the abuse of this right.

As we have already shown, the non-observance of the rights of the child has serious consequences for his or her mental and physical development. But are there any negative consequences due to improper application of these rights? But how can parents educate their children so that they are not controlled by those they should train? What are the limits within which the child's right to dignity should be seen, so that it is not mistakenly considered by minors, as their rights are violated by the mere application of a punishment with a corrective purpose.

I believe that the child must have a vision of his rights as well as of the way in which they must be exercised, so as not to arrive at a distorted view of the child on what is allowed and what is not.

CONCLUSION

The recognition of the child's distinct legal status considering the parents, has led to the last act of demystifying the treatment the child is sometimes subjected to: discovering physical, mental abuse, neglect, etc., with all the cortex of implications for its further development.

In recent years, the media has brought a large number of cases in front of the general public, in which parents mistreated their own children. The cases in Romania, but also from other countries, were presented with details, repeated several times, and some transformed into true series. Each time, the reactions of the citizens have been intense and

[1] *Manual de drept european privind drepturile copilului*, 135

humane: anger, revolt, demands for extreme punishment, the right to claim abusive behavior produced in their neighborhood, the demand for effective preventive measures, etc. [1] After the 1970s, there was an "increase" of the phenomenon of abuse of the child in the family (in the European states, America, Australia, Canada), in the environment in which the child should have been cared for by tradition. What has not been pointed and is not observed, in domestic violence studies, is that these phenomena are not new, violence against the child and the woman have been, for long periods, constant supporters of family life. They are still, but what is new is the public awareness of what is happening beyond the veil, which we call today: private family life. [2]

BIBLIOGRAPHY

Books

1. Draghici, Andreea. *Protectia Juridica a Drepturilor Copilului.* Bucharest:Universul Juridic, 2013.
2. Balahur, Doina. *Protectia drepturilor copilului ca principiu al asistentei sociale*. Bucharest: ALL BECK, 2001.
3. *Manual de drept european privind drepturile copilului*.Agenția pentru Drepturi Fundamentale a Uniunii Europene și Consiliul Europei, 2015.

Articles in Online Publications

1. Gheorghe, Florian and Mihaela Puscas. „Abuzurile asupra copilului, forme, motivatie,consecinte“
2. http://www.unicef.ro/publicatii/conventia-cu-privire-la-drepturile-copilului-2/
3. https://adevarul.ro/life-style/parinti/violenta-educatia-copilului-efectele-cumplite-bataia-dezvoltarii-copiilor-1/index.html

[1] Gheorghe Florian and Mihaela Puscas. *Abuzurile asupra copilului, forme, motivatie,consecinte*,1

[2] Balahur, *Protectia drepturilor copilului ca principiu al asistentei sociale*, 18.

Legislation

1. Romanian Civil Code
2. Law no. 272/2004

Jurisprudence

1. ECHR, Söderman / Sweden no. 5786/08, November 12, 2013
2. ECHR, Center for Legal Resources on behalf of Valentin Câmpeanu / Romania [GC], no. 47848/08, July 17, 2014
3. CEDO, C.N. and V./France, no. 67724/09, October 11, 2012
4. CEDO, Kontrová / Slovakia, no. 7510/04, May 31, 2007.
5. ECHR, Eremia / Republic of Moldova, no. 3564/11, May 28, 2013.

EDITURA C·H·BECK

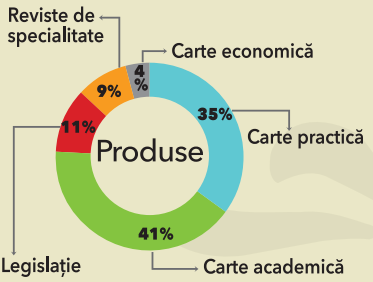
Tradiție și profesionalism

1998 parte a Editurilor All, se asociază cu Editura germană C.H. BECK devenind All Beck

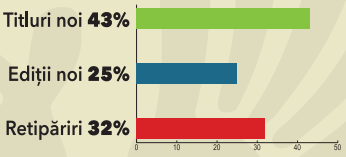
2001 se desprinde din Grupul Editurilor All

2006 preia numele partenerului european C.H. Beck, devenind astfel o societate independentă, cu capital majoritar german

Parte integrantă a grupului european C.H. Beck fondat în anul 1763, ce include societăți din Germania, Elveția, Polonia, Cehia, Slovacia și România.



Apariții



Destinatari

60% Studenți

40% Profesioniști

Realizări

Peste **400** autori colaboratori

Peste **1.000** titluri publicate

Peste **2.000** contracte de editare încheiate

Peste **15.000** clienți fideli

Peste **2.600.000** exemplare tipărite

Distribuție

200

Librării și puncte de vânzare în toată țara

Editura C.H. Beck

Calea Plevnei nr. 172, et. 3 și 4, Sector 6, București
www.beck.ro
Librărie online: www.beckshop.ro
Secretariat: office@beck.ro
Redacție: redactie@beck.ro
Vânzări: comenzi@beck.ro
Marketing: marketing@beck.ro

C·H·BECK

www.beckshop.ro

Librărie specializată de carte juridică

Noutăți și recomandări editoriale

Oferta de carte lunară a Editurii C.H. Beck

Cel mai mic preț la cărțile C.H. Beck cu reduceri de până la 80%

Experiența de cumpărare

- creezi simplu contul de client
- datele tale personale sunt protejate
- gestionezi adrese multiple de livrare și facturare
- salvezi în wishlist cărțile tale favorite
- plasezi comenzi rapid și în siguranță
- accesezi oricând istoricul comenzilor
- știi mereu care este starea comenzii tale
- urmărești livrarea (AWB) dacă optezi pentru curier rapid

Transport GRATUIT la comenzi de peste 200 lei

Oferte speciale pentru clienți

Newsletter săptămânal cu noutăți editoriale

C.H. BECK

Editura C. H. Beck • www.beck.ro
Calea Plevnei nr. 172, et. 3-4, sector 6, București
Tel.: 021.410.08.47, 021.410.08.73, Fax: 021.410.08.48
E-mail: comenzi@beck.ro