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USING ALGORITHMS IN PERSONNEL RECRUITMENT: SOME IMPLICATIONS IN LABOUR LAW

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Abstract: *Recruitment algorithms, far from eliminating potential subjective behaviours of human recruiters, risk perpetuating certain discriminatory practices and excluding candidates from the ranks of persons with disabilities or from ethnic, racial, and sexual minorities who do not fit the profile of the already established "ideal candidate" within the employing firm.*

The study explores the causes of this concerning phenomenon, manifested both during pre-contractual stages and throughout the course of employment relationships. We began by identifying existing European legislation in the field to further seek solutions regarding the risk of discrimination, as well as the risk of intrusion into the private lives of workers posed by the use of algorithmic management.

One of the main issues brought about by the use of recruitment algorithms is the difficulty not only in demonstrating but also in understanding the criteria they employ, which often are completely lacking transparency. Even in the presence of a right to information during recruitment, as enshrined by Directive 1152/2019 on transparency and predictability of working conditions in the European Union, such a right becomes devoid of substance if the information provided is generally unintelligible or specifically unintelligible to the subject of the right to information. In this context, the concept of "explainability" of the algorithms used becomes relevant, referring to the ability to explain how a specific decision was made by artificial intelligence.

Keywords*: algorithmic management; recruitment; discrimination; employee monitoring.*

Preliminaries

The algorithmic management system is a workforce management system that collects data, often in real time, about the workplace, job applicants, employees, their activities, and the tools they use. This data is then input into an artificial intelligence-based system to make automated or semi-automated decisions or provide information for those making decisions regarding employment relationships (I began with the EU-OSHA definition, which I simplified and updated. See, Artificial intelligence for worker management: implications for occupational safety and health (2022), Artificial intelligence for worker management: implications for occupational safety and health | Safety and health at work EU-OSHA (europa.eu).

The use of algorithms in recruitment and subsequently in managing labour relations has been considered an objective and fair solution, intended to eliminate human subjectivity. Indeed, we will not refer in these pages to the endless beneficial effects of using algorithms throughout a business's operations - from production to workforce management.

However, shortly thereafter, it was observed with surprise that recruitment algorithms, far from eliminating potential subjective and discriminatory behaviours of human recruiters, risked perpetuating discriminatory practices and excluding candidates with disabilities or from ethnic, racial, or sexual minorities who do not fit the established profile of the ‘ideal candidate’ in the employing firm. This risk is amplified in the case of machine learning artificial intelligence, with software capable of reprogramming its own criteria and metrics to achieve a very general predefined outcome, such as improving labour productivity (De Stefano, 2019, p. 15).

Causes of this phenomenon have been sought - from technical causes to structural causes, including existing discrimination in the society where artificial intelligence operates, which "contaminates" it with a tendency towards discrimination.

The hierarchical relationship that characterizes the employment relationship can have anticipatory effects during the pre-contractual period. This should be a period of balanced wills, as the employment contract has not yet been concluded, but the relationship between the potential candidate and potential employer can be affected by the same imbalance inherent in the employment relationship, an imbalance exacerbated by the use of algorithms. This can generate another sphere of questions (too difficult to answer within the scope of this work): where does labour law begin? (Directive 2019/1152 on transparent and predictable working conditions in the European Union already takes a step back, during the pre-contractual period).

Furthermore, once the employment contract is concluded, artificial intelligence will be heavily used, especially regarding the monitoring of employees and their activities. Certainly, monitoring workers is one of the oldest elements of managerial prerogative (for example, they worked in common spaces long before industrialization, precisely for strict monitoring purposes). But today, in a realm where artificial intelligence is fully used in labour relations, worker surveillance has far exceeded previous standards; they are monitored minute by minute - some authors speak of a "dystopian and paternalistic" control (De Stefano, 2019, p. 16) - regarding work time and breaks between activities, speed and efficiency in task completion, route taken in travel (through GPS systems), logging periods for digital workers, degree of interaction with colleagues, and even regarding health and mood.

The lack of transparency in digital means of employee monitoring corresponds to complete transparency of their entire lives, as a result of digital monitoring.

1. Is there already relevant legislation?

Timidly still, the use of algorithms in the recruitment process and, later on, in algorithmic human resource management are already subject to European and national regulations.

Notably, there is the recently adopted Directive on improving working conditions for platform work, which in Article 6 stipulates the obligation of digital labour platforms to inform platform workers about automated systems for monitoring, surveillance, and decision-making, as well as about automated decision-making systems.

Somewhat paradoxically, this protective regulation, which targets workers on digital platforms, does not extend to standard workers who remain subject to more traditional protective norms. However, the use of algorithms has long ceased to be limited to the specific case of platform workers (who represent just the tip of the iceberg), and has expanded across the entire labour market (In the long run no sector will remain unaffected by algorithmic operations. See, Adams-Prassl, 2019, pp. 123-146). Once there is a breach in the protection of a certain category of workers, it tends to be exported to others. Just as standard employment tends to become more precarious through the reduction of protections against dismissal - a phenomenon identified in many European legal systems - so too has the use of algorithmic management moved from the realm of platform workers to that of standard workers. However, the bold approach found in the Directive on improving working conditions for platform work offers no benefit to the standard workers. For the latter, there is no European legislation that, in principle, oblige the employer to fully inform the employee about the algorithmic systems they will use.

However, there are a series of norms that, if creatively applied, could lead to relatively effective protection for standard workers.

This legislation is not specifically tailored to meet the needs of employment relationships and does not consider the doubly disadvantaged position in which workers find themselves: as subordinate parties in the employment relationship and as subjects of algorithmic systems. Nevertheless, such norms can serve as a good starting point in regulating algorithmic management and limiting the risks it poses. For instance, the Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence qualifies as "high-risk systems," whose implementation would follow a special procedure, with authorized

representatives registering such systems in a specialized European Union database:

(a) AI systems intended to be used for the recruitment or selection of natural persons, in particular to place targeted job advertisements, to analyse and filter job applications, and to evaluate candidates;

(b) AI systems intended to be used to make decisions affecting terms of work-related relationships, the promotion or termination of work-related contractual relationships, to allocate tasks based on individual behaviour or personal traits or characteristics or to monitor and evaluate the performance and behaviour of persons in such relationships.

Undoubtedly, Regulation (EU) 2016/679 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (GDPR) also plays a role in protecting employees as subjects of automated monitoring systems. Algorithms are fuelled by employees' personal data; limiting the acquisition and processing of this data can lead to the regulation of algorithm use itself.

Similarly, anti-discrimination directives, although built upon the foundation of traditional legal relationships, can be used to limit the possibility of discriminatory outcomes resulting from the application of automated systems. We refer, for example, to a form of discrimination that has been less invoked in practice, namely the order to discriminate, which could be used to hold the user of an automated algorithmic system accountable.

At the national level, Law 190/2018 on measures for the implementation of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation, published in the "Official Gazette of Romania," Part I, No. 651 of 26 July 2018), refers to the processing of genetic, biometric, or health data for the purpose of automated decision-making or profiling, but allows such processing only if explicit consent is obtained from the data subject. However, consent, in the context of employment

relationships, can only be exceptionally used, as it is presumed to be compromised in the case of an employee who is hypothetically in a subordinate relationship.

Also relevant is Decision No. 174/2018 of the National Supervisory Authority for Personal Data Processing, published in the "Official Gazette of Romania," Part I, No. 919 of 31 October 2018. The source of the decision of the National Supervisory Authority for Personal Data Processing is found in Article 35, paragraph (4) of the General Data Protection Regulation: "The supervisory authority shall draw up and publish a list of the types of processing operations that are subject to the requirement for a data protection impact assessment." This decision requires operators to assess the impact on personal data protection, among other things, in cases of large-scale processing of personal data of vulnerable individuals (which includes employees), through automated monitoring and/or systematic recording of behaviour.

Furthermore, Romanian legislation includes a wide range of anti-discrimination regulations that could be used to address the effects of algorithms in the recruitment process and during the course of employment relationships. We can mention here the Labour Code (particularly Article 5), Government Ordinance No. 137/2000 on the prevention and sanctioning of all forms of discrimination, republished in the "Official Gazette of Romania," Part I, No. 166 of 7 March 2014, Law No. 202/2002 on equal opportunities and treatment between women and men, republished in the "Official Gazette of Romania," Part I, No. 326 of 5 June 2013, subsequently amended, including by Law No. 178/2018, and Government Decision No. 262/2019 approving the methodological norms for the application of the provisions of Law 202/2002, published in the "Official Gazette of Romania," Part I, No. 333 of 2 May 2019.

All these legislative acts, taken together, can serve as a starting point for legislative management of the issue. However, as we will see, they are far from providing adequate protection in the dynamic field of recruitment algorithms.

2. The Discriminatory Potential of Algorithm Use in Employment Relations

There are three stages in the recruitment process where algorithms play a decisive role:

a) Job Offer.

Until recently, a job announcement would be published in the press, accessible to anyone, regardless of whether they were part of the usual pool of candidates for that position. Nowadays, such announcements are targeted and published on social media pages to specific segments of people who might be potential candidates for the job. Those outside this segment may not even know the position exists, let alone apply for it. The selection of individuals who match the candidate profile is done automatically through algorithms at the pre-contractual stage, trained to distinguish between someone unlikely to be hired and someone who has a chance. This selection process can undoubtedly include discriminatory aspects (for example, certain genders or ethnicities might be excluded).

However, in this case, lodging a complaint would be challenging.

Firstly, those not targeted by the advertisement may be unaware of its existence. Secondly, even if they discover the job existed, they may not meet the conditions required by anti-discrimination laws to file a complaint. These conditions often require the complainant to have applied and been rejected due to belonging to a protected category.

Indeed, a major issue is not only the difficulty of proving but also knowing the criteria used in recruitment algorithms, which are often completely opaque (regarding the lack of transparency of algorithms in the recruitment and monitoring of employees, see also Klengel and Wenckebach, 2021, pp. 157–171).

The conclusion that they can prove to be discriminatory arises from a series of statistical analyses in which the outcomes of automated recruitment were compared with those of recruitment conducted, at least in part, by human beings. However, it is almost impossible, in a given

case, to identify the method by which candidates were selected by artificial intelligence.

Directive 2019/1152 on transparent and predictable working conditions in the European Union does not include an obligation to inform the candidate about the algorithms used in recruitment, or later in the monitoring and evaluation of employees. But even more than that: even if such an obligation to inform were included in the Directive, it would still not benefit those who were eliminated from the recruitment process from the very beginning. Because, as I have shown, before reaching the candidates, artificial intelligence has already operated a selection process. And this preliminary process escapes the Directive, which only addresses the information provided to candidates at the hiring stage.

b) Selection of CVs.

Even if artificial intelligence systems are programmed to ignore the gender or ethnic origin of the candidate, they can still identify, for instance, women based on certain career interruptions (corresponding to maternity leave) or members of ethnic and racial minorities based on their address or name.

c) Subsequent use in job interviews.

Artificial intelligence is also used during job interviews. There are applications used to record and analyse the micro-expressions of the interviewed candidate, identifying enthusiasm, fear, confusion, and other emotions, intended to help the recruiter make the right choice. Even at this stage, algorithmic systems can produce discriminatory outcomes, for example, regarding persons with disabilities. Additionally, the margin of error of these systems is higher if the interviewee belongs to a minority, sometimes because the system is most often 'trained' using the characteristics of the dominant gender and ethnicity in that society.

How do these recruitment systems correlate with the principles of good faith? And who is, in concrete terms, the debtor of the obligation of good faith when the recruiter itself is not a person, but an algorithm?" (Adams-Prassl, 2019, pp. 123 – 146). Of course, the initial requirements are entered into the application by the employer, but often the employer does not even know how they are processed; the employer only uses the

outcome of the selection conducted by artificial intelligence. The process is even less known to the candidate or an external audit body.

Given these obstacles, the solution most frequently identified in legal literature is, naturally, the imperative of transparency. Indeed, the algorithms used are unknown to candidates, later to employees, and also to unions or their representatives. Some legal systems, such as Spain (Decreto-Lei n.º 9/2021), have introduced a set of rules regarding the obligation to inform the union about the algorithms used in employment relations. However, technical complexity often obscures, in the rare legal systems where such an obligation exists, the concrete functioning of these algorithms. Furthermore, they are unknown even to the employer, who merely purchased an algorithmic system from the open market, hoping to gain certain advantages. The employer is not necessarily an expert in the technical subtleties underlying these systems. Sometimes, the decisions made by the system differ from those the employer would make if they were still in a position to do so.

What is above all concerning, however, is that the reason why the system arrived at a particular decision, and not another, is sometimes unknown even to the specialists who designed it.

Therefore, it is easy to demand transparency, but what does transparency truly mean in a context where merely providing information is far from sufficient to understand a system that surpasses even the comprehension of professionals in the field? Moreover, we must not forget that these applications are protected by intellectual property rights, so not every request for transparency can be easily accepted. This is why the algorithmic management system is often considered a 'black box,' whose content is unknown both to those being monitored and even to those who use it. (For example, regarding task allocation, it is never fully clear why a particular worker receives a task and not another; for instance, why a specific courier is assigned a particular order when several couriers are nearby. Baiocco et. Al., 2022, p. 15)

3. The Intrusive Potential of Algorithm Use in Employment Relations

From the recruitment stage, which this paper focuses on, to the final phase of employment relations (for instance, the decision to terminate employment), algorithmic systems are omnipresent in today's enterprises. For example, worker monitoring is carried out comprehensively and far more efficiently than a human could ever manage.

The use of artificial intelligence systems to monitor workers originated from a real issue: workers often tend not to use their working time optimally. Here, there are two options:

- Either the employer circumvents legal provisions by turning them into (false) independent contractors, focusing on the work outcome rather than the work process. They thus become liable for an obligation of result, assuming responsibility for it. Working time becomes irrelevant (an analysis of this option exceeds the scope of this paper);
- Or the employer maintains the employment contract but controls the workers through often intrusive and digitalised methods.

In the case of this second option, the role of algorithms in managerial activity increases exponentially year by year. As we have seen, algorithmic tools can select candidates for employment, but they can also subsequently monitor employees regarding their activities, interactions with colleagues, breaks, location, online behaviour (keystrokes, internet browsing history, computer screenshots, motion or facial recognition sensors that allow for the evaluation of the time the worker spends facing the monitor), and the physical and mental health or emotional state of workers. Some applications even monitor workers' sleep, their reactions at different times of the day (for instance, the level of enthusiasm when receiving a work task), and their location at every moment of the day.

Needless to say, these monitoring methods go beyond assessing the fulfilment of tasks outlined in the job description. What is most concerning is not the fact that this continuous monitoring, carried out

through cameras, applications installed on computers, wristbands, and other devices, constitutes a violation of the worker's privacy, but the purpose for which these methods are used.

And here, the issue takes on the nuances of a dystopian universe.

These means of control do not solely aim at evaluating performance but have a pronounced **predictive role**: algorithms enable employers to assess the risk that a particular employee might resign, unionise (even if they have not yet done so), have conflicts with colleagues, or underperform professionally. And this, regardless of the employee's current situation or present productivity.

From its initial role in analysis and evaluation, algorithmic management is now used to predict behaviour. Any prediction is based on the individual's behavioural history, which once again opens the door to discrimination: if a particular minority has historically underperformed in a specific job, the algorithm will assume that these minority members will not perform well in the future either. And this is textbook discrimination (A phenomenon that reminds us of the film "Minority Report", which was set in 2054).

The inherent democratic deficit of the employment contract is thus overlaid with an informational deficit: while the employer acquires more and more information about the employee, including data related to their private life, the employee knows less and less about which information is accessed, how the algorithms processing it work, and ultimately, how this data will be used.

In traditional employment relationships, the employee has the right to defend themselves during disciplinary investigations, the right to challenge evaluations, and the right to know the evaluation criteria based on which, for example, they were dismissed for professional incompetence. They also have the right to know the criteria on which bonuses or performance incentives are granted and, specifically, what performance is expected of them. Sanctions or, conversely, incentives would not come as a surprise. This is also the perspective of the European legislator, reflected in Directive 2019/1152 on transparent and predictable working conditions in the European Union.

However, things are very different when human resource management is conducted through algorithms. The system generally involves a certain rating assigned to each job candidate or employee. Some criteria, which strictly pertain to performance, are known and, essentially, legitimate. But others are simply unknown, which makes it impossible for workers to improve.

Furthermore, when workers - through formal or informal means - become aware of the criteria taken into account, there is a risk that they will only focus on fulfilling the criteria that form the basis of evaluation, neglecting other aspects of the job description that cannot be assessed in this way. Employees might concentrate solely on behaviours or skills that are positively evaluated by the system, ignoring other important aspects of their role. This could lead to a distortion in evaluation and the promotion of certain behaviours or skills to the detriment of others, which can affect the fairness and effectiveness of the evaluation process.

This issue has long concerned analysts in the field of human resources. It is an attempt to completely quantify the worker's experience at the workplace, a process that has been termed 'quantify self at work' (Moore and Robinson, 2016, pp. 2774-2792). Any evaluation criterion must, above all, be measurable; this approach trivialises the qualitative and creative aspects of work (Just an example: as a result of using strictly quantitative criteria, there is a noted risk that teaching staff in universities may neglect their teaching activities in order to focus on research, which is measured and evaluated).

The use of algorithms in human resource management can pose risks to workers' mental health. New concepts are already being used to identify these risks: 'techno-stress' or 'techno-anxiety' (Staccioli and Virgillito, 2024, p. 4). The problem is that the solutions for reducing these risks are themselves intrusive, namely the continuous monitoring of workers' mental health, coaching, psychological counselling, team-building activities, and measures to stimulate employees' interest in their work - all of which have their own potential for intrusion into the private lives and intimacy of workers.

Conclusions

The use of algorithms in managerial processes is not only inevitable today but also beneficial from many perspectives. However, in this paper, I focused on the risks that artificial intelligence poses to equal opportunities in employment and, subsequently, to the private lives of workers.

The lack of information means that some vulnerable categories of candidates, who are often avoided in hiring or promotion, may not even be aware that they could have applied for a position they did not know about, or that they were rejected for an obscure reason dictated by artificial intelligence and unknown even to the recruiter. The ontological asymmetry in the employment relationship is thus compounded by the informational asymmetry generated by the use of new technologies. Knowing about the presence of algorithms and how they operate means that half of the journey towards implementing anti-discrimination policies in the current digitalised world of work has already been made. This is why the principle of transparency and the exercise of the right to information are vital in this regard.

But this also requires the "explainability" of the system - in other words, the ability to explain how a particular decision was made or recommended by the system. It is important for these systems to be able to provide explanations or reasoning for their decisions, especially in areas where understanding the decision-making process is crucial. The right to information becomes meaningless if the information is unintelligible in general or unintelligible in particular to the subject of the right to information.

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PAID DAYS OFF GRANTED TO EMPLOYEES FOR RELIGIOUS HOLIDAYS IN LIGHT OF ART. 139 OF THE LABOR CODE AND CJEU CASE LAW

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Abstract: *This study analyzes the non-conformity of the provisions included under art. 139 of the Labor Code with the non-discrimination principle enshrined under art. 21 of the Charter of Fundamental Rights of the European Union and EU Directive 2000/78 establishing a general framework for equal treatment in employment and occupation.*

Concretely, the study demonstrates that the law lays down different rules for granting public holidays for employees who belong to a different religious cult than the Christian cult of new rite (the majority in Romania), rules which, considering various practical interpretations, lead to the application of a different treatment bases on religion.

Finally, we argue that these rules might contravene art. 21 of the Charter of Fundamental Rights of the European Union and, thus, could be disapplied under the principle of primacy of EU law.

Keywords: *public holidays; religious Christian cult of Old Rite.*

Introduction

This study analyses the conformity of Article 139 of the Labor Code with the principle of non-discrimination regulated under Article 21 of the Charter of Fundamental Rights of the European Union (OJ C83,

2010, p. 380), as well as under Articles 1 and 2(2) of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2000, pp. 16-22; Athanasiu, 2010; Dima, 2012).

Specifically, the analysis concerns the entitlement of employees belonging to a religious cult other than the Christian one (this cult represent the majority in Romania), based on the revised Justinian calendar, to paid days off during the religious public holidays included under the Labor Code.

Our research had as its starting point the case Cresco Investigation against Markus Achatzi (C-193/17, 2019, p.43) of the Court of Justice of the European Union, which we will summarize below for an easier understanding of the conclusions of our analysis.

I. Case Cresco Investigation

1. Presentation

The request has been made in proceedings between Cresco Investigation GmbH ('Cresco') and Mr Markus Achatzi concerning Mr Markus Achatzi's entitlement to compensation in addition to the remuneration received for work done on Good Friday.

Under Article 7(3) of the Law on Rest and Public Holidays, Good Friday is a paid public holiday, accompanied by a 24-hour rest period, for members of the Evangelical Churches of Augustan and Helvetic Confession, the Old Catholic Church and the Evangelical Methodist Church ('the churches covered by the ARG'). If a member of one of these churches nevertheless works on that day, he is entitled to additional remuneration for that public holiday (hereinafter referred to as a public holiday allowance).

Mr Achatzi is an employee of Cresco, a private detective agency, and is not a member of any of the churches targeted by ARG. He considers that he was discriminatorily deprived of the public holiday allowance for the work he carried out on 3 April 2015, on Good Friday,

and demands, on that basis, payment by his employer of EUR 109.09, increased by interest.

Hearing an appeal brought by Cresco against the decision of the appeal, the Supreme Court observes, first of all, that, of the thirteen public holidays listed in Article 7(2) of the ARG, all of them, with the exception of 1 May and 26 October, which are devoid of any religious connotation, have a connection with Christianity, two of them being even exclusively related to Catholicism. Moreover, those public holidays are non-working and paid for all workers, irrespective of their religious affiliation.

The referring court points out that the special arrangements laid down in Paragraph 7(3) of the ARG are intended to enable members of one of the churches covered by that provision to practise their religion on a feast day which is particularly important to them — Good Friday.

According to that court, Paragraph 7(3) of the ARG makes the grant of an additional public holiday conditional on the religion of the workers, with the consequence that persons who do not belong to the churches covered by the ARG enjoy, in relation to the members of one of those churches, one less day of paid public holidays, which constitutes, in principle, less favorable treatment on grounds of religion.

However, the referring court asks whether the situation of those two categories of workers is comparable in the sense of:

- whether the regime provided for in § 7(3) of the ARG is to be regarded as a necessary measure to protect the freedom of religion and religion of workers who are members of one of the churches covered by the ARG;
- whether the difference in treatment at issue can be justified under Article 7(1) of Directive 2000/78, since it constitutes a positive and specific measure designed to eliminate existing disadvantages.

Brief, according to Austrian law, employees, regardless of their religion, benefit from a number of 11 paid days of legal religious holiday, and if they perform work on these days, they will benefit from a certain salary increase. However, for employees belonging to the three specific

confessions (churches covered by ARG), an extra day of paid religious holiday is recognized – Good Friday, this right being attached to the obligation of the employer to pay a certain salary increase, if this category of employees performs activity on Good Friday.

The referring court has raised four questions.

By its first three questions, the referring court asked whether Articles 1 and 2(2) of Directive 2000/78 must be interpreted as meaning that national legislation under which, first, Good Friday is a public holiday only for workers who are members of certain Christian churches and, moreover, only such workers are entitled, if they are required to work on that public holiday, to an increase on public holidays which constitute direct discrimination on grounds of religion. If so, the referring court asked whether the measures provided for by that national legislation may be regarded as measures necessary for the protection of the rights and freedoms of others, within the meaning of Article 2(5) of that directive, or as specific measures to compensate for disadvantages linked to religion, within the meaning of Article 7(1) of that directive.

a. As a matter of priority, the CJEU examined whether the national legislation at issue in the main proceedings resulted in a difference of treatment between workers on grounds of their religion.

The CJEU considered that the national legislation establishes a differential treatment based directly on the religion of the workers (paragraph 40), given that for employees belonging to the three specific confessions (churches covered by the ARG) an extra day of paid religious holiday is recognized – Good Friday, to which right is attached the obligation of the employer to pay a certain salary increase, if this category of employees performs work on Good Friday.

b. The CJEU examined whether such differential treatment concerns categories of workers who are in comparable situations.

In this regard, the Court stated in paragraph 43 of its judgment that it is not necessary for situations to be identical, but only for them to be comparable. The examination of that comparability must not be carried out globally and in the abstract, but specifically and specifically in relation to the service concerned.

As a matter of priority, the Court, analyzing the specific situation of employees belonging to the ARG, concluded that the granting of a public holiday on Good Friday to a worker who is a member of one of the churches covered by the ARG is not subject to the condition that the worker fulfils a certain religious obligation on that day, but is subject only to the formal membership of that worker in one of those churches. That worker shall remain free to dispose at his discretion, for example for rest or leisure purposes, of the period relating to that public holiday.

The Court has stated that the situation of such a worker is indistinguishable, in that regard, from that of other workers who wish to have a period of rest or leisure on Good Friday without, however, being able to benefit from an appropriate public holiday.

Similarly, as regards the allowance, the CJEU has stated that, as regards the award of such a financial benefit, the situation of workers who are members of one of the churches covered by the ARG is comparable to that of all other workers, whether or not they have a religion.

The CJEU concluded that national legislation has the effect of treating comparable situations differently depending on religion. It therefore establishes direct discrimination on grounds of religion within the meaning of Article 2(2)(a) of Directive 2000/78 (paragraph 51).

c. The CJEU considered whether:

Such direct discrimination may be justified under Article 2(5) of Directive 2000/78 or Article 7(1) of that directive.

In that regard, the Court has held that freedom of religion forms part of the fundamental rights and freedoms recognized by EU law, with the result that the national legislation may be regarded as justified.

The measure is necessary for the protection of the freedom of religion of workers who were part of the ARG. In this respect, the CJEU found that the possibility for workers who do not belong to churches covered by the ARG to celebrate a religious holiday which does not coincide with one of the public holidays listed in Paragraph 7(2) of the ARG is not taken into account in Austrian law by granting an additional public holiday, but principally by means of an obligation of solicitude on

the part of employers towards their employees, enabling them to obtain, where appropriate, the right to be absent from their workplace for the time necessary to perform certain religious rites.

From this perspective, the CJEU concluded that the national measures at issue could not be considered necessary for the protection of freedom of religion;

Proportionality test. The CJEU found that the provisions at issue in the main proceedings grant a rest period of 24 hours, on Good Friday, to workers who are members of one of the churches covered by the ARG, whereas workers belonging to other religions, whose important holidays do not coincide with the public holidays referred to in Article 7(2) of the ARG, They may, in principle, be absent from their workplace for the performance of religious rites relating to those feasts only on the basis of authorization granted by their employer in the context of the obligation of solicitude.

In those circumstances, the CJEU has held that the measures at issue in the main proceedings go beyond what is necessary to compensate for such an alleged disadvantage and that they establish a difference of treatment between workers facing comparable religious obligations, which does not guarantee, to the greatest extent possible, compliance with the principle of equality.

In those circumstances, the CJEU ruled that: '*Articles 1 and 2(2) of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that national legislation under which, on the one hand, Good Friday is a public holiday only for workers who are members of certain Christian churches and, on the other hand, only such workers are entitled, if they are required to work on this public holiday, to an allowance additional to the remuneration received for the services performed on that day constitutes direct discrimination on grounds of religion.*'

By its fourth question, the referring court asked, in essence, whether EU law must be interpreted as meaning that, as long as the Member State concerned has not amended, in order to restore equal treatment, the legislation granting the right to a public holiday on Good Friday only to workers who are members of certain Christian churches, a

private employer is obliged to grant to its other workers the right to a public holiday on Good Friday and, consequently, if they are required to work on that day, to grant them the right to a public holiday allowance.

In its analysis, the CJEU brought the following arguments concerning:

- the effects of directives. Thus, a directive cannot, of itself, impose obligations on an individual and, therefore, cannot be relied upon as such against him. Thus, to extend the possibility of relying on directives which were not transposed or were incorrectly transposed in relations between particulars would amount to recognizing the European Union's competence to impose obligations on individuals with immediate effect, even though it has that possibility only in cases where it has been entrusted with the power to adopt regulations;
- the fundamental principle of non-discrimination. The prohibition of discrimination based on religion or belief of any kind is as a general principle of EU law, included under Article 21(1) of the Charter. This prohibition is sufficient in itself to confer on individuals a right which may be invoked as such in a dispute between them in an area covered by EU law;
- in conformity interpretation. It is for national courts to interpret a national provision in conformity with Directive 2000/78, without, of course, being able to reach an interpretation *contra legem*. If it were established that national provisions could not be interpreted in a manner consistent with Directive 2000/78, the referring court would none the less be required to ensure the legal protection flowing for workers from Article 21 of the Charter and to guarantee the full effect of that article;
- observance of the non-discrimination principle. In cases of discrimination contrary to EU law, as long as measures have not been adopted to restore equal treatment, compliance with the principle of equality can be ensured only by granting disadvantaged persons the same advantages as those enjoyed by persons in the privileged category. Disadvantaged persons must thus be placed in the same situation as persons benefiting from the advantage concerned. In that situation, the

national court is required to set aside any discriminatory national provision without having to request or wait for its prior abolition by the legislature and to apply to members of the disadvantaged group the same treatment as that enjoyed by persons in the other category. That obligation rests with it irrespective of the existence, in national law, of provisions empowering it to do so.

- In those circumstances, the CJEU ruled that: *Article 21 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that, as long as the Member State concerned has not amended, in order to restore equal treatment, legislation which grants only workers members of certain Christian churches the right to a public holiday on Good Friday, a private employer subject to that legislation is obliged to grant his other workers the right to a public holiday on Good Friday, provided that they have previously requested that employer not to work on that day and, consequently, the obligation to recognize those workers as entitled to compensation in addition to the remuneration received for the services performed on that day, where that employer has refused to grant such a request.*

2. National legislation.

The Labour Code establishes in art. 139 the following:

(1) Non-working public holidays shall be:

- January 1 and 2nd;
- January 6 - Baptism of the Lord - Epiphany;
- January 7 - Council of the Holy Prophet John the Baptist;
- January 24 - Unification Day of the Romanian Principalities;
- Good Friday, the last Friday before Easter;
- the first and second day of Easter;
- May 1st;
- June 1st;
- the first and second days of Pentecost;
- The Assumption;

- November 30 - Saint Andrew the Apostle, the First-Called, Protector of Romania;

- December 1st;

- the first and second day of Christmas;

- two days for each of the 3 annual religious holidays, so declared by legal religious denominations other than Christian ones, for persons belonging to them.

(2) The granting of days off shall be made by the employer.

(2^1) For employees belonging to a legal, Christian religious cult, the days off for Good Friday, the first and second days of Easter, the first and second days of Pentecost shall be granted on the dates on which they are celebrated by that cult.

(3) The days off established in accordance with para. (1) for persons belonging to legal religious cults, other than Christian ones, shall be granted by the employer on other days than the public holidays regulated under the law or annual leave.

(3^1) Employees who have benefited from the days off for Good Friday - the last Friday before Easter, the first and second day of Easter, the first and second day of Pentecost, both on the dates established for the legal, Christian religious cult to which they belong, and for another Christian denomination, shall recuperate the additional days off on the basis of a schedule established by the employer.

II. Religions recognized in Romania. Brief considerations.

According to art. 29 para.5 of the Romanian Constitution, religious cults are autonomous, Romania not having a state religion.

From a statistical perspective, it is worth pointing out that, according to the data collected following the census organized in 2021, approximately 2.7 million Romanians – so almost 15% of the total population – refused to declare their religious affiliation, over double the number of those who did not declare their affiliation during the 2011 census (Cornea, 2023).

More specifically, the 2011 census, from the perspective of religious affiliation, resulted in the following:

- 16,307,004 citizens, representing 89.45% of the population are as Orthodox,
- 870,774 citizens are Roman Catholic (4.62% of the population),
- 600,932 citizens are reformed (3.19%),
- 362,314 citizens are Pentecostals (1.92%),
- 150,593 citizens are Greek Catholic (0.8%),
- 112,850 citizens are as Baptists (0.6%),
- 80,944 citizens belong to the 7th day Adventist Church,
- 49,820 citizens belong to the religious organization "Jehovah's Witnesses",
- 42,495 citizens belong to the Christian Evangelical Church,
- 15,514 citizens belong to the Evangelical Church Romanian,
- 64,337 citizens belong to the Muslim cult,
- 3,519 citizens are part of the Mosaic cult,
- 30,557 citizens of other religions,
- 20,743 atheists,
- 18,917 without religion,
- 1,259,739 unavailable.

Instead, following the analysis of the results of the 2021 census (Cornea, 2023), it was found that:

"The high number of people for whom religious affiliation is unknown has led to significant decreases, in gross figures, in the number of believers of different denominations, proportional to their size.

Thus, at the 2021 Census, just under 14 million Romanians declared their belonging to the Orthodox religion, compared to over 16.3 million in the previous Census, in 2011.

It is a decrease of over 2.3 million people, more than 2 times higher than the total decrease of Romania's population from one Census to another: 20.12 million Romanians in 2011, 19.05 million in 2022.

The Roman Catholic and Reformed churches also have at least 100,000 fewer believers.

Other denominations, including neo-Protestants, also have fewer scriptural believers, with the exception of the Pentecostal Church - 404,000 versus 362,000.

The number of those who declared themselves atheists - 57,000, compared to 20,000 but also without religion - over 70,000, compared to 20,000 in 2011 - has increased significantly, but the figures are small compared to the oscillations within the majority Orthodox Church, for example.

As a percentage of the Orthodox population, however, it decreased by only 1.2%, from 86.5% to 85.3%, while the percentages of religious denominations are reported only to people who declared their religion."

In Romania, 18 religious cults are recognized (Law no. 489/2006, republished, 2014), of which 16 are traditional Christian and neo-protestant cults, including the old rite, to which are added the mosaic cult and the Muslim cult, as follows:

- Romanian Orthodox Church;
- Serbian Orthodox Diocese of Timisoara;
- Roman Catholic Church;
- Romanian Church United with Rome, Greek Catholic;
- Archdiocese of the Armenian Church;
- Old Rite Orthodox Church in Romania;
- The Reformed Church in Romania;
- Evangelical Church C.A. in Romania;
- Evangelical Lutheran Church in Romania;
- Hungarian Unitarian Church;
- Baptist Christian Cult - Union of Christian Baptist Churches in Romania;
- Christian Evangelical Church in Romania;
- Evangelical Church Romanian;
- Pentecostal Christian Worship – The Church of God Apostolic in Romania;
- Seventh-day Adventist Church in Romania;
- Federation of Jewish Communities in Romania – Mosaic Cult;

- Muslim worship;
- Religious Organization "Jehovah's Witnesses".

Therefore, the religions recognized by the Romanian state are the Orthodox ones, which use the revised Julian calendar; Catholic, which uses the Gregorian calendar; Protestant using the Gregorian calendar; neo-protestants that use the calendar according to the country in which they live, as well as the Muslim and Mosaic religion.

The difference between Orthodox, on the one hand, and Catholics and Protestants, on the other, in terms of public holidays granted under the Labour Code is that Easter and feasts which are calculated according to the annual date on which Easter is celebrated, *i.e.* Good Friday and Pentecost respectively, are be celebrated on different days in the three Christian denominations. This difference is given by the calendar used to determine the dates of religious holidays.

The neo-protestant denominations recognized in Romania are: Baptist, Adventist, Pentecostal, Evangelical Christians, Evangelists and Jehovah's Witnesses. These cults appeared in the nineteenth century, having no tradition regarding the use of a certain type of calendar. Under these circumstances, the calendar used by neo-Protestants is that of the country in which they live, either Julian or Gregorian.

Neo-Protestants do not celebrate saints, which means they do not celebrate January 6 (Epiphany), January 7 (St. John the Baptist), August 15 (St. Mary), and November 30 (St. Andrew the Apostle).

As for Easter, neo-Protestants do not have a special annual day on their calendar to celebrate this moment. However, neo-Protestants, depending on the specific cult, celebrate Easter at the same time as they are celebrated by the Roman Catholic Church or the Orthodox Church.

Of all neo-Protestant denominations, Jehovah's Witnesses and Adventists do not celebrate Christmas, Orthodox or Catholic Easter, or any other holidays and customs, which are considered to have pagan origins. However, Jehovah's witnesses celebrate certain aspects of the Passover holidays, such as *the Last Supper* and *Christ's death* on the evening of Nisan 14 (according to the Jewish calendar), every year on the same date as Passover. Similarly, Adventists celebrate Easter with the religious feast of the Holy Supper which is held every 3 months.

In the Mosaic cult, Passover is celebrated for eight days, from 15 to 22 Nisan, a month that marked in antiquity the beginning of the Hebrew ecclesiastical year. Of these, the first and last two days require strict adherence to religious rules (Cocoșilă, 2024). In 2024, the celebration took place from April 22 to 30 (Pesah, 2023). The Mosaic cult does not have a Christmas holiday, but Jews celebrate Hanukkah – the Feast of Lights. They also do not have in the religious calendar the religious holidays regulated by Article 139, except, as we have indicated, Easter holidays.

Muslim worship does not celebrate any of the holidays covered by section 139 of the Labour Code.

Atheists, as well as those without religious confessions in Romania, are entitled, as a rule, to free time, with the observance of public days off regulated for Orthodox or Catholic Christian worship.

III. Application of CJEU case-law in interpreting article 139 c. labour

1. Employees of the Christian religion, who use either the revised Julian calendar or the Gregorian calendar

For employees belonging to a legal, Christian religious cult, the days off for Good Friday - the last Friday before Easter, the first and second day of Easter, the first and second day of Pentecost (days that are established according to the Easter holiday) are granted depending on the date on which they are celebrated by that cult - art. 139 paragraph 21.

According to art. 139 para. (31) of the Labor Code, employees belonging to one of the recognized Christian cults (including those of the old rite) and who benefited from the days off for Good Friday - the last Friday before Easter, the first and second day of Easter, the first and second day of Pentecost, both on the dates established for the legal, Christian religious cult, to which they belong, as well as for other Christian denominations, will recuperate the additional days off based on a schedule established by the employer.

Therefore, the days off for Good Friday, the first and second day of Easter, the first and second day of Pentecost can be granted either separately to each cult, depending on the date on which these days are celebrated, or the employer has the option to grant them cumulatively, but in this case, the employees will recuperate the additional days according to a schedule established by the employer. Obviously, if religious holidays are granted separately, only on the date on which they are celebrated by each denomination, employees of this Christian religious cult will perform work on religious holidays belonging to another Christian denomination.

The question we must answer refers to the possibility of employees belonging to a Christian religious cult to benefit also from paid days off on the date on which Muslim employees and those of the mosaic cult celebrate the 6 days of religious holiday applicable to that cult.

2. Employees belonging to the Mosaic or Muslim cult

Persons belonging to a religious cult other than the Christian one benefit from two days for every 3 annual religious holidays belonging to this cult. These days will be granted by the employer on days other than **(i)** those provided for persons belonging to the Christian cult and **(ii)** those related to the days of annual leave (art. 139 paragraph 1 final sentence in conjunction with paragraph 3 of the Labor Code).

As we have indicated, employees belonging to one of the recognized Christian denominations (including those of the old rite) who benefited from the days off for Good Friday, the first and second day of Easter, the first and second day of Pentecost, both on the dates established for the legal, Christian religious cult to which they belong, and for another Christian cult, will recover additional days off based on a schedule established by the employer – paragraph 31.

However, the norm in paragraph 31 does not regulate the situation of employees belonging to the Mosaic or Muslim cult, which is why in this study we intend to analyze the consequences generated by this regulatory vacuum.

3. Employees belonging to the old-rite Christian religious cult

Also, Article 139 paragraph 1 does not regulate the case of employees belonging to the old-rite Christian religious cult and using the Julian, old-rite calendar (calendar applicable in Jerusalem, Russia, Serbia, Georgia, Poland, Sinai, Ukraine and Japan), unlike other Christian denominations, which use either the revised or new-rite Julian calendar (applicable in Constantinople, Alexandria, Antioch, Romania, Bulgaria, Cyprus, Greece, Albania, Czech Republic, Slovakia and the Orthodox Church in America) or the Gregorian Church (Finland and Estonia).

The Orthodox Church in Romanian use a double calendar: the Julian calendar, revised according to the recommendations of the Pan-Orthodox Conference in Constantinople in 1923, being implemented starting with October 1924, for fixed-date holidays, and the old, uncorrected one, for Easter-related holidays, whose date is rotated according to the new style.

The days of Epiphany, the Council of the Holy Prophet John the Baptist, the Assumption of the Virgin Mary, the Holy Apostle Andrew of the Old Rite Christian worship do not coincide with those of the New Rite Orthodox Christian religion. However, these days are regulated in art. 139 as fixed dates: January 6, January 7, August 15 (although August 15 is not specified, it is common to Orthodox and Catholic worship), respectively November 30 - which, once more, generates difficulties in applying this legal text, being necessary to establish on what dates employees of the old-rite Christian cult will benefit from the aforementioned public holidays.

At the same time, Christmas days do not coincide with those celebrated by Catholic and Orthodox employees, which are calculated by reference to the revised Gregorian and Julian calendars, respectively.

Therefore, employees who are practitioners of old-rite Christian religious worship cannot benefit from the provisions of art. Article 139(1), last sentence, since they refer to religious denominations other than Christian denominations, nor from the provisions of paragraph 21 of

the same article, since this rule refers to other religious holidays (Good Friday, the first and second days of Easter, the first and second day of Pentecost) than those listed above.

On the other hand, the Para (1) does not specify the exact date of the Feast of the Assumption or of the first and second day of Christmas.

Consequently, Article 139(1) of the Labor Code could be interpreted extensively, although we have serious reservations in relation to this option, to the effect that old-rite Christian employees will be able to benefit from days off on the Feast Days of the Assumption and the first and second days of Christmas, according to their religious calendar (Julian).

However, this solution cannot be applied to the following public holidays:

- Epiphany, which for old-rite religious worship falls on January 20;
- The Council of the Holy Prophet John the Baptist, which for the Old Rite religious worship is on January 21;
- St. Andrew the Apostle, which for the old-rite religious cult is on December 13, the legal text establishing *expressis verbis* the days of January 6, January 7 and November 30 respectively as days off, these being specific to the Christian cult of the new rite (revised Julian calendar, respectively Gregorian).

Therefore, the question to which an answer must be identified refers to the possibility of old-rite Christian employees to benefit from religious holidays proper to the cult to which they belong or to the date on which these holidays are regulated in Article 139 paragraph 1.

4. Employees belonging to neo-protestant denominations.

As mentioned now, neo-Protestants do not celebrate saints, which means that they do not celebrate January 6 (Epiphany), January 7 (St. John the Baptist), August 15 (St. Mary), and November 30 (St. Andrew the Apostle), and as for Jehovah's Witnesses, they celebrate neither Easter nor Christmas.

In this context, it is necessary to consider the possibility of neo-Protestant employees, and especially those belonging to the Seventh-day Adventist Church or the Jehovah's Witnesses religious organization, to benefit from the religious holidays listed in section 139 C. of labor, in so far as they do not celebrate any of these holidays.

5. Atheist employees (lack of belief in divinities**)/agnostics (**they claim that people do not have resources, intellect or abilities to know beyond the physical realm, so they cannot affirm or deny the existence of a divinity) or who belong to a cult that is not recognized as legal in Romania.

As regards religious denominations that are not legally recognized in Romania, the legal effects of such a situation are equivalent to those that occur in the case of atheist or agnostic employees.

By way of example, by Sent. civ. no. 928/25.05.2016 (Preduț, 2022, p.428), the Timiș Court retained the following arguments in support of the thesis according to which this type of employees cannot benefit from the provisions of art. 139 C. Labour:

"Although the provisions of Art. 139 para.1 refers only to the days off granted to legal religious cults other than Christian ones, not to persons without religious confession, it cannot be held that such a regulation is discriminatory, because the constitutional principle of equal rights does not imply uniformity, the employee having the possibility to negotiate according to the provisions of art. 17 para.6 of the Labour Code clauses of the individual employment contract, including the granting of days off, including days off that may be granted to persons without confession"

The question we must answer concerns the possibility of these employees to benefit from the days off religious holidays as listed in Article 139 paragraph 1 and in what manner.

6. The possible effects that Cresco may have on the interpretation of national law

This case raises a question of compliance of Romanian legislation with both Article 21 of the EU Charter of Fundamental Rights and Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

Taking into account the fact that on Christian public holidays the employer whose employees are mostly Orthodox Christians, as a rule, suspends its activity, the performance of the activity by employees **(i)** belonging to a religious cult other than the Christian one – mosaic or Muslim (who also benefit from their own public holidays) or **(ii)** belonging to old-rite Christian cults, in the case of the feast of the day of Epiphany, the day of the Holy Prophet John the Baptist or St. Andrew the Apostle, can be, in practice, problematic.

The solutions for the employer in this situation could be:

- if possible, these persons shall perform work during these days;
- granting them the days off provided for in art. 139 C. work on condition that these days are recuperated later in the year, a solution similar to that provided for in Article 139 (31) of the Labour Code;
- grant the employee to benefit from unpaid leave;
- employees of other religious convictions will benefit from more days off than those of Orthodox worship, with the employer assuming the payment of the related salary rights.

Art. 139 of the Labour Code can be interpreted in several ways as follows:

- all employees are entitled to the religious days off regulated under art. 139, regardless of religion, whilst employees belonging to religions other than Christian are entitled to an additional 6 days - those related to their own religions;
- only employees of Christian religion are entitled to the religious days regulated under art. 139, employees of religions other than Christian being entitled only to the 6 paid days of for their religious holidays.

Also, legal scholar have advanced two interpretations, as follows:

(i) All employees, regardless of religion, are entitled to all religious public holidays, whilst employees belonging to religions other than Christians, have the right to additional 6 days - those related to their own religions (Gheorghe, 2017, pp.234-235).

A. With regard to Muslims and those who are part of the Mosaic cult. In this case, the facts are similar if not identical to the Cresco case presented above, which would lead to the conclusion that the text of Art. 139 C. of Labour does not comply with Art. 21 of the Charter of Fundamental Rights of the EU.

In is here important to remember that Art. 6 para. (1) of the Treaty on European Union provides that the Charter of Fundamental Rights of the European Union has the same legal value as the Treaties, which means that in the event of a conflict between the provisions of the Charter (provided they are clear, precise and unconditional) and those contained in national law, the provisions of the Charter will prevail – leaving conflicting provisions of national law unapplied.

As stated above, the CJEU has held that in cases of discrimination contrary to EU law, as long as no measures have been adopted to restore equal treatment, compliance with the principle of equality can be ensured only by granting persons in the disadvantaged category the same advantages as those enjoyed by persons in the privileged category. In that situation, the national court is required to set aside any discriminatory national provision without having to request or wait for its prior abolition by the legislature and to apply to members of the disadvantaged group the same treatment as that enjoyed by persons in the other category.

At the same time, Article 139 of the Labour Code does not comply with Directive 2000/78/EC either, since it establishes less favorable treatment on grounds of religion for employees of the Christian religion who are in the majority – direct discrimination in relation to Muslim employees or those belonging to the Mosaic cult (Article 288 TFEU provides that '*a directive shall be binding on each Member State to which it is addressed as to the result to be achieved, leaving to the*

national authorities the choice of form and methods'. At the same time, according to settled case-law of the CJEU: **(i)** directives have direct effect vertically, but not horizontally, i.e. in disputes between individuals. In addition, the CJEU has accredited (i) the recognition, in certain situations, of their incidental horizontal direct effect, and **(ii)** the obligation of national authorities to interpret national law in conformity with European Union law).

Or, CJEU concluded that the national legislation establishes a differential treatment directly based on the religion of the workers (paragraph 40), given that for employees belonging to the three specific confessions (churches covered by the ARG) an extra day of paid religious holiday is recognized – Good Friday, to which the employer's obligation to pay a certain salary increase is attached, if this category of employees performs work on Good Friday.

B. With regard to employees who belong to a cult using the old Julian (old-rite) calendar.

As indicated in point 3, in the Old Rite Christian Worship, the days of Epiphany, the Council of the Holy Prophet John the Baptist, the Assumption of the Virgin Mary, Saint Andrew the Apostle and the days of Christmas do not coincide with those of the New Rite Orthodox Christian religion. These days (i) are either mentioned in art. 139 as fixed dates: January 6, January 7, August 15 (although August 15 is not specified, it is common to Orthodox and Catholic worship), respectively November 30, (ii) or are celebrated on a date other than December 25 and 26 – the case of Christmas days. In any event, they cannot be circumscribed in paragraph 21, since the hypothesis of this rule refers to other religious holidays.

From this perspective, the question arises whether these employees will benefit from the aforementioned days off on the date on which the majority of employees within the employer will benefit from them or can they be granted a right to celebrate these religious holidays on the dates determined by the cult to which they belong.

In that regard, the Court concluded in Cresto that the award of a public holiday on Good Friday to a worker who is member of one of the churches covered by the ARG is not subject to the condition that the

worker fulfils a certain religious obligation on that day, but is conditional only on the formal membership of said worker in one of these churches. That worker shall remain free to dispose at his discretion, for example for rest or leisure purposes, of the period relating to that public holiday.

The Court has stated that the situation of such a worker is indistinguishable, in that regard, from that of other workers who wish to enjoy a period of rest or leisure on Good Friday, without, however, being entitled to an appropriate public holiday.

Therefore, in light of the CJEU arguments, it could be argued that the old-rite employees will benefit from the days of Epiphany, the Council of the Holy Prophet John the Baptist, the Assumption of the Virgin Mary, Saint Andrew the Apostle, Christmas days, on the date when the majority employees of the employer will benefit from these holidays.

In this case, the principle of non-discrimination is not violated, the old-rite employees benefiting from the same number of days off as those belonging to the Orthodox/Catholic Christian cult. However, those employees will not benefit from the same number of religious holidays proper to the religious cult to which they belong, which could be qualified as a violation of the principle of non-discrimination on grounds of religion.

C. Regarding employees who belong to the Seventh-day Adventist Church or the Jehovah's Witnesses religious organization, atheist/agnostic employees, and those who belong to a cult that is not recognized as legal in Romania.

The CJEU stated in its Cresto that the situation of workers who are members of one of the churches covered by the ARG is comparable to that of all other workers, whether or not they have a religion.

Therefore, these categories of employees could benefit from days off related to legal religious holidays, as set out in art. 139 para. 1, similar to other Christian employees.

From this perspective, a separate negotiation with the employer regarding the granting of days off on days other than those regulated by

the Labour Code is questionable, since art. Article 139 paragraph 1 does not distinguish between the categories of employees to whom it applies.

(ii) Only employees of Christian religion benefit from the stated religious holidays, employees belonging to a Christian or mosaic cult being entitled only to the 6 paid days of free religious holidays (Țiclea, 2020, p.206).

Here, too, it can be concluded that the text of Art. 139 does not comply with the Charter of Fundamental Rights of the EU and Directive 2000/78 because it, i.e. Art. 139 C. of Labour, establishes less favourable treatment on grounds of religion for employees belonging to both denominations (Muslim and Mosaic) – direct discrimination, in relation to employees belonging to a Christian denomination.

We refer here to the fact that employees belonging to a Christian religious cult benefit during the year from a number of 11 days of paid free religious holidays, while employees of a cult other than the Christian one benefit from only 6 days.

Moreover, the principle of non-discrimination is also violated if the employer is unable to ensure the necessary conditions for the provision of:

- activity by one or more employees of a religion other than Christianity, on public holidays enjoyed by employees of Christian religion, the majority;
- activity by one or more employees of a religion other than Christian, beyond normal working hours, in order for these employees to recover the days off they benefited from together with employees belonging to the Christian religion.

Thus, even if Muslim employees or those belonging to the mosaic cult benefited from only 6 days of religious holidays per year, paid time off, in both cases mentioned above, a situation of direct discrimination would be created at the level of the employer, of employees belonging to the Christian religion, given that Muslim employees and those in the mosaic cult will benefit, by force of circumstances, more religious days off than those belonging to Christian worship.

Moreover, paragraph 31 establishes for Christian employees who have benefited from days off for Good Friday, the first and second day of Easter, the first and second day of Pentecost, both on the dates established for the legal, Christian religious cult to which they belong, and for another Christian denomination, that they will recover, based on a schedule established by the employer, additional days off granted by him. In other words, Orthodox, Catholic, old-rite Christian employees will make up for the extra days.

However, the law does not provide for a similar solution in the case of employees of Mosaic or Muslim religion who have benefited from free time corresponding to Christian religious holidays. Therefore, as we have shown, they will be in a position to benefit from both the religious holidays regulated in para. 1, to the extent that they are granted by the employer, as well as by those related to the religion to which they belong.

Under these circumstances, employees belonging to a Muslim or Mosaic cult cannot be obliged to recuperate these days off from which they benefited, unless there is a written agreement between the employer and the employee.

As for the other days of Christian religious feast, i.e. Epiphany, the Council of the Holy Prophet John the Baptist, Good Friday, the Assumption of the Virgin Mary and Saint Andrew the Apostle, in the analyzed hypothesis, employees belonging to the Muslim and mosaic cult will not be able to benefit from them. However, these categories of employees shall be granted the right to paid days off not related to religious holidays, as regulated in Article 139.

As a consequence, in the light of what the CJEU held in Cresto, through the direct application of the Charter of Fundamental Rights of the EU into national law, but also through the procedure for interpreting Art. 139 with a Directive no. According to Regulation (EC) No 2000/78/EC, the five days of religious public holidays could also be considered as days off for non-Christians.

However, even this interpretation is open to criticism, since it could be argued that there is no objective and proportionate reason why

employees of a non-Christian denomination cannot benefit from five days off religious holidays, in addition to the 6 days already recognized by the legal norm, as declared by the cult to which these employees belong.

In this situation, from the perspective of the right to benefit from the same number of days off for the celebration of religious holidays, the principle of non-discrimination would be observed, since both employees of Christian worship and employees of a cult other than Christian would benefit, in the situation described above, from 17 days of public holiday (11 days of religious holiday and 6 secular days).

However, from the perspective of the existence/non-existence of the right of employees of a cult other than Christian to benefit from the same number of days of religious holiday specific to the religious cult to which they belong, similar to employees belonging to the Christian religious cult, could the existence of discriminatory treatment applied to employees of a cult other than the Christian one be called into question?

We are of the opinion that the answer is negative. We take into account the fact that the granting of paid days off on the religious holidays of Epiphany, the Council of the Holy Prophet John the Baptist, Good Friday, the Assumption of the Virgin Mary and Saint Andrew the Apostle is not conditioned by the fulfillment by Christian employees of any religious obligation, but have been regulated as a period of rest / rest. Therefore, the purpose of the legal norm will also be achieved by Muslim employees and those who are part of the Mosaic cult, given the non-existence of such holidays in their own religion.

IV. Addressing the issue in other countries

The regulation on the benefit of paid days off on religious holidays could be influenced by the character of the regulating state, as provided for in the constitution: secular state or state declaring a separatist policy towards religion.

In this sense, the state can decide whether and to what extent it will adopt a religious policy, which will obviously have an influence on the type of religious holidays that could be regulated as days off: Or, on

the contrary, the state can decide that none of the religious holidays, whatever they may be, shall be considered paid days off for employees.

However, in one study (Fox, 2011), the author showed that *"the results show that if a state has a separatist or secularism-based clause in its constitution, this situation does not predict which of the specific types of religious policy is likely to follow. For example, a state that declares itself secular in the constitution is about as likely to have a neutral policy as secularism. Similarly, a state with a separatist clause is actually more likely to meet the secularism-secularism 2 model than to meet any of the separatist standards. Thus, the wording of constitutional clauses on religion does not significantly influence which of the standards of separatism and secularism-secularism a particular state is likely to meet. (...) Another important result is that, among states that declare separatism or secularism in their constitutions, the majority do not follow these policies."*

Romanian Constitution provides in art. 29 para.5 that religious cults are autonomous from the state and enjoy its support, including by facilitating religious assistance in the army, hospitals, penitentiaries, nursing homes and orphanages. In other words, Romania does not have a state religion, but declares its support for religious cults. However, following a worldwide study, "Religiosity and Atheism Index", conducted by Gallup International, it was found that Romania is in the top 10 most religious countries in the world (Studiu, 2015).

From the perspective of establishing days off for religious holidays, it can be noticed that the state did not have an equidistant intervention towards all religious cults recognized in Romania.

Or, supporting diversity and inclusion at the level of employers develops the sense of belonging of all employees regardless of the religion assumed by them, ultimately leading to the creation of an optimal climate for the development of interpersonal relationships at work. In this regard, the question arises as to how employers have the possibility to grant days off religious holidays in such a way that the principle of non-discrimination is not violated.

United States

1. There have been views in the US that the state should not recognize religious holidays as paid holidays (Rakhshandehroo, 2022), on the assumption that the Christmas holiday, established as a legal day of celebration, does not take into account religious diversity in the US.

The argument used by the author of the publication took into account the fact that being a Christian holiday, Christmas has negative implications for other religious communities, for which none of their holidays are recognized as a public holiday. By recognizing Christmas as a public holiday, the U.S. government shows a preference for some religions over others, this mechanism being offensive, considering that the traditions and customs of religions other than Christianity are less important than those of Christianity.

In this context, the application of the constitutional principle of separation of church and state, according to which religious organizations and government must not intertwine, has been questioned.

In conclusion, it was stated that the federal government cannot choose which holidays of which religions to institute as public holidays. To be completely impartial about religious diversity in the U.S., the government does not have to have public holidays with religious affiliations.

2. In another approach, the question arose whether if a government refused to recognise religious holidays for fear of favouring a religion, that refusal would violate an individual's right to the free exercise of religious beliefs (Ryman and Alcorn, 2023; The Boisi, 2011), given that the statutory religious holiday was determined by reference to the Christian religion. At the same time, such a religious holiday instituted at the state level for other religions (Hindu, Muslim, etc.) was not recognized.

In this context, a Jewish lawyer brought an action (Ganulin v. United States – SD Ohio 1999) against the U.S. government, arguing that regulating Christmas Day as a public holiday violates the First Amendment, which prohibits the enactment of any law that, among other things, establishes a state religion or prevents the free exercise of

religion. The argument used by the petitioner was based on the existing facts, namely that Christmas is a Christian religious holiday and Jews are not entitled to a public holiday celebrating their faith. That action was dismissed.

However, in Brindenbaugh v. O Bannon, the Court of Appeals ruled that a government can grant employees a religious holiday as a paid day off only if a legitimate secular purpose can be given for choosing a particular day.

In another case, Lynch v. Donnelly (1984), however, when it involved the staging of Jesus' birth in public property, the Supreme Court found that such an event was intended to present the historical origins of the holiday, and therefore had "legitimate secular purposes". Such a finding further substantiated the possibility of staging the celebration of Jesus' birth.

3. The Civil Rights Act of 1964, which eliminated most forms of discrimination against African Americans and women, including racial segregation, provides employees with protection for their religious beliefs, including time off to celebrate religious holidays, provided the employer's work is not unduly impeded.

In this respect (Holland, 2021), the religious affiliation declared by the employee constitutes a presumption of veracity. However, if the employer has doubts about the good faith of his employee, he may initiate a limited investigation into the facts and circumstances in which an employee claims to belong to a particular religious denomination.

The EEOC (U.S. Equal Employment Commission) guidelines state that an employee may be refused if:

- it is costly for the employer to adapt the employee's working hours so that he benefits from the day off;
- compromises safety at work;
- violates the rights of other employees;
- involves the performance of additional work by other employees in dangerous or burdensome conditions.

The EEOC guidance also provides for the possibility for employers to offer one- or half-day leave, flexible start or stop times, voluntary shift shifts, recovery time.

Inclusion in the workplace is the first step towards a fair approach in the workplace so that the principle of non-discrimination is not violated.

In this regard, in a publication (Toll) were formulated some aspects regarding the measures that the employer could adopt in order to satisfy all employees belonging to faiths other than Christian:

- changing the work schedule of an employee for the celebration of a religious holiday;
- giving the employee the possibility to arrive earlier at the workplace or to leave later, according to his needs;
- offering holidays, these days will be recovered.

Canada

The Canadian Human Rights Commission said the Christmas celebration was evidence of Canada's "colonialist" religious intolerance. Thus, it was considered that the public holiday on December 25 "could adversely affect non-Christians, some of whom may therefore have to look for other special ways to respect their own faith"(Hopper, 2023).

Germany

In Germany, there are voices (Fredebeul, 2021) who have questioned compliance with the principle of non-discrimination, given that there are public holidays for many of the most important Christian holidays, employees can benefit from paid days off, which is not always applicable to religious holidays for other religious communities. Such a circumstance may be regarded as discriminatory.

In this situation, employers should orient themselves and decide individually, if employees who do not belong to the Christian religion want to benefit from a day off related to an important holiday of their confession.

The German Constitution regulates right to time off during public holidays recognized by the state, which must be paid. Thus, an adequate number of church holidays is recognized depending on the tradition of the state and the composition of the population. Depending on the state, there are a number of Catholic and Protestant holidays on which employees have the right to miss work and still be paid, even in the private sector.

It has been pointed out that, although a considerable part of the population belongs to other confessions, there are practically no regulations referring to other religious holidays. In North Rhine-Westphalia, the Public Holiday Act provides that members of the Jewish religion may be absent from work on New Year's Day and Yom Kippur, the Day of Atonement, and the evening before, stipulating that these days are non-working days. However, the Public Holidays Act explicitly states that the employer is not obliged to pay for this time off. In North Rhine-Westphalia and other federal states there are no state-recognized public holidays for other religions.

In these circumstances, employees have to resort to extensive interpretations of applicable national rules. Thus, it was considered that paid time off should be granted for one's own religious holidays because the employee is "temporarily prevented from working", applying § 616 of the German Civil Code, according to which workers are still entitled to remuneration if they are temporarily prevented from carrying out their work through no fault of their own.

The Constitution provides constitutional protection for the unhindered exercise of religion. Therefore, the argument that a religious festival constitutes a temporary means by which the employee is temporarily prevented from carrying out his activity through no fault of his own is not entirely unsuccessful. However, employers might object to this argument on the basis of another constitutional principle: the principle of equal treatment.

The author proposed a similar approach to Canada, in that employers could allow non-Christian employees to celebrate religious holidays through structured working hours. Under shift systems, non-

Christian workers could work on Christian holidays, and on Muslim, Jewish or other religious holidays, Christians could work in their shifts. In this way, workers wishing to celebrate a religious holiday could be programmed for a free shift.

If employers wish to give employees paid time off voluntarily, this should not be taken lightly, as employers must take into account the principle of equal treatment.

If paid time off is granted to an employee, other employees who wish to celebrate a religious holiday should also have a rational and legitimate expectation that they too can benefit from this right on their own religious holidays. To prevent discrimination against non-religious workers, employers could consider allowing a 'flexible holiday'. This could be taken by all workers and used either for a religious holiday or as an additional day of leave.

United Kingdom of Great Britain and Northern Ireland

In JH Walker Ltd v Hussain and Others, the employer stated that leave was not allowed between May and July. This coincided with the Muslim religious holiday of Eid. Muslim employees brought an action against their employer on the grounds of indirect racial discrimination.

The Employment Tribunal (ET) held, and the Employment Appeal Tribunal (EAT) subsequently agreed, that the employer had not weighed the needs of the company against the needs of the employees. Therefore, the employer did not take into account the fact that employees offered to work overtime to reduce delays that could have allowed applications to be approved (Employment Team, 2019).

Several solutions were highlighted (Daniels, 2023).

Thus, if a large number of employees apply for annual leave at the same time for religious purposes, it may not be practical to approve all leave applications. However, if a large number of applications can be anticipated, prior negotiations should be held between employer and employees with the aim of reaching an agreement on how best to manage this issue.

It was considered that if such a request for leave cannot be approved, employers should not offer special paid leave, as the employer could discriminate in favour of a particular religion in this respect.

Conclusions

The analysis carried out reveals the following conclusions regarding the application of the provisions of Article 139 C. of Labour:

(i) The two interpretations proposed in the literature violate Article 21 of the Charter of Fundamental Rights of the European Union, as well as those of Articles 1 and 2 para. (2) of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

As I have indicated, the CJEU has held that the prohibition of discrimination on grounds of religion or belief is a general principle of EU law. Consequently, the prohibition of discrimination, as laid down in Article 21 of the Charter of Fundamental Rights of the European Union, is sufficient in itself to confer on individuals a right which may be invoked as such in a dispute the subject matter of which falls within the scope of application of the Charter. Therefore, in so far as either Directive 2000/78 cannot be relied on directly, given that the dispute arises between individuals, or national provisions cannot be interpreted in a manner consistent with Directive 2000/78/EC, the national court is required to ensure the legal protection flowing for workers from Article 21 of the Charter and to guarantee the full effect of that article (paragraph 78 of Cresto).

Moreover, in this judgment, the Court held in paragraph 80 that, on the basis of Article 21 of the Charter of Fundamental Rights of the EU, that the national court is required to set aside any discriminatory national provision, without having to request or wait for its prior abolition by the legislature, and to apply to members of the disadvantaged group the same treatment as that enjoyed by persons in the other category. That obligation rests with it irrespective of the existence, in national law, of provisions empowering it to do so.

Therefore, Art. 139 of the Labor Code must be interpreted as meaning that all employees are entitled to religious public holidays, regardless of their religion, by applying the rules regulated in paragraphs 2 to 3^1.

Concretely:

- employees belonging to the Muslim or Mosaic cult will each benefit from both the 6 days of religious public holiday regulated for the cult they belong to and from the religious public holidays for employees who are Orthodox Christians;
- Christian employees (regardless of their denomination) will also benefit from legal religious holidays enjoyed by Muslim employees or those who are part of the Mosaic cult. In other words, to the 11 religious holidays recognized to Christians will be added another 12 days of religious holiday, 6 days each for Muslim employees and those belonging to the mosaic cult. At the same time, those in the mosaic cult will benefit from religious holidays of those in the Muslim cult and vice versa. In total, all employees will benefit from 23 paid days off;
- employees belonging to an old-rite Christian cult (e.g. Lipovans found in Dobrogea region) will benefit from religious holidays as regulated in Article 139 paragraph 2 and paragraph 21, which means that the days of Epiphany, the Council of the Holy Prophet John the Baptist, the Assumption of the Virgin Mary, Saint Andrew the Apostle will not be related to the religion of this category of employees.

Neo-Protestant employees, those who belong to the Seventh-day Adventist Church or the Jehovah's Witnesses religious organization shall benefit from the religious holidays listed in section 139 C. of labor;

Atheist, agnostic or religious employees who are not recognized as legal in Romania will benefit from the days off religious holidays as listed by art. 139 para.1. However, in order for them to benefit from the days regulated by art. 139 para. 1, these employees should submit a request to their employer requesting the granting of days off.

(ii) However, in the manner of interpreting § 139 C. of Labour, a substantially higher number of paid holidays is achieved than that envisaged at the time of the enactment of the rule.

On the other hand, it could be considered that discriminatory treatment is applied to employees of a cult other than the Orthodox Christian one, from the perspective of the absence of the right of those employees to benefit from the same number of days of religious holiday specific to the religious cult to which they belong, similar to employees belonging to the Orthodox Christian religious cult.

The solution would be to adopt a law text recognizing an equal number of paid days of free religious holidays specific to each religious cult recognized by national legislation, with the obligation to recover these days if employees will also benefit from days off related to religious holidays of other denominations.

(iii) Another issue concerns the possibility for the employer to find out the confessions of its employees. In this regard, we are of the opinion that in order for employees of a religious cult other than the Orthodox Christian one to benefit from the days off related to their own religious holidays, they have the obligation to declare their religious confession.

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IMPLEMENTATION OF THE EUROPEAN UNION WORK-LIFE BALANCE DIRECTIVE INTO THE POLISH LEGAL SYSTEM

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Abstract*: The author discusses the implementation of the "Work-Life Balance" directive into the Polish legal system. The directive was adopted in 2019 and member states had to implement it by 2 August 2022. In Poland, the process was delayed, and finally the legislation implementing the directive was adopted in March 2023 and entered into force on 26 April 2023. This implementation includes issues such as carer's leave, paternity leave, parental leave, protection of the employment relationship of employees taking parental leave, and the possibility of introducing flexible working arrangements. Despite the nine-month delay in the implementation of the WLB Directive, it must be stated that, in principle, its provisions have been faithfully implemented into the Polish legal system. The Labour Code contains regulations that should guarantee that employees achieve the objectives set out in the WLB Directive. These regulations do not differ from similar solutions that have been implemented in internal legislation in other European Union Member States.*

Keywords: *Work-Life Balance; Work-Life Balance Directive; Parental leave; Paternity leave; Carer's leave; Flexible working arrangements; Implementation of European Union law.*

Introductory remarks

Directive (EU) of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU (OJ L 188 of 12.07.2019, p. 79), referred to, due to its content, as the "Work-life Balance Directive" (the WLB Directive), lays down minimum requirements aimed at providing equality between men and women with regard to labour market opportunities and treatment at work; the aim is supposed to be achieved by facilitating the reconciliation of work and family life for workers who are parents or carers. To that end, the Directive provides for individual rights related to, on the one hand, paternity leave, parental leave and carers' leave while enabling, on the other hand, flexible working arrangements for workers who are parents or carers. The Directive applies to all workers, men and women, who have an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State, taking into account the case-law of the Court of Justice. Member States were obliged to adopt and publish the provisions necessary to implement the WLB Directive by August 2, 2022. In Poland, this was delayed because the relevant Act of Parliament introducing solutions ensuring the necessary balance between work and family life for employees was passed only on March 9, 2023 (the Act of 9th March, 2023 Amending the Labour Code and Certain Other Acts - Journal of Laws of 2023, item 641), and entered into force on 26th April, 2023. It gave rise to the reconstruction of the principle of promoting work-life balance as a principle of labour law (Gołaś, 2023, p.51).

The assumption underlying the WLB Directive was to contribute to achieving gender equality by ensuring work-life balance, in particular by supporting women's participation in the labour market, equal sharing of caring responsibilities between men and women and reducing the gender pay gap (Ludera-Ruszel, 2020, p. 10). As is known, a significant factor contributing to the underrepresentation of women in the labour market is the difficulty in reconciling professional and family responsibilities. Women who have children tend to spend fewer hours on paid work and

more time on unpaid care responsibilities. Having a sick or dependent relative also turns out to have a negative impact on women's employment and causes some of them to withdraw from the labour market altogether. Meanwhile, the existing law lacked sufficient measures to encourage men to share care responsibilities equally, which significantly deepens the differences between women and men in the field of work and care. According to EU policymakers, regulations should have been introduced that would increase fathers' use of work-life balance arrangements and thus exert a positive impact on reducing the amount of unpaid family work performed by women and leave them more time for paid work. Therefore, the WLB Directive sets minimum requirements for paternity leave, parental leave, carer's leave and flexible working arrangements for employees who are parents or carers. Paternity leave is the leave taken in the time of the child's birth in order to care for him/her. Meanwhile, willing to encourage fathers to take parental leave, the directive extends the minimum period of parental leave not transferable to the other parent to be not one but two months. The directive also notes that, to give men and women with caring responsibilities greater opportunities to remain in the labour market, every employee should have the right to carers' leave of five working days a year. Employees should also have the right to time off from work, without prejudice to the accrued or accruing employment rights, on grounds of force majeure, for urgent and unexpected family matters.

As usual with this type of regulations, the EU legislator explicitly provides that the exercise of employee rights related to fulfilling parental and caring functions must not have a negative impact on the employee's status and treatment in employment.

The Act of March 9, 2023 - in addition to the provisions implementing the WLB Directive - also includes rules implementing Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union (EU OJ L 186 of 11.07.2019, p. 105), as well as a number of adaptive and technical provisions. The subject of the author's further considerations will only include the most important regulations related to the implementation of the WLB directive.

I. Granting the right to carers' leave

In accordance with Art.6 of the WLB Directive Member States shall take the necessary measures to ensure that each employee has the right to carers' leave of five working days per year. Member States may determine additional details regarding the scope and conditions of carers' leave in accordance with the national law or practice. The use of that right may be subject to presenting appropriate substantiation, in accordance with national law or practice. Member States may allocate carers' leave on the basis of a reference period other than a year, per person in need of care or support, or per case.

This provision is implemented by the newly added Art. 173^1-Art. 173^3 of the Labour Code. The new regulation stipulates that an employee is entitled to 5 days of care leave during a calendar year to provide personal care or support to a family member or person living in the same household who requires care or support for serious medical reasons. This leave may be used at one time or in parts.

A family member is considered to be son, daughter, mother, father or spouse, in accordance with the definition of a "relative" in the WLB Directive. Leave is granted upon request on days that are working days for the employee, in accordance with the person's actual working time schedule. The application must be submitted no later than 1 day before the start of the leave. The request shall provide detailed information justifying the award, including the name and surname of the person who requires care or support for serious medical reasons and the reason why the employee needs to provide personal care or support. However, the application is not expected to include detailed information about the health of the person on whom the employee's personal care is extended. The employee does not retain the right to remuneration for the duration of carer's leave, but the period of taking that leave is included in the period of service determining employee entitlements.

II. Time off from work on grounds of force majeure

As provided for by Art. 7 of the WLB Directive, Member States shall take the necessary measures to ensure that each worker has the right to time off from work on grounds of force majeure for urgent family reasons in the case of illness or accident making the immediate attendance of the worker indispensable. Member States may limit the right of each worker to time off from work on grounds of force majeure to a certain amount of time each year or by case, or both.

This regulation has been laid down by the newly added Art. 148^1 of the Labour Code. It provides that an employee is entitled to leave from work during a calendar year due to force majeure in urgent family matters caused by illness or accident, if the immediate presence of the employee is necessary, for 2 days or 16 hours, the right to half the remuneration being retained. The employer grants such leave, at the employee's request submitted no later than on the day of using this leave, on the date indicated by the employee. The amount of time off work granted on an hourly basis for a part-time employee is determined in proportion to the employee's working time.

During the period of leave from work referred to above, the employee retains the right to half of his or her remuneration.

The above regulation is yet another one introducing the possibility of relieving an employee from the duty to do work, and therefore potentially constitutes an additional burden for employers. However, it should be noted that Polish labour law has long had provisions on the so-called leave on request. The employee has the right to take four days of holiday leave each year, without having to agree on the date with the employer. It seems that in connection with this regulation there was no need to separately implement Art. 7 of the directive, because the provisions on leave on request actually meet the intention of the EU legislator.

III. Extending the length of parental leave and granting a non-transferable part of it to each working parent

Pursuant to Art. 5 of the WLB Directive Member States shall take the necessary measures to ensure that each worker has an individual right to parental leave of four months that is to be taken before the child reaches a specified age, up to the age of eight, to be specified by each Member State or by collective agreement. Member States shall ensure that the two months of parental leave cannot be transferred.

Therefore, in the new wording of the Labour Code, employees being the parents of a child have the right to parental leave to take care of a child for up to 41 weeks - in the case of the birth of one child at one delivery- and up to 43 weeks in the case of multiple births. However, in the event of a severe and irreversible disability or an incurable life-threatening disease that occurred during the prenatal period of the child's development or during childbirth, parental leave is extended by 24 weeks.

Each employee who is the child's parent has an exclusive right to 9 weeks of parental leave counted against the length of the leave specified above. This right cannot be transferred to the child's other parent (the so-called non-transferable part of the leave).

IV. Protection of the employment relationship of workers taking parental leave

The WLB Directive requires that legal measures be adopted to protect employees exercising parental rights, including prohibiting dismissal and any preparations for the dismissal of such employees. Polish law has long had provisions protecting the sustainability of employment of both pregnant women and women and men exercising parental rights. The new wording of the rules has made them more clear, and more effective protection measures have been added. Currently, Art. 177 of the Labour Code provides that during pregnancy and maternity leave, as well as from the date of submission by the employee of an

application for maternity leave or part thereof, leave under the terms of maternity leave or part thereof, paternity leave or part thereof, parental leave or its part - until the end of this leave, the employer shall not: 1) prepare for giving notice to terminate or terminate without notice the employment relationship with such employee; 2) give a notice to terminate or terminate the employment relationship with the employee, unless there are reasons justifying termination of the contract without notice due to the employee's fault (disciplinary dismissal) and the trade union company organisation representing the employee has consented to the termination of the contract. The above prohibitions come into force duly in advance of the commencement of parental leave.

The above protection is modified if the employer is declared bankrupt or goes into liquidation.

In the event of disciplinary dismissal or due to liquidation or bankruptcy of the employer, the burden of proof rests with the employer.

An important novelty of the above regulation lies in its reference to the concept of preparation for dismissal. It was pronounced in the judgment of the CJEU in case C-460/06 Paquay against the context of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) In the judgment in question the CJEU stated that "having regard to the objectives pursued by Directive 92/85 and, more specifically, to those pursued by its Article 10, it is necessary to point out that the prohibition on the dismissal of pregnant women and women who have recently given birth or are breastfeeding during the period of protection is not limited to the notification of that decision to dismiss. The protection granted by that provision to those workers excludes both the taking of a decision to dismiss as well as the steps of preparing for the dismissal, such as searching for and finding a permanent replacement for the relevant employee on the grounds of the pregnancy and/or the birth of a child".

V. Flexible working arrangements

Reconciling work with personal needs and preferences resulting mainly from family responsibilities is to be ensured by flexible work organisation. This concept is defined in the WLB Directive as the employee's ability to adapt his or her work organisation to the needs indicated above, including by using remote work, flexible working time schedules or reducing working hours. These goals are achieved under Polish labour law by the newly added Art. 188^1 of the Labour Code. The provision stipulates that an employee raising a child until the latter is eight years old may submit an application for flexible work organisation (not less than 21 days before the planned start of using such work organisation).

Flexible work organisation within the meaning of that provision includes: a) distant work, b) intermittent working time system (introducing a break of up to five hours, not counted towards working time), c) shortened working week system (working for less than 5 days in week, but with a longer daily working time), d) weekend work system, e) the so-called flexible working time (different starting times), f) individual working time schedule, g) reduction of working time.

The application for flexible work organisation is considered by the employer taking into account the employee's needs, including the date and reason for the need to use flexible work organisation, as well as the needs and capabilities of the employer, including the need to ensure a normal course of work, the organisation of work or the type of work performed by the employee.

VI. Other arrangements

In addition, the Act implementing the WLB Directive provides for a number of other specific solutions including, *inter alia*, extension of the period during which an employee raising a child may consent, among others, to overtime work (from four to eight years), shortening the period for taking paternity leave (to 12 months from the current 24 months),

extending the principle of allowing an employee to work after the end of parental leave onto all leaves related to parenthood. The rules for using parental leave have also been changed (the leave may be granted at one time or in no more than 5 parts, no later than until the end of the calendar year in which the child turns 6).

National provisions implementing the rules of European Union directives should be effective, hence establishment of sanctions for non-compliance with these provision is required. The sanctions must be real, proportionate and dissuasive. Consequently, the list of offences against employee rights has been supplemented with new types of those. These include the actions of the employer or a person acting on the employer's behalf, consisting in: a) violating the provisions on flexible work organisation, b) infringement of the provisions on carers' leave, c) breach of the rules on considering the employee's request for the introduction of flexible work organisation. Violation of the provisions on leave from work due to force majeure will also be punishable.

The introduction of additional breaks at work should not be neglected, either. On June 8, 2020, the employees and employers sitting on the Social Dialogue Council concluded an Agreement on Active Ageing (inspired by the Autonomous Framework Agreement of the European social partners on *Active Ageing* and an *Intergenerational Approach* (adopted in *March 8, 2017*). In the Agreement, the social partners jointly recognised a need to implement solutions for active ageing in Poland, including *inter alia* moves to improve employment conditions, also by means of the introduction of additional breaks at work. As part of these efforts, the partners recognised a need to introduce into the Labour Code an additional break from work reckoned towards working time The parties to the Agreement agreed to provide, in the Labour Code, for a second break from work lasting at least 15 minutes, considered part of the working time, if the employee's daily working hours are longer than 9 working hours, as well as a third break from work lasting at least 15 minutes, included in the working time if the employee's daily working time exceeds 16 hours. Amendments covering those proposals have been introduced to Art. 134 of the Labour Code.

Conclusions

Despite the nine-month delay in the implementation of the WLB directive, it should be stated that, in principle, its provisions have been accurately implemented into the Polish legal order. The Labour Code includes regulations that should guarantee employees meeting the goals set out in the WLB directive. The regulations do not differ from similar solutions that have been implemented into national legislation of other Member States of the European Union (De la Corte-Rodriguez, 2022).

It is also worth mentioning that the implementation of the WLB Directive was not limited only to labour law. To a large extent, provisions of the Directive have also been introduced into the law regulating employment based on other arrangements than the employment relationship. This concerns primarily the legal relations of state officials serving in the police, Border Guard, State Fire Service, Prison Service and similar state formations. The officers in question are generally not subject to labour law provisions (Stelina in: Stelina, Tomaszewska and Zbucka-Gargas, 2021, p. 5) and therefore, in order to achieve the objectives of the WLB Directive, the legislator has made amendments to individual Acts regulating their status. However, as regards persons working under civil law contracts, the implementation of the WLB Directive concerned their situation only to a limited extent. Theoretically, the group in question should be narrow and include people performing what is termed non-subordinate work. In practice, however, we very often deal with fraudulent civil law employment, where civil law contracts, for economic reasons, are concluded instead of employment contracts required by law. Despite the state fighting pathologies of such kind, eliminating them has not proven successful so far.

Finally, it should be mentioned that the implementation of the WLB Directive is part of a broader problem related to the integration of the Polish and EU legal systems. It seems that the method of implementing EU law adopted by the Polish legislator, which consists - to a large extent - in literally translating directives and entering them into national law, is not appropriate. In this way, "implanted" into the national

legal order are provisions that do not fit it due to their nature, group of addressees and functioning mechanisms. There is no need to say how much damage is caused to the cohesion of the legal system due to such practices. Unfortunately, also in matters touched in this paper, the amended Labour Code contains very complicated, ill-formulated provisions in which references are frequently made to other regulations. Applying the law formulated in such a way is not an easy task.

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FROM PRACTICE TO CONSTITUTIONAL REFORM – TOWARDS THE HYBRIS MODEL OF CONSTITUTIONAL REVIEW IN POLAND[1]

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***Abstract*:** *The article offers a detailed examination of the changes and controversies surrounding the Polish system of constitutional review, particularly focusing on the shift towards a hybrid model that incorporates elements of both centralized and decentralized (dispersed) review. It discusses the challenges and debates that have emerged in the context of Poland's political and constitutional crises since 2016, the paralysis of the Constitutional Tribunal, and the potential amendments to the Constitution proposed in 2024. The proposed amendment to Art. 193 seeks to formalize the practice of dispersed constitutional review, allowing courts to refuse to apply unconstitutional laws directly, which marks a significant departure from Poland's traditionally centralized model. The article also delves into various perspectives on this shift, highlighting both the potential benefits—such as quicker and more effective judicial protection of constitutional rights—and the risks, including legal uncertainty and possible conflicts between courts and the Constitutional Tribunal. In conclusion, while the chances of the constitutional amendment being adopted remain slim due to the current political landscape, the mere proposal signifies a growing recognition of the need to adapt Poland's constitutional review system to current realities. The proposed changes reflect substantive developments in the legal framework and practice, even if they are not yet formally enshrined in the Constitution.*

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Keywords: *constitutional review; Poland; Constitutional Tribunal; legal question; constitutional amendment.*

Introduction

In recent years, the Polish system of constitutional review has undergone significant changes, sparking numerous controversies and intense public debate. This debate was prompted by the extraordinary need to counteract the erosion of the fundamental principles of a democratic state ruled by law. Due to emerging political and constitutional crises after 2016, in particular the paralysis of the Constitutional Tribunal and uncertainties regarding its composition, it was necessary to find solutions that would protect human rights and constitutional values. Current practices in constitutional review suggest an emerging trend towards creating a hybrid model that combines elements of the classical review system with solutions new to Polish constitutional law. The article aims to analyse this process, highlighting the key factors that have shaped it, and to present the attempts made in 2024 to formally enshrine the practice formed in this regard in the Constitution.

Polish model of constitutional review

The main body responsible for constitutional review in Poland is the Constitutional Tribunal established in 1982. According to the Constitution of the Republic of Poland of 1997 (Official Journal of Laws "Dziennik Ustaw" 1997, No. 78, item 483, with later amendments), it is an independent constitutional court that examines the conformity of statutes and international agreements to the Constitution, the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute, the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutes (ar.188). In view of the fact that it was intended to be a body of high authority, the Constitution entrusted it

with a number of other functions, such as the review of the conformity to the Constitution of the purposes or activities of political parties, settling disputes over authority between central constitutional organs of the State or deciding on the President o the Republic's ability to perform duties. Judgments of the Constitutional Tribunal are of universally binding application and are final. As a rule, they are required to be immediately published in the official publication in which the original normative act was promulgated and they take effect from the day of this publication, however, the Constitutional Tribunal may specify another date for the end of the binding force of a normative act. Such time period may not exceed 18 months in relation to a statute or 12 months in relation to any other normative act. The judgment of the Constitutional Tribunal on the non-conformity to the Constitution, an international agreement or statute, of a normative act on the basis of which a legally effective judgment of a court, a final administrative decision, or settlement of other matters was issued, has a direct effect on the rights of the individual as it can be a basis for reopening proceedings, or for quashing the decision or other settlement in a manner and on principles specified in provisions applicable to the given proceedings.

The constitutional review by the Constitutional Tribunal can be conducted in different modes. The basic one is the abstract review which may concern the normative acts in force without being linked to their application to a specific case. It is sufficient that the act is in force. It may be initiated by selected bodies, such as the President of the Republic, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, 50 Deputies, 30 Senators, the First President of the Supreme Court, the President of the Supreme Administrative Court, the Public Prosecutor-General, the President of the Supreme Chamber of Control and the Commissioner for Citizens' Rights. If the normative act relates to matters relevant to the scope of their activity, an application for the review may also be made by the National Council of the Judiciary, the constitutive organs of units of local government, the national organs of trade unions, and the national authorities of employers' organizations and occupational organizations, as well as the churches and religious organizations. The

abstract constitutional review can also have a form of preventive review as it can be carried out before a normative act enters into force upon the application of the President of the Republic of Poland, who, before signing a bill into law, may refer it to the Constitutional Tribunal for examination of its conformity with the Constitution.

The second mode of review is a concrete review carried out in connection to a certain case and is expressed in the possibility of submitting a legal question or lodging a constitutional complaint. According to art. 193 of the Constitution, "Any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court". While art. 79 provides that "In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution".

The basic model of constitutional review implemented in Poland is therefore the centralized review based on assumptions developed by Hans Kelsen. There is no doubt about it. Nevertheless, while the Constitution does not explicitly provide the competences of ordinary courts in the area of constitutional review, it also does not exclude it. This raises a critical question if under the Constitution, specifically Articles 8, 178 p. 1, and 193, courts have the right to assess the constitutionality of laws they are to apply and, if found unconstitutional, to refrain from applying them. Art. 8 provides that "the Constitution shall be the supreme law of the Republic of Poland" and "the provisions of the Constitution shall apply directly unless the Constitution provides otherwise". Art. 178 p. 1 states that "judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes" and the aforementioned Art. 193 provides for the possibility for the court to ask a question of law.

Constitutional crises and the constitutional review

The paralysis of the Constitutional Tribunal in 2016 (Sadurski, 2019; Rytel-Warzocha, 2017, pp.153-155) provoked debate on the exploration of alternative mechanisms to ensure both the supremacy of the Constitution and the protection of constitutional rights and freedoms that would be permissible under the current Constitution. This debate focused primarily on the applicability in Poland of dispersed constitutional review exercised by ordinary courts. It should be pointed out that a similar discussion has already taken place in Poland in the late 1990s right after the Constitution entered into force. At that time, the prevailing view among legal scholars was that constitutional review should remain exclusively centralized. The arguments against dispersed constitutional review were primarily rooted in the belief that constitutional competence must be explicitly defined within the Constitution itself, rather than inferred or interpreted from other provisions. On the other hand, proponents of complementing the centralised model with dispersed constitutional review argued that it would not undermine the authority of the Constitutional Tribunal. They emphasized that when a court finds a specific provision unconstitutional, its decision is limited to that particular case and has inter partes effects only. This approach does not grant courts the authority to invalidate laws outright but rather permits incidental review - *ad casum* - resulting in the refusal to apply a provision deemed unconstitutional in a specific instance. When it comes to the highest judicial authorities, the Constitutional Tribunal itself has consistently maintained that it holds exclusive authority over constitutional review - The Supreme Court's judgment of 7 April 1998 (I PKN 90/98), 4 October 2000 (P 8/00), 31 January 2001 (P 4/99), 4 December 2001 (SK 18/00), decision of 22 March 2000 (P 12/98), resolution of 4 July 2001 (III ZP 12/01), while the Supreme Court initially was of the opinion that courts had the right to refuse to apply a provision if its unconstitutionality was obvious and its application would lead to an unjust outcome - The Supreme Court's judgement of 7 April 1994 (I PKN 90/98); 26 September 2000 (III CKN

1089/00), 25 July 2003 (V CK 47/02), 29 August 2001 (III RN 189/00), decision of 26 May 1998 (III SW 1/98), resolution of 4 July 2001 (III ZP 12/01), in subsequent years, however, it withdrew from this position - Supreme Court's judgment of 16 April 2004 (I CK 291/03), resolution of the Civil Chamber of the Supreme Court of 24 November 2015 (II CSK 517/14), decision of 18 September 2002 (III CKN 326/01). Therefore, the courts, until the outbreak of the constitutional crisis in 2015, consistently did not decide on their own but referred to the Constitutional Tribunal with legal questions when faced with doubts about the constitutionality of a provision to be applied in a particular case.

Due to the circumstances mentioned above, there has been a noticeable shift in the stance of legal scholars on this issue in recent years. It is increasingly recognized that courts may possess the authority to engage in constitutional review, though the extent of this authority remains a subject of debate. Some academics argued that dispersed constitutional review has always been permissible under the current Constitution, while others justify this judicial power based on the "doctrine of necessity" treating it as an "emergency constitutional review" (Rytel-Warzocha, 2022, pp. 32-33. Mikuli, 2022, pp. 635-648). Beyond these doctrinal shifts, there have also been notable changes in judicial practice as more and more courts directly refer to the Constitution as the basis for their judicial decisions and disapplying the law declared by them unconstitutional (Resolution of the Supreme Court of March 17, 2016 (V CSK 377/15), resolution of the Supreme Court of March 23, 2016 (III CZP 102/15), decision of the Court of Appeal in Wrocław (II AKa 213/16), resolution of the Supreme Court of September 16, 2020). It should be noticed that under the current legal framework, courts already have the power to review the constitutionality of sub-legislative acts (such as regulations, local laws, and internal orders) on a case-by-case basis.

In addition to the obvious advantages that dispersed constitutional review may bring in a situation where the Constitutional Tribunal does not perform its functions, it was considered whether this model should be introduced into the Polish constitutional order on a permanent basis and what consequences it entails. Apart from benefits, several potential

threats and risks were pointed out. In particular, it was noticed that dispersed constitutional review could undermine the consistency of constitutional interpretation, leading to legal uncertainty as with around 10,000 judges in Poland, there is a risk of varied interpretations, which could diminish predictability in the legal system. Judges might also face significant challenges in conducting constitutional review, such as dealing with legal gaps left by the removal of unconstitutional provisions or handling conflicts between the Constitutional Tribunal's rulings and their own.

Towards the constitutionalisation of the mixed model of the review

When the opposition took power after the 2023 elections, some of the first reforms it announced for implementation concerned the judiciary. In March 2024 the Senate of the Republic of Poland undertook proceedings aiming at submitting the proposal to amend the Constitution to the Sejm. It was possible, as Art. 252 p. 1 of the Constitution provides that a bill to amend the Constitution may be submitted by at least one-fifth of the statutory number of Deputies, the Senate, or the President of the Republic. On 6 March 2024 a group of senators, according to the requirements specified in the Standing Orders of the Senate (The Standing Orders of the Senate of 23 November 1990, unified text: Official Journal of Laws “Monitor Polski” 2024, item 10) submitted the Constitutional Amendment Bill to the Marshal of the Senate who referred it to the Senate’s Legislative Committee. The proposal concerns different aspects of the judicial power in Poland but from the point of view of the subject of this paper, I would like to focus on the changes concerning the constitutional review. Pursuant to Art. 1 p. 1 of the draft law on amending the Constitution, Art. 193 of the Constitution of the Republic of Poland would have the following wording: “Any court may submit a legal question to the Constitutional Tribunal as to the compliance of a normative act with the Constitution, ratified international agreements or the law, if the settlement of a case pending before the court depends on the answer to the legal question and the direct application of the

Constitution, as referred to in Article 8 (2), is insufficient to obtain that settlement". It should be noted that the proposal will introduce a mixed model of constitutional review by implementing the concept of a decentralized review, granting each court the authority to refuse to apply a legal provision in the case it is adjudicating.

As A. Jackiewicz pointed out in its opinion commissioned by the Senate, after the amendment of the content of Art. 193 of the Constitution, there will be two legal institutions in this provision, appropriate for two models of control of constitutionality of law. These will be, on the one hand, the hitherto existing mechanism of the legal question, and on the other hand, the mechanism of examination of the constitutionality of a normative act by the court before which the case is pending. The aim of both mechanisms remains the same - to resolve the case pending before the court on the basis of provisions that are consistent with the Constitution of the Republic of Poland (avoiding the application of unconstitutional provisions). However, it follows from the draft that the court will be able to submit a legal question to the Constitutional Tribunal when two premises are met - the outcome of the case pending before the court depends on the answer to the legal question, and the direct application of the Constitution is insufficient for obtaining such an outcome. A court wishing to submit a legal question to the Constitutional Tribunal will therefore have to consider that both conditions are met, and thus, in the light of the new wording of Art. 193 of the Constitution, first try to apply the Constitution directly. The legislator clearly constructs a preference in favour of the mechanism of dispersed control, which obviously does not interfere with the abstract review or constitutional complaint. The undoubted advantage of the new wording of Art. 193 will be a faster dispensation of justice in cases where doubts have arisen as to the constitutionality of the provisions to be applied, but also more effective protection of constitutional freedoms and rights, which will become an even more categorical criterion of review of normative acts applicable in the practice of the Polish judiciary (Jackiewicz, 2024, p. 12, https://www.senat.gov.pl/gfx/senat/pl/senatekspertyzy/7061/plik/oe-496.pdf.).

As pointed out by M. Jabłoński, the proposed amendment of the Constitution must take into account the following consequences of it23 s possible enactment, such as, inter alia systemic depreciation of the role and significance of the Constitutional Tribunal as the body reviewing the constitutionality of law, difficulties with the systemic interpretation of the constitutionally defined competencies of the Constitutional Tribunal, or the emergence of interpretative problems concerning the identification of the nature and essence of a constitutional complaint. He also notices that the fundamental question is also what legal effects will be produced by a judgement of the Constitutional Tribunal, issued in a mode of abstract review, confirming the compliance of a specific regulation with the Constitution, while the earlier (or later) judicial decisions were (or will be) different, i.e. will take the form of an omission of a statutory regulation with the justification of its non-compliance with the Constitution (e.g. due to the infringement of the procedure of enacting a law and observance of the principles of correct legislation) (Jabłoński, 2024, pp. 13-15, https://www.senat.gov.pl/gfx/senat/pl/senateksperty zy/7060/plik/oe-495.pdf).

More sceptical about the change in the content of Art. 193 is S. Patyra, pointing to doubts as to the need of introducing the proposed regulation, which in his view is more of a 'verbal ornament' than a real change of Art. 193. Moreover, the requirement of "insufficient direct application of the Constitution", which would constitute the basis for referring the legal question to the Constitutional Tribunal by the court deciding the case, is also problematic. The phrase 'insufficient' is in fact an underdetermined formulation, which should be avoided at the level of constitutional regulation as creating a "discretionary loophole", which in the practice of law application may result in a 'blurring' of the boundaries of pro-constitutional interpretation. As a result, the introduction of the proposed provision may result in excessive limitation of the mechanism of direct application of the Constitution by courts (contrary to the intention of the initiators of the proposal), or excessive application of this regulation, contrary to the model of centralised

constitutional review adopted in the Polish system (Patyra, 2024, pp. 9 – 10, https://www.senat.gov.pl/gfx/senat/pl/senatekspertyzy/7062/plik/oe-497.pdf).

In the opinion presented by M. Matczak it was noticed that the advantage of the proposed change to the constitutional review formula will be a reduction in the number of cases considered by the Constitutional Tribunal. This change is also likely to lead to a reduction in the length of court proceedings. The latter effect will result from the fact that, in the case of an independent, direct application of the Constitution by the court, it does not have to suspend the proceedings, which is necessary when a legal question is asked. He also noted that the proposed amendment would also have a positive effect on constitutional awareness among litigants and judges, as constitutional arguments will become more widely used in court proceedings. On the other hand, there is a potential risk concerning the divergence in the understanding and direct application of the Constitution by courts of different instances, including judges who have so far had no experience in the application of general constitutional clauses when deciding specific cases. A *de lege ferenda* postulate would therefore be the introduction or strengthening of solutions ensuring the uniformity of judicial rulings on the direct application of the Constitution (for example, through appropriate supervision of the Supreme Court in this respect). It should be borne in mind, however, that a situation in which the necessary unifying supervision will be exercised in some scopes of direct application of the Constitution by the Supreme Court and in some by the Constitutional Tribunal, which will still be answering legal questions from the courts, may lead to a dualism of jurisprudence in this respect (Matczak, 2024, pp.6-7, https://www.senat.gov.pl/gfx/senat/pl/senatekspertyzy/7059/plik/oe-494.pdf).

An opinion on the draft was also presented by the Ombudsman, according to whom three key issues should be considered in the discussion on this change. First, he pointed out that the proposal lacks an expanded analysis of the effects of such a significant change, namely granting nearly 400 courts the authority to independently refuse to apply

statutory provisions. In particular, the proponents have not sufficiently considered the issues associated with granting courts explicit authority to refuse to apply statutes, especially the risk of increasing discrepancies in judicial decisions. These discrepancies are likely to be particularly pronounced when interpreting the Constitution, given its generality, the differences in legal opinions among judges, and inevitable conflicts with Constitutional Tribunal rulings. The proposed solution could therefore increase the unpredictability of court decisions, where citizens would have to consider not only the content of legal provisions but also the risk of their non-application by a court. He also noticed that according to the proposal, both ordinary courts and the Constitutional Tribunal would have the authority to assess the constitutionality of provisions, which would inevitably lead to conflicts between them and exacerbate legal uncertainty. Introducing a mixed model would require more comprehensive changes that clearly define the boundaries of the courts and the Constitutional Tribunal's competencies, as well as designate a "court of last resort" for constitutional review (Senacki projekt zmiany Konstytucji dotyczący Trybunału Konstytucyjnego. Opinia Marcina Wiącka, 2024, https://bip.brpo.gov.pl/pl/content/rpo-tk-projekt-zmiany-konstytucji-senat).

Conclusions

The chances of a constitutional amendment being adopted in the current political situation are almost nil. The Polish Constitution is a rigid constitution with a very difficult amendment procedure and the political scene is still very divided. As indicated above, the very proposal of changes also requires discussion and a very careful and detailed analysis of the consequences of its possible adoption. Nevertheless, what is important is the very fact that the need to rationalise the model of constitutional review in Poland has not only already been recognised in the academic debate, but has taken the form of concrete legal proposals. Undoubtedly, the proposed solution would also close the discussion on the possibility of using the mechanism of dispersed control in the Polish

constitutional system. However, it should be emphasised that the proposed constitutional amendment does not constitute a constitutional *res novum*, but only formally confirms the substantive constitutional change that has taken place in recent years.

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THE LEGISLATIVE UNIFICATION AND THE CONSTITUTIONAL ROLE OF THE JUDICIARY IN THE DEBATE: THE CASE OF C. N. SCHINA 1919-1920

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Abstract: *C. N. Schina was a member of a family of distinguished magistrates. Constantin E. Schina (1838-1913), his father, was the fourth prime president of the Court of Cassation (1838-1913), and his grandfather, Eustațiu Schina, was the president of the Criminal Court (1859). In the period 1919-1920, C. N. Schina was involved in the public debate on the problems of the Romanian society regarding legislative unification and the independence of the magistracy. First, he supported the professional collaboration of lawyers and magistrates, the establishment of a joint legal journal, but also the establishment of an organization of jurists from Greater Romania, with a very ambitious program. On the other hand, he critically presented the difficulties encountered in the judiciary, in particular, in the relationship between judges and the executive power, and he also supported the organization of a union of civil servants.*

All this could not remain without consequences. First, in December 1919, the report of the ad-interim minister of justice, Ștefan C. Pop, presented several acts committed by C. N. Schina, which affected the prestige and dignity of the magistracy. As a result, the magistrate was suspended from his position for 15 days by the Royal Decree of 23 December 1919. Secondly, in the report of August 1920, it was estimated that the imputed facts were much more serious, and Schina's recidivism required an appropriate sanction. This time, he was sanctioned with the disciplinary penalty of being suspended from the position of president at

the Court of Appeal in Bucharest, and the Royal Decree of 10 August 1920 was countersigned by the Minister of Justice M. B. Cantacuzino.

What remains over time is the remarkable affirmation, in the first years after 1918, of some principles which will guide all future legislation: freedom of association, freedom of trade union, freedom of speech, protection of private life, separation of powers in the state and, above all, the independence of the judge.

Keywords: *legislative unification; freedom of association; independence of the judge; Superior Council of the Magistracy*.

Introduction

The problem of legislative unification was not encountered for the first time in Europe or in Romania after the First World War. The matter had known a series of precedents on the continent, and not only, since ancient times. But, after 1918, it acquired a significant general character, being found in states neighbouring Romania or with which the Romanian nation had a long historical connection. It was found in France through the reunification of Alsace and Lorraine, in Italy, Belgium, Denmark and enlarged Greece, in Poland, Czechoslovakia and Finland as new states, reborn by reuniting some provinces with different state legal regimes, in our neighbour Yugoslavia in relation to the old Serbia. In this context, it can be stated that legislative unification is a historical process whose content has continuously evolved from a quantitative and qualitative point of view (Sachelarie and Georgescu, 1968, pp. 1185-1186). In France, with regard to the issue of Alsace and Lorraine, Henri Capitant, jurist, said that "*the lack of unity of the legislation leads, fatally, to the lack of unity of the state*" (Capitant, 1934, p.164), which could be true wherever this issue was raised.

For Romania, the issue of legislative unification in the unitary national state appeared immediately after the historic moments of 1918, and public debates continued to occur. After the Union of the Romanian Principalities in 1859, the problem of legislative unification was solved in a short period of time. During the reforms supported by Alexandru Ioan Cuza, the president of the Council of Ministers, N. Crețulescu,

firmly stated that: "*the duality of legislation is in contradiction with the general interest of a state and, being harmful, it must be fought against*" (Rădulescu, 1927, p.20). Even if the legislative work of that period was criticized in terms of the methods of implementation or the lack of originality, its unifying principle was unanimously affirmed and appreciated. But after 1918, the pace of legislative reforms proved too slow compared to the expectations of Romanian society. Among others, the role of the magistracy in the drafting of laws, as well as the status of magistrates caused heated debates involving judges, prosecutors or lawyers, the press and politicians. The independence of the judiciary was the topic that occupied, at a given moment, a central role, about which much has been said and about which much can still be said. The involvement of magistrate C. N. Schina in this debate, the aspects and arguments brought to the attention of the public in the period 1919-1920, will be presented below.

The public debate in the Romanian area regarding the status of the legal and material protection of magistrates is topical. Arguments *for* and *against*, brought from all directions, have reached the extremes and seek the middle ground on this subject of general interest. On the one hand, there is direct concern for "privileges", which are harshly criticized, integrated or not in a wider system. On the other hand, a reasonable compensation of the demanding expectations that magistrates have to meet in the political system of constitutional democracy is also discussed. In this matter, Valeriu Stoica, the Minister of Justice in the period 1996-2000, published several studies that won the loyalty of an impressive number of readers coming from different horizons of Law and which allow the subject to be anchored in current affairs (Stoica, 2023, pp.11-12). First, looking for answers to the question "*Who threatens the independence of the magistrates?*", one can notice that, on the one hand, the Superior Council of the Magistracy opposed both the establishment and the abolition of the Section for the Investigation of Crimes in the Judiciary with the same argument: the executive and the legislature want to subordinate the judiciary or, more directly, politicians attack the independence of justice. Under these circumstances, the vicious circle of

suspicion tends to replace the function of loyal cooperation between the state powers and the function of mutual control within constitutional limits (Stoica, 2021, pp.17-18). Secondly, it is stated that "*The service pension of magistrates is not a privilege*" (Stoica, 2023, pp.19-20)., but we are warned that excesses can create the impression that it is a privilege. In the context, it is observed that it is excessive for the service pension to be higher than the salary. Thirdly, in "*The judge, the dictator and the smart one*", it is emphasized that judges are independent, immovable and they abide only by the law, and these guarantees ensure the equality of the judicial power to the legislative power and the executive power. Dictators need teachers, doctors, engineers, electricians, farmers, civil servants, etc., they can tolerate parliaments and governments, to create a semblance of legitimacy, but they do not need independent, immovable judges who abide only by the law (Stoica, 2023, pp.80-81).

The conference of 29 September 1919 at the Ilfov Bar

C. N. Schina was born in a family of distinguished magistrates, his father, Constantin E. Schina (1838-1913), was the fourth prime president of the Court of Cassation (1838-1913), and his grandfather, Eustațiu Schina, was the president of the Criminal Court (1859) (Duțu, 2012, p.240). In the period 1919-1920 he got involved in the public debate on the problems of Romanian society regarding legislative unification and the independence of the magistracy. First, he supported the professional collaboration of lawyers and magistrates, the establishment of a joint legal journal, but also the establishment of an organization of jurists from Greater Romania, with a very ambitious program. On the other hand, he critically presented the difficulties encountered in the judiciary, in particular, in the relationship between judges and the executive power, but he also supported the organization of a union of civil servants. All this reflects only a small part of the problems that Romanian society had to solve in the first years after the Great Union. Magistrate C. N. Schina risked sanctions based on his

public criticism (Juvara, 1920, pp.424, 426; Teodorescu, 1925, pp.145-148).

In the summer of 1919, C. N. Schina, the president of the 3rd section of the Bucharest Court of Appeal, wrote a series of articles on the constitutional role of the judiciary. As the director of a legal journal, Schina assumes with a lot of "*courage*, *sincerity*" and above all "*conscience*" (Schina, 1919, pp.53-56), the presentation of some problems within the judiciary. Starting from the reality that after the Union, the unification of the legislation was required, he emphasized that quick measures must be taken with regard to the judicial organization, which must be "*one and only for the whole Greater Romania*". He noted that after the war, the progress of democracy also brought "*more and more violent competitions*" because "*the mass of individuals*" legitimately tried to obtain a "*better life*".

Schina considered that Justice was the only one endowed to impose on democracy the observance of the law indispensable to the social order, but it in turn needed the guarantee of independence and immovability. In this context, he examined the extent to which the interference of the executive power in the powers of the judiciary was compatible and reconcilable with its mission. He observed that if the executive power was seized by political parties, which often took the interest of the state for the political interest of the party, the risk of sacrificing legality and justice became predictable (Schina, 1919, p.55).

In order to demonstrate the necessity of the constitutional changes that he proposed in the judicial organization, he mentioned the reasons requiring the inclusion of the principle of the separation of state powers in modern constitutions (Schina, 1919, pp.74-80; Georgescu, 1919, p.80). He analysed the application of the principle in Belgium and Romania (Schina, 1919, pp.91-95), and noted that, when the Romanian law of 1865 brought the "*absolute right of appointments, permutations and promotions*" into the hands of the Minister of Justice, justice and the magistracy were in fact left at the discretion of the executive power. In this context, Schina stated that the dependence of the judicial power on

the executive power could not be reconciled with the "*principle of constitutional independence*".

Schina supported his arguments in a public conference organized by the Ilfov Bar at the invitation of the vice-dean Dem. Dobrescu, at a time when he was running for the position of dean. He presented the problems of the judiciary and advocated the need to twin *the magistracy with the advocacy.* This approach fired up an audience of lawyers at a time when the legal professions were facing many challenges. The press recorded that for the first time a high magistrate got down from his chair in the middle of the bar to frankly expose, from the inside, "*all the evils that the magistracy suffered from*". Symbolically, he reached out, like a brother, to the body of lawyers and called for the "*common work of regeneration, to which it is the duty of every good patriot to contribute*" (Galu, 1919, pp.133-134). Confident in the justice of the assumed cause and determined to stand "*in the front line*", Schina said out loud what others thought in silence ("*tout haut ce que les autres pensent tout bas*"). He anticipated the risks of his revelations – "*if fate is not favourable to me and I fall under the blows received*..." (Schina, 1919, pp.134-138), but he seemed confident in the necessity of these endeavours to correct the situation.

In a spirited speech, he argued that the common goal of magistrates and lawyers was a good administration of Justice, so that it was necessary to strengthen the fraternity of these two bodies separated by a wall of suspicion. It was mentioned that pursuant to some decree-laws, the rules on the admission exam to the magistracy and the conditions under which the appointments were made were abolished. The Minister of Justice had the opportunity to directly appoint magistrates. In this context, magistrate Schina criticized the political interest of the executive power in keeping the judicial power under control (Schina, 1919, pp.145-155).

In the report of the ad-interim Minister of Justice Ștefan C. Pop, no. 50094 of December 1919, no less than four acts committed by Schina were identified, acts which affected the prestige and dignity of the judiciary (Schina, 1919, pp.160-164). First, Schina "*unjustly and recklessly blames*" the attitude of the Court of Cassation, which in 1918,

when the intention to suspend the immovability of the magistracy was agitated, sent a memorandum to the king defending this principle. Schina estimated that this gesture denoted the Court's tendency to intervene in party political battles, "*defending a certain interest"*, "*supporting its own cause*", "*ensuring a situation of superiority over the magistrates from the other courts*" and "*joining hereby a certain political party*", which supported the same constitutional thesis (Schina, 1919, pp.160-161).

Secondly, to highlight the dependence of the judicial power on the executive power, Schina made an irreverent allusion to "*a traditional and constant custom of the prime presidents of the Court of Cassation, past and present*", who, on the occasion of taking the oath, thank the king and government for their appointment. The expression of a "*feeling of elementary politeness*" was appreciated as the tendency of a subordination through which the heads of the supreme court indirectly encouraged the executive power "*to keep the judicial power under its dependence*".

Thirdly, Schina criticized the solution of the supreme court regarding the legal power of decree-laws, which, in the absence of Parliament and an exceptional state of affairs, it justified by the theory of the "*right of necessity*" in the matter of awarding citizenship to foreigners. Going beyond objective criticism, based on scientific arguments, "*which he had every right and every freedom to do*", Schina "*indulges in ironies lacking seriousness and legal foundation, arguing with the most inexplicable lack of civility*" that the supreme court "*sanctions the suspension of the Constitution*" and embraces the German theory of the "*right of the fist*" (faustrecht). With a "*surprising and irreverent*" expression, Schina stated that "*the Teutonic fist is raised by our Court of Cassation to the rank of a principle of public law*" (Schina, 1919, pp.162-163).

Fourthly, Schina questioned the fairness of magistrates, in general, when he claimed that "*through side means they were granted in the form of benefits, per diems and other advantages of this kind, sums which for some magistrates even tripled their salary*". He argued without any evidence that the magistrates were not paid "*in the normal way, but*

in shady ways, in order to better establish those links between governors and magistrates". He said that favours were offered depending on the position of the magistrates, so that "*some of the members of the Court of Cassation are in great honour in this regard*". Through the intervention and interference of political parties, Schina claimed, without providing any evidence, that some court decisions "*were reduced to the level of traffic values*" (Schina, 1919, p.164).

In analysing this situation, the Superior Council of the Magistracy considered, first, that the right to criticize, either the judgments or the judicial activity, could not be denied to anyone. An objective and purely legal criticism was useful and a guarantee for the proper administration of justice. But, when this criticism was made by a magistrate, it did not have to be devoid of the propriety and dignity that must reign in the discussions and mutual or hierarchical relations between magistrates. It was observed that, without relying on any serious basis or even the slightest evidence, a superior magistrate blamed, with impermissible ease, the supreme court for having interfered in political struggles. It was held that Schina stated that, by supporting the position of a party, some magistrates were being favoured and paid in dubious ways from undisclosed funds, resulting in the enslavement of justice. It was appreciated that judgments had become traffic values. The Superior Council of the Magistracy established that such serious and absolutely unproven statements constituted an obvious and offensive lack of propriety in hierarchical relations, as well as one of the biggest insults that could be brought to the consideration of the judicial order, likely to reduce confidence in the country's justice system. It was held that the "*excuse of the combativeness of his temperament*", which Schina invoked, but which put him in a less favourable light from the point of view of his situation as a magistrate, "*is perhaps the only mitigating circumstance that the Council has in view, in the lenient appreciation of his culpability"* (The report of the Minister of Justice no. 50 094 of December 1919, Off. G. No. 201 of 26 December 1919).

In the press from the fall of 1919, Schina was seen as a "*natural representative of the magistracy*". Even the lenient assessment of his guilt by the superior council of the magistracy was, in turn, criticized and

ironized. Alfred Juvara appreciated, in the defence of the magistrate, that his brutal statement regarding the political dependence of the judiciary demanded a brutal response, i.e. his exclusion from the profession. The disciplinary council had imposed a punishment that would have been appropriate "*if, entering the Tinerimea Club, he had refused to respond to the greeting of the Prime President of the Court of Cassation, his hierarchical superior*"(Nichita, 1919, pp.314-316).

The ideas stated by Schina in the public conference of September 1919 were widely resumed in the press of the time. In a gesture of solidarity, other magistrates publicly criticized the interference of the political sphere in the judiciary, with the purpose of controlling the promotion system. They remarked the alarming tendency of "*many good judges*" to leave and the hesitancy of "*capable young people*" to embrace this career (Alexandru, 1919, pp.284-286). It was appreciated that "*freeing the judiciary from the yoke of politics*" and "*bringing the bar closer to the magistracy*" were principles of capital importance. In addition, at the "*time of our democracy*", only the magistracy had the power to save modern society from anarchy. In the fight started by the magistracy against "*politicism*", which "*offended it mercilessly through humiliation and deprivation*", the approach supported by Schina became "*an act of great courage, high manhood and civility*" (Dobrescu, 1919, pp.281-282).

In an interview given to the newspaper Adevărul in December 1919, Schina said: "*I only attacked the system of the political parties which have always understood to make the judiciary their vassal...".* He mentioned, among other things: "*...the cause of justice can no longer be considered an isolated fact due to the noise made around it...*". In defence of the proclaimed principles, he added: "*...this reform of the judiciary will enter...into the very constitution that will be given to enlarged Romania. The idea of justice responds to a need equally claimed beyond the Carpathians, in the other Romanian provinces, and in the old kingdom*" (Nedelea, 1919, p.2).

The Superior Council of the Magistracy decided to suspend magistrate Schina from office for 15 days by Royal Decree no. 5291 of 23 December 1919.

"The general union of national professional trade unions of State, county and commune employees". The national congress of 18-19 July 1920 in Bucharest

The mild sanction took into account the circumstances of the case and the experience of the magistrate, who enjoyed a good professional reputation. Equally, it relied on a cessation of his critical attitude and his professional reserve in these matters. But magistrate Schina did not stop. On the contrary, he unleashed "*a movement, through writing and speaking*" against the interference of politics in the judiciary. In this fight he wanted to involve all the jurists, "*but inexperienced, by his very profession, in the art of writing and speaking*"(Juvara, 1919, p.282) he ended up before the disciplinary board again.

This time, "the State, county and commune officials", without having the authorization required by the Law of 20 December 1909 on professional trade unions, organized themselves in an association entitled "*The General Union of National Professional Trade Unions of State, county and commune Employees*". At the head of this organization, which had an illegal character, Schina took steps to organize a national congress in Bucharest, between 18-19 July 1920. Professional, moral and economic discussions and demands were announced on the agenda.

The government did not authorize the congress, appreciating that for reasons of public order, its holding "*under the current circumstances*" was inopportune. For his part, the Minister of Justice was surprised by the unusual invitation to participate in the congress. In response, through address no. 33552 of 17 July 1920, the minister drew Schina's attention to the fact that "*it is not worthy for a magistrate to put himself at the head of unauthorized unions and preside over meetings, where resolutions likely to disturb the public tranquillity of the state can be discussed and made*".

Ignoring all these impediments, the government's desire to postpone the congress and the advice of the minister of justice not to attend such meetings, Schina organized the congress and presided over it. In his speech he protested against the government. He mentioned a private conversation with the Interior Minister Argetoianu, regarding the organization of the congress. Schina claimed that the Minister of the Interior would have told him on that occasion that "*all officials - with imperceptible exceptions, are lazy and pickpockets, that magistrates also steal and that such elements are found even at the Court of Cassation and the Courts of Appeal*..." (In front of the council, Argetoianu recalled that he had had a private conversation with Schina, in a completely friendly tone, after which he had the impression that he would no longer organize the congress, that he did not have the slightest intention of causing any offence to officials and magistrates, that he did not discuss anything about the Court of Cassation or the Courts of Appeal. These aspects were also confirmed in the investigation by his treating doctor Costiniu, who said that a private conversation had taken place, Off. G. no. 104 of 12 August 1920). His claims further irritated spirits, gave rise to violent speeches and anger screaming against the government and the minister. The Congress approved a motion, read and submitted to voting by Schina himself, in which the officials' wishes were mentioned. The government was invited to satisfy them "*so as not to put them in the position of making decisions to the detriment of the proper functioning of public services*".

The press of the time announced that civil servants, members of the "Union of National Trade Unions of State Employees" had met on Sunday, 15 August 1920, in the morning, in large numbers, in the "Dacia" hall, under the chairmanship of Mr. N. Schina. It was emphasized that the entrance of Schina and Dobrescu into the hall was received "*with endless ovations*". At this meeting, Schina stated, among other things, that the civil servants' unions must be organized like those in France, that the government aimed to disunite civil servants, recalling the obstacles that the civil servants' movement had to overcome in order to organize the congress. Schina did not miss the opportunity to say that

Romania had a servile justice in the hands of the government. He analysed the "*illegal way*" in which he was judged and the decision given in his case. He remembered how the advisers of the Court of Appeal in Craiova showed solidarity with him and re-elected him to the superior council of the magistracy. Several trade union leaders took the floor at that meeting - Maria Oprescu, from the "administration trade union", N. Ganea, who represented the "finance officials", Dinulescu, from the "city hall of the capital", Lazăr Gherman from the "ministry of domains", C. Antonescu, representing the "officials from Prahova", M. Stănescu, "from the internal affairs" - and lawyer Dem Dobrescu. In the meeting it was publicly requested to reinstate Schina and the other colleagues"(Misș, 1920, p.4).

In investigating these facts, the Superior Council of the Magistracy opined, first, that whatever the nature of the conversation was and whatever discussions followed with the Minister of the Interior, Schina should not have forgotten that he was a magistrate. The most elementary common sense and, above all, the dignity of a magistrate, obliged him not to divulge in public, "*under the current circumstances when spirits are agitated*", a conversation with a person who respected him and who could not expect that what he had said would be published (Superior Council of the Magistracy, 1920, pp.412-414). On the other hand, the mentions in the motion voted by the congress were appreciated as a threat and an absolutely thoughtless and provocative, but very transparent allusion to a certain possible attitude that all civil servants would take to paralyze the smooth running of the general services of the state at a certain moment. It was considered that by the actions of his "*public life*" – "*the only ones that the council retains in his responsibility*" - Schina caused "*serious harm to his dignity as a magistrate and the consideration of the order to which he belongs*" (Royal Decree, 1920). In August 1920, Schina was sanctioned with the disciplinary penalty of being removed from the position of president of the Court of Appeal in Bucharest. Royal decree no. 3338 of 10 August 1920 was countersigned by Professor M. B. Cantacuzino, the Minister of Justice. In the report no. 36 592 of 10 August 1920, it was considered that the imputed acts were much more serious than the previous ones, and

the recidivism of Schina, who was reminded that he had been punished for other acts of a professional nature, imposed the appropriate sanction (Minister of Justice, 1920).

The Law for the Court of Cassation and Justice of 20 December 1925

In the fall of 1925, magistrate Emil Pușcariu analysed, in the pages of a legal journal, the role of the magistracy in the drafting of laws (Pușcariu, 1925, pp.561-562). During that period, the Minister of Justice, G. G. Mârzescu, had requested the opinion of the senior magistrates from the High Court of Cassation and Justice in the preparation of a law that directly concerned them: the Law for the Court of Cassation and Justice of 20 December 1925. The criticism of the press, which combatted with obstinance the tendency of the judicial authority to interfere in the attributions of the legislative power, indirectly directed against the magistrates, brought back into question the principle of the separation of powers in the state.

Pușcariu argued that the media regrettably ignored the fact that their mutual independence did not exclude the collaboration of the powers, so necessary in the interest of a normal functioning of the state. On the other hand, the discussions in that period about the need for a law on unpredictability, which resulted precisely from case law, from the observation of flagrant inequities in the turmoil of daily life, brought to the public's attention the role of the judge in law-making (Pușcariu, 1925, p.561). At least two ideas asserted in that opinion are noteworthy. First, the law can no longer be the arbitrary order of an unconditional will, but must be the expression of proven social needs, the result of experience. Secondly, the judiciary, which brings with it the experience of enforcing the laws, has an important role in their elaboration. At that time, the first idea was widely shared throughout society and used "*as needed*": in the electoral struggle between the parties; in parliament, in the relations between the minority and the majority, when the adoption of a law seemed imposed by the voting machine; in the claims of different professional categories that tried to impose certain solutions to gain

certain rights. The second idea had some support among jurists, but it basically resumed an older problem, which was regarded with reservations even by the magistrates.

Pușcariu argued that the times had passed when the judge was required to fulfil a purely automatic function in the enforcement of the law, according to Montesquieu's well-known formula: "*le juge est simplement la bouche qui prononce les paroles de la lois, sans essayer d`en modérer la force, ni la rigueur*" (Popa et al., 2002, pp.113-128). In reality, only the intervention of the magistrate can temper the legislature's tendency "*towards abstraction and the search for purely scientific criteria, foreign to legal practice*". The predominant role of the judge in the elaboration of draft laws, in the preparation of norms "*corresponding to the social needs that inspired them*" is highlighted. Unless it understands this truth, Pușcariu warned, society will continue to helplessly witness "*the application of hybrid laws, true abortions of the science of law, - as is the legislation after the war in our country for the most part*" (Pușcariu, 1925, p.562).

His reasoning started from the reality that judges are directly involved in the settlement of various disputes in society, so it is natural for them to be the most entitled to propose the necessary adjustments. The professional training of the judge was taken into account. Even if they were not specialists "*in everything*", judges had, through the diversity and complexity of the cases they had to decide, the opportunity to observe and understand society's problems. They thus acquired an indispensable specialization for the whole society, which deserved to be used in the legislative procedure.

Beyond the circumstantial exaggerations, which must be observed subject to the circumstances in which these statements were made, the matter of the role of the judiciary in Romanian society, in general, and in the legislative process, in particular, was brought back into discussion. Pușcariu's public plea for the role of the judiciary took place only 6 years after the conference of C.N. Schina at the Ilfov Bar, in September 1919. In the meantime, the Constitution of 1923 had been adopted, and the immovability of the judge had constitutional guarantees. But, in Romanian society, many problems, exposed with great courage by

Schina, were still unsolved, even if important steps had been taken at the legislative level.

Instead of conclusions

The actions of magistrate Nicolae C. Schina, from the period 1919-1920, who gave up the comfort of the professional chair to get involved in debates and initiatives of wide interest for the Romanian society, represent an illustrative page in the history of the Romanian judiciary. First, the "*General Association of Jurists from Greater Romania*" was founded, on 26 October 1919, "*to the acclaim of the 115 jurists who were present*" and Schina was part of the organizing committee, along with Dem. Dobrescu. The goal of the association was "*to strengthen the relations between all the jurists from Greater Romania, organized in a solidary body, based on the community of moral and material interests, regardless of the political beliefs of each member*". "*Professors, magistrates and lawyers*" were admitted as legal members. The association aimed at establishing an "*Institute of social sciences*", with "moral, economic, legal" subdivisions. A "*Legislative committee*" of the institute was to contribute to "*the development and popularization of legal studies through publications, conferences and law courses*". They also prepared a journal of the institute. The association aspired "*to collaborate and make an effective contribution*" to the drafting of the future Constitution of Greater Romania and to the "*work of legislative unification*". In the activity of organizing the association, a rich correspondence was sent to courts and bar associations of the Old Kingdom and the allied provinces, with the invitation to join the association's program and to form subsections by counties (Schina, 1919, p.11). C. N. Schina became the general secretary of the association on 28 December 1919.

On the other hand, the series of studies published in the journal Curierul Judiciar in 1919 drew attention to some topics of great interest regarding the judiciary, its constitutional role and the necessary reform, the principle of the separation of powers in the state or the need for the

collaboration of lawyers and magistrates. Many ideas written in the journal were resumed at the public conference of 29 September 1919 held at the Ilfov Bar. With regard to this episode, it can be noticed that the journal run by the director C. N. Schina, advertised on the front page, in small letters, on 21 September 1919, his conference, which was to take place on 29 September1919. To draw attention, he enthusiastically introduced the "*spirit*" in which the theme of the "*twinning*" of the judiciary with the bar was to be presented. The same journal similarly described, on 5 October 1919, the elections at the Ilfov Bar in which Dobrescu participated, and whose election as dean was anticipated as "*a just reward for a work that has always known only selflessness and sacrifice*". It would seem that the proposal for the general twinning of the judiciary with the bar had been implemented in Bucharest, by twinning the Court of Appeal, or at least the section headed by Schina, with the Ilfov Bar, headed by Dobrescu. But these aspects reconstruct a state of mind that tended to be general and was apparently orchestrated with the best of intentions. Moreover, they are not even mentioned in the analysis of the higher council of the magistracy.

Finally, his participation in the National Congress of an unauthorized trade union on 18-19 July 1920 in Bucharest and his chairing the proceedings constitute the beginning of a war with the *Power*. Attracted by the attempt to set up an organization to represent all civil servants, including magistrates, C. N. Schina will end up in prison, on the evening of 22 April 1923, for incitement to strike (Sora, 2023, pp.134-158).

Beyond details that may betray subjectivity and lack of balance, but which must be seen through the eyes of the time at which they took place, a few aspects remain remarkable. In the opinions of C. N. Schina and in the records of the council of magistrates, we can notice the affirmation and support of some principles, rules and values that will guide the future legislation of Greater Romania: freedom of association, trade union freedom, freedom of speech and the limits of the freedom of expression, protection of private life, separation of powers in the state, independence of the judge.

The idea of consulting magistrates with regard to legislative changes related to justice was found several times in the interwar period. Over time, the Minister of Justice C. Hamangiu supported an extensive consultation of the courts on the issue of legislative unification (Hamangiu, 1932, pp. 1-40). Even if his project did not materialize, the opinions and arguments submitted in the respective procedure demonstrated the concern and rigour of the Romanian magistracy in this matter of national interest.

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THE DIVISION OF INHERITANCE. A SPECIAL LOOK AT ITS CONSTITUTIVE EFFECT

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Abstract: *The purpose of the partition of the estate is to put an end to the state of undivided inheritance which has arisen following the debate on the deceased's estate and the issue of the certificate of inheritance or, where applicable, the finality of a court decision. Whether it is done amicably or by court order, partition now has constitutive effects. The discussion of this issue is of particular practical interest, since, prior to the entry into force of the current Civil Code, partition had declaratory, and therefore retroactive, effects from the moment the inheritance was opened. However, de lege lata, partition only produces future effects, which has important practical consequences. For example, with regard to an asset acquired by inheritance and assigned to an heir in exclusive ownership by partition, it will be specified, from the point of view of the mode of acquisition, that a share of it was acquired by inheritance, retroactively, from the date of the opening of the succession of the person who owned it, and the remaining share was acquired by partition, from the date specified in Art 680 Civil Code. As a result, the tax due in the case of transfer of ownership of, or dismemberment of ownership of, such property will be calculated differently, taking into account the date of acquisition of the shares.*

Key words: *division; indivision; opening the inheritance; constitutive effects; declarative effects.*

Introduction

The Civil Code, which entered into force on October 1st, 2011 (we are referring to the Law no 287/2009 on the Civil Code), stated, for

the first time in our legal system, certain legal institutions (such as trust, engagement, family council, maintenance contract, medically assisted human reproduction with a third party donor, periodic property, inheritance vocation, inheritance petition, etc.), borrowed from the legislation that served as a source of inspiration, in particular that of the Canadian Province of Quebec, and also reformed other institutions of private law, known in our legislation, but which, in the view of the Romanian legislator, needed to be renewed (Pătrașcu and Genoiu, 2018, pp.12-16, Pătrașcu and Genoiu, 2017, pp. 31-39, Pătrașcu and Genoiu, 2016, pp. 4-11). The latter category includes, for example, divorce, intestacy, trusteeship substitutions or partition. It is equally true that most of the traditional institutions of our civil law have been maintained in their established form and have become veritable constants of our private law. In fact, the greatest innovation of this Civil Code is that it has taken up the monist vision, stating not only civil law institutions, like its predecessor, but all private law institutions (Bob, 2012, pp. 27-29).

In this paper, we will discuss the institution of partition, in particular the partition of a succession, insisting on the effect it produces *de lege lata*, namely a constitutive one, which generates significant practical consequences.

The partition. General considerations

The institution of partition is generally stated by the Civil Code, in Book III "About property", Title II "Private property", Section 5, Articles 669-686, and by the Code of Civil Procedure (we are referring to Law no 134/2010 on the Code of Civil Procedure), which states the procedure of judicial partition in Book VI "Special procedures", Title V, Articles 980-996. These legal provisions constitute common law in the matter, applying to partition irrespective of the source of co-ownership (co-ownership or joint ownership in shares - a form of joint ownership, together with ownership in usufruct - is characterized by the existence of several owners of the same property; each holder owns an ideal share of the asset, in the form of a mathematical fraction or percentage, which is not fractional in its materiality). In the doctrine, it is pointed out that

"The right of each co-owner is concurrent and meets at every moment with the rights of the other co-owners over each particle of the property" (Uliescu and Gherghe, 2014, p. 137). As a result, they become applicable whenever the parties concerned request the termination of co-ownership, without it being of any relevance that it relates to property acquired during the marriage by spouses who have chosen the legal or conventional community regime (Avram, 2022, pp. 739-746), in respect of which, however, the share of contribution to their acquisition has been established (thus, by the liquidation of the matrimonial property regime, the joint property in devilish property has been transformed into joint property in shares) or on property acquired by inheritance (in which case we are talking about indivision) or the constitution or reconstitution of the right of ownership under the land laws. Similar to co-ownership, undivided ownership is characterized by the plurality of holders of property rights, but in the case of the latter, ownership is vested in a legal universality. Co-individuals know only the ideal and abstract share that belongs to them, not the goods in their materiality that correspond to this share. The difference between co-ownership and undivided ownership therefore lies in their subject matter, the former relating to one or more assets and the latter to a legal universality. We are therefore talking about undivided inheritance, which is the state in which the co-heirs find themselves after the succession has been debated and the certificate of inheritance has been issued. In the doctrine, undivided ownership has been qualified as a form of property, and not as a form of ownership, such as co-ownership (Uță, 2013, pp. 180). It is also true that there are some special legal texts, one of them in the family field, namely art. 357 of the Civil Code, which bears the indicative title "Liquidation of the community. Partition" and another in the area of inheritance, namely Art 1144 of the Civil Code, with the indicative title "Voluntary partition", which merely reiterate the general principles of division enshrined in the common law.

Traditionally, the doctrine has defined partition or division as that legal operation by which the state of co-ownership or indivision ceases (in the same sense is also the first sentence of Art 669 of the Civil Code,

which states that the: “Termination of co-ownership by partition (...)”), in the sense that the place of the ideal shares is taken by goods or material parts of the property (Bîrsan, 2015, p. 238; Deak, 1999, p. 551; Chirică, 2014, p. 594). As a result of partition, joint ownership in shares is transformed into exclusive ownership.

It is interesting to point out here that the action for partition is not time-barred from an extinctive point of view, under Art 669 of the Civil Code, the partition may be requested at any time, unless it has been suspended by law, legal act or court decision. Therefore, the partition can be suspended, and the agreements concluded for this purpose cannot cover a period longer than 5 years. The provision mentioned by Art 672 of the Civil Code with the indicative title “Agreements concerning the suspension of partition” is not without flaws and is open to interpretation. Reading it, the following question arises: can agreements suspending partition be renewed? A general rule of statutory interpretation is that what is not prohibited is permitted. Just in view of this, we could deduce that such an agreement cannot have a duration of more than 5 years, but could be renewed, and there is no limit to the number of renewals. However, it would be useful to refer in our approach to the corresponding text of the old Civil Code, namely Art 728 Para 2, according to which “A stay of division may be granted for a period of five years. After the expiry of this period, the leave may be renewed”. Considering these two pieces of legislation, we rather tend to think that such a convention could not be renewed. This is because, if the new Romanian legislator had wished to retain the option on this matter of his predecessor, he would have taken over the old text of the law exactly, as he has done on numerous occasions. However, the new legislator has limited itself to providing that such an agreement may not be concluded for a period exceeding five years. In the same vein, it should be noted that, in the case of immovable property, agreements must be concluded in authentic form and be subject to the formalities of publicity laid down by law (Art 672, second sentence, Civil Code).

The agreement to suspend the partition, discussed above, should not be confused with the possibility of suspending the pronouncement of the partition, governed by Art 673 of the Civil Code, according to which

"the court hearing the partition application may suspend the pronouncement of the partition, for a maximum of one year, in order not to cause serious prejudice to the interests of the other co-owners. If the danger of such harm is removed before the expiry of the time limit, the court shall, at the request of the party concerned, review the measure".

Of the two types of partition, as identified in Art 670 of the Civil Code, i.e. the partition by agreement and the partition by court order, we are particularly interested in the first type, the authentication of which falls within the competence of the notary public, in view of our profession. Therefore, we believe that it is not at all uninteresting to show, here, what are the conditions required by law for the valid conclusion of the voluntary partition and, especially, to insist on the capacity required by law of the co-parceners. Being a genuine legal act, the partition agreement must meet all the conditions of validity required by law, both in terms of substance (relating to capacity, consent, object and cause) and form, if it concerns immovable property. From the point of view of the capacity required for the conclusion of the partition agreement, the provisions of Art 674 of the Civil Code should be reproduced, which provide as follows: "If a co-owner lacks legal capacity or has limited legal capacity, partition may be carried out by agreement only with the authorization of the guardianship court and, where applicable, of the legal guardian".

The legislator's requirement is fully justified, in our opinion, since partition, which, *de lege lata*, has a constitutive effect, can be qualified, without hesitation, as an act of disposition, in view of the criterion of its importance. As a result, such an act may be concluded by persons lacking legal capacity, i.e. minors under the age of 14 and persons benefiting from special guardianship, through their legal representative and with the authorization of the guardianship court, and by persons with limited legal capacity, a category subscribed to minors aged between 14 and 18 and persons benefiting from legal advice, in person, but assisted by their legal guardian and with the authorizations of the guardianship court.

Similarly, if the protected person is in a conflict of interests with his guardian, e.g., both are co-parties in the same deed, it is necessary to appoint a special guardian, in accordance with Art 150 of the Civil Code, apparently by the guardianship court and not by the guardianship authority.

Our hesitation is justified by the fact that the text of Art 229 Para 3 of Law no. 71/2011 on the implementation of the Civil Code (”Until the entry into force of the regulation provided for in Para 1, the appointment of the special curator who assists or represents the minor at the conclusion of the acts of disposition or at the debate of the succession procedure shall be made immediately by the guardianship authority, at the request of the notary public, in the latter case, no validation or confirmation by the court is required”) is again suspected of unconstitutionality.

We recall that in 2020, the Constitutional Court of Romania ruled on the unconstitutionality of Art 229 Para 3 of Law no. 71/2011, by Decision no 795, from the considerations of which it appears that the content of Art 229 Para 32, but only that of Art 229 Para 3. In 2022, Decision No 18 reopened the question of the unconstitutionality of the same text of the law, including of Art 229 Para 32. Recital 9 of the latter decision states that: “(...) the procedure to be followed in the case of the appointment of a special guardian to assist or represent the minor in the conclusion of the acts of disposition or in the debate on the succession procedure, as well as in the case provided for in Art.167 of the Civil Code, as the appointment of the curator is not included in the content of the single article, point 2, of the contested law (with reference to Art 229 Para 31, nor in relation to the advice provided for in the single article, point 3, of the contested law (with reference to Article 229 Para 35). Thus, it is pointed out that, in so far as the intention of the regulation is to refer misdirected applications to the competent court, the proposed rule should be of a transitional nature and refer to the immediate transmission, ex officio, of the misdirected application to the competent court”.

We have thus included in our approach the novelties brought to the protection of the individual by Law no. 140/2022 (we are referring to the Law no 140/2022 on some protection measures for persons with

intellectual and psychosocial disabilities and amending and supplementing some normative acts).

Although not all the aspects of interest for the issue of partition (Bîrsan, 2015, pp. 237-242, Chelaru, 2012, pp. 726-739) have been discussed or even listed, for reasons of scope of this paper, we will now focus on the specifics of partition of succession.

Inheritance division

A species of partition, the inheritance partition is the legal operation that puts an end to the state of undivided property by dividing the inherited assets, the undivided shares being replaced by the exclusive rights of the co-individuals over the assets of the estate determined in their materiality (Deak, 1999, p. 551; Popa, 2022, p. 615; Chirică, 2014, p. 594; Stănciulescu, 2015, p. 275). According to the model of the genre to which it belongs, the division of inheritance can take two forms: voluntary division and judicial division (Genoiu, 2023, pp. 374-380; Popa, 2022, pp. 616-618; Deak and Popescu, 2013-2014, pp. 193-205).

The provisions of Art 1143-1145 of the Civil Code affecting the division of inheritance are based on the principles of common law on division of inheritance, Art 1143 Para 2 of the Civil Code expressly and unequivocally provides that "The provisions of Art 669-686 shall also apply to the partition of a succession in so far as they are not incompatible therewith". Thus, the principle according to which no one can be forced to remain in indivision, and the conditions of voluntary partition are reiterated, i.e., that all the co-parties must be present and have full capacity to exercise their rights and, in the case of partition of immovable property, the authentic form of the agreement must be respected, under penalty of absolute nullity (Art 1144 Para 1 Civil Code). If any of the first two conditions mentioned above is not met, the assets of the inheritance will be sealed, as soon as possible, and the voluntary partition will be carried out in compliance with the rules concerning the protection of persons lacking legal capacity or with limited legal capacity or concerning missing persons (Art 1144 Para 2 of the Civil Code).

We should not infer from the wording of Art 1144 Para 1 of the Civil Code, the impossibility for one, several or even all of the co-parceners to be represented, at the conclusion of the deed of partition of the estate, by a representative appointed by a special power of attorney, drawn up in authentic form, even if the agreement in question concerns immovable property. Similarly, this text of the law should not be understood to mean that persons lacking legal capacity or those with limited legal capacity would be prohibited from being party to the agreement on the division of the estate. As already mentioned in the previous point of this paper, these persons can be represented, i.e., assisted at the conclusion of the partition, an act of disposition without any doubt, while the guardianship court must authorize the act. In addition, if there is a conflict of interests between the protected person and the guardian, a special guardian must be appointed, as already mentioned.

The constitutive effect of partition and its practical consequences

As we have seen so far, the new legal regulation of partition takes over the basic principles of this legal institution from its predecessor. However, there is a notable change in terms of the duration of the agreement suspending the partition and a real paradigm shift in terms of the effects of the partition. Thus, *de lege lata*, it produces constitutive effects (Uță, 2013, p. 189), exclusively concerning the future. According to Art 680 Para 1 of the Civil Code, "Each co-owner becomes the exclusive owner of the property or, as the case may be, of the sums of money allocated to him only from the date fixed in the deed of partition, but not earlier than the date of conclusion of the deed, in the case of voluntary partition, or, as the case may be, from the date of the final judgment". Therefore, the effects of partition are only for the future, not for the past, as provided for in the old Civil Code, in Art 786, according to which "Each co-heir is presumed to have inherited alone and immediately all the property which makes up his share, or which has fallen to him by auction, and that he has never been the owner of the

other property of the estate". It is well known that, under the old Civil Code, partition produced declaratory effects, and thus for the past.

In view of the above, from a practical point of view, we consider that the share of a co-partitioner who takes sole ownership of an inheritance must be made up of the share of the inheritance that the co-partitioner lacks, i.e., the difference between the whole and the share acquired by inheritance.

Exempli gratia, if the deceased had a surviving spouse and two children, and the estate consisted of three pieces of land, the deceased's own property, acquired by inheritance or donation, the heirs receive the following shares, as recorded in the final settlement and in the certificate of inheritance: the surviving spouse, 2/8 share, and each child, 3/8 share. Once the certificate of inheritance has been issued, the co-partitioners, who own shares, can conclude a deed of partition, with each of them taking sole ownership of a piece of land. Accordingly, the surviving spouse's share will consist of 6/8 (1-2/8=6/8) of that land, the remaining 2/8 being acquired by inheritance, and each child's share will consist of 5/8 (1-3/8=5/8) of the property concerned, the remaining 3/8 being acquired by inheritance. Thus, by partition, the co-partitioner increases his right of ownership over one or more inheritance assets which he will hold in exclusive ownership, at different times and on different legal grounds. For example, in our case, the surviving spouse acquires the 2/8 share through the effect of the inheritance, retroactively from the moment of its opening, and the 6/8 share from the date established in the partition deed, but no earlier than the date of the deed's conclusion, since we are talking about voluntary partition. Moreover, the land register of these lands will show exactly how they were acquired.

If we were to consider that a co-partitioner acquires, by the effect of partition, the entire property, retroactively, from the date of the opening of the inheritance, we would be circumventing the provisions of Art 680 Para 1 of the Civil Code, which expressly enshrines the constitutive effect of partition for the future. On the contrary, if we were to consider that the entire property would be acquired by the co-partitioner, by the effect of the partition agreement, from the date

provided for in the above-mentioned legal text, therefore exclusively for the future, we would leave the period between the opening of the inheritance and the completion of the partition uncovered. So who is the owner of this property at this time? For, by *lege lata*, there can be no property without an owner. Thus, neither of these two options can be supported and substantiated in law.

The correct solution, in our opinion, is to consider that the heir has acquired from the date of the opening of the inheritance, therefore retroactively, a right of joint ownership in shares of the property of the succession and that one, several or even all of it may be assigned to him in exclusive ownership, by partition, only to the extent of the remaining share necessary to complete his right. This way of thinking and operating in the authentic deeds of partition ensures not only a fair rendering of the manner of acquisition of the right of ownership of inheritance property, with faithful respect for the constitutive effect of the partition, but also guarantees the correct calculation of the tax due in the case of transfer of ownership. Thus, if the surviving spouse in our example will alienate the inherited property and then assigned to sole ownership by partition, the tax owed to the state will be calculated differently for the two shares: for the 2/8 share acquired by inheritance, the time of the opening of the inheritance will be taken into account, and for the 6/8 share, the time of authentication of the partition deed or the date stipulated in the partition deed. If 3 years have passed since the opening of the *de cuius* inheritance, the tax due for the 2/8 share will be 1%, and for the remainder of the share acquired by partition, from the conclusion of which less than 3 years have passed, the tax in question will be 3%.

We consider that our point of view is based on the provisions of Art I Para 1 Point 33 Let h) (xiii) of Government Decision no 1336/29 December 2023 (we are referring to the Romanian Government Decision no 1336/2023 on the modification and amendment of the Methodological Norms for the application of the Law no 227/2015 on the Tax Code, approved by Government Decision no 1/2006 published in the Official Gazette of Romania, no 1996/29 December 2023), according to which "in the case of disposal of a real estate property held by an owner, for which the right of ownership was acquired in different shares, on

different dates, the date of acquisition is the one corresponding to the acquisition of each share".

In the same way, we believe that the tax should also be calculated in the case of the transfer of ownership or its dismemberment by *inter vivos* legal acts on a property acquired in different ways, i.e., a share, by reconstitution of ownership under the land laws, and the remaining share, subsequently, by partition. For the share acquired as a result of the reconstitution of the right of ownership, the tax due to the State will be calculated by reference to the date of its acquisition, i.e. the date of issue of the administrative act (title deed, prefect's order, etc.), while for the remaining share, the date of authentication of the voluntary partition deed or the date of finality of the partition judgment will be taken into account.

Conclusions

Partition is undoubtedly one of the most entrenched institutions of our private law, with significant practical implications, and the recipients of the law frequently resort to it. It is therefore necessary for the legislator to pay greater attention to partition, ensuring that it is regulated in a flexible manner and in a way that is suited to the interests of those concerned. It seems that, *de lege lata*, the way in which partition is portrayed in our civil legislation is satisfactory, as the action by which it can be invoked is not limited in time, the effect it generates being one that is future-founding, and therefore constitutive, with both the possibility of suspending partition and suspending its pronouncement being regulated.

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CLIMATE CHANGE - THE SUBJECT OF HEATED POLEMICS

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Abstract: *The problem of the effects of climate change caused by global warming generated by anthropogenic greenhouse gas (GHG) emissions is considered one of the great environmental challenges of our time. Formulated and promoted by scientists before the increasingly obvious realities, gradually assumed in political circles under the pressure of public opinion, mobilized by civil society, it is increasingly the subject of legal regulation and related theoretical reflection. Thus, worldwide, the issue now briefly analyzed, has been raised in several international documents: the United Nations Convention on Climate Change and the Kyoto Protocol, the Paris Agreement, which address issues of major poverty, the protection and ecological development of human settlements, the provision of food resources, the protection against natural disasters, and other global issues facing humanity at these times. Climate controversies have existed since the 18th century and continue today in the scientific literature because knowledge about the understanding of the climate system remains subject to many uncertainties, is insufficiently known or the subject of fierce controversies.*

Keywords: *climate; climate change; climate law; international climate regime; the right to a stable climate; Framework Convention on Climate Change; Kyoto Protocol; Paris Agreement; adaptation; mitigation; nationally determined contribution; common but differentiated responsibility; climate diplomacy.*

Introduction

According to the official rhetoric, which can be found in international documents, the changes occurring at the level of the climate system (Duțu and Duțu-Buzura, 2020, pp. 323-468) represent direct and immediate evidence of the negative consequences that atmospheric pollution generated by human activities creates on the entire environment (Duțu, 2021, p. 39), and probably are, due to the concrete manifestations of the impact caused, the most important and serious environmental problem that mankind has to face[1](Saul et al., 2012, Duminică, 2015, Duminică, 2019).

Climate controversies (Scotto D'Apollonia, 2014) have existed since the 18th century and continue today in the scientific literature because knowledge about the understanding of the climate system remains subject to many uncertainties, is insufficiently known or is the subject of fierce controversies (Berthelot, 1996, 2002, 2008).

International documents on climate change

On May 9, 1992, the *United Nations Framework Convention on Climate Change* was concluded in New York and was opened for signature in June 1992 during the United Nations Conference on Environment and Development in Rio de Janeiro; it entered into force on March 21, 1994. As its name suggests, the convention we have just mentioned is a framework one, which, under international law, represents a premise for future negotiations and provides a legal foundation for subsequent decisions and protocols (Puthucherril, 2012, p. 43). The convention was based on several findings in the sense that: changes in the planet's climate and their harmful effects are a cause of concern for all mankind; human activity has significantly increased the

[1]The term "global warming" was first introduced in 1975 by the geochemist Wallace Broecker of Columbia University's Lamont Doherty Geological Observatory, which was entitled *Climate Change: Are We on the Brink of a Pronounced Global Warming?*

concentrations of greenhouse gases in the atmosphere; this growth intensifies the natural greenhouse effect and will lead, on average, to an additional warming of the earth's surface, which natural ecosystems and people are at risk of bearing; most of the greenhouse gases emitted in the world, in the past and at present, originate in developed countries because per capita emissions in developing countries are still relatively low, and the share of total emissions attributable to developing countries will be increasing to allow them to meet their social and development needs; the forecast of climate changes is affected by a large number of uncertainties, especially in terms of their development over time, their extent and regional characteristics. The United Nations Framework Convention on Climate Change (Ratified by Romania through Law no. 24 of May 6, 1994, Official Gazette no. 119 of May 12, 1994) has the ultimate goal of stabilizing greenhouse gas concentrations in the atmosphere at a level that prevents any dangerous anthropogenic disruption of the climate system; the parties agreed to reach this objective within a sufficient time interval so that ecosystems can naturally adapt to climate change[1](Mitroi, 2019, pp. 215-216), so that food production is not threatened, and economic development can take place in a sustainable manner.

The principles, expressly provided in art. 3 are: a) the duty of the parties is to protect the climate system for the benefit of present and future generations, based on equity and according to their common responsibilities, but differentiated by their capacities, therefore, the developed country parties must be in the vanguard of the fight against climate change and its harmful effects; b) full consideration should be given to the specific needs and the special situation of developing country parties, especially of those on which the convention would impose a disproportionate or abnormal burden; c) precaution must accompany the measures meant to anticipate, prevent, minimize the causes of climate change and limit their harmful effects; the absence of

[1]Article 1 Definitions of the Convention defines climate change as a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.

absolute scientific certainty should not serve as a pretext to postpone the adoption of such measures; d) the parties have both the right and the obligation to act for a sustainable development, meaning that the measures intended to protect the climate system must both be adapted for each party's own situation and be integrated into the national development programs; e) the parties have the task of working together on an open international economic system that leads both to economic growth and to the sustainable development of all parties. Based on and as an embodiment of the principle of common but differentiated responsibility, the parties to the convention have undertaken commitments in relation to climate change; the obligations are different depending on the group to which the states belong, the convention having two annexes that are justified by the contribution of each state to the generation of climate change and by the ability of each to get involved in actions to combat the phenomenon. The United Nations Framework Convention on Climate Change does not contain concrete and binding commitments for parties to reduce greenhouse gas emissions, which has been a disappointment for some state parties to the convention (McAllister, 1993, pp. 484-485, Duminică, 2016); this absence of concrete binding commitments gives the United Nations Framework Convention on Climate Change the character of a ‘soft law”[1] (Cazala, 2011, pp. 41-48) international rule, as the Convention does not impose concrete obligations on states, but rather establishes a long-term evolutionary process of legal approach to the issue of climate change, it only states the objective and principles of this approach, establishes the necessary institutions and decision-making mechanisms, promotes a system for centralizing some necessary information and encourages national actions in the field. With the intention of continuing and strengthening the efforts made to reduce greenhouse gas emissions, the parties to the United Nations Framework Convention on Climate Change,

[1] The notion of "hard law" refers to the rules of international law that imply binding and concrete commitments whose non-observance entails certain sanctions, while the rules of "soft law" are rather a means of promoting better cooperation between states.

in the third session of the Conference of the Parties (COP3), decided, on December 11, 1997, the adoption of the *Kyoto Protocol*, which aimed to reduce greenhouse gas emissions by at least 5% compared to the level of 1990 in the period 2008-2012[1]. As the first result and implementation step of the United Nations Framework Convention on Climate Change, the Kyoto Protocol committed the industrialized states and the EU in a coercive policy and strategy to reduce GHG emissions, but through using the planetary „market" of emission shares, by fixing a global emission ceiling and according to a descending, *topdown* mechanism, distributing to the states in the form of „emission rights" which, in turn, allocated them to polluting entities (Duțu and Duțu-Buzura, 2020, p. 346). The Kyoto Protocol (Meinhard, p. 556, Mitroi, 2019, p. 222) is conceived on the structure rules of an international treaty (Wijen & Zoeteman), more precisely, a short list of definitions (art. 1) is followed by the enumeration of the substantial obligations that the parties assume, (art. 2-12); the institutions established in order to achieve the proposed goals are established by art. 13-18, and the provisions relating to the resolution of possible disputes are contained in art. 19; the provisions relating to the adoption of amendments and the addition of annexes to the protocol (art. 20, 21) are followed by those relating to voting rights, the manner of exercising them (art. 22), signing, ratification, entry into force, reservations to the protocol and withdrawal of the parties (art. 23-28). The Protocol also includes two annexes: Annex A includes a list of greenhouse gases relevant to the protocol and Annex B contains the amounts of greenhouse gas emissions allocated to each party in Annex I to the United Nations Framework Convention on Climate Change.

[1] In force on 16 February 2005; ratified by Romania by Law no. 3/2001, Official Gazette no. 81 of 16 February 2001. PROTOCOL 11/12/1997 - Portal Legislativ (just.ro). In December 2012, at the eighth session of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol held in Doha, Qatar, the Doha Amendment to the Kyoto Protocol was adopted, whereby the Parties established a second period of obligations regarding the reduction of greenhouse gas emissions, which would take place in the period 2013-2020 AMENDAMENTUL DE LA DOHA LA PROTOCOLUL DE LA KYOTO (europa.eu) - accessed 18.03.2024.

As for the principles on which it is built, since the Kyoto Protocol is built onto the United Nations Framework Convention on Climate Change, its principles constitute at the same time its own principles, namely: the principle of sustainable development, the precautionary principle, the principle of common but differentiated responsibilities, the polluter pays principle, the principle of public access to information and justice in environmental matters and to the development and enforcement of environmental decisions. Likewise, the obligations assumed by the parties through the Protocol are similar to those in the Convention; the most important part of the Kyoto Protocol is given by the commitments of the parties in Annex I and this because they are the first concrete obligations assumed at the international level to reduce greenhouse gas emissions. Thus, in accordance with art. 3 point 1 of the Kyoto Protocol, ‘The Partiesincluded in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the green house gases listed in Annex A do not exceed their assignedamounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their overall emissions of such gasesby at least 5 per cent below 1990 levels in the commitment period 2008 to 2012.” Next, point 2 of the same article establishes for each of the parties included in Annex I the obligation to make ‘demonstrable progress in achieving its commitments under this Protocol.” Since the Protocol does not contain any definition of the notion of ‘demonstrable progress” or by what means this possible progress can be demonstrated, it is considered that this legal provision is not useless, but comes to strengthen the commitments of the parties, bringing an additional note of obligation to the assumed duties (Mitroi, 2019, pp. 242-243). Art. 3 point 5 of the Protocol provides a way to grant a degree of flexibility to some of the parties in Annex I in order to perform the obligations assumed so that the parties included in annex no. I, which are in the process of transition to a market economy, will notify the Conference of the Parties serving as the meeting of the Parties to this Protocol of the intention to use as a year or as a reference period other

than 1990, for the implementation of the obligations resulting from the application of this article. The Protocol established three main flexible mechanisms capable of achieving the proposed objectives: the Joint Implementation Mechanism, the Clean Development Mechanism and the International Emission Trading Mechanism; all three mechanisms were designed to stimulate the reduction of greenhouse gas emissions and the evolution of climate change through investment and technology transfer between the State Parties, with the aim of making the efforts of the States economically more efficient, as well as of including developing countries in the strategy to combat and reduce the negative effects of air pollution.

On December 12, 2015, 195 State Parties participating in the 21st Conference of the Parties (COP 21) to the United Nations Framework Convention on Climate Change adopted the *Paris Agreement*, the objective of which is to maintain the increase in average temperature below 2°C compared to the preindustrial period. Among the reasons for the appearance of this agreement is the fact that the Kyoto Protocol, although it represented at its time, the most concrete and coherent legal instrument in the field, began to prove its limits despite the Doha Amendment through which the period of commitments under the Kyoto Protocol was extended until the year 2020. The central problem that led, over time, to the weakening of the effectiveness of the Kyoto Protocol was represented by the differentiated system of the obligations assumed by the parties based on the criterion of the development stage of the states included in the annexes to the convention and to the Protocol; thus, some states that were not included in Annex I to the Convention and that were exempted from the obligations to reduce greenhouse gas emissions imposed by the Kyoto Protocol, over time, ceased to be developing states and have become big polluters; for example, China did not appear in Annex I to the Convention among the states that assumed concrete obligations to reduce emissions under the Kyoto Protocol, but in recent decades China has become one of the biggest polluters alongside the United States of America (Victor, 2001). As a structure, the Paris Agreement starts with the preamble of 16 paragraphs, continues with 29 articles that can be divided into three parts: principles and objectives, action strategies and implementation techniques. In the legal literature, it

is considered that although the name of agreement can be misleading, the Paris Agreement is only a protocol of the United Nations Framework Convention on Climate Change, as evidenced by the unequivocal references to this effect in the preamble and in art. 1[1] and 2 of the Agreement (Savaresi, 2016, p.2). Following the model of the Kyoto Protocol, the Paris Agreement also established implementation mechanisms, namely: the international transfer of greenhouse gas emission reduction units; the sustainable development mechanism; the increased transparency mechanism.

In the community of researchers alongside those who assert a broad consensus on the determining role of human activities in global warming in the last fifty years, there have appeared ‘climateskeptics” (Bony, 2013, Bourg, 2010, pp.29-40, Bréon, 2013) who invoke several points of controversy regarding: the role and formation of clouds against the background of the influence of cosmic rays and solar variability; climate sensitivity and natural variability; reliability of models; the impossibility of making a clear connection between human activity, climate change, and extreme phenomena such as hurricanes (le Roy Ladurie, 1967).

Moreover, there are many experts who believe that many other factors, - such as the influence of solar cycles, changes in the position of the magnetic poles, the cyclical variations of the Earth's orbit around the Sun, described by the so-called Milankovic cycles, the effect being the variation in the amount of energy received by the Earth from the Sun, - also significantly influence both the weather and the climate. However, the atmosphere is such a complex system that it is hard to believe that dramatic developments such as climate change can be caused solely by the increasing CO2 concentrations, unless there is an extra-scientific interest in promoting this explanation. In fact, Ivar Giaever, laureate of

[1]*Article 1* For thepurposes of this Protocol, thedefinitionscontained in Article 1 of theConventionshallapply. In addition: (a) “Conference of theParties” meanstheConference of thePartiestotheConvention; (b) “Convention” meansthe United Nations Framework Convention on Climate Change, adopted in New York on 9 May 1992; (c) “Party” means a Party tothis Protocol.

the Nobel Prize for Physics in 1973, considered 'global warming' to be *pseudoscience* and said that the miracle was that in such a complex system we had such small variations in temperature around the globe." Ivar Giaever found the measurement of a global average temperature increase of 0.8 degrees over 150 years to be highly unlikely to be accurate, due to the difficulties associated with the precision of such measurements - and small enough not to count in any case: 'What does the temperature rise by 0.8 degrees mean? Probably nothing." He disagreed that carbon dioxide was involved and showed several charts which claimed, among other things, that the climate actually cooled, so he declared: 'Is climate change pseudoscience? If I were to answer the question, the answer is: absolutely."[1] Giaever reaffirmed his position on the topic of global warming at an event in 2015, arguing his position based on the Global Average Temperatures (GISTEMP) data published by NASA[2] among others, which indicated that the global average temperature at surface had increased by less than one degree kelvin in 140 years and had not increased at all for the period between 2000 and 2014. An important point of Giaever's speech was that of confidence in the statistical calculation of these temperatures against the inhomogeneous spatial distribution of units of measurement on the globe, especially the very poor coverage of the southern hemisphere.

The nodal point of the climate controversies refers to models because they have an essential role in delineating the future scenarios of economic and social development (Allegre, 2005, pp. 157-159). In this context, the position of science on modernity was questioned, the reflections being articulated around the question of knowing whether we are in a society of knowledge or a society of risk? (Berthelot, 2008, p.165) Uncertainties and controversies before major political issues

[1]Lindau Nobel Laureate Meeting: From the Big Bang to the Big Controversy (aka Climate Change) | Observations, Scientific American Blog Network (archive.org)– accessed 18.03.2024.

[2]Data.GISS: GISS Surface Temperature Analysis (GISTEMP v4) (nasa.gov) – accessed 18.03.2024.

involving decision-making on a global scale led Berthelot[1] (Stoffel, 2017, pp.163-165) to propose to add the principle of circumspection (for the use of scientific knowledge in contexts characterized by uncertainty) to the precautionary principle (in decision-making). Simply put, the principle of circumspection involves openness to doubt, controversy, or ecological and epistemic diversity.

Conclusions

The theory of climate change generates a clear attitude: either total acceptance or abrupt skepticism; the attitude seems to be explained even by the fact that the debated topic is not understood by 99.9% of the planet's population who does not even grasp its meaning, being constantly bombarded by the notion of 'follow the science", i.e. to trust science in order to solve the so-called problems of the climate. If until a few years ago the majority of published climate books were in complete agreement on the topic, in the last few years dissenting voices have been heard; different or opposing opinions are expressed and published by retired university professors and experts; therefore, they no longer fear that deviating from the official positions of politicians and industries which stand to profit from climate policies could negatively affect their professional reputation (Koonin, 2021). Steven E. Koonin, author of a recently published book (*Unsettled: What Climate Science Tells Us, What It Doesn't, and Why It Matters*) also includes in his conclusions the following ideas: there are major discrepancies regarding global warming and especially in how much the planet's temperature will rise if we continue to use traditional fuels (coal, natural gas and crude oil); the amount of carbon dioxide (CO2) in the atmosphere is as high today as it was 300 million years ago; the amount of carbon dioxide in the

[1] Idem. Jean Michel Berthelot (1945 – 2006) was a French sociologist, philosopher, epistemologist and theorist, specialist in the philosophy of social sciences, the history of sociology, the sociology of education, the sociology of knowledge, the sociology of science and the sociology of the body. Jean-Michel Berthelot - Wikipedia - accessed 4.03.2021.

atmosphere is increasing, but it will only become a concern in 250 or 500 years from now.

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HOBBES, LOCKE, ROUSSEAU AND HUME - POLITICAL THOUGHT TITANS OF THE 17TH CENTURY FROM A CONTEMPORARY PERSPECTIVE

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Abstract: *The political philosophies of Hobbes, Locke, Rousseau, and Hume represent four distinct perspectives on the origin and structure of society. Hobbes emphasizes the need for a strong state to prevent conflict, while Locke advocates for the protection of individual rights through the limitation of state power. Rousseau focuses on the idea of the social contract and a return to an ideal form of communal life, rejecting the representation of sovereignty and insisting on the general will of the people. In the light of these ideas, a society based on a legal framework that guarantees a better and safer life in exchange for obedience to the general will emerges. Rousseau also emphasizes the importance of equality and the indivisible unity of society members. In contrast, Hume questions contractual theories about the origin of society, arguing that political authority arises from the need to regulate disputes in complex societies. He highlights the importance of custom and social acceptance in the formation and perpetuation of political authority. At the same time, Hume promotes a political perspective that seeks to ensure individual freedom through a government limited by laws and through the education of the human individual. Thus, while Hobbes, Locke, and Rousseau explore the nature and structure of the state and society, Hume makes an important contribution by criticizing contractual theories and promoting a perspective that emphasizes the balance between freedom and authority within a civilized society.*

Keywords: *social contract; state; Hobbes; Locke; Rousseau; Hume*.

Introduction

In the evolution of political thought, philosophers such as Hobbes, Locke, Rousseau and Hume have occupied a central place, significantly contributing to shaping the theoretical foundations of society and the state. These thinkers sought to answer essential questions about the origin and structure of human society, as well as the role and legitimacy of political authority. In light of the social and political changes of their time, these philosophers elaborated distinct visions of human nature, the state, and social relations.

From Hobbes's pessimistic conception, which emphasized the need for a strong state to maintain order and stability in a world marked by conflict and competition, to Locke's theory of individual rights and the social contract, which promoted the idea of limited authority and respect for individual freedom, and to Rousseau's communal vision, which advocated for the importance of the general will and a form of political life based on participation and equality, each philosopher made significant contributions to understanding the role and function of the state in society. Additionally, in this work, we aim to examine Hume's critical perspectives on the social contract theory, which raise provocative questions about the origin of political authority and its foundation of legitimacy. His critique brings to the forefront an essential debate about the nature and origin of the state, thus contributing to the ongoing evolution of political thought.

Through the exploration of the ideas and theories of these thinkers, we aim to gain a deeper understanding of the diversity and complexity of perspectives on society and politics. Thus, we will be able to highlight the distinctive contributions of each philosopher to the understanding of political and social fundamentals, offering a comprehensive perspective on the evolution of political thought in the history of philosophy and the relevance of these ideas in contemporary context.

1. Leviathan by Hobbes: Critique and Controversies in Political Philosophy

Hobbes lays down in his essays the very foundation of our scientific understanding of existence (Höffding, 1924, p. 276). His system remains the most profound materialist system of his era. He distinguishes scientific knowledge of isolated phenomena, delving into their causes, thus differentiating it from theology, which studies the eternal without beginning. Science, for him, begins with defining fundamental ideas (Höffding, 1924, p. 277), and even though arbitrary, these principles are known in themselves through a kind of intuition called reflection (Hobbes, 1981, p. 1).

Ranked among materialist thinkers, his materialism is nuanced by acknowledging a form of intuition in the understanding of principles. His method is deductive, emphasizing that all science arises from sensation, and principles are derived from the analysis of sensory data. (Höffding, 1924, p. 232). He establishes a distinction between motion itself and its appearance, arguing that only actual existence is motion (Rogers, 1997, p. 265).

Though often interpreted as a materialist and atheist, Hobbes acknowledges the existence of God as a legislator. He rejects traditional theology but views God as the first power of all powers, a corporeal entity. His belief in God arises from fear and self-interest, and while he does not deny faith, his motivations are utilitarian. Ultimately, he rejects theology and first metaphysical philosophy, regarding it as a correct delineation of terms necessary for understanding simple concepts related to the generation of bodies. This first philosophy is not a science of the infinite, as Hobbes considers all ideas, we can formulate to be finite. Thus, the infinite and God are excluded from both philosophy and first philosophy.

Hobbes regards politics and law as sciences, basing his vision on the instinct of self-preservation of the human being. According to him, ethics and politics can be constructive sciences, equivalent to geometry or mechanics (Höffding, 1924, p. 393), as they deal with human life and

depend on individual will. They are based on a voluntary contract between individuals, aiming to produce a secure social life. This contract, based on utility and the preservation of humanity, derives from right reason, with Hobbes rejecting the need for universal consensus. In contrast to Aristotle, he asserts that man is not naturally sociable but rather selfish by nature. The state of nature is described by him as a "bellum omnium contra omnes," a war of all against all. However, desire and language, distinctive characteristics of humanity, allow for the formation of human relationships and civil society (del Vecchio, 1997, p. 85).

Fear, born from the uncertainty introduced by social interactions, leads to the necessity of establishing political power (Zorka, 1994, p. 311).

Hobbes justifies the state through a voluntary act in which each individual authorizes a leader (the sovereign) to govern on their behalf (Hobbes, 2023, p. 177).

This concept of authorization reveals the active relationship between subjects and sovereign. The sovereign acts on behalf of the subjects, who in turn act through the sovereign. Thus, the sovereign will become the expression of the will of all individuals. According to Hobbes, the authorization contract justifies absolute political power. The state, represented by Leviathan, transcends individuals and ensures social peace, safeguarding human happiness. Sovereignty is absolute, indivisible, and inviolable, conferring upon the sovereign unrestricted political power.

In Leviathan, Hobbes introduces the concept of authorization as a major philosophical innovation. This concept reveals the relationships between subjects and sovereign, as well as the relationships among the subjects themselves. The central idea is that subjects are the authors of a political will whose actor is the sovereign, thus establishing an active relationship between subjects and political power. Through the authorization contract, he argues that sovereign will is not alien to individual wills but rather their expression. Authorization implies that the sovereign acts on behalf of the subjects, and they act through the sovereign. Subjects are active in shaping political will, and the

authorization contract becomes the legitimate foundation of political authority. Hobbes defends the theory of the double contract, in which individuals associate with each other and then cede all their rights to the sovereign. Regarding the theory of law, Hobbes asserts that authority, not truth, creates law. Civil or positive law is an expression of the sovereign's will, which has the right to command without being limited by external sources such as custom or common law. The concept of Leviathan, representing a monster formed by individuals united on its shell, symbolizes the transcendent power of the sovereign above individual wills. Sovereignty is absolute, indivisible, and inviolable, elevating the sovereign above the demands of the law. Regarding economic power, Hobbes outlines the principles of a liberal and mercantilist theory of the state, asserting that absolute monarchy is the regime that best guarantees social peace (Brimo, 1978, p. 114). The justification of sovereign power is anchored in the social contract and serves to build the state as an entity necessary for ensuring the happiness and peace of individuals. In conclusion, Hobbes's concept of authorization in Leviathan brings an innovative perspective on the relationship between subjects and sovereign (Besnier, 1998, p. 144), highlighting the agency of subjects in shaping political will and legitimizing absolute sovereignty.

Critics of Hobbes's philosophy highlight several shortcomings in his thinking. Firstly, he emphasizes what individuals desire society to be rather than what it ought to be. This distinction between individual desire and social necessity persists in later philosophies, especially in Hegel and Marxism. The emphasis on motion in Hobbes's political philosophy implicitly aligns him with historicist philosophies (Popper, 1993, p. 15), although social visionariysm is later criticized for its failures (Lyon, 1893, 214).

A major critique of his thought concerns its potential for totalitarianism (Touchard, 2012, p. 330), with Hobbes being portrayed as a precursor to modern totalitarianism (Jouffroy, 1998, p. 229). He created a monstrous state that completely absorbs the individual, necessitating the surrender of human essence for the protection offered by this state (Hobbes, p.8).

The abstract nature of Hobbesian thought leads to a desert devoid of love and action, painting a picture of a world inhabited by things rather than souls. The logical impossibility of the state of nature, according to Hobbes, can also be criticized, as the creation of society is perceived as a voluntary act, but this implies a contradiction when society itself is based on qualitative considerations. His denial of God weakens the moral foundation of law, and his view of society as merely repressive of the state of nature is criticized for its lack of consideration for legitimacy and morality (Hobbes, p.23).

Despite these criticisms, some scholars argue that Hobbes's absolutism is imbued with an enlightened self-interest, aiming to ensure the full flourishing of the individual. However, his philosophy is also accused of lacking trust in human nature, leading to a society where individuals completely surrender their rights to the sovereign without retaining any rights outside the imposed legal order (Touchard, p. 330).

Critiques of Hobbes's philosophy highlight its limitations, especially its lack of consideration for human nature, its potential for totalitarianism, and its weakened moral foundation. Despite his contributions to political philosophy, Hobbes remains subject to significant criticisms that question the viability of his ideas in building a just and equitable society.

2. John Locke: Architect of Seventeenth-Century Liberal Thought

John Locke represents the transition from scientific reasoning to the political revolution of the seventeenth century. His ideas shaped the foundations of modern liberalism and constitutionalism. His life marked by exile and commitment to the bourgeoisie makes him a key figure of his time. Considered the founder of English empiricism, he developed a philosophical conception that later influenced thinkers like Berkeley and Hume. His empiricism evolved as a reaction to the concepts of substance and causality advocated by modern philosophers such as Galileo, Boethius, and Descartes. He emphasized the empirical foundations of knowledge, rejecting innate ideas and highlighting the importance of objective experience (Trandafiroiu, 1999, p. 11).

In modern philosophy, Locke was a proponent of an orientation towards experiential knowledge, considering human action upon nature as a source of objective knowledge. His critique of the concepts of substance and causality had a major impact (Trandafiroiu, p. 20), emphasizing the crucial role of reason and experience in acquiring knowledge. He rejected the idea of substance as a verbal invention, stating that the human mind does not possess a clear idea of it. He also emphasized that the idea of spiritual substance is as obscure as that of corporeal substance (Locke, 1961, p. 69). By criticizing abstract notions, he laid the groundwork for the empiricism later developed by Berkeley and Hume.

In his "Essay Concerning Human Understanding," Locke argues that "our idea of substance is just as obscure in both cases, or else there is nothing to it, for it is merely a hypothetical I-know-not-what" (Locke, 1961, p. 286). Substance is thus the unknown cause of the qualitative state of sensible things, both at the level of sensations and of our ideas. Regarding the causal relationship, this is closely related to the notion of substance. Locke observes that things are susceptible to relationship, but his understanding is limited to the external relationships that exist between things. "Relation consists in the consideration of one thing together with another that is external to it" (Locke, 1961, p. 302), and "the nature of relation consists in the comparison or the relating of one thing to another"(Locke, 1961, p. 303). Within the notion of relation, the causal relationship occupies an important place. He has a subjectivist conception of this relationship, stating that "the notions of cause and effect derive from ideas received by sensation or reflection, and that this relationship, however comprehensive it may be, ultimately ends in these ideas. For, in order to have the ideas of cause and effect, it is sufficient to consider that a certain simple idea or substance begins to exist because of the action of another, without knowing the nature of that action." (Locke, 1961, p. 307)

Analysing his philosophy, Hegel will say that "the only important thing is Locke's question about the origin of those representations. Thus, the analysis of experience is the main thing. Modern sciences have their

origin here, the natural sciences, mathematics, and, among the English, political science." (Hegel, 1964, p. 493).

Locke's conception of knowledge represents a turning point in the development of philosophical thought, marking the transition from sterile speculation to an experientially focused approach. Locke emphasizes the importance of observation and reflection on concrete experience, thus influencing subsequent philosophical orientations of empiricism. His critique of abstract concepts, such as substance and causality, sparked relevant discussions and paved the way for further development of empiricist thought. Locke's socio-political work has been perceived as hedonistic in nature. "Political society is characterized by the power of action and positive right by constraint; action is valid if it is rational, reason being the characteristic of man and humanity." (Brimo, 116).

As did Hobbes, he remains faithful to English philosophy, which links the idea of rights to individual or social utility. However, fundamentally, rights, in their authentic sense, are based on the idea of freedom, and the foremost among freedoms is freedom itself (Fouillée, 2019, p. 333). Freedom and equality are inherent to human nature. In other words, human nature consists of liberty. The relationships among individuals in the state of nature are relations of power, but rights are not rights of power relations, but of relations between a free being and another free being, which are realized in equality. These relationships are naturally constituted prior to any agreement that would lead to the formation of civil society. (Locke, 1999, p.65). In other words, there existed a natural society before any civil society.

In Locke's view, the transition from the state of nature to civil society was made possible through a general consensus in which individuals sought to maximize their security and liberty. (Locke, 1984).

The transition from the state of nature to civil society was based on a contract. The principle of any association can only be mutual consent. The object of the contract is to guarantee natural rights, not to annul them in favour of the sovereign, as Hobbes believed. The only right that associates relinquish to civil society is that of punishing and administering justice. Political power cannot be absolute; it must have

limits. People abandoned their natural state and formed civil society to obtain maximum protection. The contract underlying this agreement can be terminated if those in power fail to fulfil their obligations. The purpose of any political power must be the preservation of life, liberty, property, and all forms of possessions. If this objective is not respected, the government will come into conflict with civil society, and a return to the state of nature, which the contract sought to overcome, will occur. As in any contract, if one party violates it, they cannot bind the other. By establishing legislative and executive powers, the people do not relinquish their share of sovereignty. If these powers confiscate the rights of the people for their own benefit, the people are no longer bound by the contract and may even resort to force to replace those who govern. There is also the possibility that governors may resort to coercion to ensure that citizens abide by the rules established for the common good.For Locke, the judicial power aims only to ensure maximum freedom and guarantee prosperity for all. If this end is not respected, the government will come into conflict with civil society, and a return to the state of nature, which the contract sought to overcome, will occur. If one party violates the contract, as in any contract, it cannot bind the other (Locke, 1984). With this conception, Locke legitimizes revolution. To avoid this, it is necessary to give major importance to the one who can maintain a balance between parties. That is the judge. According to Locke, the limit of political power is given by the natural rights of individuals, for the defence of which this power was instituted.

John Locke's individualistic political vision is the cornerstone of contemporary democratic liberalism. For him, natural rights are essentially individual, and the state is instituted to defend these rights against any form of social oppression. He envisions a constitutional organization meant to concretize the protection of individual rights and eliminate oppression. According to him, political society results from the partial and temporary relinquishment of individuals from their state of nature in favour of a better-organized justice and more efficient power. However, the power of the state always remains limited by natural rights. Locke presents the state as a "limited liability society" (Brimo, 118),

where the ultimate goal of power is to ensure freedom, equality, and legality. His central concern for individual freedom leads him to reflect on preventing the evolution of power towards arbitrariness. For him, the freedom of the governed means living according to a permanent rule established by the legislative power, thus guaranteeing the possibility to follow one's own will within the limits defined by this rule. (Locke, 2009, p. 189). His entire theoretical construction aims at limiting power to favour individual freedom. He rejects any form of arbitrary sovereign power, emphasizing the need for the separation of powers in the state to avoid abuses. Locke's fundamental thesis is that of "taming power" (Locke).

Individuals elect and authorize a legislative body to create laws and establish rules to limit and moderate any potentially abusive domination. Thus, Locke's foundational vision will influence modern liberalism, emphasizing the importance of limiting power to protect natural rights and ensure social peace.

John Locke's liberal ideas can pose social challenges (Popa et al, 2007, pp.166-167). While he advocates for strong individualism to protect natural rights, it's important to underscore the risks of social atomization and the formation of pressure groups. The balance between individual freedom and state intervention is at the core of concerns. A strict limitation of state intervention in the private sphere could weaken social cohesion. The theory of non-interventionism, although proclaimed, is often challenging to implement, especially in a complex media-driven world. Excessive individual freedom could lead to social inequalities that threaten social cohesion and the common good. Is there truly a united society when individual interests predominate, potentially leading to class division or interest groups? Extreme individualism could lead to isolation, as suggested by electoral absenteeism and disinterest in public life. We observe the increasing withdrawal of the individual into oneself in an increasingly complex contemporary society. John Locke's contribution to the foundations of justice lies in his central role in the development of democratic liberalism. Influenced by the need to protect

natural rights, Locke elaborates a political vision focused on limiting power to ensure individual freedom and social peace.

3. Jean-Jacques Rousseau: The Social Contract, Ideal Foundation of Political Society

In response to the challenge posed by the Dijon Academy regarding how the development of sciences and arts contributes to moral purification, Jean-Jacques Rousseau sparked a true scandal. In the midst of the Enlightenment era, when the idea that sciences and arts bring individual happiness and collective good was accepted, he offered a radically negative response. In his Discourse on the Sciences and Arts, he asserts that contemporary society creates the illusion of mutual understanding and the pursuit of common interests. However, in reality, individuals are driven to compete for their own happiness, leading to the development of apparent but deceptive virtues. This conceptual framework highlights the fundamental opposition between "natural man" and "social man". For Rousseau, natural man is free and independent, living in a pre-moral state. In the state of nature, he is described as an isolated individual, dominated by physical instincts, unorganized in communities, yet happy without consciously seeking happiness. However, upon entering society, man becomes a prisoner of conventions and social illusion, losing his innocence and morals. (Ony, 1987, p.110).

The central concept of Rousseau is the contradiction between nature and culture, wherein civilized society is seen as a degradation of human essence. His perception of natural man opposes both Hobbes' view, according to which the state of nature is a war of all against all, and Locke's perspective, which holds that sociability is preexistent in human nature. The association of individuals in society, according to Rousseau, is the result of deliberation and must serve man's natural endowments without compromising his freedom. Although the transition from the state of nature to society involves an apparent surrender of freedom, this is compensated by the acquisition of civil liberty and legitimate property. (Ony, 1987, p.112). Thus, he founds rights on freedom, with the general

will becoming the supreme principle of social order. (Fouillée, 375). Although this conception may seem to contain a contradiction, the qualitative distinction between natural freedom and civil freedom clarifies the complex nature of the social evolution proposed by Rousseau. He concludes that true happiness is found within oneself and that the progress of sciences and arts does not contribute to this pursuit. (Fouillée, 376). Virtue is perceived as a sublime science of simple souls, and the return to the simplicity of the soul is considered the key to escaping the vices induced by knowledge and art. (Rousseau, 1964, p.4).

In the transition from the state of nature to political society, Rousseau emphasizes the central concept of the social contract. (Rousseau, 1957, pp. 107-108).

After analysing the causes of human degeneration in society, as presented in his discourses on the sciences, arts, and the origin of inequality, Rousseau attempts to define the ideal foundations of a political society that would protect individuals against oppression and guarantee their natural rights. He proposes a model of society in which the person and property of each individual are protected, ensuring total freedom. (Djuvara, 1997, p.187).

To define such a society, Rousseau examines the human condition through its history (Rousseau, p. 45), highlighting the necessity of the social contract to preserve freedom and equality among individuals. He emphasizes that the issue of the origin of society is not purely historical but philosophical, linking the cause of society to a convention based on individual liberty. According to him, the transition to society has negative consequences, leading to the loss of natural freedom and the possibility of a sort of slavery (Rousseau, pp. 99 and 106). To avoid such consequences, Rousseau proposes establishing a social order based on convention, distinct from the natural order, as his man, unlike Aristotle's, is not naturally a social creature.

The social contract has a legal character, with law being the foundation of society and the state. Sovereignty resides in the general will of individuals, and Rousseau rejects the representation of sovereignty, emphasizing that society is a direct creation of the social body. He asserts that society should not be based on the right of the

strongest, but on a free convention that guarantees freedom and equality. Thus, he proposes an association in which each individual preserves their liberty while respecting a moral and legal order. The social contract thus becomes the key to reconciling human nature, characterized by freedom and equality, with life in society (Djuvara, pp. 91, 103-104, 124).

Freedom is based on an initial equality, with the contractors being free and equal, and the purpose of the social contract is to preserve this freedom and equality, ensuring everyone the security provided by society. (Hegel, 1969, p.278)

In addition to freedom, Rousseau identifies two more fundamental principles to establish and realize the social contract: equality and security. Society can only be legitimately founded upon a natural equality, distinct from the civil equality that arises with the institution of society. According to him, the social contract establishes a moral and legitimate equality, compensating for all physical inequalities left by nature. Furthermore, Rousseau rejects the idea that war can generate a right, arguing that force cannot create right (Brimo, p. 122). He emphasizes that war is a relationship between things, not between individuals, and that right results from convention, an agreement between free wills. Thus, he asserts that neither violence nor war can justify slavery or subjection. Society, founded on the social contract, must protect the rights and persons of the associates. According to Rousseau, the social contract is based on three interdependent principles: freedom, equality, and the protection of individual rights (Rousseau, p. 106).

Society is conceived as an association in which each individual retains an equivalent sphere of freedom, thus establishing legal and moral equality. The social contract aims to reconcile individual freedom with life in society, creating a framework in which the protection of rights and persons is ensured through the general will.

In this seminal work, Rousseau explores the foundations of the social contract, revealing the birth of a social body imbued with an indivisible unity forged by the general will (Rousseau, p. 106). The social pact (Burdeau, 1984, p. 133), far from being merely a simple adherence, creates a moral and collective organism, a "we" that transcends

individualities. Sovereignty emerges as an absolute force, granted to the body politic through the pact, establishing an authority oriented towards the common good. The general will become the cornerstone of this sovereignty, an inalienable force that transcends individual whims. (Guchet, 1995, pp.403-404).

Rousseau illustrates the concept of absolute sovereignty, far from arbitrariness, marking a beneficial exchange between governors and the governed. Life entrusted to the state is consistently protected, and when endangered to defend the state, it becomes an act of restitution.

By rejecting the representation of sovereignty, Rousseau supports the idea that the general will cannot be delegated (Guchet, 1995). Thus, any law not ratified by the people in person remains null. In this light, the indivisible nature of sovereignty is revealed, and the emergence of a united society anchored in a luminous social contract is brought to the fore. Rousseau highlights the normative nature of the people, distinguishing society as an ideal entity from the mere aggregation of individuals (Rousseau, pp. 101-102). The concept of absolute sovereignty (Brimo, p.124) emerges as a key element, linked to the general will that transcends individual interests. He insists on the importance of the indivisible unity of society members, emphasizing the conscious submission to the general will. This sovereignty, far from being arbitrary, is based on a beneficial exchange between governors and governed, establishing a legal framework that guarantees a better and safer life in exchange for submission to the general will (Rousseau, pp. 123-129). The representation of sovereignty is impossible, as it inherently resides in the general will, which cannot be delegated. Thus, any law not ratified by the people in person is deemed null. In this captivating perspective on the nature of the social contract, the foundations of legitimate authority based on the will of the people and inalienable sovereignty come into view. The social contract creates a "moral and collective body" (Popa et al., p. 181) formed by the union of individual wills. This social body, although collective, does not have an independent legal existence apart from the individuals who comprise it. Rousseau insists on the indivisible unity of

the members of society, emphasizing that each must unconditionally submit to the general will to ensure the common good (Burdeau, p. 133).

According to Rousseau, the constitution of the people does not result from geographical, linguistic, or cultural factors, but rather from a legal act, the social contract. He insists on the moral and juridical character of the social body, opposing any idea of sociological aggregation. For him, the people are a normative structure rather than a fact (Rousseau, pp. 81, 101, 102).

Sovereignty cannot be represented because it resides in the general will, which cannot be alienated. Rousseau defends the idea that without the continuous exercise of sovereign right by the people, there is no legitimate power. Regarding the exercise of the general will, he introduces the idea that popular sovereignty resides in the collective as a whole. He emphasizes the equality among all individuals, each having an inherent share of sovereignty. This theory implies a partial relinquishment of natural freedom in exchange for the protection provided by the general will. Thus, Rousseau insists on the inalienability, indivisibility, and infallibility of sovereignty. He opposes the separation of powers and asserts that the general will must always aim at the common interest, avoiding the influences of particular interests (Rousseau, pp. 81, 101, 102).

The notions of inalienability, indivisibility, and infallibility of sovereignty reflect Rousseau's conceptual rigor (Brimo, p. 124).

His stance against the representation of sovereignty and criticism of the separation of powers clearly define his theoretical framework. Rousseau argues that the representation of popular will is excluded, emphasizing that governance must be direct, with legislative power exercised by the citizens themselves. The people can delegate power, but not will. Thus, the government has only executive functions, acting as an instrument of the general will (Laferrière, 1947, p. 367).

He makes a clear distinction between the sovereign and the government, emphasizing that the former holds legislative power, while the latter exercises executive power, insisting on the need for sovereign control over the government to prevent abuses of power. The government

is an intermediary entity between the sovereign and subjects, ensuring their mutual correspondence. Rousseau introduces the concept of the "Prince" as an intermediate body between the Sovereign and subjects, playing a crucial role in maintaining civil and political freedom (Laferrière, 1947, p.367). He proposes a typology of forms of government based on the number of those who compose it: democracy, aristocracy and monarchy (Rousseau), still maintaining the distinction between inalienable sovereignty and governance by emphasizing that only power is transferred, not will.

Rousseau insists on the idea of natural equality among individuals in the state of nature, distinct from civil equality that arises with the creation of society. He asserts that a legitimate society must be based on moral and legitimate equality, compensating for the physical inequalities induced by nature. This conception of equality is essential for understanding the foundations of justice in Rousseau, which seeks to establish a society where each individual retains an equivalent sphere of freedom. The central notion of the general will is crucial to his vision of justice (Jouvenel, 1999, p.109). He argues that sovereignty resides in the general will of individuals and that society must be founded on a free convention that guarantees freedom and equality. Justice, in this perspective, springs from collective deliberation and agreement on what is in the common interest. Rousseau proposes the social contract as a means to transition from the state of nature to the political society. This contract aims to establish a moral and legal order that ensures the protection of individual rights and the preservation of liberty. Justice, in the Rousseauian context, derives from this free and enlightened convention seeking to create a society based on equitable principles. He addresses the necessity for society to protect the rights and persons of its associates. His conception of social justice involves maintaining fairness in the distribution of rights and responsibilities within society while avoiding the influences of particular interests. Social justice, in this perspective, arises from upholding equality and liberty. Some contest the historical validity of the idea that individuals voluntarily relinquish their state of nature and freedom in favour of a general will to form civil

society, arguing that the origin of society is based more on brute force than on a free association (Popa, Dănișor, Dogaru & Dănișor, p. 186). Despite defending individual freedom on one hand and the general will on the other, Rousseau risks subordinating individual interests to the general will, thus creating a form of democratic absolutism (Brimo, p. 130).

While seeking balance, the general will tends to become an end in itself. The bipolarity of Rousseau's political conception, oscillating between individual freedom and the general will, draws criticism. Some argue that the general will may prevail over the will of all, thus creating a form of absolutism. Rousseau attempts to subordinate individual interests to the general will, but this subordination is criticized as dangerous.

A major critique lies in the theory of social contract replacing monarchical absolutism with democratic absolutism. It must be emphasized that this absolutism can manifest through the domination of the majority over the minority, despite Rousseau's precautions. Rousseau's conception of the social contract has also been criticized by the founders of Marxism, who argue that the state does not arise from reason but emerges from necessary economic conditions in a specific stage of historical development (Popa et al., pp. 186-187).

Ultimately, despite numerous criticisms, Rousseau is recognized for raising the crucial issue of democracy. His promotion of the general will contributed to the emergence of national sovereignty, and his influence persists, even though his ideas have sparked varied and even opposing interpretations.

4. David Hume: Architect of Anticonstitutional Thought

Contrary to Hegel's view, according to which Hume is not remarkable in himself but only historically (Hegel, p. 537), it is observed that Hume's work awakened Kant from dogmatic slumber. Diving into the empiricist tradition, Hume analyses the limits of human intelligence, emphasizing the subjective nature of thought. His scepticismsare based

on the necessity of limiting knowledge to phenomena and the relationships between them (Bagdasar, 1987).

This approach deeply influenced Kant, who emphasized the importance of precisely defining the limits of human knowledge. Hume insists on the need for experience to establish causal relationships, questioning the ability of reason to understand notions such as necessity. For him, the notion of substance is a fiction, highlighting his agnosticism. Far from being merely historical, Hume laid the foundations for reconsidering the foundation of human knowledge. He established limits to human intellect, questioning the claim to ultimate knowledge of things. Considering Hume's profound scepticism (Hume, 1987, pp. 95, 100, 107), we cannot help but notice how his ideas have persisted far beyond his time, influencing Kant and redefining the foundations of human thought. Thus, Hume is not merely a historical figure but a courageous architect of cognitive limits. He raised fundamental questions about the nature of our understanding of the world (Flanta, 18), and his scepticism illuminated both the mysteries of human reason and the limits of our understanding.

Hume argues that reason alone is incapable of providing moral precepts. Instead, it relies more on sentiments to discern the distinction between good and evil. He defends the morality of sentiments against those who advocate for a morality based on reason. (Iliescu, 1999, p.78).

According to him, moral principles rely on intimate sentiments distributed universally in society. He thus challenges the role of reason in providing moral precepts, asserting its dependence on sentiments (Hume, 2010, p.74), advocating for a morality based on sentiments as opposed to a morality of reason. According to him, reason should serve the passions rather than claim to dictate moral actions. Hume argues that morality is based on universal intimate sentiments, not on rational principles. He emphasizes that reason alone is incapable of preventing or producing actions, stating that it must be the servant of the passions (Hume). Benevolence is presented as an example of morality, being beneficial in the precariousness of human existence. Regarding the origin of society (Hume, pp. 84, 85, 86), Hume rejects contractual theories, arguing that societies can exist without governance. He criticizes the social contract

theory, stating that people generally accept inherited political authority rather than viewing it as the result of an explicit contract (Hume, 1987, p. 92).

He justifies state authority, emphasizing its role in administering justice, essential for maintaining peace and social security. Highlighting the need for a balance between freedom and authority, he emphasizes that freedom is the perfection of civil society, but authority is essential for its existence.

Looking at Hume's deep scepticism, we cannot help but notice how his ideas have persisted far beyond his time, influencing Kant and redefining the foundations of human thought. Thus, Hume is not merely a historical figure but a bold architect of cognitive limits. He raised fundamental questions about the nature of understanding the world, and his scepticism has illuminated both the mysteries of human reason and the limits of our understanding. As for the origin of society, Hume rejects contractual theories, arguing that societies can exist without governance. He criticizes the social contract theory, stating that people generally accept inherited political authority rather than viewing it as the result of an explicit contract. He justifies state authority, emphasizing its role in administering justice, essential for maintaining peace and social security. Highlighting the need for a balance between freedom and authority, he emphasizes that freedom is the perfection of civil society, but authority is essential for its existence.

Focusing on everyday life and completely neglecting spiritual virtues, Hume falls into empiricism, limiting himself to subjects related to the sphere of practice and daily experience. The total elimination of reason from the process of justifying moral actions can lead to the establishment of hazard in the relationships between individuals. Simple sentiment, without the contribution of reason, cannot be the basis of social cohesion. Then how does human society differ from that of bees? Can pleasures and pains alone lead to what we call morality? The fact that Hume conceives such sentimental relationships attests that he founds them rationally. There cannot be a categorical separation between true and false, as notions of reason, and between good and evil, as notions

exclusively belonging to sentiment; for what is true is also good, and what is false is evil. Let us not forget the subtle relationship established between evil and falsehood, given by ignorance, confusion of truth with falsehood, or total neglect of truth. On one hand, it cannot be believed that reason is subject to inactivity and that feelings, passions are the only active ones. Rather, we can say that we are dealing here with a sensitive-rational complex that underlies action. Feeling, as doubled by reason, can be a simple instinct. However, there is something in man that elevates feeling above instinct. This something, which often surpasses mere rationality, may be what underlies our actions. Hume's conception leads us to Kant, who will not limit knowledge only to sentiment, recognizing the intellect's contribution to its foundation. In agreement with this, he will still seek to demonstrate the impossibility for reason to know the real as such. Without the contribution of reason, there is no framework to encompass experience, laws to guide it, conditions to make it possible. Although Hume did not elaborate on an extensive system of political and legal philosophy, nor moral philosophy, he is one of those who laid the foundations of liberal political ideology. According to his conception, politics must guarantee freedom through the law, through a government limited by laws, the law being conceived as a means of defending against personal abuses. Contrary to the scepticism that characterized him, he believed in society's progress through the education of the human individual.

Hume rejects contractual theories about the origin of society, stating that societies can exist without governance. He suggests that political authority naturally arises from the need to regulate disputes in more complex societies. Thus, justice has its roots in the need to maintain social order. Hume's critique of the social contract theory has profound relevance in political and philosophical thought. He emphasizes that political authority is not always the result of an explicit agreement or a social contract, as advocated by contractual theorists. Instead of seeing the formation of the state and political authority as the result of a formal understanding among individuals, Hume suggests that they are rather the result of habit and social acceptance. This critique raises important questions about the nature and origin of political authority. Why do

people accept the authority of a government or a political institution? How is political power formed and legitimized in society? By emphasizing the importance of habit and social acceptance, Hume draws attention to the complexity of power relations and how they are constructed and perpetuated in society. He emphasizes the importance of state authority in administering justice for maintaining peace and social security. While he values freedom, Hume recognizes the necessity of authority for its existence. Thus, justice is based on a balance between individual freedom and the authority necessary for maintaining social order and stability (Popa et al., pp. 194-195).

Conclusions. Hobbes, Locke, Rousseau, and Hume – Perspectives on Modern Politics

In this article, we have explored the thinking of three fundamental figures of modern political philosophy: John Locke, Jean-Jacques Rousseau, and David Hume.

John Locke is recognized for his ideas about natural rights, private property, and consent as the foundation of political liberalism. Jean-Jacques Rousseau proposes a revolutionary vision of the social contract, placing major emphasis on the general will and questioning the concept of the separation of powers. David Hume, on the other hand, highlights the importance of sentiment over reason, thus challenging the foundations of the social contract and emphasizing the need for a government limited by laws.

Locke's liberal conception and Rousseau's republican vision have been enriched by the criticisms and nuances introduced by Hume. Although Rousseau emphasized the importance of popular sovereignty, he has frequently been the subject of criticism for allegedly encouraging democratic absolutism and for uncertainties regarding the historical validity of the social contract theory.

The ideas of Locke, Rousseauand Hume continue to influence contemporary discussions about politics, freedom, and social justice, illustrating the significant and enduring impact of their thought on

modern politics. Locke was one of the pioneers in promoting the idea that every individual has natural rights, including life, liberty, and property. These ideas contributed to the development of the modern concept of individual rights and their defines against state authority. Both Locke and Rousseau developed theories of the social contract to explain the origin and legitimacy of government. The idea that government derives its power from the consent of the people and is accountable to them has had a major impact on the development of modern democracies and the justification of resistance against tyranny.

Hume emphasized the importance of state authority in administering justice and maintaining peace and social security. This perspective contributed to the development of the rule of law and the recognition of the need for a legal and institutional framework to ensure justice and social order.

Collectively, their ideas have illustrated the complexity of the relationship between individual freedom and government authority. These ideas have fuelled debates about limiting government power and ensuring the protection of individual rights without undermining the need for effective political authority.

Overall, the ideas of Locke, Rousseau, and Hume have contributed to the foundation of key concepts of modern politics, such as democracy, the rule of law, and individual rights, influencing how we think and organize political and social structures in the contemporary world.

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THE ROLE OF MIDDLE CORRIDOR IN ONE-BELT ONE-ROAD INITIATIVE IN THE CONTEXT OF UKRAINE-RUSSIA WAR

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Abstract: *In XXI century, the government of China announces new economic initiative "One Belt One Road" which is considered as the restoration of old Silk Road. The main aim of this new initiative is economic convergence between Asia and Europe. One of the most important factors in "One Belt One Road" is identifying those short routes which makes it easier transporting goods from Asia to Europe.*

After the Russian invasion in Ukraine in 2022, situation radically changed. It became necessary identifying new routes which should be shorter and cheaper. One such linking route can be considered The Trans-Caspian International Transport Route (TITR) known as the Middle Corridor, is a multilateral institutional development linking the containerized rail freight transport networks of the People's Republic of China (PRC) and the European Union through the economies of Central Asia, the Caucasus, Turkey, and Eastern Europe. It is an alternative to the Northern Corridor, to the north through Russian, and the Ocean Route to the south, via the Suez Canal. Geographically, the Middle Corridor is the shortest route between Western China and Europe. It is undergoing major developments in parts, with the Trans-Kazakhstan railroad completed in 2014 and the Baku-Tbilisi-Kars (BTK) railway operational in 2017.

The replacement process of old route (northern corridor) with new one (middle corridor) is politically decisions. But in this process several factors must be considered. One is supply-side policy which suggests that growth in transcontinental containerized rail transport is politically feasible. However, demand-side factors suggest that trade development

potential is largely limited to greater extraregional connectivity from the Middle Corridor economies with little economic rationale for increased PRC–Europe transcontinental freight flows.

Keywords: *One belt One Road; Silk Road; Northern route; middle route; economic integration of Eurasia; industrial policy; transportation policy.*

Introduction

In 2013, China president Xi Jinping, during his visit Kazakhstan announced new economic strategy, which should be considered as a restoration of old silk road. As early 2024, more than 140 countries were part of BRI. The participating countries include almost 75% of the world's population and account for more than half of the world's GDP (Caridi, 2023, p. 192).

Belt and Road Initiative (BRI, or B&R), which is known as One Belt One Road can be considered as legal heir of old silk road, involves two main components, each underpinned by significant infrastructure investments: the Silk Road Economic Belt (the „Belt") and the New Maritime Silk Road (the „Road"). The BRI is composed of six urban development land corridors linked by road, rail, energy and digital insfrastructure and Maritime Silk Road linked by the development of ports. This Six overland economic corridors are: The China–Mongolia–Russia Economic Corridor, the New Eurasian Land Bridge, the China–Central Asia–West Asia Economic Corridor, the China–Indochina Peninsula Economic Corridor, the China–Pakistan Economic Corridor, and the Bangladesh–China–India– Myanmar Economic Corridor (World Bank", 2019, p. 3). Final destination transported goods are Europe.

This mega-project will encourage the development of ports, logistic facilities, railway connections, power supply chains and other infrastructure improvements along the mentioned routes. The mentioned routes are supposed to shorten the time and cost of shipment of goods from China to European and global markets. Not only the absence of infrastructure challenges the interstate and interregional transportation of goods; trade and customs barriers, discrepancies in laws, irrelevant transit fees, absence of political will and other factors also discourage trade and

economic cooperation. So, the Chinese vision tries to encompass the development of transport corridors tackling all the mentioned barriers and is ready to engage in intensive international dialogue and discussions with all actors along the mentioned corridors.

Numerous studies conducted by World Bank, if completed, BRI transport project could reduce travel times along economic corridors by 12%, will increase trade between 2.7% and 9.7%, increase income by up to 3.4% and lift 7.6 million people from extreme poverty. Supporters praise the BRI for its potential to boost the global GDP, particularly in developing countries. However, there has also been criticism over human rights violations and environmental impact, as well as concerns of debt-trap diplomacy resulting in neocolonialism and economic imperialism. These differing perspectives are the subject of active debate (Brautigam, 2020, pp. 1-14).

What aim has China has from this project? And why they began talking about this project in XXI century? We can identify several goals that China has from this project. One factor is that this new project can be a plateau in the domestic economy, which can be characterized as the end of extensive phase, which had been based on enormous infrastructural development. State corporations, such as China State Construction Engineering Corporation, China Railway Corporation and China National Petroleum Corporation can get a benefit from Silk Road initiative. Another aspect of that China wants to receive from this project is economic stimulus, not only from domestic consumption, but also from opening new trading routes, export markets and energy sources, not only in Asia, but also in Africa and Europe.

One of the important aspect is the reduction of US power in South and East China, because her territorial claims in these two area aims to achieve and open so called “Blue Water” for China. A valorization of the Chinese presence in Central and Western Asia is another element in asserting Chinese power vis-à-vis the US. In the same vein, Beijing sees the Transatlantic Trade and Investment Partnership (TTIP) and Trans Pacific Partnership (TPP) as a toll of strategic efforts by the US to isolate the BRICS (BRICS is the acronym coined to associate five major

emerging national economies: Brazil, Russia, India, China and South Africa) in this initiative. But the BRICS represents its – and Russia's bulwark against what they perceive as unipolarity of US influence in the worlds scene. The Silk Road provides an effort at once to demonstrate that such efforts won't be succeed and a way of countering them.

The Role of Middle Corridor in the Context of Russian-Ukraine War

From the begining of the 90th of XX century new opportunities have been emerged in the transportation system. European Union paid much more attention for creating new possibilities, started developing new transportation corridor from Asia to Europe through South Caucasus, Caspian Sea. EU wanted alternative energy suppliers, because of high dependency of Russia fas and oil. For this reason, several important project was initiated (TRACECA and INOGATE) which have been dedicated for producing wide feasibility studies for transpor and energy infrastructure devlopment along this routes.

In recent years, the inter-governmental Trans-Caspian International Transport Route (TITR) Organisation has become the principal platform for developing the Middle Corridor. This initiative which shared TRACECA's goals but was narrower in scope, explores multiple corridor routes from China through Kazakhstan, the Caspian Sea, Azerbaijan and Georgia, diverting thereafter into various paths leading to the EU. or alternatively via land to Turkish ports on the Mediterranean (Mersin), Marmara (Ambarlı or Haydarpaşa in Istanbul) or Aegean (Çandarlı) seas, or via a Bosporus tunnel into the EU.

Since its inception, the TITR has been staunchly supported by key players including Kazakhstan, Azerbaijan and Turkey, along with other Central Asian nations, notably gas-rich Turkmenistan and the populous, landlocked Uzbekistan. In contrast the Northern Corridor, which links China and the European Union via Kazakhstan, Russia and Belarus, underwent dynamic development during this period (Popławski & Kaczmarski, 2018).

Russia's full-scale invasion of Ukraine in 2022 brought about considerable alterations in the land transportation routes between East

and West. Consequently, European shippers increasingly resorted to the slower but more cost-effective sea route for importing goods from China.

Nowadays, the Middle Corridor presents a unique opportunity to enhance trade not only between the South Caucasus, Central Asia, the EU and Turkey but also potentially as a major transit route between Europe and Asia. The key to boosting the Middle Corridor's capacity is the development of ports, railways, and a comprehensive network of logistics terminals within the region. Streamlining the documentation and customs clearance procedures will also be essential, given the multiple customs zones along the Middle Corridor. There exist several reasons of its. One of them is transportation potential.

Prior to the Russian invasion of Ukraine, the development of the Middle Corridor was progressing at a modest pace; Such developments indicate gradual but steady progress in building up the Middle Corridor's operational efficiency. The concerted efforts to develop the Middle Corridor have led to a notable acceleration in its growth and capacity. In 2017, the Middle Corridor handled a modest 8900 TEUs, but this figure saw a significant surge of nearly 70% to 15,000 TEUs in 2018. The global pandemic and the resulting disruptions to supply chains led to a decrease in shipments through the Middle Corridor, which fell by about 20% in 2020 to 21,000 TEUs. Nevertheless 2021 saw a recovery, with an increase to 25,200 TEUs.

The Russian invasion of Ukraine in 2022, which significantly undermined the credibility and reliability of the Northern Corridor, shifted the focus of the logistics industry towards the Middle Corridor as a viable alternative route for Europe-Asia land freight. Consequently, the freight traffic via the Middle Corridor in 2022 amounted to 33,000 TEUs;8 while an improvement, this still did not meet the anticipated potential of 50,000 TEUs. In comparison the Northern

Corridor, despite the dampened dynamics, managed to transport 410,500 TEUs in 2022.9 This volume is markedly higher than that of the Middle Corridor, but is dwarfed by the traditional maritime route between Europe and Asia, which handled a staggering 24.2 million TEUs.10 Nevertheless, due to the low sea freight rates in 2023 and

multiple transshipments on the route, transport on the Middle Corridor dropped by nearly 40% last year compared to 2022. According to official data, only 20,200 TEUs were transshipped in 2023, although the TITR association expected this number to be at least twice as much.

Given the strong interest from freight forwarders in using this route, the TITR is optimistic about its performance in 2023, anticipating a significant increase in cargo shipments. in 2023 it declined by 39%. However, a 2023 study by the European Bank for Reconstruction and Development (EBRD) commissioned by the European Commission projects that the Middle Corridor could achieve a transit capacity of 130,000 TEUs by 2040 in a 'business as usual' scenario.

The Middle Corridor is currently attracting significant attention from the world's largest shipping companies, such as the Italian-Swiss MSC, Denmark's Maersk, France's CMA CGM, China's COSCO, and Israel's ZIM. In March 2022, meanwhile, Finland's Nurminen Logistics signed an agreement with Kazakhstan Railways to commercialize the Middle Corridor.

Conclusions

The unpredictability of Russia's foreign policy, as starkly illustrated by its full-scale invasion of Ukraine, has significantly accelerated progress on developing the Middle Corridor. Moreover, there is an increasing drive to bolster economic integration within the region itself and to collectively represent their interests on the global stage.

The prospects for the Middle Corridor are now much more promising than they were post-2014, thanks to a tactical alignment in the objectives of the major global players – the US, EU, and China. Ultimately, establishing land transport corridors to Europe that are independent of Russia will provide China with increased capacity and flexibility for shipping goods to its key export markets.

With this tactical synergy in place, the development of the Middle Corridor could highlight the systemic rivalry between China and the West, particularly in the management of the infrastructure along the route. Conversely, China might initially aim to dominate the logistical

services of the Middle Corridor, using it as a springboard to extend its economic influence, especially in Central Asia and the South Caucasus.

Financial transparency could emerge as a point of contention. Nevertheless, this alignment is unlikely to translate into direct cooperation or coordination between the EU's Global Gateway initiative and China's Belt and Road Initiative. Ankara is also seizing the opportunity to enhance its economic ties with the South Caucasus and Central Asia, with the goal of positioning Turkish logistics centers as key transit hubs along the Middle Corridor. Additionally, there is a recognition of the growing demand for faster goods transportation between China and Europe. Despite higher costs compared to sea transport, this demand is fueled by the increase in trade between the Central Asian and South Caucasus's countries with China, Turkey and the EU.

In the long term, the success of the Middle Corridor may gradually reduce the dependence of the Central Asian and South Caucasus's states on Russia and the development of their economic relations with the West, China and Turkey. In addition, it will promote the economic integration of the region itself, which will also weaken Moscow's influence.

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EFFECTS OF THE LEGAL ACT SIMULATION ON RECENT PRACTICE OF THE CJEU IN THE SUBJECT MATTER OF THE PRESCRIPTION OF CRIMINAL LIABILITY. ASPECTS RELATING TO THE ADMISSIBILITY OF THE ACTION IN DECLARING THE SIMULATION AT THE REQUEST FOR A PRELIMINARY RULING OF THE BRASOV COURT OF APPEAL AND THE ACTS, DEFENCES ADMINISTERED BY THE ROMANIAN STATE IN THE CASE C-107/23

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Abstract: *Where there are inconsistencies between national law and European law, the priority application of the latter is an aspect of undisputed fact.*

The recent practice of the CJEU on the limitation of criminal liability should be applied as a priority by the courts in relation to the CCR Decision 358/2022g.

However, the admissibility of any action in declaring the simulation of the process resolved by the European court may be of a nature which attracts the tortuous liability of the authors of the simulation, who can acquire the quality of civilly responsible party in criminal cases.

The emergence of Decision 107/23 of the CJEU is likely to exclude from application the effects of CCR Decision no. 358/2022, since the European court considered that the latter decision is contrary to European Union law.

The CJEU Decision should be applied as a priority under national law in relation to CCR Decision no. 358/2022, since between the two decisions there are elements of undeniable contradiction.

Although the CJEU decision cannot be abolished, the acts, the defenses and the whole legal construction administered by the Romanian state as a defendant falls within the scope of simulation of processes as well as the malus processus exception.

Keywords: *legislative unification; freedom of association; independence of the judge; Superior Council of the Magistracy.*

Introduction

The premises of the conflict between the interests of the European Union and Romanian Constitution, conflict „solved" by simulating the procedural framework for the delivery of the CJEU Decision in Case C-107/23.

By a decision dated 22.02.2023, the Brasov Court of Appeal formulated a request for a preliminary ruling pursuant to Art. 267 TFEU to the European Union Court of Justice on the interpretation of certain rules of the TFEU.

These articles, whose interpretation was requested, are the following: art. 2, art. 4 para. (3) and art.19 para. (1) Second paragraph TEU, art. 325 para. (1) TFEU, art. 49 Par. (1) the last sentence of the Charter of Fundamental Rights of the European Union, article 2 paragraph 1 of the Convention drawn up pursuant to art. K.3 of the

The European Union Treaty on the protection of the financial interests of the European Communities, signed in Brussels on 26 July 1995 and annexed to the Council Act of 26 July 1995, Articles 2 and 12 of Directive 2017/1371, The European Parliament and the Council of 5 July 2017 on combating fraud directed against the financial interests of the Union by means of criminal law, Council Directive 2006/112/EC of 28 November 2006 on common system of value added tax, Commission Decision 2006/928/EC of 13 December 2006 establishing a cooperation and verification of the progress made by Romania in order to achieve

certain specific benchmarks in the field of judicial reform of the fight against corruption and the principle of supremacy of Union law.

The application request was filed by the Brasov Court of Appeal within an extraordinary attack strategy introduced by C.I., C.O., K.A., L.N. and S.P., having as object the abolition of a final judgment condemning them to prison punishments for facts qualified as tax evasion and the formation of organized criminal enterprise.

In essence, this request for a preliminary ruling from the Brasov Court of Appeal was settled in contradiction with the Romanian State/Government, whose representation was provided by E agencies, The 2nd, M. Chicu, It. Gane and O.-C. Ichim.

The scope of the referral concerned the exclusion from the application of the effects of the Decision CCR no. 358/2022, decision which abolished the special limitation periods of the criminal liability charges in the files pending settlement in courts.

The government agent is an institution of the Romanian state, and not a European Union's.

From this perspective, it is worth noting that the performance of the government agent, Emilia Gane, was entirely within the meaning of the prosecution agent being more concerned to confirm the rights of the European Union than the rights of the Romanian state it represents.

All arguments and defences invoked by the Romanian State/Government were directed towards ensuring the pre-eminence of the sovereignty of law The European Union in relation to the binding nature of the decisions of the Constitutional Court of national law.

Regarding this situation – for similarity – we are exactly in a criminal case type, in which the defendant's lawyer brings arguments and formulates defences to support the indictment drawn up by the representative of the Public Ministry, instead of trying to prove the non-meaning accusations to refute the allegations.

That lawyer, at best, would be suspected of malpractice, or even corruption, when betraying the interests of the client they represent.

In the context in which the state/government had a representative, an agent of government whose defences were intended to subordinate the

Constitution to the European Union law, the question arises whether in this case the referral of The Court of Appeal of Brasov to the CJEU against the Romanian state takes the form of simulated process, according to Art. 1289 and the following Civil Code.

The simulation in this situation concerns two categories of acts:

- the act/public acts consisting in the complaint itself addressed to the European court, as well as the defences, the conclusions administered in the case by government Agent Emilia Gane, acts and defences that have nothing inconsistent with the referral to the Brasov Court of Appeal;

- the secret act/occult that has as its object the understanding between the representatives of The Court of Appeal of Brasov and those of the Romanian State/Government not to respect the decisions of the Constitutional Court.

"Simulation, regulated by art. 1289-1294 NCC, is the unitary legal operation which creates an appearance inconsistent with reality by the conclusion of two legal acts: a public and lying one, the effects of which are removed or modified, wholly or partly by another secret and true, containing in itself, implicitly or explicitly, the agreement of the parties to simulate." (Baias et al., 2012, p.1350).

The notification of the Brasov Court of Appeal together with the government's defences are related to the notion of unilateral legal act (being the result of the will of a single parts), act which may be the subject of the simulation.

Although from the way of drafting art. 1289 Civil Code only the secret contract exists, not mentioning the public act, the bipolar nature of the simulation, however, presupposes the existence of both types of acts.

Apart from the public legal act (apparently, simulated, known) and the secret act, to talk about the existence of the institution regulated by Article 1289 and the following Civil Code requires the existence of the agreement simulator between the parties.

Based on this simulator agreement, the real, secret act is the one that stipulate the true relations between the parties.

In regards to the presence of the simulation on the elements that have led to the delivery of Decision 107/23 of the CJEU, we consider that the public acts consisted both in the complaint issued by the Court of

Appeal of Brasov, by the decision of 22.03.2013, pursuant to art. 267 TFEU and the written defence (conclusions administered in question by the government agent as being the representative of The Romanian State/Government in this case).

The government agent works according to the provisions of GEO 11/2017 and must ensure legal representation in the pending preliminary applications CJEU.

As for the occult, secret act, its object is given by agreement between representatives of the two institutions – Brasov Court of Appeal subordinated to the Ministry of Justice (Minister of Justice being also member of the Government) and the Romanian State/Government of Romania – on abolition of the effects of Decision no. 358/2022 of the Constitutional Court, deprivation of this content decision.

Basically, the occult, secret act does not meet the validity conditions of the legal act, within the meaning of the provisions of Article 1179 (1) item 3, because in such case the existence of the lawful object of the legal report cannot be mentioned.

Apart from the subject matter, is called into question the existence of an illicit purpose of the occult act (art. 1179 (1) paragraph 4), considering the intention of the parties involved to imagine a procedural framework, following which the European court would pronounce a decision on non-application in criminal cases of the CCR decision on the statute of limitation.

By the so-called „preliminary request" (request that was not supposed to tend to settlement of disputes, but only in establishing a formal interpretation of European Union law, according to which the dispute will be settled), the European court was invested to act – basically - as an extraordinary court of appeal in relation to the decisions of the Constitutional Court, which is a profoundly illegal aspect.

In this context, the CJEU has been invested in asserting that European Union law takes precedence over the Romanian state's Constitution.

The Brasov Court of Appeal together with the Government secretly establishes undermining the authority of the Constitutional

Court, the lack of effect of this institution's decisions, which is actually the object of the secret act.

The effects of this simulation resulted in a conflict between the law and the interests of the European Union and the Romanian Constitution, on the background of breach of the principle of legal certainty, which we will develop in what follows.

The action in declaring the simulation: aspects related to the conditions of admissibility to the applicant's active procedural quality.

Who can promote the action in declaring the simulation?

As regards the holder of the action, we specify that it may be any person who justifies an interest.

This solution is natural, because it is about restoring a legal reality and to allow this reality to produce the corresponding legal effects.

I. First, the simulation can be invoked by one of its parts against the other to reveal the true relations between them and to oppose the defendant's secret act (Baias, 2003, p. 215).

In the context in which the parties involved in the construction of the simulation are the Brasov Court of Appeal and the Romanian State/Romanian Government, the main problem that must be discussed (before addressing issues of interest) it is that of the civil capacity, of the legal personality necessary to be able to be valid in court.

As regards the courts of appeal, including the Brasov Court of Appeal, the legal basis of the legal personality is found within the provisions of art. 39 item (1) of Law no. 304/2022 on judicial organization.

Regarding the Romanian state, in the civil reports in which it is presented directly, in its own name, as holder of rights and obligations, it participates through the Ministry of Public Finance, unless the law establishes another body in this regard (according to Article 223 (1) of the Civil Code).

It is hard to assume that – in this case – any of the entities belonging to the Romanian state, author of the simulation, the legal construction that stood at the basis of the CJEU pronunciation in case C-

107/23, would ever promote – one against the other – any action in declaring the simulation, since the simple promotion of such an action is contrary to the principle *nemo auditor propriam turpitudinem allegans*.

Although both in Romanian and in the French doctrine, is invoked the contrary argument, in the sense that the above-mentioned principle could be opposed to the applicant who is also the subject of the simulation, only for the reason that the simulation is not by itself illicit (Baias, 2003, p. 216), we cannot agree with these arguments.

In this situation, the question arises of the existence of an illicit simulation, fraudulent, in the context in which both the public act and the secret act are struck by nullity for illicit purpose.

"The cause is a substantive, essential, validity and general condition of the civil legal act. It answers the question: why was the judicial act drafted in the first place?" (Boroi and Anghelescu, 2012, p. 172).

It is impossible for the authors of the simulation not to be aware of this illicit purpose,

In the context in which both entities with legal personality have their own legal departments, being assisted by qualified persons in the field.

From this perspective, the promotion of the action by the simulant represents, in reality, an invocation of one's own guilt to gain benefits.

II. Promotion of action by third parties, (*penitus extranei*) that is, by persons completely foreign to the legal act, who did not participate directly and nor by representation at its conclusion.

With regard to third parties, the sphere of the chirographic creditors, of the successors, of the universal successors or of the universal title, must be surpassed, in the meaning that in the category of the *penitus extranei* must also be included and the defendants present in the criminal cases whom the courts invoke – ex officio or at the request of the Public Ministry – priority application of the decision CJEU in relation to CCR decision 358/2022.

The declaration of action in the simulation may have as legal basis – apart from the provisions of the Civil Code in the field – the provisions of art. 52 Criminal procedure code.

The provisions of this article – preliminary issues - are the following:

”(1) The criminal court is competent to hear any prior matter for the resolution of the case, even if by its nature that matter is within the competence of to another court, except where the jurisdiction to settle does not belong to the judicial bodies.

(2) The prior matter shall be judged by the criminal court, according to rules and means of proof concerning the matter to which it belongs.

(3) Final judgments of courts other than criminal ones on a preliminary issue in criminal proceedings have authority to initiate a trial in a criminal court.”.

The criminal court, before issuing a judgment, has the obligation to resolve the prior issue which concerns the action in the declaration of simulation promoted by the defendant.

This action – as we have shown – is aimed at simulating the decision request of preliminary ruling of the Brasov Court of Appeal together with the administered acts and defences at issue by the Romanian state, more specifically, the simulation of a procedural framework with the outcome of a decision of the CJEU which is of such a nature as to render ineffective a CCR decision.

The lack of effect of this CCR decision is the object and the purpose of the occult act, and the existence of interest for the defendant in declaring the action in the simulation we will develop it in the following:

If the court, in criminal matters, admits the action in declaring the simulation, the natural question arises: can the admission of this action render the solution pronounced by the CJEU in Case C-107/23 unenforceable?

The answer to this question can only be negative.

The decision of the CJEU in Case C-107/23 should be applied as a priority under internal criminal law in relation to the provisions of CCR

Decision 358/2022, even if it is the result of the simulation of the process by two authorities, institutions of the Romanian state.

With the approval of the secret act related to the simulation, the problem which arises is the absolute nullity of both the secret act and the public act, context in which the participants in the simulation should be charged with/accused of tort liability, according to the provisions of art. 1349 Civil code.

In the context in which the defendant as a third party would have benefited from the effects the criminal limitation statute and ANAF did not exercise the civil action in court inside the term of the criminal statute limitation, in such case become valid the provisions of art. 1394 Civil code: ”In all cases where compensation derives from a fact subject to a longer statute limitation than the civil one, according to the criminal law, the limitation period for criminal liability also applies to the right to action in case of civil liability.”

Practically, the occult abolition of CCR Decision no. 358/2022 simulants, puts the defendant in a situation where he can no longer benefit so much neither from the effects of the statute limitation in criminal law nor from the effects of the statute limitation on payment of damages in civil law.

The effects of the CJEU Decision make not only CCR Decision 358/2022 inapplicable, as well as the provisions of art. 1394 Civil code regarding the extension of the term of the statute limitation.

In such a situation, the defendant who may have the quality of defendant in a civil file introduced by ANAF for tort liability, as a result of the commission of a crime, can no longer benefit from the statute limitation not even in the civil case, file introduced to the court by ANAF, in the situation in which the criminal court left the civil action unresolved.

The provisions of art. 1394 Civil Code can no longer be applicable, because the criminal statute limitation stipulated by the CCR no longer has a legal basis, and by applying with priority the European law, CJEU decision makes the relevant law rule inapplicable.

Also, the simulation of the process framework by institutions of the Romanian state in the CJEU case C-107/23 is achieved by concluding both the public documents and the secret act under conditions of absolute nullity, considering the illicit purpose (according to art. 1236 Civil code).

In this context, both the public act and the secret act have no legal effect with retroactive character, considering the institution of nullity of which I have spoken.

In this situation, the promotion of action in declaring the simulation should be doubled – as legal basis – including the invocation of the absolute nullity of the legal act for the lack of one of the validity conditions, namely purpose.

The action in declaring the simulation must be doubled by the action in nullity; the first will bring to light the secret act or only the simulative agreement, and the second will result in a lack of an essential condition for the validity of the apparent act, like the cause.

In this case, one can also talk about the existence of the notion of fraud at law, according to art. 1237 Civil code: "The cause is illicit and when the contract is only the means to circumvent the application of an imperative legal rule."

The intention of the two state institutions in simulating this procedural framework, in the context in which both the public act and the secret act are null and void for illicit purposes, it is liable to incur the tort liability of the authors of these acts, under the conditions of art. 1349 Civil code, as we have previously shown, with the consequence of forcing the authors of these acts to pay for the damage caused.

Another issue that needs to be raised about admissibility of the action in declaring the simulation refers to the applicability of the provisions of art. 1294 Civil code, a rule according to which the provisions regarding the simulation do not apply to non-patrimonial legal acts.

On this issue, at first glance, the action in the declaration the simulation would be inadmissible because both the referral to the Brasov Court of Appeal and the acts, the defences administered by the Romanian state would not have a patrimonial character, a content appraised in money.

In reality, the mediated purpose (remote cause) of the occult act (destruction of the effects of the CCR decision in violation of the principle of security of legal relations), it is that the defendants in the criminal files are obliged to pay all the amounts of money to which ANAF was a civil party.

The validity conditions for the case of the legal act relate to the purpose mediated, being examined as such and in jurisprudence.

On the other hand, the very public act – the referral, the preliminary request of the Brasov Court of Appeal – was carried out, derives from a criminal case which, on the civil side, involves the payment of a prejudice for tax evasion.

In other words, both the preliminary application as a public act and the occult act are patrimonial.

Also, even if the legislator, at first glance, sets out the scope of the simulation, restricting it only to the scope of legal acts with content appraised in money, there are exceptions to the rule: the simulation application in the matter of family law was expressly regulated in art. 295 Civil code, civil code, the penalty being – in this case – absolute nullity of the marriage concluded in another purpose other than the foundation of a family (fictional marriage) (Afrasinei, 2013).

What is meant by the notion of prejudice?

Where, following the priority application of the CJEU Decision in relation to the CCR decision, the defendants in the criminal cases no longer benefit from statute limitation on both criminal liability and civil liability, we consider that the notion of damage must be approached from two points of view:

1. Amounts of money related to a conviction of defendants to prison/custodial sentence representing material and moral damage/loss;

2. Amounts of money related to the so-called prejudice in the criminal case, amounts to which ANAF is a civil party.

In the absence of trial simulation, the defendants should not have had to bear it these damages, including for the fact that the Public Ministry, with the notion of reasonable term related to art. 6 ECHR for the completion of the criminal investigation, it should be held liable for

situations where exceeding the deadlines the criminal prescription would be imputable to him.

Basically, exceeding the limitation periods of criminal liability - in most cases - it is due to a poor investigation or even lack of investigation, in fact, a situation in which, in the practice of civil courts, there were decisions of the obligation of the Romanian state (through the Ministry of Finance) to pay the damages, precisely for the inaction of the Public Ministry in criminal cases, inaction synonymous with lack of effective investigation (Mehedinti Tribunal, 2016).

In the context in which the CJEU decision is applied as a priority in national law in report to the CCR decision, even if the entire procedural framework was simulated, from our point of view, the authors of the simulation should respond in solidarity with defendants in criminal cases for the payment of the damage related to the amounts of money to which ANAF was a civil party or which were the object of the actions in claims for tort liability made by this institution in a separate way, against the defendants in the criminal case who acquire the quality of defendants in civil files.

Samples related to the action in the declaration of the simulation

According to art. 1292 Civil code: “The proof of the simulation can be made by third parties or creditors with any means of proof. The parties can also prove the simulation with any means of proof, when they claim that it has unlawful character.”

For the defendants in the criminal files the existence of the simulation, of the occult act it can be done with inscriptions, interrogation of simulants and even sample testimonial.

As regards the documents, apart from those administered by simulants at the CJEU, we consider relevant the posting on the website of the Ministry of Justice entitled ”Press release right to reply”, on the endorsement favourable by the Superior Council of Magistracy of the draft Law on the status of judges and prosecutors in relation to the removal by the Ministry of Justice of the Law on the Status of Judges and prosecutors of the possibility of disciplinary sanctioning of the judge for failure to comply with the decisions of the Constitutional Court, in favour of the application of binding provisions of European Union law.

In other words, the application of CCR – decisions including the Decision 358/2022 – would acquire an optional character from the courts of law, depending on how the judge or not appreciates that a decision the CJEU would apply as a priority or not.

It is precisely this post on the website of the Ministry of Justice (Court of Appeal Brasov being, of course, subordinated to this institution) is likely to prove the existence of the occult act within the simulation that is the subject of the present article.

Basically, this post is a proof, a document that proves no only the existence of the occult act, but also its illicit character.

Apart from these aspects, this illicit character of the occult act would like to be regulated by a law (to remove the provisions that state the character mandatory of CCR decisions), aspect that strengthens – if needed - applicability of the provisions of art. 1237 Civil code, on fraud to the law.

During the interrogation of the simulants, as legal persons, we consider that questions should be asked to prevent the CJEU from invoking the principle of the security of legal relations in the ECHR practice.

Thus, the European Court of Human Rights, in a number of cases against Romania (The Brumarescu case against Romania), determined that "one of the fundamental elements of the rule of law is the principle of the security of legal relations, which imposes, amongst other rules, that the solution definitively given by the courts to a dispute not to be re-discussed" (Predescu and Safta, 2021).

In our situation, the question arises whether between the non-application of effects of the CCR decision and the abolition of this decision is a difference.

The answer to this question is negative.

Even if a CCR decision cannot be scrapped, its non-application in criminal cases has the same effect as if the decision is scrapped.

More seriously, the voluntary application of CCR Decision 358/2022 is likely to breach - again - the principle of legal certainty, both

with regard to unitary legal practice, as well as ensuring the unitary interpretation of the law.

In other news, the existence of conflicting solutions in the practice of internal criminal law, in the sense that some courts, by applying the decision of the CJEU, condemns the defendants and obliges them to pay the damage, while others apply the Decision CCR 358/2022 with contrary effects, is likely to expose the Romanian state to new disputes within the competence of the ECHR.

These disputes may be based both on art. 6 ECHR – right to a fair trial – in conjunction with the existence of non-unitary practice as evidence for violation of the principle of legal certainty.

In this case, we consider that the provisions of art are applicable. 14 ECHR with regard to wealth discrimination and the provisions of Article 8 (1) lit. b) of the Competition Law 21/1996 governing the prohibition of the state in establishing discriminatory conditions for the activity of enterprises, but these issues will be discussed in a future article.

Within the action in declaring the simulation, the petitioners may invoke and the exception of the bad process led (malus processus) by the Romanian state which – in the CJEU – fully agreed with the Brasov Court of Appeal's preliminary request, not admitting any mandatory defence regarding the violation of the legislation and principles of the ECHR described above.

It's hard to assume that a government agent doesn't know what the binding nature of a CCR decision means , the principle of security legal relations, as well as other issues concerning inadmissibility of the preliminary application, as provided in Article 20 item 2 of the Constitution (whether there are inconsistencies between the fundamental human rights agreements and treaties to which Romania is a party to, and domestic laws, prioritize international regulations unless the Constitution or the internal laws contain more favourable provisions).

Practically, the CJEU judges could not pronounce another decision in case C-107/23, acting within the limits of investment and in the context in which so-called “combatants” pursue the same thing: abolishing the effects of a CCR decision.

The effects of the action admission in the simulation declaration

In case the criminal court admits the request for a summons for declaring the simulation, doubled demand including the finding of nullity of both the public act and the secret act (contract) for illicit purpose, they can no longer produce legal effects.

Repositioning the parties in the previous situation is not possible, and the CJEU decision pronounced in case C-107/23 is to produce its legal effects in national law.

The illicit purpose of the acts underlying the simulation exceeds the scope of contractual liability, with simulants having to respond according to the rules of tort liability, in the context in which the illicit character of the completed acts was fully aware before they were drawn up.

In this situation, the simulating institutions together with their representatives must jointly respond with the defendants in the criminal files for the entire damage claimed by ANAF or other state institutions as an injured person.

The priority application of the CJEU decision in Case C-107/23 must be carried out on the civil side - including the simulants that caused this decision.

The problem of the degrees of jurisdiction of the action in declaring the simulation in relation to the degrees of jurisdiction of the criminal case.

With the promotion of the action in promoting the simulation, in a criminal case in the trial phase, according to art. 52 Criminal procedure code, as a preliminary matter - we specify that the solution of this request must be judged according to the rules and means of proof regarding the matter to which that matter belongs, the matter, that is, according to the provisions of the Civil Code and the Civil Procedure Code.

In this situation, the action in declaring the simulation, doubled by the finding of the nullity of public acts, as well as of the occult act, has three degrees of jurisdiction (fund, appeal and appeal), and the criminal case has only two degrees of jurisdiction (fund and appeal).

The main issue to be discussed concerns the resolution of the appeal of the action in declaring the simulation, an appeal to which the defendant cannot legally access, because the criminal record ends with the appeal.

The criminal file in the appeal phase cannot be suspended until the final settlement of the action in declaring the simulation in the appeal phase, because the suspension cases provided for in Article 367 Criminal procedure code regarding the suspension of the trial does not regulate such a situation.

Failure to comply with the defendant's right of appeal, as regards the declaration of action in the simulation, is a violation of the right to defence, in the context in which the solution rendered by the court in this prior matter is of the nature of determining whether - on the civil side - apart from the defendants must answer in solidarity, as we have shown, inclusively, the simulants.

Although art. 367 Criminal procedure code does not include as grounds for suspension of judgment and this situation, we believe that the criminal case in question should nevertheless suspended on the basis of the removal from application of the Romanian law in force, in favour of applying art. 6 ECHR regulating the right to a fair trial.

In this case, the provisions of art should be removed from application. 367 Code criminal proceedings, with the consequence of suspending the file until the resolution appeal in the prior matter – action in declaring the simulation.

In this respect, it should be remembered also the practice of the ECHR that established that ”the statute conferred on the Convention in national law allows national courts to remove – ex officio or at the request of the parties – the provisions of the national law that it considers them incompatible with the Convention and its additional protocols. ... This matter implies the obligation for the national judge to ensure the full effect of its rules, assuring them pre-eminence from any other provision contrary to national law, without having to wait for its repeal by the legislator” (Dumitru Popescu case against Romania).

Another possible solution is aimed at regulating – of ferende law – a right of appeal of the defendant in the criminal case in which a prior

issue regulated by art. 52 CPP, a matter of nature analysed, which also benefits from the effects of Art.483 and the following Code civil procedure on the extraordinary appeal.

Conclusions

The request for a preliminary ruling of the Court of Appeal of Brasov, as well as the documents and the defences administered by the Romanian State in C-107/23 of the CJEU takes the form of the simulated process.

This simulation is unlawful, the purpose of the apparent act and the occult act consisting in the absence of effects of CCR Decision 358/2022.

Action in declaring the simulation must also benefit from the extraordinary attack path of the appeal, in the context in which it was introduced in the criminal case, as a prior issue.

In the context in which both the public acts and the secret act are null and void for illicit purposes, simulants must respond according to the rules of tortuous liability, they have been aware from the outset of the illicit character of the acts which they conclude.

Simulants must respond in solidarity with the defendants in the files criminal for all the damage created, in the context in which the CJEU Decision 107/2023 was applied as a priority over CCR Decision 358/2022.

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75 YEARS OF THE GERMAN BASIC LAW - SOME OBSERVATIONS ON ITS EVOLUTION

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Abstract: *The German Basic Law celebrates its 75th anniversary in May. A glance at its evolution allows us to conclude that the core of the German constitution, its value section, i.e. its fundamental values of human dignity, freedom and equality and the associated fundamental rights, have been consolidated and strengthened by the jurisdiction of the Federal Constitutional Court. The second feature of the constitutional evolution is that fundamental rights have become internationalized and are particularly influenced by the supranational legal order of the European Union.*

Keywords: *Basic Law; value system; human dignity; internationalization; EU Fundamental Rights Charter.*

Introduction

This May, the German Basic Law celebrates its 75th anniversary. This is an occasion to reflect on its evolution and to present some thoughts on this subject.

The Basic Law was created as a provisional constitution in 1949 in the situation of a divided Germany and the already emerging East-West conflict. The representatives of the eastern, Soviet occupation zone were not allowed to participate in the drafting of the constitution, so that only the 11 states in the west of the then Federal Republic, i.e. in the occupation zones of the USA, Great Britain and France, could participate and their state parliaments had to decide on the proposed Basic Law

drawn up by the Parliamentary Council in Bonn on the basis of a Bavarian text, the well-known Herrenchiemsee draft (Bauer-Kirsch.(2005). It was agreed that if two thirds of the state parliaments voted in favor, the Basic Law would come into force for all West German states at the time. As is well known, all states except Bavaria voted in favor; however, Bavaria rejected the draft due to what it saw as the lack of a federal structure. Nevertheless, Bavaria also saw itself as a state of the newly founded Federal Republic and declared its support for it.

The Basic Law, which was intended as a provisional document, developed into a full constitution, which was not replaced by a new constitution when Germany was unified in 1990, more than 40 years later, but was adopted in its existing form. This is based in particular on the great acceptance of the Basic Law as a constitution among the population, which is largely due to the very value-oriented and balanced case law of the Federal Constitutional Court established in 1951. The Basic Law, which has been amended over 60 times (and in some cases with quite extensive changes), has managed to become a firm anchor in politics and in the consciousness of the population.

The value system of the German Basic Law and its evolution

a. The anthropocentric value system and its reinforcement by constitutional jurisdiction

The system of values laid down in the Basic Law is based on the human being and its dignity. This is evident from the fact that the guarantee of human dignity is enshrined in the initial norm of the Basic Law, Article 1 (1), and as a central value it permeates the entire legal system as a basic orientation. This guarantee is linked to Immanuel Kant's philosophy, which understands man as a subject, as an end in itself, and strictly rejects its instrumentalization for another purpose, its degradation to an object (Kant (1788), 1961, p.192).

The guarantee of human dignity is thus also a conscious rejection of the National Socialist regime in Germany from 1933 until the end of

the war in 1945, which was characterized by contempt for humanity, violence and arbitrariness. Furthermore, at the time of the drafting of the Basic Law, human dignity was also used as a key concept at international level and was expressed in a very prominent way in central documents such as the Universal Declaration of Human Rights of 1948: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...". This, too, undoubtedly had an influence on the creators of the Basic Law, especially as key figures such as Hans Nawiasky, who had been involved in the drafting of the influential Herrenchiemsee preliminary draft of the Basic Law and even before that in the drafting of the Bavarian constitution, had developed a constitutional thinking based on his exile experience in Switzerland during the Nazi regime that focused on the individual. “The state exists for the human beings, not the human beings for the state,” is his core principle, also contained in Article 1 (1) of the Herrenchiemsee draft, which was immediately followed by the sentence "Human dignity is inviolable" in Article 1 (2) of this draft. This statement has become the first paragraph of the initial provision, Art. 1(1) of the today’s constitution.

The entire value system of the Basic Law based on the central idea of human dignity consists of three anthropocentric core values: human dignity, freedom and equality. The principle of freedom (expressed in Article 2 (1) of the Basic Law) is the principle associated with the individual, which acquires its fundamental character through human dignity. While human dignity is inviolable, cannot be restricted and cannot be weighed up against other constitutional rights, freedom as a principle is necessarily restricted in favour of other members of the community.

However, from the point of view of human dignity, it is essential that freedom is recognized as a principle and that its restriction is the exception that must always be legitimized. The principle of proportionality, developed by the Bavarian Constitutional Court, found its way into the German constitutional legal system early on via the case

law of the Federal Constitutional Court (FCC)and forms the standard for the delimitation of freedom and the necessary restriction of freedom in favour of the general interests of the community and the rights of others.

The values section of the German Basic Law (BL) is made up of the fundamental rights listed in Articles 1 to 19, in the judicial rights of Articles 101 to 104, which are not formally considered fundamental rights because they are not included in the catalog of Articles 1 to 19, but which have the character of fundamental rights or, as the Federal Constitutional Court says, are equivalent to fundamental rights - The German Federal Constitutional Court qualifies Art. 101 Grundgesetz (Basic Law,BL) which guarantees the lawful judge as a "procedural fundamental right" (FCC, p.212-226), and in the institutional values, the so-called state objective provisions of Article 20 and, since 2004, the newly inserted Article 20A concerning the protection of the environment and the natural foundations of life.

The values part of the Basic Law has been consolidated and further expanded by the case law of the German Federal Constitutional Court. The fundamental rights, specific expressions of the general principle of human freedom as an essential element of human dignity, offer substantive and functional comprehensive, fully effective protection (Arnold, 2015, pp.3-10). The starting point is the principle of freedom, which is inherent in every authentic constitution, that means a constitution of a necessarily liberal-democratic character, has as its normative goal to protect against all dangers, those that are already present and those that will arise in the future. That is why the written catalog of fundamental rights is never exhaustive, but open, evolving and must also be interpreted in the sense of the *effet utile* (Potacs 2009, p.465-487). Article 2(1) of the Basic Law, which according to the text protects the free development of the personality, contains the principle of freedom; it protects the general freedom of action per se and is therefore a fundamental norm on the basis of which non-formulated fundamental rights can also be derived. This general freedom of action, whose protective content was recognized early on by the Federal Constitutional Court in the famous Elfes decision (FCC, 1957) as freedom of action in general, going beyond the protection of personality, is the source of

numerous other, also unwritten fundamental rights and forms the basis for the interpretative extension of written fundamental rights by new functional dimensions.

Thus, in conjunction with the guarantee of human dignity in Article 1 (1) of the Basic Law, numerous individual aspects of the right of personality have been developed, including a so-called computer fundamental right, which places the integrity of information technology systems under constitutional guarantee. This case law was intended to provide protection against the secret infiltration of a computer with Trojans, which were to be used for police investigations (FCC, 2008). In general, it can be said that the case law of the Federal Constitutional Court has strengthened and expanded the function and substance of fundamental rights. This has also become part of the constitutional culture in Germany.

The case law of the Federal Constitutional Court has certainly recognized the dynamics of constitutional law and has taken them into account. A look at the history of the origins of the constitution is only of subsidiary importance when interpreting the Basic Law. What is decisive is the objective normative will at the time of interpretation. This means that the meaning of the constitutional norms is determined by the course of time. The figure of constitutional change (Verfassungswandel), i.e. the change in the meaning of a constitutional norm without a formal change to the text, is a vehemently debated phenomenon in German constitutional law (Voßkuhle, 2004, pp. 450-459).

The evolution of the constitutional order in the area of fundamental rights, brought about by constitutional jurisprudence, is particularly evident in two areas: the further development of fundamental rights functions and the internationalization of the content of fundamental rights.

While fundamental rights were traditionally regarded as rights of defense against encroachments on freedom by the state, this view has changed considerably over time, again as a result of the Federal Constitutional Court. At an early stage, the court interpreted fundamental rights not only as subjective rights, i.e. rights assigned to the individual

as a defense against intrusions of state power into their freedom, but also as objective values and thus part of a coherent system of values that influences the entire legal system, in particular civil law (FCC, 1958).

The qualification of fundamental rights as objective values was also the foundation for deriving duties of protection of the public authorities from fundamental rights in favour of the legal interests protected by fundamental rights. This theory of the duty to protect has become a very important pattern of argumentation in constitutional jurisprudence in Germany. The duty to protect concept is primarily directed at the legislature, which is obliged by fundamental rights to enact adequate laws to protect them, which should also prevent private individuals from violating fundamental rights (FCC, 1977; FCC, 2019). Such laws can contain substantive rules (e.g. with the normative definition of limit values for the emission of environmentally harmful substances), procedural rules (by defining procedures with a protective effect, for example in data protection) or rules on the organization (e.g. regulations on the organization of public broadcasting to ensure its independence and balance). However, it must also be noted that an invocation of the violation of such an (objective) duty to protect, for example by way of a constitutional complaint, can only be successful to a very limited extent, namely only if the legislator has not made any provision for protection or has made such a provision but it is obviously inadequate. Such an inadequacy must indeed be obvious, which often leads to such a complaint being rejected if some form of protective regulation already exists, but its deficient design is not immediately apparent (FCC, 2009).

Constitutional duties to protect derived from fundamental rights may be directed against other private individuals, i.e. they may concern the area of civil law (horizontal protective effect), or they may also be directed against the state itself, which has failed to provide adequate protection for a particular fundamental right (vertical protective effect of the duty to protect). The spelling of the Federal Constitutional Court has introduced the term "prohibition of inadequate protection" (Untermaßverbot) (FCC, 2009, paras. 26,27), which is intended to express that the protection regulation issued by the state offers too little

protection, is below the normal level of protection. This linguistic neologism can be explained by the fact that the term "prohibition of excessiveness" is commonly used for excessive, disproportionate state intervention and has now found its counterpart for insufficient protection by state regulation.

The constitutional duty to protect also frequently serves as a weighing criterion at constitutional level. One example of this is the case that occurred during the pandemic, when religious gatherings, church services and the like were banned due to the risk of infection. In this case, the fundamental right to freedom of religion under Article 4 of the Basic Law collides with protection against the disease, i.e. the state's duty to protect resulting from Article 2 (2) of the Basic Law, which standardizes the protection of life and health. The freedom of religion in Article 4 of the Basic Law cannot be restricted by law; there are only inherent constitutional limits, i.e. limits that result from other constitutional norms. Since the constitution is a functional overall order, all constitutional norms must be balanced against each other. This means that freedom of religion is restricted by the state's duty to protect the life and health of people living in the state, duty to protect as a constitutional duty and therefore a restriction of freedom of religion at the same level, at the constitutional level. Here we see the great functional significance of the constitutional duty to protect.

For the time being, a final step towards the functional expansion of fundamental rights was taken in the well-known climate protection decision of the Federal Constitutional Court in March 2021 (FCC, 2021), namely the conceptual development of the so-called intertemporal protection of fundamental rights.

This means that a fundamental right is not only violated if this violation occurs in the present, but also if this violation only occurs in the future, but the cause of this violation is set in the present.

Specifically, this concerns the reduction of greenhouse gases, which must be completed by a certain date (2045); so-called climate neutrality is to be achieved by this date, as stipulated by law in the Federal Climate Protection Act. In order to achieve this, greenhouse gas

emissions must be gradually reduced. Six sectors that emit such greenhouse gases particularly intensively are named in the Act:
1.energy sector,
2.industry,
3.transportation,
4.buildings,
5.agriculture,
6.waste management and other.

For the years 2020 to 2030, the permitted annual emission quantities for the respective sectors are standardized in Annex 2 of the Act. Annex 3 of the Act sets out the annual reduction targets (in relation to 2020) for the period from 2031 to 2040, expressed as percentages. This starts at 67% in 2031 and increases to 88% by 2040. This corresponds to the climate protection target set out in Section 3(1)(2) of the Climate Protection Act. From 2040 to 2045, i.e. in five years, the remaining 12% of the reduction target is to be achieved.

Let us return to the dogmatic starting point: it should first be noted that the content of the Climate Protection Act referred to here was amended following the aforementioned decision of the Federal Constitutional Court and that the conceptual development of the intertemporal protection of fundamental rights was based on the text of the law in force before the decision, which did not contain any legal requirements from 2030 until the desired date of climate neutrality. This means that, from 2030 onwards, the state had it in its power to reduce greenhouse gas emissions and thus also the intensity of the restriction of freedom (which is always associated with a reduction in activities with emissions) quite generously after 2030, i.e. initially to avoid a serious restriction of freedom and thus also to achieve less reduction in emissions. However, this initially low burden on freedom would have had the logical consequence that in the later phase up to 2040 an even greater burden on freedom would have had to be imposed, which would have been disproportionate and therefore unconstitutional. This is where the core of intertemporal protection of fundamental rights becomes apparent: if an overall reduction in greenhouse gas emissions has to be achieved by a certain point in time and if this requires an overall

restriction of freedom up to this point in time, the overall restriction of freedom must be distributed proportionately over the entire time phase. It would be unconstitutional to provide for a low burden on freedom in an early phase of the entire time available, so that this would necessarily mean a considerably greater, indeed disproportionate, burden on freedom in a later phase. In such a case, the unconstitutionality of the restriction of liberty is actualized in the present, even though the restriction of liberty leading to this unconstitutionality only occurs later, in the future.

In this context, reference should be made to a further aspect of German protection of fundamental rights, which was particularly important in the climate protection decision, namely the extraterritorial effect of German fundamental rights. Fundamental rights of the Basic Law are also violated if they take effect outside German territory. The only thing that matters is that a German public authority has violated a fundamental right through its action or omission. This is stated in Article 1 (3) of the Basic Law, which binds all German state authority to fundamental rights. This applies to the three fundamental functional areas of legislation, administration and jurisdiction and to all institutions derived from these functional areas. It is irrelevant whether the effect of an act or omission that violates fundamental rights occurs in Germany or abroad. The surveillance of foreign journalists abroad in violation of Article 5 of the Basic Law, which is a human right and comprehensively protects the freedom of the press, is a violation of the German Basic Law and can also be asserted before the Federal Constitutional Court by means of a constitutional complaint. The failure of the German government or German authorities to take adequate climate protection measures, which results in increased environmental pollution abroad, is a violation of the duty to protect arising from the fundamental right to life and health (Article 2 (2) of the Basic Law) and thus a violation of a fundamental right of the Basic Law. This is also the reason why residents of Nepal and Bangladesh were also able to appear as complainants in the constitutional complaints proceedings against the German Climate Protection Act before the Federal Constitutional Court. Their constitutional complaints were classified as admissible by the Federal

Constitutional Court, even though they were ultimately not considered well-founded. Particularly in the event of a violation of a fundamental rights protection obligation due to an omission by German authorities, the foreign connection of fundamental rights protection is only given in a few cases.

b. The internationalization of the value system

However, this must be distinguished from the tendency in German constitutional law to "internationalize" German fundamental rights. Internationalization is to be understood in a twofold sense of adapting the content of fundamental rights protection to that of the European Union and that which applies in the universal and regional international sphere.

The issue of fundamental rights from a German perspective has been a special topic since the establishment of the European Community: the existence of fundamental rights in the Community area has been an important concern of the Member State Germany from the very beginning. This issue has also been given significant impetus on the European Community side by the famous Solange decisions of the German Federal Constitutional Court (FCC, 1974). The case law of the European Court of Justice has developed unwritten fundamental rights in the form of general legal principles of Community law, which also led to the balancing decision of the Federal Constitutional Court in the Solange II case in 1986 FCC 1986). A further step on the way to consolidating the protection of fundamental rights at Community level was then taken by the Maastricht Treaty in 1993, in that its text already expressed the previous development in terms of European interaction between the constitutional law of the Member States, the European Convention on Human Rights and Community law. This ultimately led to the drafting of the Charter of Fundamental Rights of the European Union, which is a pan-European fundamental rights document that only came into force 10 years later in 2009 as part of EU primary law, or one could also say as part of EU constitutional law.

The protection of fundamental rights was already presented as an essential element of a constitutional order in the Solange case law of the Federal Constitutional Court. The core idea of this case law was: If there are no fundamental rights on the part of the Communities with regard to acts of the Communities that interfere with the freedom of individuals, national fundamental rights must apply. This applies in any case as long as there are no sufficient guarantees of fundamental rights at Community level. If these fundamental rights guarantees were established, it would then be the task of the Court of Justice of the Communities, i.e. the European Court of Justice, to apply these fundamental rights to Community acts that interfere with freedom. The national constitutional courts, according to the German Federal Constitutional Court, would then only have the task of deciding whether this protection of fundamental rights continues to exist as an effective protection mechanism at Community level. This was the solution of the Solange II case law of the Federal Constitutional Court, which probably also provided the impetus for the fact that in 1993, with the creation of the first European Union through the Maastricht Reform Treaty, i.e. seven years after the Solange II decision, the Basic Law was amended and its Article 23 now became the Europe Article, which permitted accession to the European Union, but imposed various conditions, such as the existence, at the side of the EU, of a fundamental rights protection comparable to the Basic Law. Originally, Article 23 of the Basic Law (alongside Article 146, which had a different structure in terms of content) was a constitutional basis for German unification through the accession to the Basic Law of the parts of Germany willing to join, i.e. the former GDR, without the need to create a new constitution, as required by Article 146 of the Basic Law. The path via Article 23 of the Basic Law was finally taken in 1990 for the unification of Germany. Article 23, which had thus become obsolete, then became the central article for Germany's membership of the European Union, whereby the requirements for a transfer of sovereign rights to the European Union and also the substantive requirements for the European Union were tightened compared to the previously relevant Article 24(1) of the Basic Law. In addition, Article 23 contains a

comprehensive regulation on the participation of the German federal states in the integration process.

With the entry into force of the new European Union in 2009, the Charter of Fundamental Rights of the EU also came into force, bringing with it a far-reaching Europeanization of German fundamental rights. According to Article 51 of the Charter, the fundamental rights of the Charter are exclusively applicable in the Member States when they apply EU law. In such a case, the Charter supersedes the German Basic Law and thus its fundamental rights. If, on the other hand, German law is applied, the fundamental rights of the Basic Law apply exclusively, not the fundamental rights of the EU Charter. This is therefore a mechanism for the alternative application of either the German Basic Law or the EU Charter of Fundamental Rights.

However, the opinions of the German Federal Constitutional Court on the one hand and the Court of Justice of the European Union on the other differ insofar as the latter court assumes a broader scope of application of the EU Charter of Fundamental Rights (namely whenever the scope of application of EU law is opened up - Grand Chamber, Case C 617/10 - than the German Federal Constitutional Court, which only assumes the application of the EU Charter of Fundamental Rights when EU law precisely determines the German law that is enacted in implementation of EU law (FCC, 2013, para.88).

Irrespective of these differences of opinion, however, it can be stated that when the EU Charter of Fundamental Rights is applied, German protection of fundamental rights is substituted by EU protection of fundamental rights. This is therefore a strong form of Europeanization of German fundamental rights protection.

In this context, however, it is also important to mention the case law of the German Federal Constitutional Court on so-called constitutional identity. In the decision on the constitutionality of the Lisbon Reform Treaty in 2009 (FCC, Lissabon, 2009), the concept of constitutional identity was developed as a barrier to the sovereignty of the European Union. This concept, which is not mentioned in the text of the Constitution, is derived from the so-called eternity clause in Article 79(3) of the Basic Law. This provision states that constitutional

amendments, even if they are formally carried out correctly (with a two-thirds majority in the Bundestag and the Bundesrat as well as with a text amendment), may never affect Article 1, the guarantee of human dignity, and the principles of Article 20 of the Basic Law. These principles are the republic, democracy, the welfare state, the federal state and the rule of law - based state (whose essential elements of commitment to the law and the constitution are enshrined in paragraph 3 and the separation of powers in paragraph 2). This eternity clause (or more correctly: clause of intangibility) is interpreted narrowly and in its interpretation refers to the time when the Basic Law came into being, i.e. the year 1949. It is doubtful whether this clause reflects the true constitutional identity of the Federal Republic of Germany. Since the constitution is a living instrument, its content changes over time, which must also apply to the constitutional identity. Without going into this in depth here, however, it should be noted that essential characteristics of Germany's constitutional order are not mentioned in 79 (3) of the Basic Law: for example, the strictly implemented representative system at federal level, the broad-based constitutional jurisdiction that has become highly significant over time and, finally, the dynamically developing so-called open statehood, i.e. the constitution's orientation towards international law and, in particular, the law of the European Union. The identity of today's constitution is an internationalized, Europeanized identity.

The fact that the Federal Constitutional Court refers back to the provision of Article 79 (3) of the Basic Law in its definition of constitutional identity may have something to do with the fact that the new Article on Europe created in 1993 also refers to this constitutional provision. The transfer of sovereign rights to the supranational EU and the primacy of EU law over national law (accepted in principle by the Federal Constitutional Court) do not constitute a formal, but a substantive constitutional amendment. It is therefore also obvious that the barrier of Article 79(3) of the Basic Law, which applies to constitutional amendments, can also be used for the EU area. Nevertheless, it is still a controversial question to what extent Article 4 of the Treaty on European Union, which makes respect for the national identity of the Member

States an obligation of the EU institutions, overrides and changes the national concept of constitutional identity.

In our context, the concept of constitutional identity is important because it also has an effect if the EU Charter of Fundamental Rights is applied exclusively in the Member States. This may be the case if the guarantee of human dignity, contained in Article 1 of the EU Charter of Fundamental Rights as well as Article 1 of the German Basic Law, is called into question. According to the concept of constitutional identity from a German perspective, the interpretation of Article 1 of the Basic Law, as shaped by the case law of the Federal Constitutional Court, is solely decisive here, even if, according to Article 51 (1) of the EU Charter of Fundamental Rights, only this Charter applies, i.e. with complete substitution vis-à-vis German fundamental rights. This view has been relativized in the latest case law of the Federal Constitutional Court (FCC, 2020).

It seems necessary to address the issues raised by the Federal Constitutional Court's decision on the "right to be forgotten" I of November 6, 2019 (FCC 2019.Right to be forgotten I). This decision considers a case in which German fundamental rights apply alongside EU fundamental rights and involves complex factual situations affecting both the German and EU legal systems. It concerns the area of data protection, specifically the so-called opening clause of the EU General Data Protection Regulation. This clause leaves it up to the member states to issue their own regulations on data protection for journalists, to whom the special constitutional privilege of freedom of the press applies. On the one hand, this case refers to the provisions of German law regulating the journalist privilege, but on the other hand, these provisions of national law are embedded in an EU legal framework, so that both legal systems must be adequately taken into account. This embedding of national law in the principles of the EU Data Protection Regulation means that the principles of EU law must not be disregarded by the German legislator, despite the freedom of the Member States to regulate the privileged treatment of journalists in data protection themselves. The national regulation must therefore be compatible with the basic structure and objectives of the EU General Data Protection Regulation and thus

ultimately also with the fundamental right to data protection under EU constitutional law. In fact, the question arises as to which fundamental rights are applicable in such a hybrid case, those of the Basic Law or those of EU law. The German Federal Constitutional Court gives the answer that German fundamental rights are applicable that also include the protective content of EU law.

The Federal Constitutional Court makes an important distinction here: is the relevant regulatory area of EU law fully harmonized or not? If it is fully harmonized (one could also say: fully determined by EU law), only the EU Charter of Fundamental Rights applies. If the area of regulation in question is not fully harmonized (that means not fully determined by EU law), i.e. if EU law allows Germany to set its own standards, the German Basic Law applies primarily in the view of the Federal Constitutional Court. In this case EU law, which in itself takes precedence, is not aimed at uniform protection of fundamental rights, but at diversity in the protection of fundamental rights. A presumption can be derived here that (from the EU's perspective) the German protection of fundamental rights "co-guarantees", functionally includes the level of protection of the EU Charter of Fundamental Rights. A different view (that the German fundamental rights do not co-guarantee the EU level of protection) could only be considered if there were concrete and sufficient evidence for this.

The fundamental rights systems of all Member States of the European Union have their foundation in the European Convention on Human Rights (ECHR). The EU Treaty, the constitution of the EU so to speak, and the Charter of Fundamental Rights itself refer to the common constitutional traditions of the Member States, including the European Convention on Human Rights. We see here the interconnectedness of the guarantees of fundamental rights in the European area, their interdependence and thus their convergence as a common foundation of values, which finds particular expression in the ECHR (FCC, 2019, right to be forgotten I, paras.57,59).

In the decision of the Federal Constitutional Court "Right to be forgotten I", one can see the special starting point for an opening of

German fundamental rights towards a cross-border understanding. The embedding in its own legal systems, such as that of the European Union and that of the Council of Europe as a regional organization under international law, extends the standard for the interpretation of its own national fundamental rights. The boundaries drawn by the Basic Law in relation to other legal systems remain in place. This means that international law, regional and universal treaty law is only introduced into the internal German legal system through the transformation theory, which is reflected in Article 59(2) of the Basic Law, that means that this introduction occurs only with the consent of the state. A parliamentary act , the act of approval, gives the consent and transforms the content of the treaty into German law. This is also the case with the ECHR, which only applies as a simple federal law in the German legal system. However, the phenomenon is also evident here that the human rights content of the ECHR is introduced into the understanding of the fundamental rights of the Basic Law through interpretation. In the important Görgülü decision of 2004 (FCC, 2004), the Federal Constitutional Court derives the obligation to interpret the national fundamental rights in the light of international law from Article 1 (2) of the Basic Law, which regards human rights, whether of national or international origin, as the "foundation of every human community, of peace and justice in the world". In my opinion, this is the correct starting point for the interpretation of German fundamental rights in terms of the ECHR and the case law of the European Court of Human Rights. In the meantime, the interpretation of German fundamental rights in the sense of the EU Charter of Fundamental Rights has also been added.

The decision of the Federal Constitutional Court in the Right to be Forgotten II case (FCC, 2019, Right to be forgotten II), also from November 6, 2019, goes one step further and has great institutional significance. The Federal Constitutional Court traditionally applies the German fundamental rights, i.e. the fundamental rights in accordance with Articles 1 to 19 of the Basic Law together with other special rights (as listed in Article 93 (1)(4a) of the Basic Law), in the context of constitutional complaint proceedings, i.e. in the individual application to the Federal Constitutional Court to grant protection of fundamental rights

in a specific case after legal recourse has been exhausted. Until the Recht auf Vergessen II decision, it was essential that these were fundamental rights of the German legal system. In this ruling, however, the Federal Constitutional Court has extended its review competence to the fundamental rights of the EU Charter of Fundamental Rights. This becomes relevant in all cases in which "German bodies" (i.e. courts, authorities and other institutions) may only apply EU law, i.e. only the EU Charter of Fundamental Rights, due to the primacy of EU law over national law, for the reason that the specific area of law is "fully harmonized" by EU law (i.e. fully "determined" by EU law). Since a German body makes a decision and is therefore an act of German public authority, its decision can be challenged before the Federal Constitutional Court on the grounds of a violation of fundamental rights by means of a constitutional complaint. However, in such cases the Federal Constitutional Court cannot apply German fundamental rights, as the EU Charter of Fundamental Rights claims sole application in the Member State concerned. According to this constellation, the German Federal Constitutional Court would be prevented from reviewing a violation of fundamental rights. If the Court of Justice of the European Union is also unable to do so, a serious gap in protection would arise. However, this would not be compatible with the principles that apply to the relationship between the Basic Law and EU law. Accepting the primacy of EU law over national constitutional law also presupposes that the protection of fundamental rights is effective for German citizens. This is required by Article 23(1) of the Basic Law, which only permits Germany's membership of the European Union if, among other things, "protection of fundamental rights essentially comparable to this Basic Law is guaranteed". The case law of the Federal Constitutional Court has concluded from Article 23(1) that the German state organs have a so-called" responsibility for integration". This consists in particular of guaranteeing the requirements of Article 23 of the Basic Law. This also includes the substantive and procedurally effective protection of fundamental rights. It therefore seems logical that constitutional case law has extended the Federal Constitutional Court's standard of review to

include the fundamental rights of the EU Charter. In terms of constitutional dogma, this can be explained by the fact that Article 23(1) of the Basic Law supplements or modifies Article 93(1)(4a) of the Basic Law, which concerns the constitutional complaint and its requirements.

This new interpretative approach can be considered as a so-called constitutional change due to a very significant change in the conception of the German constitutional complaint, which corresponds to the dynamic development of European integration in particular with regard to the relationship of the Member States to the supranational central power of the European Union.

Conclusions

Overall, we can see that the core of the German constitution, its value section, i.e. its fundamental values of human dignity, freedom and equality and the associated fundamental rights, have been consolidated and strengthened. The second feature of the constitutional evolution is that fundamental rights have become internationalized and are particularly influenced by the supranational legal order of the European Union

In the institutional area of the Basic Law, the course of development has also been dynamic, but characterized by a large number of formal constitutional amendments. We can highlight three major areas of constitutional change: the elimination of the consequences of war (regaining sovereignty and overcoming the division of Germany), next European integration and finally the reform of the federal state (with major reforms in 2006 and 2009), although the so-called financial equalization between the (poor and rich) members of the federal state is a constant source of contention.

Important topics in today's debate, which also has constitutional relevance, include the dispute over the relaxation of the debt brake enshrined in the Basic Law (the limitation of government borrowing in the interests of future generations), the management of the environmental and energy crisis (with relevance for Article 20a of the Basic Law), the reduction in the size of the Bundestag and the associated reform of

electoral law, and also the possible introduction of plebiscitary elements into the strict representative decision-making system of the federal government, the safeguarding of the conditions (partly regulated in simple federal law) for the functioning of the Federal Constitutional Court and much more. For reasons of space, this cannot be dealt with further here.

Overall, it can be said that the Basic Law has certainly proved its worth in the 75 years of its existence. The great social acceptance of the constitution is largely due to the human-centred value system of the Basic Law and the constitutional jurisprudence that reinforces this value system. The federal state has proven to be an essential element of the vertical separation of powers. Even during the pandemic with its significant restrictions on freedom, the greatest challenge to the functioning of the constitution to date, the fundamental values of the constitution, including the rule of law and the federal state, have certainly proven their worth.

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IMMINENT DANGERS FOR OUR FREEDOM AND OTHER FUNDAMENTAL VALUES FROM OUTSIDE AND INSIDE THE EUROPEAN UNION

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Abstract: *Today, Europe faces dangers from without and within. The war waged by Russia against Ukraine will be, if won by the aggressor, only the prelude to further exercises of Russian imperialism aiming, in the end, at Russian hegemony over all of Europe. Bearing this in mind, the "West", and Western Europe in particular, should understand that defending the Ukraine means defending Europe. Unfortunately, European politicians do not always seem to be sufficiently clairvoyant, and therefore armament transfer to the Ukraine is unfortunately reluctant in means and extent. In addition, populist movements in the EU have grown stronger; and their objecting against further support for Ukraine is but part of their overall position of obstruction of the work of the European Union. Both developments might either lead to a break-up of the EU or to the creation of European Defense Community which will be less democratic, less liberal, less social and less solidary. Non-populist politicians should understand that our – the European – values are at stake.*

Keywords: *Russia; Ukraine; Aggression; Imperialism; Hegemony; Populism; European Union; European values.*

The political turn of 1989/91 – not the "end of history"

The dissolution of the Eastern block and the political turn in Europe between 1989 and 1991 made such an overwhelming impact on many observers in the West – me included – that Francis Fukuyama was

induced to proclaim the end of history (Francis Fukuyama, 1992). This bold approach neglected not only the fact that Red China, unlike the Soviet Union, had crushed its own democratic movement in the Tianamen massacre, but also the likeliness that Russia would rearm sooner or later and become a threat, first, for those states that had attained independence by the dissolution of the Soviet Union, second, for her European neighbors, and, finally, for the world at large.

When I met the former member of the FPD and SPD and then EU commissioner Guenther Verheugen soon after the turn of the millennia at the Mykolas Romeris University in Vilnius which awarded him an honorary doctorate for his merits in the EU enlargement process that included Lithuania, I pointed out to him that the Ukraine would also need support in its pro-European efforts, he shrugged the issue off with the remark that we (the Austrians? similarly concerned people in other EU-Member States?) were only interested in a glacis against Russia. That such a glacis could once become necessary was either not part of his perspective or he belonged even then to those who have always been ready to sacrifice, for an entente with Russia, the interests of those people who live in States situated in regions that have been regarded, already under the Tsarist regime, the "natural" Russian sphere of influence.[1]

Russian imperialism

It should be pointed out that Russian imperialism was able, at a time when, after World War II, all other European colonial empires had

[1] Russian imperialism was prophetically described by the nineteenth century Russian poet and diplomate Fyodor in his poem "Russian geography" expressing the ideology of a world-wide Slavic Empire. The text quoted here is taken from the Article "Russian Imperialism" in WIKIPEDIA: Moscow and Peter's grad, the city of Constantine, / these are the capitals of Russian kingdom. But where is their limit? And where are their frontiers / to the north, the east, the south and the setting sun? The Fate will reveal this to future generations. / Seven inland seas and seven great rivers from the Nile to the Neva, from the Elbe to China, / from the Volga to the Euphrates, from Ganges to the Danube. That's the Russian Kingdom, and let it be forever, / just as the Spirit foretold and Daniel prophesied.

to dissolve, to camouflage itself by the name of Soviet Union, a designation which did not even include the term Russia(n), with the effect that the decolonization process was postponed until the USSR's dissolution in 1991.

Twenty years later, Russian imperialism was theoretically and practically back. The leading figure was, right from the beginning, Putin, a former KGB-agent who became 1999 provisional and 2000 elected Russian president (Van Herpen, 2013). It appeared already in 1999 with regard to Chechnya and 2008 with regard to Georgia which had been practically abandoned by the NATO, and, more specifically by the United States notwithstanding previous promising encouragements. Then, Georgia lost important territories one of which (South Ossetia) has only recently declared its intention to accede to Russia.

The Crimea – Putin's trial and NATO's error

However, Putin finally transgressed the Rubicon by the annexation of the Crimea in 2015. Had NATO decided to energetically oppose the Russian reach for the Crimea in 2015, the world would have been spared further adventures of Putin and perhaps would have also caused his domestic political downfall (Barshadska, 2022).

Putin's boldness on the line of Hitler

Together with a few other clairvoyants I then held the opinion that Putin, in his military adventures, proceeded in the same way as Hitler in the nineteen thirties: 1936 military occupation of the Rhineland 1936, annexation ("Anschluss") of Austria in 1938, annexation of the Sudetenland only six months later (following the abominable Munich treaty with the United Kingdom, France and Italy imposing a dictate on Czechoslovakia), and occupation of "Rest-Czechia" in early 1939 and its transformation into the "Reich's Protectorate Bohemia and Moravia". When the United Kingdom and France finally –but much too late – decided to stop Hitler's because of his aggression against Poland on 1 September 1939, it was at the cost of a new World War.

Putin's grasp for the Ukraine

In the absence of such decided confrontation, Putin's invasion of the Ukraine on 22 February 2022 was but a repetition of Hitler's invasion of Poland on 1September 1939, with the only difference that the West tried to limit its confrontation with Russia by providing war material to the Ukraine without intervening with own troops. Whether this attempt will succeed or whether sending in ground forces will finally become inevitable, has to be seen.

The terminological transition from "NATO" to "the West" is justified by the fact that Putin's war rhetoric is not directed so much against of NATO than against the West This proves that for his enemy image a distinction between Western States within and Western States outside NATO (not ideologically but militarily neutral) has no meaning. For this reason, reasonable Western politicians have taken the position that there will be no survival if not under the umbrella of NATO. Finland and Sweden have made this abundantly clear following Russia's aggression against the Ukraine. The fact that Austria still clings to her "permanent neutrality" is caused by the fact that she does not have common land or sea frontier with Russia and will therefore not at the forefront of an eventual aggression and that it is surrounded by NATO Members which – politicians are not ashamed to argue – would defend her in their own interest.

Russia, China and the values of the "free world"

While some politicians, but also economists and social scientists still indulged in the illusion that Russia, but also China, could – by economic linkages – be induced to gradually adopt, not only the Western life style but, Western value conceptions, political leaders of both powers have clearly rejected such expectations. Putin, in particular, has fundamentally repudiated the Western idea of free democratic states on the basis of pluralism with the protection of human rights which he considers failed and therefore outdated, as well as the idea of an

international community of legally equal states which offers all peoples the possibility of a free internal development and which may freely decide about their international relations as long as they respect the principles of peace and security and of international solidarity.

Putin's grasp for Europe

On the domestic level Putin envisages an authoritarian regime with totalitarian ideology which has no room for dissenters but treats them officially as public enemies, for whom the notion of enemies of the people is also at hand. The People's Republic of China pursues the same national path, a fact that is demonstrated by the abolishment of liberties on Hong Kong as well as by the treatment of the Uighur people in Xinjiang.

As regards foreign policy, Putin is thinking about a system of the kind as it existed in Europe in the nineteenth century in the framework of the "European Concert" where the great powers had hegemony within their respective sphere of interest (Sheehan, 1996). For the twenty-first century, Putin claims hegemony over Europe and would be ready to accept a similar claim of China in East- and South-East Asia and of the United States in North- and South America. Since these plans have not yet been sufficiently developed, the future of, say, India or Australia and New Zealand remains still open as much as that of black Africa.

Ignorance, cowardice and impertinence in Europe

It is interesting, if not disturbing, to note that these totalitarian and imperialistic declarations of intention have not been met by an uproar. Some might not have understood what is really at stake (namely our head), while others did not want to think about the urgent measures that should have been adopted in response, in order not to cause unpopular ripples in the water, while again others might have hoped that things will not be as bad as they seem to be.

However, the contrary is the case. Within the European Union, the front of those who want to continue effective support for the Ukraine

starts to crumble alarmingly. As usual, it started with Hungary. (You could not expect anything better from Orbán.) Then Slovakia. The new Prime Minister Robert Fico is a friend of Putin. And how things will develop in the Netherlands after the electoral success Geert Wilders, a friend of Trump and Orbán, who has spoken out against further supplying arms to the Ukraine.

All three countries are Members of NATO. In former times, the Alliance would not have tolerated this kind of games. But with Recep Tayyip Erdoğan Turkey has already become a weakness while the Europeans within NATO will have to be even more self-reliant if Donald Trump should become re-elected President if the United States this November 2024. And there is also the United Kingdom. While we have gotten used to the BREXIT, there is also a political change to be expected from Tories to Labor. And although all ways at a crossroad lead (somewhere) ahead, this does not necessarily mean that they lead upwards.

German ambiguity

Until recently, one might have said that Germany has the clearest Ukraine policy. It was the "Green" foreign minister Annalena Baerbock who has admirably stayed the course in thereby recommended herself for this position also in a future government which to form without the Green Party will hardly be feasible. Besides her, Federal Chancellor Robert Scholz appears a laggard rather than a leader ("too late and too little"). Even more disturbing is the fact that in the meantime defeatist tendencies have been come to the surface from within the parliamentary club of the SPD (Social Democratic Party).

The existence also in other German political parties of confused ideas concerning the Ukraine conflict has been proven by the prime minister of Saxony Michael Kretschmer of the Christian Democratic Union who pleaded for a "freezing" of the conflict on the basis of the *status quo* and wanted to put the Ukraine off till future more favorable "strategic windows". The Secretary General of the Liberal Party Bijan

Djir-Sara commented this idea by stating that “Thanks Heaven, this man is not responsible for our foreign politics.” Yet, it would be desirable that Kretschmer is also reprimanded by Friedrich Mertz and that the Union does not turn to a total opposition to the traffic-lights government. This is already taken care of by the AfD (Action for Germany).

Just before Easter 2024, an inflammatory letter by five social democratic historians concerning the course of the government in the Ukraine policy roused the SPD. In a letter to the party executive, the group around Professor Heinrich August Winkler from Berlin reproached chancellor Olaf Scholz for lacking an unambiguous solidarity with the Ukraine. The remarks of faction leader Rolf Mützenich about “freezing” the war was even criticized as “fatal”. The historians argued that Europe was in a situation similar to that in the interwar era before World War II and that democratic countries had to stand up against aggression before it was too late.

Populism – in America and in Europe

In addition, it is necessary to focus on another aspect of the present development but the danger of which – while strongly present in academic writing and in politics – is by and large ignored by the mass media, probably because the latter can make “good business” with its excesses. I am speaking of populism (Abromeit et al., 2015, Kaltwasser, 2017, Anselmi, 2017) the danger of which we have become aware of, here in Europe, only with Donald Trump. Trump, it is said, would have never reached that degree of prominence and had never become President but for the numerous TV-Stations which have transmitted his live appearances; and they did so not because they shared his political ideas but because they used him as a mixture of haunting specter and funny person who raised the level of viewer figures.

Still, that so many people bought his „Make America Great Again“ is proof of the inferiority complex of many US citizens who had the impression that they stood on the dark side of life because they believed to be badly off or at least not as well as they deserved as American nationals. This feeling and the strange electoral system of the

United States which permits to win the majority of electors with a minority of votes sufficed to bring to power an unscrupulous people's tribune who – once the coup was successful – would not be ready to give it back peacefully.

The lack of self-restraint and fairness

The feeling that one is badly off or at least not well enough is widespread among European citizens, too; if not amongst all then among those twenty percent which can make the difference in elections. To yield to this feeling is a temptation for everyone. To resist it requires the ability and the willingness to seek the information necessary for seeing clearly the respective problems, or to have people in whom one can have confidence. But not all who would be able to inform themselves are also willing to do so. And as regards people who should be able, for professional reasons, to see things more clearly, namely politicians, do not enjoy the necessary confidence. This is only due, to a smaller extent, to the conduct of the politicians themselves who indeed have lost much credit. To a greater extent it is due to the fact that criticism of politicians and politics in general has lost every restraint, and that the awareness that all human doing is necessarily imperfect is ignored.

Equally, fairness as a necessary aspect in inter-human relations is often discarded. To give an example from the field of the media. How often are measures taken by the government introduced not by a report on this matter but immediately by a report about the fact that it has already met with criticism from the opposition? The legendary editor-in-chief of the *Arbeiterzeitung*, official organ of the Austrian Social Democratic Party, Oskar Pollak who held this position between 1931 and 1934 and again from 1945 to 1961 always stressed to young journalists that report and comment have to be strictly held apart. Today, such a remark is taboo, although the independence of journalists – which is upheld by society – is by far no guaranty for their impartiality that could be expected in return.

Political consequences of a specialized society

Since it is not possible for anyone, in a society resting on a division of labor with its high degree of specialization to have sufficient knowledge in all fields, we are dependent in various (or rather in many) fields on the knowledge and the experience of others. Seen in this perspective, we all are confronted, in many regards, with "elites" on whose professional knowledge we have to rely. To recognize this is not a sign of stupidity but of sageness.

Stupidity starts if one is not willing to content oneself with this natural situation but alleges to know everything better and would preferably topple the elites. Such may happen in all fields. Early in the Belgian Congo's independence (in 1960) qualified nurses demanded permission to do operations. Presently, it is not as bad in our societies; however, populist try to make us believe that everyone is in a position to know, in the field of politics, what is the best for himself and those like him, i.e. (generally spoken) for the people, and what is needed is only to enforce one's will against the elites which are aloof from the people.

Consequences for decision shaping and decision making

This problem is not new and, in the doctrine of the state and of political science, is since long resolved in favor of parliamentarism with representative democracy. A rational decision is conceivable only as the end of a dialogic process during which all arguments in favor and against can be calmly pondered. Since today we are not living anymore in the time of the Greek city states where all (then comparatively few) citizens could convene in the people's assembly and discuss the decisions to be taken, but in modern territorial states where a public gathering of all citizens is not feasible, we have to delegate representatives to a parliament who then have to conduct the rational decision process and, in the end, decide in our place. To make sure that each delegate can decide on the basis of the insight arrived at by this rational process, all of them have a so-called free mandate and, when it comes to deciding, are bound not by any mandate of their voters but only by their conscience.

In such a system of rational decision shaping populists are not in clover. For this reason, they attempt to substitute it by the so-called direct democracy, where everything ius either black or white, and where there is no possibility for compromise but only the choice between “Aye” and “No”. In Germany where the worst experiences have been made with populism in the inter-war era, each kind of direct democracy has been avoided in the Basic Law (*Grundgesetz*).

In contrast, populists have been able to make some break-throughs in the representative system of Austria. The beginning was already made in in the constitution of 1920 which requires referenda for any "overall amendment of the federal constitution"; and the notion of “overall amendment” has been stretched very far. The second inroad was made 1929 with the introduction of the direct election of the federal president. After World War II, first a popular consultation of the people was introduced (mitigated only by the need of a preceding decision of the National Assembly), and later on the so-called “popular demand” which is initiated by citizens supported by a small fraction of the population and which has to be dealt with in parliament if it reaches a constantly reduced number of voters. So far, populist agitation for obligatory referenda has not been successful, but the danger is increasing, given the fact that politicians of other parties, too, could be ready to support this demand because, on the one hand, because they do not see the danger involved, and on the other, because they are always less ready to carry the responsibility of taking difficult decision. Yet, as soon as populism in politics will become disastrous it will not help them against being called to account even if they have earlier chosen to wash their hands in innocence.

Stupid and brazen allegations

All over Europe, populist politicians take advantage of this negative development and the negative sentiment thereby prepared in order to undermine the national and European order of peace and freedom. Even allegations of blatant stupidity have effect because the

boldness by which they are made renders one speechless. Thus, the leader of the AfD parliamentary group, Alice Weidel, recently alleged in a discussion on tv that all problems of importance to man could be solved only in on the domestic level of the individual or national state. And no one seemed able idea to counter her immediately with the compelling argument that what concerned all Europeans could be solved only on the European level. As regards stultification of society, it is also enhanced by all kinds of conspiracy theorists who also disseminate mistrust among the population, notwithstanding the fact that they cannot invoke, for their frizzy theories, any foundation in reality.

Promotion of hatred

Caroline Emcke, holder of the peace prize of the German Book trade2016, has already pointed out that hatred plays an important role in the context of populism, since populism is directed against "those above", i.e. against the elites, especially those who operate in politics and from whom those in governmental positions are recruited.
Populists tend to incite and foment hatred am among their followers and then to present it as "wrath of the people". This might lead to acts of violence against "representatives of the establishment" and resistance against the power of the state and, finally, to an attempted coup d'état. The storming of the Congress by Donald Trump's followers has given a small taster of what might be about come.

„European successes " of populists

As has been shown above by the discussion with the leader of the AfD parliamentary group Alice Weidel, populists take a negative stance towards European integration because their cheap slogans are more easily sold "at home" than on the European level where arguments have often already passed through discussions on the national level. Yet, populists have already had successes with EU wide effects, beginning with the rejection of the "Constitution for Europe" and thereafter with the BREXIT. Strong populist tendencies can be found in Hungary, in Poland under the previous (PiS) government and more recently in Slovakia and

the Netherlands. It is not unlikely that Austria, were the populist "Freedom Party" (FPÖ) rank first in the polls with around 30 percent, could be drawn into the populist maelstrom. Germany, where the AfD stays at 20 percent, because the other political parties have not yet shown populist tendencies.

EU, Trump and NATO

The goal of (at least part of) the populists is the destruction of the European Union and perhaps – if sympathies for Trump get the upper hand – also the destruction of NATO. Yet, as regards the latter, populists might get into a dispute among themselves. While one part would prefer to throw themselves into the arms of Putin, another would plead for a Europe that take her defense into her own hands.

With such a European Defense Community we will all end up with a Europe that would be less democratic and liberal, less social and less committed to human rights but economically more streamlined and stricter organized, and where a European Parliament – if anything like it would be provided for at all – would have only little say and little rights of supervision.

2024 – a year of elections and possibly of crisis

What is presently needed is the formation, or rather the renewal, of a European consciousness in the population of the various Member States of the European Union. The forthcoming elections to the European Parliament offer the opportunity for doing so. But though this is an urgent task, politicians in the Member States – even those outside the populist camp – still regard European election campaigns as a playground for domestic politics rather than a chance for rallying around the guidon of European values.

But elections are held, in 2024, not only in the European Union but also in the United States. The dangers for Europe which the re-election of Donald Trump to the Presidency might hold have already

been mentioned. Under these circumstances, the year of elections 2024 may turn out to become a year of crisis.

If the worst comes to the worst, 2024 will strengthen the present negative developments, globally, regionally and nationally. If NATO should, in case of an electoral victory of Trump, loose the USA as a leading power in the fight against a Putin-led aggressive Russia then the already weakening support, which would become a burden only for the European Union and the United Kingdom, would not be sufficient to save the Ukraine from a military defeat. Thereafter, the Baltic states as well as the countries of the Caucasus will be threatened in their existence by the desire of Putin to restore the Russian empire within the frontiers of the Soviet Union.

Dissolving or downsizing the European Union?

But already the defeat of the Ukraine would not only shake the outward credibility of NATO and the EU but also their inward self-confidence. The European Union would then be faced with the decision to give itself up or to sufficiently strengthen itself structurally and militarily.

Even if the centrifugal forces within the populist camp must be considered strong, not all populist parties will be ready to surrender to the Russian bear. The likelier scenario is therefore the “strong” European Defense Union already mentioned above which will leave the politically foot-weary Member States behind.

If this will save “free” Europe from becoming a satellite of Russia will depend on whether the Member States of the envisaged European Defense Union will be able to re-arm in time before Russia, after the heavy losses involved even in a victorious war in the Ukraine, will again be strong enough to demand Europe’s unconditional surrender.

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SAFE, BUT UNDER THE UMBRELLA OF UNCERTAINTY. TEMPORARY PROTECTION STATUS FOR DISPLACED UKRAINIANS AFTER 4 MARCH 2025

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Abstract: *The outbreak of the military aggression committed by the Russian Federation against Ukraine on 24 February 2022 and the attempt by millions of people to flee the war and seek protection on the territory of the Member States forced the European Union to activate for the first time (4 March 2022) Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.*

The temporary protection regime granted to Ukrainians fleeing the invasion has been extended successively (2023 and 2024) for the maximum duration of 3 years allowed by the Directive, which gives people in need a secure current framework but also reveals future uncertainties. 4 May 2025 marks the end of the period of application of the temporary protection regime.

This study aims to identify the advantages of the temporary protection system, how it has been transposed into Member States' legislation, in particular in Romania, and potential solutions to the prospect of Ukrainian citizens attempting to regularise their stay in the EU after 4 May 2025, obviously if the conflict in Ukraine does not end by then.

Keywords: *Ukraine; Council Directive 2001/55/EC of 20 July 2001; temporary protection; military aggression; Russian Federation; Ukrainian refugees.*

Introduction

The moment of 24 February 2022 left a deep mark on the European continent, which was taken by surprise by the military aggression committed by the Russian Federation against Ukraine. Attacked with bombs and missiles, the population was forced to seek refuge not only on Ukrainian territory, far from the border with the Russian Federation, through internal relocation, but also on the European continent. Under the impact of the emotional shock, neighbouring countries opened their borders, offering shelter to all those fleeing war. It soon became clear that the influx of people would be increasingly difficult to manage, so the European Union had to find rapid intervention mechanisms.

While reviewing the secondary legislation that could be used in this situation, Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof was identified (Meltem, 2016, pp.1-33). For ease of expression, references to this legislation will be made using the noun "Directive".

It should be noted that this Directive had never been implemented before 4 March 2022, when Council Implementing Decision (EU) 2022/382 was issued establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC and having the effect of introducing temporary protection for a period of 1 year. Subsequently, the regime was automatically extended for a further 1 year (twice, for 6 months each time) until 4 March 2024. As it became increasingly clear that the much-desired peace was not on the horizon, a new secondary legislation

instrument was adopted on the basis of the Directive, namely Council Implementing Decision (EU) 2023/2409 of 19 October 2023 extending the temporary protection as introduced by Implementing Decision (EU) 2022/382, which takes effect until 4 March 2025.

Therefore, until that time, the general rule is that the displaced persons from Ukraine who are eligible for temporary protection within the meaning of the legal provisions contained in the abovementioned secondary legislation instruments have the possibility to apply for residence permits on the territory of any of the Member States, but are not prevented from applying for international protection, if they so wish (Küçük, 2023, pp.1-10). Obtaining a temporary residence permit thus regularises, in a very rapid procedure, the presence of a displaced person from Ukraine on the territory of a Member State and at the same time gives him or her socio-economic rights in the host State (Kurzępa-Piękoś1 et al., 2023, pp.415-426). Statistics from the UNHCR website show that on 19 April 2024, 6 471 600 Ukrainian refugees were registered worldwide, of whom 5 930 400 were enjoying some form of protection on the territory of EU Member States (UNHCR, 2024).

In the following section we aim to specify the content of temporary protection status as outlined by the Directive and Council Implementing Decision (EU) 2022/382, as amended.

Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection. General considerations

A first aspect that needs to be stressed in relation to the Directive is that it introduces new legal institutions or concepts that shape the protective regime or individualize the beneficiaries of the protection instrument.

Thus, according to Article 2(a) of the Directive, temporary protection is essentially an exceptional (and summary) procedure providing immediate and temporary protection for displaced persons from third countries whose return to their country of origin is not possible. Recourse to temporary protection is subject to the cumulative

fulfilment of several conditions, mentioned in the content of the abovementioned article, namely:
(a) there is "a mass influx" or a risk of an "imminent mass influx of displaced persons from third countries" (Arenas, 2005, pp.435-450);
(b) displaced persons are unable to return to their country of origin;
(c) there is a risk that the asylum systems of the Member States will not be able to cope with this influx, which has repercussions on the very interests of the persons they are supposed to protect.

From the statistical data mentioned in the previous subsection, it is clear that Member States' national immigration systems were unable to manage efficiently and in the interest of the persons concerned the applications for international protection that could have been lodged under ordinary law, i.e. asylum applications, amid the conflict in Ukraine. In essence, an asylum application involves an individual examination of each case, carried out within an administrative procedural framework which is both time-consuming and burdensome in terms of public resources.

As regards the concept of "displaced persons", according to the provisions of Art. 2 letter (c) of the Directive, it is understood as persons who cumulatively meet the following conditions:
(a) “they are third-country nationals or stateless persons “;
(b) “they had to leave their country or region of origin, or have been evacuated, in particular in response to an appeal by international organizations “;
(c) “they cannot return in safe and durable conditions" to their country of origin, precisely because of the internal context.
d) they may fall “within the scope of Article 1A of the Geneva Convention or other international or national instruments on international protection”, in particular if they are:
“(i) persons who have fled areas of armed conflict or endemic violence;
(ii) persons at serious risk of, or who have been the victims of, systematic or generalized violations of their human rights.”

The procedure for implementing the Directive is governed by Article 5, which states that it is for the Council, acting by qualified

majority, to adopt a decision establishing the existence of a mass influx of displaced persons. However, the initiative for implementing the Directive lies with the Commission, which, when it deems it necessary to take action, draws up a proposal for a Decision to be forwarded to the Council. This must include, inter alia, the subject field of application (the specific group of persons eligible for temporary protection) and the date from which temporary protection takes effect.

As stated above, the effectiveness of the Directive was ensured by the adoption of Council Implementing Decision (EU) 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine (the Decision), as subsequently amended.

As regards the scope of application, Article 2(1) of the Decision establishes that the following categories of persons displaced from Ukraine on or after 24 February 2022 are covered by the temporary protection regime:

"a) Ukrainian nationals residing in Ukraine before 24 February 2022;

b) stateless persons and nationals of third countries other than Ukraine who were beneficiaries of international protection or equivalent national protection in Ukraine before 24 February 2022;

c) family members of the persons referred to in points (a) and (b)."

It can therefore be seen that the European legislator attempted to bring under the protection regime not only Ukrainian citizens, but also persons enjoying protection from the Ukrainian state, as well as family members of both categories of beneficiaries.

The provisions of Article 2(4) of the Decision outline the family ties which also have effects in the field of temporary protection. Thus, members of both the nuclear family and the extended family of the displaced person from Ukraine falling within the scope of Article 2(1) of the Directive may become beneficiaries of temporary protection, respectively: the spouse of the displaced person; the unmarried partner of the displaced person, where unmarried couples enjoy, under the legislation of the host State, a treatment comparable to that of married couples; the minor unmarried children of the displaced person or of his or her spouse, without making any distinction as to whether the children are born in or out of wedlock, or adopted; other close relatives of the

displaced person who were living with the displaced person "at the time of the events leading to the mass influx of displaced persons and who were at that time wholly or mainly dependent" on the displaced person (Art. 2(4) c) of the Decision).

Careful analysis of the provisions of Articles 12-16 of the Directive reveals the content of the temporary protection regime. Thus, in essence, beneficiaries of temporary protection enjoy the following rights:
-the right to carry out economic activities on the basis of an employment contract or self-employed activities, in compliance with the rules applicable to the chosen profession;
-the right to participate in educational activities, including professional training courses.

It should be pointed out that the Directive does not oblige Member States to treat beneficiaries of temporary protection in the same way as European citizens or third-country nationals enjoying the right of legal residence, such as persons recognized as having refugee or temporary protection status (Article 12, second sentence, of the Directive). Consequently, although the temporary protection regime allows measures to be taken rapidly to ensure the safety of the displaced person on the territory of the host State, there can be no equality between temporary and international protection, between the displaced person and the European citizen.

Consequently, by transposing the Directive into national law, Member States cannot be held to be under any obligation to ensure non-discriminatory treatment of displaced persons in absolute terms, so that, as follows from the second sentence of art. 12 of the Directive, in matters of labour market integration, „Member States may give priority to EU citizens and citizens of States bound by the Agreement on the European Economic Area and also to legally resident third-country nationals who receive unemployment benefit“.

-the right to apply to them the general legal framework in force „as regards pay, access to social security schemes corresponding to employed or self-employed activities and other conditions of employment” (Article 12, final sentence of the Directive);

- the right of access to accommodation or means for obtaining it (Article 13(1) of the Directive);

-the right to social assistance, means of subsistence and basic healthcare (Article 13(2) of the Directive);

-access to education for persons under the age of 18 (without making any distinction between pre-university and university education - s.n.), under the same conditions as nationals of the host Member State, with the provision that non-discriminatory treatment may be limited by Member States to the state education system only (Article 14(1) of the Directive).

Access to the temporary protection system

As regards access to the temporary protection system for Ukrainian nationals displaced as a result of the conflict in Ukraine, this is provided for under the national legislation of the Member States transposing the Directive. In the case of Romania, for example, transposition was achieved by means of Government Decision No 367/2022 on the establishment of certain conditions for ensuring temporary protection and for amending and supplementing certain legislative acts in the field of aliens, a legislative act which introduced provisions into the legal framework in force at the time, more specifically into the content of Law No 122/2006 on asylum in Romania.

The rights enjoyed by beneficiaries of temporary protection are listed in Article 133 paragraph 1 of Law No 122/2016, as follows:

"(a) to be issued a document granting them permission to stay on the territory of Romania;

b) to be informed, in writing, in a language they are supposed to understand, about the provisions on temporary protection;

c) to be employed by natural or legal persons, to engage in self-employed activities, respecting the rules applicable to the profession, as well as activities such as educational opportunities for adults, vocational training and practical work experience, under the terms of the law;

(d) to receive, on request, the necessary assistance with subsistence if they do not have the necessary material means;

(e) to receive free primary healthcare and appropriate treatment, emergency hospital care and free healthcare and treatment in cases of acute or chronic life-threatening illness through the national system of emergency healthcare and qualified first aid. These services are provided, where appropriate, by the medical service of accommodation centres and/or other health facilities accredited and authorised by law.
f) the right of beneficiaries of temporary protection with special needs to receive appropriate medical care;
g) to have access to the state education system under the conditions laid down by law for Romanian citizens, in the case of beneficiaries of temporary protection who have not reached the age of 18".

It can therefore be seen that in the transposition process, Romania has faithfully respected the minimum standard of protection imposed by the Directive and has also refrained from establishing a differentiated regime for beneficiaries of temporary protection compared to beneficiaries of international protection in terms of labour market integration.

Another aspect that needs to be highlighted is the Romanian legal framework on family reunification, which protects families previously created in Ukraine and separated in the context of the events unfolding during the mass influx of displaced persons. Thus, in full accordance with the provisions of the Directive (Art. 15 para.2), Art. 135 para.2 of Law No 122/2016 respects the wishes of family members regarding the state where reunification will take place, even if family members have previously received temporary protection in different states.

Currently, displaced persons from Ukraine are safe on the territory of the EU under the umbrella of the temporary protection mechanism. Obviously, the above statement is valid if these persons have applied for this status to the competent immigration authorities in the Member States and prove the existence of documents confirming, where appropriate, nationality, residence status on 24 February 2022, the pre-existence of international or national protection status granted by the Ukrainian authorities at the time of the outbreak of the conflict or the family relationship on which the temporary protection will be based.

With regard to the State required to grant temporary protection status, it should be noted that the Directive does not oblige the applicant to submit an application to a particular Member State (as is the case for third-country nationals who avail themselves of the provisions of the Dublin Regulation - Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person), so the displaced person has a discretionary right to choose the State that will protect him/her (Kuzmenko et al., 2023, pp. 224-240). This explains the disproportionate distribution of beneficiaries of temporary protection across the Member States.

4 March - the end point of temporary protection?

As regards the duration of temporary protection, Article 4 of the Directive states that "(1) Without prejudice to Article 6, the duration of temporary protection shall be one year. Unless terminated under the terms of Article 6(1)(b), it may be extended automatically by six monthly periods for a maximum of one year. (2) Where reasons for temporary protection persist, the Council may decide by qualified majority, on a proposal from the Commission, which shall also examine any request by a Member State that it submit a proposal to the Council, to extend that temporary protection by up to one year."

As emphasized in a previous section, all the steps mentioned in the above legal text have been completed, so that by Council Implementing Decision (EU) 2023/2409 of 19 October 2023 extending the temporary protection, as introduced by Implementing Decision (EU) 2022/382, the duration of the temporary protection has been extended for a further year, until 4 March 2025. After that date, there is no additional secondary legislation at European level creating a coherent and stable framework for the protection of displaced persons from Ukraine, so the way in which the individual situation of each beneficiary of temporary

protection will be managed remains a matter for the national immigration authorities.

We consider that the termination of the temporary protection regime on 4 March 2025, in the absence of a European harmonization instrument, will prompt beneficiaries of protection to use the ordinary path to legalize their stay on the territory of the Member States where they reside, which will entail submitting applications for international protection with a view to obtaining either refugee status or temporary protection status, as the case may be (Verleyen and Beckers, 2023, pp.727-742). Regardless of the finality of the applications, it is clear that beneficiaries of international protection will be forced to submit to national immigration procedures, which, due to the large number of people who will need protection, will certainly not be characterized by expeditiousness. There is thus a risk that people who have previously benefited from temporary protection will, after 4 March 2025, be subject to a provisional period until the normal asylum procedures have been completed, which runs counter to the very purpose for which the Union established the temporary protection measure.

Therefore, precisely in order not to create discriminatory situations between beneficiaries of temporary protection after 4 March 2025, depending on the specificities of the 27 national systems, it is necessary that the regularization of the right of residence for these persons be carried out at EU level, by means of a single legal instrument, because this is the only way to ensure effective, coherent and uniform protection of displaced persons from Ukraine on EU territory.

Conclusions

Demonstrating humanity and solidarity, on 4 March 2022, the EU activated for the first time Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof. At the time, this was the only way the EU could

effectively and coherently manage the influx of people fleeing the war in Ukraine.

Applying the provisions of Article 4 of the Directive for 3 years (4 March 2022-4 March 2025), displaced persons from Ukraine can access the procedure for obtaining temporary protection allowing them to stay on the territory of any of the Member States. The deadline calls into question the situation of the people protected until then, who, in the absence of European secondary legislation, are exposed to a double risk: expulsion, together with their families, to Ukraine, or access to the time-consuming and resource-consuming procedure for obtaining international protection under ordinary law. In these circumstances, EU intervention is imperative, as solidarity between Member States cannot be given half measures.

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THE CONCEPT OF CIVIL OBLIGATION IN POSITIVE LAW

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Abstract: *This research endeavors to illuminate the evolution of the concept of civil obligation within the framework of positive law, particularly against the backdrop of rapid technological advancements characterizing the contemporary era. Civil obligations, traditionally understood as legally enforceable duties arising from contracts, torts, or law itself, are experiencing a profound transformation influenced by digitalization, automation, and the emergence of artificial intelligence. The study examines how these technological shifts are reshaping the understanding and execution of civil obligations, necessitating legal systems to adapt and redefine the bounds of liability, enforcement, and compliance. By analyzing legislative developments, judicial precedents, and scholarly debates, the research highlights the dynamic interplay between established legal doctrines and the demands of a digital society. This exploration not only traces the trajectory of civil obligations from their classical roots to their current configurations but also projects the trajectory of future developments, providing insights into the legal implications of an increasingly interconnected and technologically reliant world.*

Keywords: *Civil Obligation; Positive Law; Technological Advancements; Legal Adaptation; Digital Society; Legal Compliance; Artificial Intelligence.*

Introduction

This research explores the evolution and complexity of the concept of civil obligation, from its deep origins in Roman law to modern applications in the context of emerging technologies such as smart contracts.

In a legal world that is becoming increasingly interconnected and technologized, the classical understanding of civil obligation, defined by the legal relationship between debtor and creditor, is being challenged and redefined.

The analysis focuses on three main aspects: the historical foundation of obligations in Romanian law (1), their adaptation in modern Romanian civil law (2), and their interaction with new forms of digital contracts (3), thus reflecting the impact of blockchain technology in the traditional legal framework. This approach not only highlights the continuity and adaptability of civil law, but also its relevance in the face of the challenges imposed by digital innovations.

1. Exploring the notion of obligation in Romanian civil law

1.1 The concept of obligation is fundamental to understanding legal relationships in society. This term, deeply rooted in Latin etymology - deriving from the word "*obligatio*", which suggests a bond or constraint - is a pillar of civil law.

From a technical perspective, the obligation is regarded as the passive part of the personal right or claim (Cornu, 2018). It represents a legal bond (*vinculum juris*) by which one or more persons, called debtors, are committed to perform a service (*by action or abstention*) towards one or more other persons, called creditors.

Traditionally, obligations can have various sources, including contracts (*contractual obligations*), quasi-contracts (*quasi-contractual obligations*), torts or quasi-delicts (*tortious or quasi-delictual obligations*), or they can derive directly from the law (*legal obligations*). For example, the obligation of the seller to deliver the goods sold to the

buyer, the obligation of the transferor of goodwill not to relocate in the vicinity, or the obligation of the person liable for an injury to compensate the victim.

These types of obligations are often referred to generically as debts or commitments and usually refer to legal obligations, as opposed to moral obligations, especially civil obligations - i.e. debts that are imposed by state compulsion, as opposed to natural obligations.

1.2 The notion of obligation in Roman law is one of Rome's most significant contributions to the modern legal system (Deroussin, 2012). The notion, evolved and refined over the centuries, laid the foundations for legal relationships concerning commitments and duties between persons.

This concept, referred to as "*obligatio*", suggests, as we have already said, a bond or constraint between the parties, reflecting the legal nature of commitments or liabilities at that time. In a society where interactions and transactions were becoming increasingly complex, these obligations served as pillars of stability and predictability.

In early Rome, most obligations arose from torts, that is, acts that caused harm to others. These often-imposed liability to repair the damage through a system of penalties. A notable example of this is the "*Lex Aquilia*", which provided for compensation for damage to the property of others, reflecting an early concern for the protection of individual property.

As Rome evolved, it diversified its types of obligations, introducing contractual obligations that were no longer necessarily based on a tort. These contractual obligations involved consensual agreements, which were recognized and protected by law. For example, the "*emptio vendition*" contract of sale allowed property to be transferred for a price, laying the foundations for the modern system of commercial transactions.

An archaic example of an obligation was "*nexum*", which illustrates the severity of personal obligations in ancient Rome. Through *nexum*, a debtor could secure a debt with his own body, ending up serving as the creditor's slave if he could not honour his obligation. This

type of pledge underlines how literal the bond of obligation was in those times, and is an early manifestation of the concept of personal liability.

As Roman law developed, so did praetorian obligations, introduced by the praetor to provide legal protection in situations not covered by civil law. These extended the scope of civil obligations and introduced new forms of justice adapted to the needs of a changing society.

The inheritance of obligations in Roman law is not limited to the legal structure of ancient Rome, but is found in the foundations of contract and tort law in modern legal systems. By adapting and refining these concepts, Rome shaped the legal foundations that govern contracts and civil liability around the world today, reflecting a lasting impact on the way we understand and apply laws in our social and economic relationships.

1.3 *The notion of obligation in Romanian law* is elaborated in detail and explained in the modern context, reflecting a significant evolution from its roots in Romanian law to the complexity of today's legal relationships. Analysing significant works in this field (Stătescu ans Birsan, 1994, p.10), we can identify the main aspects that characterize contemporary civil obligations.

According to the Civil Code (art. 1164 of the Civil Code: "*An obligation is a legal relationship by virtue of which the debtor is bound to provide a service to the creditor, and the creditor is entitled to obtain the service due*"), as interpreted in various legal works, an obligation is defined as a legal bond by which the debtor is bound to perform a certain service for the creditor. This performance may be to give, do or not do something, depending on the specifics of the obligation.

This bipartite structure emphasizes the relationship between the creditor, who has the right to claim a benefit, and the debtor, who has the duty to perform that benefit.

Obligations can arise from multiple sources, including contracts, unilateral acts, business management, unjust enrichment, undue payment and wrongful acts, and any other acts or facts to which the law links the

creation of an obligation. This wide range of sources reflects the complexity and diversity of legal situations in which obligations may arise, demonstrating the adaptability of Romanian civil law to the current social and economic context.

In the legal literature, it is emphasized that the obligation relationship is made up of two inseparable sides: the active part, represented by the creditor and his claim, and the passive part, represented by the debtor and his debt. This duality is crucial for understanding the dynamics between the rights and responsibilities of the parties involved in an obligation. From the creditor's perspective, the obligation appears as a claim, while for the debtor, it represents a debt, illustrating how obligations affect the assets of both parties.

The evolution of the concept of obligation from the purely material, corporeal ties of Roman law to the complex legal relationships of today shows a transition from a view in which the creditor could dispose of the debtor to a system in which rights and debts are regulated fairly and justly. This progress reflects changes in social values and understanding of individual rights, highlighting the role of law in promoting a balanced and functioning society.

Thus, the notion of obligation in contemporary national law is an illustration of how traditional principles can be adapted and reinterpreted to meet today's needs and challenges, while preserving the coherence and integrity of the legal system. This continuous adaptation ensures that the law of obligations remains relevant and effective in managing the complex relationships and transactions of modern society.

2. The concept of civil obligation at European level

The concept of civil obligation is an essential element in the legal systems of Europe (Cuniberti, 2019), manifesting itself in a set of rules governing interactions between individuals in private transactions. It is vital for understanding the structure and regulation of obligations and rights between parties in different legal frameworks.

In Europe, each Member State has its own system of civil law, which is influenced by either the Roman-German or Anglo-Saxon

tradition. In countries with a Germanic-Romanic system of law, the notion of civil obligation is often very detailed and codified, as in the French Civil Code or the Bürgerliches Gesetzbuch (BGB) in Germany. In contrast, Anglo-Saxon law systems rely more on case law and individual cases to define and interpret civil obligations.

2.1. *Romano-Germanic legal systems*, also known as civil law systems, are predominantly found in continental Europe, including France, Germany, Romania, Italy and Spain. They are deeply influenced by the principles of Roman law and are characterized by a codified and methodically structured legal system, which ensures a clear and predictable organization of legal rules.

Codification is central to these systems, with most of the applicable rules meticulously included in exhaustive codes such as the French Civil Code or the German Civil Code (BGB). These codes detail the rules for the formation, performance and termination of civil obligations, providing extensive sections dedicated to different types of contracts and obligations.

Civil obligations in this framework are explicitly classified into obligations to do (to perform a certain action), not to do (to refrain from a certain action) or to give (transfer of property or other rights). This classification is well established and reflects an articulated legal structure.

The principle of legality is another important pillar, where obligations and rights are clearly defined by law. This allows for the anticipation of many possible scenarios in human interactions and gives a rigid structure to civil relations. The role of the judge in these systems is to interpret the law without creating new legal rules, which maintains a consistent and predictable application of the law.

As far as contracts are concerned, they are governed by principles such as autonomy of will, good faith or *pacta sunt servanda* (agreements must be respected). The *pacta sunt servanda* principle is considered sacred, emphasizing the importance of strict compliance with contractual obligations. Contracts are seen as laws between the parties and must be

followed except in cases of force majeure or impossibility of performance.

Thus, the Romano-Germanic civil law systems provide a rigorous and structured approach to law, continually adapting to social change by periodically revising legal codes to reflect the needs and realities of society.

2.2. *The Anglo-Saxon legal system*, also known as common law, prevails in countries such as the UK, the United States, and other nations influenced by British culture. This system is distinguished by the significant role that case law plays in the development and application of the law.

Common law jurisprudence is the central pivot of the legal system. Previous court decisions are fundamental in determining civil obligations, and judges not only interpret existing laws but also create precedents. This gives them the flexibility to adjust legal rules to the complexity and specificity of cases arising in modern society.

Flexibility is another pillar of the common law, contrasting with the rigidity of the Romano-Germanic systems. In the common law, adaptability to the particular circumstances of each case gives judges wide latitude in interpreting the law. This attribute of the system can generate diversity in judicial decisions, but also brings a degree of legal uncertainty, unlike the predictability offered by codified systems.

Fairness and consideration are essential concepts in common law, playing a crucial role in validating contracts. Consideration means that each party to a contract must offer something of value, thus conferring legality on the agreement. Moreover, principles of fairness can allow contractual obligations to be avoided or modified in situations of fraud or duress, providing additional protection to vulnerable parties.

The role of contracts in common law shows a different approach from civil law systems. Although contracts are also central to the common law, the way they are interpreted and applied varies significantly due to the influence of precedent and principles of equity, which can alter the strict application of a contract.

In conclusion, the comparison between the Romano-Germanic and Anglo-Saxon systems of civil obligations illustrates their basic philosophical differences. Whereas the Romano-Germanic system focuses on structure and predictability, the Anglo-Saxon system emphasizes flexibility and adaptability to changing social and legal dynamics. These differences influence not only the application of the law, but also how citizens and legal professionals navigate the justice system, reflecting the adaptability or rigor of each system in its approach to civil obligations.

2.3. Harmonization of civil obligations in the European Union must be seen as one of the pillars of the single market.

In the European Union, the concept of civil liability occupies a central place in the efforts to harmonize the law, which are essential to smooth economic and personal relations between Member States. This harmonization not only facilitates trade and mobility within the European area, but also contributes to strengthening mutual trust between national legal systems, a fundamental element in the functioning of the single market.

Civil obligations, including contracts and tort liability, form the basis of commercial and private interactions. In a union of countries with diverse legal systems, differences in national regulations can create barriers to the free movement of goods, services and capital. Harmonization of these laws through a series of directives and regulations aims to reduce these obstacles, promoting a unified approach that ensures predictability and fairness for all EU citizens.

A significant example of harmonization in the area of civil obligations is Directive 93/13/EEC on unfair terms in consumer contracts. This Directive protects consumers against unfair contract terms and requires greater transparency in consumer contracts. It strikes a fairer balance between traders and consumers and contributes to increasing consumer confidence in the internal market.

Regulation (EC) No 593/2008, known as “Rome I”, is another key instrument governing the law applicable to contractual obligations in

situations with an element of foreignness. This Regulation facilitates the choice of applicable law by the parties to a contract and, in the absence of a choice, establishes criteria for determining the applicable law. By standardizing conflict-of-law rules, Rome I help to reduce legal uncertainty and facilitate cross-border trade.

Legislative reform on sales of goods and related guarantees is another area where the EU has intervened to harmonize civil obligations. Through Directive (EU) 2019/771, the Union has established common rules on contractual requirements and guarantees for sales of goods, seeking to ensure a uniform level of consumer protection across the Union.

Despite these harmonization efforts, the uniform application of EU law across national legal systems presents challenges. Cultural and legal differences can influence the way laws are interpreted and implemented, requiring continuous monitoring and adjustment. For example, the implementation of the Unfair Terms Directive requires careful attention to detail to ensure that national interpretations do not dilute the protections intended by EU law.

In the age of digitization, the EU is faced with the need to update and adapt civil obligations legislation to include digital contracts or those generated by emerging technologies such as blockchain. This means reassessing the existing legal framework and possibly creating new rules that adequately respond to the complexity and particularities of digital transactions.

Looking ahead, the European Union must continue to balance respect for national legal traditions with the need for a unified legal framework to promote a robust and integrated internal market. Harmonization measures must be flexible and adaptable to meet both the current and future needs of European citizens and businesses.

Thus, civil liability in the European Union remains an evolving area, crucial for ensuring the smooth functioning of the single market and for protecting the fundamental rights of European citizens in a framework of economic growth and social justice.

3. Civil obligation in the age of the smart contract

Smart contracts, also known as "smart contracts" or "contract algorithms", are an emerging technological innovation in blockchain technology. This new category of contracts facilitates the automation of the execution of contract terms and conditions without human intervention, through a set of programmatic codes.

Already in 2018, we noted (Stancu, 2018) that these technologies have generated numerous discussions in academic circles, addressing topics ranging from clarifying the concept of a chain data network, to assessing the legal impact of agreements established through these new means and analysing the mechanisms through which they exert their effects.

3.1. There is a wealth of literature on smart contracts. Thus, in order to avoid redundancy with arguments already discussed in previous works or by other authors, we will focus below strictly on the legal characterization of the smart contract (Guelin, 2017, p. 215).

The rapid growth of blockchain technology has brought a new dimension to the legal field by introducing smart contracts. Although referred to as "contracts", they differ substantially from traditional civil law contracts, as they are in fact computer programs that automatically execute predefined actions without the need for human intervention.

The contractual algorithm is activated based on pre-defined conditions which, once met, automatically trigger digital currency transfers or other specified obligations. Operating on the blockchain platform, they facilitate a wide range of digital transactions and interactions, improving efficiency and eliminating the need for traditional intermediaries such as banks or notaries.

A key point in legal discussions about smart contracts is their difference from fiat contracts. Unlike traditional contracts, which are based on the agreement of will between the parties, smart contracts are more like sets of programmed instructions that automatically execute certain operations, such as payments or transfers of digital assets, when

the conditions are met. This self-executing mechanism poses challenges for their integration into the existing legal framework and requires legislative adaptations to regulate their legal effects.

There are two main types of smart contracts: endogenous, which uses information from within the blockchain, and exogenous, which requires external data often via an "oracle" (Cattalano, 2019, p. 321). This interdependency opens up new possibilities for automating transactions, but also adds complexity in verifying and validating execution conditions.

Another legal question that arises is how contractual or legal obligations are enforced through smart contracts. They can automate various performances, such as data transfer or compliance with regulations such as GDPR, but integrating legal obligations into the code of smart contracts can be difficult, especially when they involve fundamental rights or complex legal principles (Deroulez, 2017, p.973).

In summary, smart contracts mark a significant evolution in the legal world, offering new ways to streamline and automate digital transactions. However, their integration into the legal system requires a prudent approach and appropriate legislative adaptations to ensure respect for fundamental principles of contract law and the protection of the interests of all parties involved.

3.2. The analysis of civil obligation and smart contracts, taking into account related legal and technological developments, highlights an interesting intersection between traditional and modern. According to Article 1164 of the Civil Code, civil obligation is defined as a legal bond that obliges debtors to perform in favour of creditors. In the context of the European Union, this also implies the necessary legislative adaptations to integrate new technologies, such as smart contracts.

Smart contracts, by their programmatic nature, change the traditional concept of civil obligation, bringing a new perspective on how obligations can be enforced automatically, without human intervention. These contracts are executed on blockchain platforms and are designed to act automatically when predefined conditions are met.

As has been found in the doctrine (Mekki, 2019, p.27) contractual algorithms require a clear legal framework governing them. Unforeseeability and force majeure issues are difficult to manage through strictly scheduled contracts, which cannot adapt contractual terms to changes in unexpected circumstances or to force majeure situations recognized by civil law.

Moreover, integrating principles of good faith and fairness into algorithms can be problematic. Smart contracts operate on the basis of programmatic code and are unable to interpret the ethical nuances or underlying intentions of the parties, which can lead to contracts being executed in ways that could be considered unfair or unjust from a human perspective.

Conclusions

Traditionally, the law of civil obligations has been geared towards protecting contractual and tortious relationships, ensuring adequate enforcement and compensation mechanisms in social and economic interactions. Within these frameworks, contracts represented consensual arrangements, where state intervention was necessary only to ensure compliance with agreed terms or to provide remedies in case of breach.

However, the concept of civil obligation in positive law is currently at an inflection point, driven by the rise of smart contracts. These new legal forms significantly expand the traditional notion of obligation by introducing automated enforcement mechanisms that promise efficiency and cost savings. However, they also bring substantial challenges, especially in aligning with fundamental principles such as good faith.

Positive law must evolve to incorporate these innovations, ensuring that they adhere to established ethical and legal standards, and thus maintaining fairness within the contemporary digital society. This requires a prudent approach that balances technological innovation with individual protection and rights.

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PUBLIC DEBT AS STANDARD FOR ADMINISTRATIVE ORGANISATION

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Abstract: *Very often the common people think of the administrative organisation of their country rather from a geographical and ethnic perspective, in relation to the strength of different local identities.*

However, it is important to note that in this century things are changing even in this specific political-administrative action. Efficiency and economic stability are becoming more important than before, and it is necessary to take them into account, both from the perspective of the development of the different areas, but especially from the perspective of administrative inefficiency, which is often expressed in the increase of public debt.

Keywords: *Public Debt; Administrative Organisation; Efficiency; Professional Competence; Political Interest.*

Introduction

The organisation of human communities has always been a theoretical and practical issue. Most often, only those who have sought a perfect formula for the organisation of states (usually the highest level of analysis) have remained at the theoretical stage. This imbalance, favouring the theoretical dimension, is somewhat logical because the practical situations good governance must solve often include issues not found in the "manuals of good governance" written by philosophers (Eriksen, 2011).

Governing is, above all, the science of the possible, not an art in itself, and thoroughly understanding the state of a country forms the basis of reality (Fukuyama, 2013). In fact, the most dangerous moment for a society is when its political leaders start to believe that their own intelligence is sufficient for valuable leadership, rather than continually seeking the realities of the day, regardless of how many rumours or distortions may surround them.

Nevertheless, the scientific debate, as well as the practical discussion regarding the ideal organisation of states and public institutions, is crucial, as the limits of their actions are not always the same. Yesterday's mistakes can be corrected today or tomorrow, others from several decades ago may hold relevance for future decades, and certain intelligently made investments can yield returns for a century or more. In any situation, however, the analysis and debate must be conducted with elegance, based on objective data, so that their outcomes (of the analyses and debates) are as pertinent and difficult to contradict as possible.

1. The organisation of human societies has the immediate effect of creating specific structures, with the role of leading communities in one direction or another. The desire for organisation is natural and profitable for everybody, because the limits of safety and the possible gains of people in an anarchic society would be quickly cancelled by any medium-level disturbance. For this reason, it is mandatory to finally create political-administrative structures whose role is precisely this general rule of society.

The organisation of states and communities cannot be done on an improvised basis, given that the complexity of political, economic, social, and environmental challenges would create insurmountable tasks within a short period. Therefore, it is necessary to professionalise the entire effort of state organisation, which means, on one hand, the professionalization of the public apparatus (state public institutions or local public administration), as well as the education of individual actors – primarily citizens – towards accepting a coherent type of organisation

within their own structures and activities (OECD, 2017). Thus, we can think of codes of ethics, entry standards into professions, various product standardisations and their subsequent uses, directing certain funding to universities and research institutions for the development of specific goods, based on certain characteristics, etc.

In the process of organising state and local (administrative) structures, two major questions arise.

The first pertains to the ideology that the state or local communities wish to promote, noting that there can be differences between local options and those at the state level. The second issue concerns the science of organising state communities and its capacity to be neutral and connected with science.

The first question primarily has a political nature, but cannot be excluded because, according to constitutional mechanisms, political institutions subordinate administrative ones. Taking into account that this is a political competition, there are participants in the field, resources they use to secure victory, and the public administration observing their behaviour, seeking to protect itself from excessive politicisation (Fuenzalida, 2019). Following political victories, new legal norms bring about transformations, and the public administration is obliged to implement them, including through the reorganisation of its institutions. As a result, it can be generally configured in line with a particular ideology, but at the sectoral level or within small territorial areas – city, district – it can take various forms, depending on the outcomes of political competition. This necessitates a general harmonisation of the state, which can sometimes be challenging due to the ideological differences underlying the most recent normative acts that have organised the state or local communities.

On the second issue, we must note that one of the aims of political parties might be to eliminate any form of legal and especially intellectual-moral autonomy of public administration. If the process of eliminating this autonomy has success, public administration becomes merely a tool of political power, regardless of its nature. This leads it to a role not only as a "servant of communities", irrespective of their size and

importance, but also as an electoral agent or even an armed extension of the political environment.

In this struggle – which, unfortunately, is natural though somewhat unethical – the public administration stands on its own and may have science on its side, albeit not always the citizens. Specifically, the citizen does not have a complete understanding of the distinction between political power and public institutions, nor can they fully comprehend the entire legal framework governing the actions of each public institution. As a result, the average person tends to equate political groups with all public institutions, which generally deprives these institutions of citizens' support when they seek to maintain substantial intellectual-moral autonomy. Thus, what remains for the public administration is reliance on science, the science of organising the state and local communities based strictly on results – namely, showcasing to the political environment those best administrative practices that have led to improved quality of public services. Delivering public services at lower costs while increasing community satisfaction – implicitly, including a reduction in legal actions against administrative acts – effectively demonstrates the scientific possibility of enhancing the quality of community management without significant intervention from party politics in the recruitment of public officials tasked with implementing legal norms.

2. Public administration constantly seeks to be as insulated as possible from political interference, while the political sphere seeks to neutralise any claims or autonomy of the public service, ensuring that public institutions remain perpetually under political control. However, the common citizen does not wish for variations in public service, but desires a continual improvement in its quality. Thus, the citizen's common desire from the outset contradicts the will of the political environment, since an increase in the quality of administrative actions would imply there are few reasons to change a government through elections, and those already in office should not be removed.

Thus, we observe a qualitative debate concerning the purpose of public administration.

Firstly, the citizen desires a completely neutral public administration, as minimally visible in the political arena as possible, and capable of handling most actions of public interest independently of political will. More precisely, the ordinary person's wish is for a life with minimal contact with the political realm, having matured and understood the power of the political environment. The reality is easy to witness, as there have been instances where countries have functioned without a prime minister for hundreds of days (Belgium being an example, with two cases exceeding a combined total of 800 days), without descending into civil war, and where public administration maintained all its activities neutrally and at a genuine qualitative level.

The second purpose of public administration is to serve as an interface between the political environment and the citizen, striving to serve both. This second orientation is, however, based on the reality of life, which recognises the power of the political environment to adopt normative acts capable of changing the organisation of public administration and legal institutions. Citizens cannot be protesting on the streets against various political decisions all the time. Essentially, those who make laws can also decide whether they can be condemned, which means they hold power over the entire society. As a direct result of this power, any significant crisis can only be attributed to them, either because they created a low-quality legal framework, or because they pressured public administration not to act completely neutrally towards any public actor (plainly speaking, because they provided political protection to their groups of supporters/members).

In any case, states will have to contend with a political-administrative reality that also depends on another factor, namely the freedom of movement of their inhabitants. For centuries, these people were more or less prisoners of inadequate means of transport, and emigration was a solution only for a very few. Now, however, we find ourselves in a situation where the average person can see what is happening in their own country – as examples of poor administrative practices – as well as what superior practices exist in other countries. As a result of these comparisons, the political environment retains control

over administration and those citizens without the financial means or professional opportunities to emigrate, while others take the significant step of leaving their own country. Today, this global number of emigrants exceeds 280 million (IOM, 2023), driven by non-compliant political practices and substandard or politically loyal public administration actions, thereby resulting in the opposite phenomenon of brain-drain.

3. Even though the administration is subordinate to the political environment, this does not mean that the two cannot be separated in public perception. However, for this separation to occur, it must rely on clear and, as much as possible, widely known regulatory acts. These regulatory acts need to be implemented by the public administration, which will have an interest in maintaining a clearer separation from the political environment (Overeem, *in* Bryer, 2021).

This legal aspect is, however, variable, depending on the interests of the ruling political groups, so that a well-structured legal framework, capable of clearly separating the interests of the two parties (the political environment vs. public administration) can be dismantled within less than a legislative term. Therefore, it is necessary to find objective ways to separate these two actors, so that the subjective factor has fewer grounds for altering the legal framework.

The objective criteria that influence administrative organisation, and implicitly its relationship with the political environment, are threefold: geographical factors, which delineate the boundaries between different territorial units (regions, districts, republics, etc.); demographic aspects, which alter over time the capacities or degree of intervention of the administration (in a sparsely populated region, public service has practically different characteristics); and the economic aspect. Evidently, the economic factor is highly complex and subdivides into various sections, but for the purposes of this text, we will focus on aspects related to the public debt of states and local communities.

The concept of public debt is not a new one, as history demonstrates. Although the written record points to instances of public borrowing as long as two thousand years ago, recent scholarship points to

1000 – 1400 A.D. as when borrowing agreements with states were concluded with regularity and debt contracts entered into by sovereigns were standardized. Loans to territorial monarchs in Late Medieval Europe, such as those provided by Italian bankers to Edward III during the Hundred Years' War (1337 – 1443), were short term and bore high interest rates. Only after 1500 were territorial states able to borrow long term. Small city-states, in contrast, appear to have been able to borrow at longer maturities already the in 13th and 14th centuries (Eichengreen, 2019, p. 2).

The complex historical shift from personal creditworthiness of the ruler to sovereign creditworthiness was integral to European state building. It was associated with the development of the idea and practice of the impersonal, professionalized 'fiscal state', in particular 'public' debt. Historical reputation as 'strong' or 'weak', 'virtuous' or 'vice-prone', is intimately associated with the reputation of political rulers as creditors or debtors. Historical changes in the relationship between debt and political rule reflect the complex interplay of four key factors: the widening territorial scale of capacity for fiscal control; professional and institutional innovation, growth, and maturity; changing social forces; and longer-term shifts in economic structure and in economic cycles. Each has in its own way affected state capacity, willingness to pay, and creditworthiness. Rulers and governing elites operated with more or less imperfect knowledge and understanding of these processes and how to master them (Dyson, 2014, pp. 168 – 176).

Frequent changes in political leaders and occasional shifts in borders have stressed the concept of public debt, particularly in relation to the defence of a territory. However, the relative stabilisation of borders after the 1850s brought into focus the quality of public services – which were few at the time – and their associated costs. Considering the low life expectancy, with a global average of under 30 years before the 20th century (Dattani et al., 2023), it became apparent that public administration could be more easily organised, as its operational costs were lower, and the budgetary burden of the "active population – inactive population" ratio was significantly reduced.

The major wars of the first half of the 20th century, as well as the diversification of technologies, led to a more lasting change in borders, increased life expectancy, and caused three types of expenditures to rise. Firstly, there were increased expenses due to the medical and social effects of wars (war invalids, orphans and widows, reconstruction of localities), which needed to be addressed to improve the lives of tens of millions of people in genuine need (not as a result of leftist ideology). Secondly, it diversified the administrative sphere responsible for overseeing many of the new technologies that emerged and created public services where necessary to manage them, without necessarily having the economic efficiency characteristic of the private sector. Finally, after the post-war baby boom ended, there were necessary expenditures to balance the demographic relations between the young and the increasingly numerous elderly, which boosted public budget contributions for pensions.

At the end of the Cold War, the demographic situations in many developed countries revealed a bleak future, with age proportions becoming imbalanced and a significant portion of public expenditure set to be directed towards pension systems. This same end to the political bloc confrontation also led to an increase in global migration, resulting in cheaper labour beginning to circulate. However, this did not have a corresponding effect on budget revenues, as these immigrants did not carry the same tax burdens as nationals. Although they would make substantial contributions in the countries where they found employment, also improving the financial status of their families remaining in their home countries, these new workers would also generate other societal tensions, including electoral impacts. The fact that some communities have a lower work ethic, so only certain members participate in the workforce, makes the reunification of emigrant families in wealthy countries costly.

Public administration also followed the consequences of these phenomena. On one hand, it gained competencies and created public services – or extended those already in existence – bringing more employees into the civil service. However, it simultaneously faced practical issues that the allocated funding was not always sufficient to

address. Specifically, due to various types of migration, cities have become younger, and the school infrastructure has not always been able to keep up. The general urban infrastructure is increasingly strained in these hubs of development (transport, water supply, etc.), but public funds have not always matched the needs. In another perspective, the towns and districts with high emigration rates have found themselves in a different, more difficult situation because both the real tax base has decreased, and certain public services have become nearly unusable and too costly, leading to a desire for consolidation (for example, schools with few students need to be merged). This consolidation, however, offends local and broader political prides and interests, especially with general elections in view.

We are living in an era where public debts of states and local communities are rising, primarily because the range of social and economic rights – requiring financing for their fulfilment – has significantly expanded. Since the World War II, the political environment has adopted an "ethics of irresponsibility", regularly accepting increases in benefits for various individuals and public institutions without considering whether they are sustainable in the long run. In this context, public administration becomes merely a spectator of political decisions and an executor, as it also benefits – in terms of the number of public officials and their duties. However, the fact that there are only a few states with low public debts means that (IMF, 2022), in the long term, the future of our children's generations will be more dedicated to repaying these debts, and public administration will have to get used to operating with increasingly smaller funds.

The rise in the standard of living after 1945 allowed the political class to extend public services not just in recognition of the efforts of the population during the two world wars – which occurred within just 30 years, enough time for most people to experience both – but as part of a broad, perhaps unconscious, operation to organise "the best possible world". The competition between the two political blocs also contributed to the enhancement of quality and ultimately to the expansion of the number of public services. However, offering a lot suddenly also means

conditioning people to expect something from the state and its legislation, but more importantly, it introduces significant difficulties in calculating the long-term costs of these benefits. As the population has increased enormously over the last 65 years (by more than 5 billion), and the quantity of natural resources has decreased due to massive consumption, a budgetary competition for better public services has resulted. Only certain countries have been able to sustain this competition, at the cost of an increasingly large national public debt. Consequently, over time, it will be practically impossible to avoid reorganising public administration on strictly economic, almost commercial bases in all countries of the world. This will be a problem for many ordinary people and an insurmountable image problem for politicians.

Conclusions

The fundamental standard for organising public administration is formulated by the political environment through the legal framework it adopts, generally to satisfy its own interests – and only secondarily in accordance with the general interests of society. However, this standard is influenced over time by political successes, so that public administration finds its dimensions and departmental duties modified in line with changes that governments are compelled to adopt over time, as a result of realising their political failures.

Public debt of a country indirectly influences the organisation of public administration, in relation to the overall performance of the economy, the digitalisation of public services, and especially as an effect of demographic changes that compel the political environment to adopt different budgetary measures. The success of certain policies will be evident in demographic growth – births and economic immigration – which alters the scope of public services. However, in the case of economic failure, residents will seek to relocate to more developed regions, including abroad, and states will be forced to borrow more to fulfil public services, but without having enough taxpayers to support them.

Public administration is thus more dependent on the state of a country's finances than on its operating principles, because the fulfilment of public services – which are recognised by law, do not forget – means nothing if there are no funds to cover the necessary expenses imposed by these services. Therefore, any ideological vision, imposed or augmented by the force of public administration, will fail, and states will need to resize their entire range of public services, including through the reorganisation of administrative structures.

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THE RELATIONSHIP BETWEEN THE STATE AND THE CHURCH IN POLAND. REMARKS AGAINST THE BACKGROUND OF ARTICLE 25 OF THE POLISH CONSTITUTION

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Abstract*: The relationship between the state and the Roman Catholic Church in Poland is regulated by the 1993 agreement between Poland and the Holy See.*

This agreement is in line with the Constitution, and more specifically with Article 25, which states that 'Churches and other religious associations shall have equal rights. Public authorities in the Republic of Poland shall be impartial in matters of religious, philosophical and ideological beliefs, ensuring the freedom of their expression in public life."

Theoretically, therefore, such a situation should not give rise to any objections. nevertheless, in practice, these objections, especially in recent times, are gaining in strength, which in turn has a direct impact on support for the Catholic Church. This situation is due to a number of factors. One is the tightening of abortion laws, another is the issue of church taxes and fees and yet another is the issue of special powers granted to the church by the state and teaching religion in school. Together, these factors mean that the equality of churches and religious associations is being called into question, and it is precisely the examination of these doubts that will be the subject of this paper based on a theoretical-legal and dogmatic-legal method.

Keywords*: Equality of churches and religious associations; religious freedom; religious instruction in schools; abortion.*

Introduction

The history of Poland is closely linked to the Roman Catholic Church. Starting from Poland's baptism in 966 to the present day. Hence, it is not surprising that over the centuries it has been present at the great triumphs as well as the downfalls of the Polish state (Krukowski, 2016, p. 83 and n.). At some times it was revered, and at other times it was exterminated, such as still in the not-so-distant times of the Polish People's Republic, when the communist authorities launched open and unprincipled attacks on the Roman Catholic Church and its representatives. At the time, their goal was twofold-on the one hand, they sought to marginalize Catholicism in public life, because it conflicted with the prevailing Marxist doctrine. On the other hand, the state authorities wanted to "control church structures," through intimidation by means of pressure, including harassment and repression (such as the seizure of church property, the removal of religion from schools, the banning of church organizations and institutions or persecution, and even murder, such as that of Father Jerzy Popieluszko (Noszczak, 2008, p. 38 and n.; Wyszowadzki, 2018, p. 83 and n.) to subjugate them to themselves. in this way the authorities of the People's Republic of Poland implemented the then prevailing concept of separation of state and church (https://ngoteka.pl/bitstream/handle/item/294/Panstwo_Kosciol_katolicki_w_Polsce-JZ.pdf%3Fsequence=5, p. 37; Jaworska, 2006, p. 235).

This is because it was hoped that a fractured society, not united around ideas and religion, would be easy to subjugate, to rule, because, after all, it is much easier to fight the individual than the collective. In this aspect, it is worth quoting the words of Father Mark Truszynski, who wrote in 2013 that the "Political power perceived the Roman Catholic Church in terms of a real purely political threat. Such a submission may seem anything but irrational, but the logic of the PZPR did not always have much to do with the facts, instead it had a lot to do with Soviet ideology, which viewed any entity (social, political, economic) not subordinated to the interests of the ruling party in terms of a major threat." (Truszczyński, 2013, p. 148)

Thus, it should come as no surprise that already after the Round Table Talks, after the overthrow of communism, in 1989, there was a new shaping of relations between the state and the Roman Catholic Church, which was justified by its active role in these events (Skrzydło, 2009, pp. 31-32). Paradoxically, the beneficiary of the new, systemic shape of relations became not only the Roman Catholic Church, but all other churches and religious associations. In the newly formed system, a number of legal regulations were undertaken in this regard **(**Krukowski, 2016, pp. 94-95)[1], but the most important were two, namely, the Constitution of the Republic of Poland of April 2, 1997 (Constitution of the Republic of Poland of April 2, 1997, Journal of Laws. 1997, No. 78, item 483) and the Concordat between the Holy See and the Republic of Poland signed on July 28, 1993 and ratified five years later - on February 23, 1998 (Journal of Laws 1998, No. 51, item 318.), as the post-communist parties, holding a majority in parliament after the September 1993 elections, blocked the proposal for its ratification for several consecutive years (Krukowski, 2016, p. 95).

The essence of Article 25 of the Constitution of the Republic of Poland as the basis of relations between the State and the Roman Catholic Church

In the Basic Law itself, the basic provision on the basis of which the relationship between the state and churches and religious associations

[1]The key regulation, in the first months after the change of the political system to democratic laws, and negotiated as a compromise by representatives of the Government with representatives of the Episcopate of Poland, authorized by the Holy See, and with representatives of the Polish Ecumenical Council (in matters relating to other religious unions) was the so-called "package of church laws" of May 17, 1989 (Journal of Laws 1989, No. 29, items 154-156). This package consisted of three laws, namely:
1) the Law on Guarantees of Freedom of Conscience and Religion
2) The Law on the Relationship of the State to the Catholic Church;
3) the Law on Social Insurance for Clergy.

was formulated became Article 25 of the Constitution of the Republic of Poland, containing the general principle of the system and stating that
" (1) Churches and other religious associations are equal in rights. (2) Public authorities in the Republic of Poland shall maintain impartiality in matters of religious, philosophical and worldview beliefs, ensuring freedom of expression in public life. (3) Relations between the state and churches and other religious associations shall be formed on the principles of respect for their autonomy and mutual independence of each in its own sphere, as well as cooperation for the good of man and the common good. (4) Relations between the Republic of Poland and the Catholic Church shall be determined by an international agreement concluded with the Holy See and laws. (5) Relations between the Republic of Poland and other churches and religious associations shall be determined by laws passed on the basis of agreements concluded by the Council of Ministers with their competent representatives."

This provision is an expression of compromise, since the legislator, through its formula, met the expectations of both believers and non-believers (Kępa, https://www.repozytorium.uni.wroc.pl/Content/79180/08_M_Kepa_Sytuacja_Kosciola_i_zwiazkow_wyznaniowych_w_swietle_Konstytucji_RP.pdf.).

In light of its content, these relations, should be formed on the basis of autonomy and mutual independence of the state and churches and religious associations (Kępa, https://www.repozytorium.uni.wroc.pl/Content/79180/08_M_Kepa_Sytuacja_Kosciola_i_zwiazkow_wyznaniowych_w_swietle_Konstytucji_RP.pdf). Its interpretation has led in practice and science to the formation of specific principles of relations between the state and the church.

1) Equality of churches and other religious associations (Article 25(1) of the Polish Constitution),
2) worldview impartiality of public authorities (Article 25(3) of the Polish Constitution),
3) respect for autonomy and independence in relations between the state and churches and religious associations,

4) cooperation between the state and religious associations for the good of man and the common good (Article 25(3) of the Constitution of the Republic of Poland) as well as,
5) regulation of relations between the state and churches and religious associations on a bilateral basis; Article 25(4) and (5) of the Polish Constitution (Mezglewski, *Leksykon prawa wyznaniowego*, https://www.ksiegarnia.beck.pl/media/product_custom_files/1/0/10671-leksykon-prawa-wyznaniowego-artur-mezglewski-darmowy-fragment.pdf, p. 1).

The first of the aforementioned principles traces its genesis to the general principle of equality expressed in Article 32 of the Constitution of the Republic of Poland (Judgment of the Constitutional Court of October 23, 2001, K 22/01- OTK ZU nr. 7/2001, p. 1080). This, in practice, consists in the fact that all subjects of law characterized by a given essential feature to an equal degree, should be treated equally, that is, without favoritism or discriminatory differences. At the same time, the essence of this principle is the differential treatment of those subjects of law that do not share a common essential characteristic (Granat, 2021, pp. 168 and n.).

The Constitutional Court in its jurisprudence stated that the principle of equality of churches and religious associations boils down to the fact that "all churches and religious associations that share a common essential feature should be treated equally. At the same time, this principle implies a different treatment of churches and religious associations that do not share a common essential characteristic from the point of view of the regulation in question." In addition, the Court deduced, from Article 25 of the Constitution of the Republic of Poland, the obligation for public authorities to seek in the sphere of relations with churches and religious associations such consensual legislative solutions that will find the acceptance of the addressees. Accordingly, successive legislators may not undertake unilateral interference in the sphere of relations between individual churches and religious associations. The Basic Law leaves a wide range of freedom to the churches and religious associations concerned and to the Council of Ministers to shape the

content of the legislation that affects them. At the same time, it is worth noting that this freedom has its limits, as the legal solutions adopted must remain in compliance with constitutional norms, including, among others, the principle of equality of individuals and the principle of equality of churches and religious associations (Judgment of the Constitutional Court of April 2, 2003, K 13/02).

In practice, this principle, recognizing that every religious community is to be guaranteed equal rights, eliminates the possibility of introducing a confessional state in Poland (Krzysztofek-Strzała, 2018, p. 437, „Studia Z Prawa Wyznaniowego" 2020, t. 23, https://ruj.uj.edu.pl/server/api/core/bitstreams/0836bd14-f6fe-4f03-b201-2510704cbad2/content.).

Another principle derived from Article 25 of the Polish Constitution is the principle of impartiality. Unlike the above-characterized principle of equality, whose addressees are churches and religious associations, the addressees of this one are public authorities. This is because it is on the organs of the legislative power, the executive power as well as state organs and organs of local self-government units that the legislature has imposed an obligation to maintain neutrality with respect to a particular worldview or religion without any prejudice. Thus, public authorities are prohibited from putting a particular belief ahead of another and endorsing it, and even more so by assertions regarding the rightness or truthfulness of a particular belief or worldview. The object of this principle is the impartial attitude of the state authority to "religious, worldview and philosophical beliefs."(Kępa).

The Constitutional Court stresses that the interpretation of the normative content of Article 25(1) and (2) of the Constitution must therefore be carried out in close connection with Article 53(1) of the Constitution, which refers to the provision of freedom of religion (and freedom of conscience) to everyone (by public authorities), and in connection with Article 53(2) of the Constitution. The latter provision of the Constitution states that: "Freedom of religion includes the freedom to profess or adopt a religion of one's own choice and to externalize one's religion individually or with others, publicly or privately, through worship, prayer, participation in rituals, practice and teaching. Freedom

of religion also includes the possession of temples and other places of worship according to the needs of believers, and the right of persons to receive religious assistance wherever they are." Thus, based on the provisions of the Basic Law, particularly Article 25(2) and Article 53(1) and (2), this impartiality of the public authorities' action in matters of religious beliefs amounts to ensuring that everyone enjoys all the rights of religious freedom, but at the same time it consists of ensuring that churches and religious associations can have temples and other places of worship (Judgment of the Constitutional Court of December 2, 2009, U 10/07, OTK ZU 11A/2009, poz. 163).

Based on the above, it should be stated, following the Constitutional Court, that public authorities act impartially, and churches and religious associations are equal, in a situation where each of them "can exercise the rights arising from freedom of religion, and churches and religious associations can perform their functions arising from freedom of religion and exercise the powers necessary for the performance of these functions, while performing these functions by ensuring in an equal manner, to each of the followers of different religions and denominations, the rights that are a consequence of freedom of religion, as referred to in Art. 53(2) and (3) of the Constitution."

Further, the third principle derived from Article 25 of the Constitution of the Republic of Poland concerns, the aforementioned principle of respect for the autonomy and independence of churches and other religious associations. It should be mentioned at the outset that the concepts of autonomy and independence coincide. For in the law, independence is considered the highest degree of autonomy. Independence can be reduced to the highest degree of autonomy of entities, in which the interference of one entity in the internal affairs of the other is excluded. The difference between the two is thus defined by the scope of these concepts for while autonomy refers to ad intra relations, i.e. in internal relations, independence refers to - ad extra relations, i.e. in relation to external communities. Importantly, independence is enjoyed by both the state and churches and other religious associations, while what distinguishes them is the sphere of this

independence. This is because the independence of the state will refer to its boundaries of territorial sovereignty, while the independence of churches and other religious associations will refer to spiritual sovereignty. On the other hand, the concept of autonomy mentioned above involves organizational and functional independence. Within the framework of this autonomy, a given church or religious association has the right to freely create internal laws that determine its internal organization, the procedure for appointing bodies, their powers and functioning. Moreover, the same autonomy, also entitles it to independently create new organizational units, their transformation and liquidation, as well as to fill positions. Based on the above, it should be concluded that in the Polish system there is an autonomy of legal orders in the relations between the state and churches and religious associations. Within its framework, the internal law of churches and religious associations does not apply ex lege to state law, while state law does not apply ex lege to the internal law of churches and religious associations. The interpenetration of these legal orders is carried out on the basis of legal dispositions (Mezglewski, p. 3 and n; Garlicki and Zubik, 2016, p. 618-220).

Does not mean the complete isolation of the legal orders of the state and. On the contrary, the principle of cooperation for the good of man and the common good expressed in Article 25(3) in fine of the Constitution of the Republic of Poland, provides for the possibility of taking into account in one legal order the peculiarities of the other. An example of just such implementation of the principle of respect for autonomy and independence is the procedure for the acquisition of legal personality by organizational units of churches and other religious associations, or the repeal by the Polish legislator of the ban on the processing of sensitive personal data by churches and other religious associations. It follows, therefore, from the principle of autonomy and independence that the state and religious associations are subjects of law complementary to each other, which means that they complement each other in the realization of a specific goal, which on the constitutional level has been defined as cooperation for the good of man and the common good (Article 25(3) of the Constitution of the Republic of

Poland). Confirmation of the autonomy of religious associations is also provided by the constitutionally defined mode of regulating matters of relations between the state and religious associations. Indeed, it follows from Article 25(4) those relations between the Republic of Poland and the Catholic Church are determined by an international agreement with the → Holy See - due to the public law subjectivity in the international arena of the Holy See, as the supreme authority of the Catholic Church - and laws. In the case of other churches and religious associations, relations between the state and them are determined by laws passed on the basis of agreements concluded by the Council of Ministers with their competent representatives. Through the principle of consensual determination of relations with religious associations, the legislature has expressed respect for their autonomy and independence (Mezglewski, p. 3 and n).

The constitutional complement to the above-mentioned relations between the state and churches and religious associations is the principle of their cooperation for the good of man and the common good. The formula derives this essence of cooperation from the idea of coordinated activity, undertaken jointly, and focused on the pursuit of the same goals. It is worth noting that in existing legal acts it is possible to find specific provisions, pointing directly to the spheres of cooperation between the state and churches and religious associations. By way of example, one can cite the Law of May 17, 1989 on Guarantees of Freedom of Conscience and Religion, whose action is directed at "(...) preserving peace, shaping the conditions of national development, combating social pathologies" (Article 16). (Journal of Laws. 1989 No. 29 item 155). In addition, the law also provides for the state's cooperation with religious associations "(...) in the protection, conservation, provision and dissemination of monuments of architecture, art and religious literature, which are an integral part of cultural heritage" (Article 17). The Concordat, in turn, declares cooperation for the defense of and respect for the institutions of marriage and family, which are the foundation of society (Article 11.). (Łach, https://wspia.eu/media/mffjefcs/14-%C5%82ach-sabina.pdf , p. 105 and n.)

The last of the principles derived from Article 25 of the Polish Constitution is the principle of the consensual nature of the relationship between the state and churches and religious associations. A certain norm is that European democratic states shape relations in the subject area based on the idea of coordinated separation (Tuleja, 2019, p. 99-100). In this model, states adjust the individual elements individually within the framework of relations with a particular church or religious association having in mind the entire legal order in force on its territory. In Poland, the definition of the legal situation of the Roman Catholic Church and the shape of mutual relations with the state was determined by an international agreement concluded between the Republic of Poland and the Holy See, i.e. the so-call (https://www.ekai.pl/autonomia-panstwa-i-kosciola-oraz-klauzula-sumienia/).

3. Contemporary selected problems in the formation of relations between the State and the Roman Catholic Church in Poland

At present, in science as well as in doctrine, there are more and more voices about the violation of a kind of boundary in the implementation of Article 25 of the Constitution of the Republic of Poland in the relations between the State and the Roman Catholic Church. The grounds for their formulation are various and multifaceted.

One of them concerns the Roman Catholic Church's involvement in the process of adopting in national legislation the provision known as the "conscience clause," that is, Article 39 of the Law on the Profession of Physician and Dentist (https://www.ekai.pl/autonomia-panstwa-i-kosciola-oraz-klauzula-sumienia/.). The article reads that "A doctor may refrain from performing health services that are incompatible with his conscience, subject to Article 30, the doctor's duty to provide medical assistance, except that he is required to record this fact in the medical records. A physician practicing under an employment relationship or in the service is also required to notify his superior in writing in advance" (Act of December 5, 1996 on the professions of physician and dentist, Journal of Laws (Dz.U.)2023.0.1516).

The extensive discussion within this regulation focused on the possibility of performing abortions and prescribing contraceptives. Various circles, both liberal (https://bip.brpo.gov.pl/pl/content/panel/sesja-14KPO-klauzula-sumienia.) and conservative, took part in it. The representative of the latter trend was the Polish Episcopate, which, citing the objectification of the child and "wishful medicine", pointed out that every doctor should have the right to choose the procedures he undertakes (this does not apply, of course, to life-saving situations) (https://episkopat.pl/stanowisko-zespolu-ekspertow-kep-ds-bioetycznych-w-sprawie-klauzuli-sumienia/.). The church's active stance was recognized socially (Krzyżak, https://www.rp.pl/kosciol/art5164781-kosciol-broni-wolnosci-sumienia). This gave grounds for the more liberal part of society to formulate accusations against the Roman Catholic Church of excessive interference in state affairs (Sidorski, https://oko.press/wystepuje-z-kosciola-bo-dlaczego-ksieza-juz-nie-chca-uzasadnien-od-apostatow).

Another sensitive example on the basis of which accusations are formulated in Poland about the lack of proper separation of state and church is, related to the above argument about the conscience clause, the issue of abortion. In 1993, a so-called abortion compromise was worked out in Poland. The compromise dealt with the tenets of the Act on Family Planning, Protection of the Human Fetus and Conditions for the Permissibility of Abortion, which allowed for the possibility of legal abortion in three cases:

1) pregnancy resulting from a criminal act (i.e., rape or incest)
2) in the case of severe and irreversible impairment of the fetus or an incurable disease threatening its life, and
3) in case of danger to the woman's life or health. (Law of January 7, 1993 on family planning, protection of the human fetus and the conditions of permissibility of abortion, Journal of Laws. 1993 No. 17 item 788)

In October 2020, the Constitutional Court ruled unconstitutional the performance of abortion in the case of severe and irreversible

impairment of the fetus or an incurable disease threatening its life with the verdict K 1/20, leading to a change in the law and narrowing the grounds for abortion (Sobczak, , https://www.prawo.pl/prawo/wyrok-tk-ws-aborcji-jest-uzasadnienie-bedzie-publikacja,506088.html; Książkowski, https://pulsmedycyny.pl/w-ciagu-ostatnich-30-lat-tylko-cztery-panstwa-zaostrzyly-przepisy-aborcyjne-w-tym-polska-1213006).

The ruling sparked a wave of protests (https://www.gazetaprawna.pl/wiadomosci/kraj/artykuly/9304353,zapadl-wyrok-wobec-studentki-protestujacej-po-werdykcie-tk-ws-aborcji.html). It is important to note, however, that the responsibility for the decision taken by the judges of the Constitutional Court was, so to speak, distributed, because in parallel with the judges themselves, the politicians of the government of the day, as well as the Roman Catholic Church as the one that has always stood in defense of conceived life, were blamed for it (Ostaszewski, 2012, p. 261 and n.; Wenz, 2016, pp. 127 and n). Paradoxically, it was on the latter that the greatest criticism was focused, as can be seen from publications of the period. Thus, the change in the abortion law renewed the discourse as to the lack of a proper boundary in the relationship between the state and the Roman Catholic Church (Kocemba & Stambulski, *Gotowanie żaby. Prawicowy konstytucjonalizm a prawa kobiet w Polsce*, https://pure.eur.nl/ws/portalfiles/portal/96220327/SSRN-id4365933.pdf; Łętowska, *Wokół wyroku Trybunału Konstytucyjnego w sprawie aborcji*, https://monitorkonstytucyjny.eu/wp-content/uploads/2020/11/Letowska_NRA-Tezy.pdf.) .

Another problem that appears to blur the boundary between the state and the church is the issue of the acquisition of agricultural land and subsidies for the Roman Catholic Church and related institutions. According to the wording of Art. 2a. Ust. 1. of the Act of April 11, 2003 on the formation of the agricultural system, "The purchaser of agricultural real estate may only be an individual farmer, unless the law provides otherwise" and in accordance with Article 2a, paragraph 3 point 1 sub-point d) of the cited Act, some of those excluded from this restriction are "legal persons acting on the basis of regulations on the

relationship of the State to the Catholic Church in the Republic of Poland, on the relationship of the State to other churches and religious associations and on guarantees of freedom of conscience and religion,". Accordingly, the Roman Catholic Church has obtained an entitlement that, and the public perception, goes far beyond the function and role it has to perform, which does not go unnoticed.

In this aspect, the analysis additionally needs to be deepened by the issue of the niodpaty transfer of land. In fact, according to the provisions of the Act of May 17, 1989 on the relationship of the State to the Catholic Church in the Republic of Poland, Article 70a, "1. To legal entities of the Catholic Church, which after May 8, 1945 undertook their activities in the Western and Northern Territories, may be, at their request, transferred free of charge for ownership of land located in the resources of the State Land Fund or in the Agricultural Property Stock of the State Treasury. If the land is under the management or use of legal entities, the transfer to ownership may be made only with the consent of these entities. (2) The size of the transferred agricultural property, together with agricultural land already owned by the applicant, may not exceed for: 1) farms of parishes - 15 hectares; 2) farms of dioceses - 50 hectares; 3) farms of seminaries, diocesan and religious seminaries - 50 hectares; 4) farms of houses of religious congregations - 5 hectares, unless these houses carry out the activities referred to in Articles 20 and 39; in these cases, agricultural real estate of up to 50 hectares may be transferred. (3) The transfer of real estate referred to in paragraphs (1) and (2) shall be effected by a decision of the governor having jurisdiction over the location of the real estate, issued with the approval of the President of the Agricultural Property Agency of the State Treasury." This decision is the basis for making entries in the land and mortgage registers. Based on the above provision, by November 30, 2023, a total of 90.4 thousand hectares of land were transferred free of charge to church legal entities (not only Roman Catholic), of which 82.7 thousand hectares (equivalent to 91.5%) concerned free transfers of real estate to legal entities of the Catholic Church

(https://orka2.sejm.gov.pl/INT10.nsf/klucz/ATTCZZJV4/%24FILE/i00191-o1.pdf.).[1]

Moreover, it should not be overlooked that Poland also has the institution of the Church Fund, which was established under Article 8 of the Law of March 20, 1950 on the State's taking over of dead-end property, guaranteeing pastors possession of farms and establishing the Church Fund (Official Gazette 1950 No. 9 item 87 with changes).

At the time of its establishment, the fund was an institution tasked with managing church finances obtained from the state takeover of church property (Tyrakowski, 2009). Nowadays, its role has changed, for although Article. 9 of the law, which indicates the main purposes of the Church Fund as: maintenance and reconstruction of churches, providing material and medical assistance to clergy and organizing rest homes for them, covering clergy with sickness insurance at the expense of the Church Fund in justified cases, special retirement provision for socially meritorious clergy, performing charitable-care activities; it has become primarily an institution through which the state subsidizes the Church. Consequently, it has become a point of disagreement between conservative and liberal parties. While conservative parties in power supported the fund with large sums of money, which was met with accusations of buying the support of the church, liberal parties minimize this financial support for the church. This situation is most clearly illustrated by information from the website of the Ministry of Internal Affairs and Administration, in which we read that "In the draft budget law for 2024, 11,000,000.00 PLN was planned. The Minister of Internal Affairs and Administration informs that the maximum amount of subsidy provided from the Church Fund in 2024 will be PLN 200,000.00. In justified cases, taking into account important social interests, the Minister of the Interior and Administration may grant a higher subsidy than PLN 200,000.00" (https://www.gov.pl/web/mswia/fundusz-koscielny). It is

[1] Reply to the interpellation of the Minister of Agriculture and Rural Development Czesław Siekierski Warsaw, January 30, 2024 case no: DNI.mr.058.37.2023, No. 191, dated December 19, 2023, brought by Ms. Anita Kucharska-Dziedzic, Member of the Parliament of the Republic of Poland.

worth mentioning that this budget bill was prepared by the conservative coalition, after the change of government on December 13, 2023, the liberal coalition came to power in Poland.

And when the amounts of subsidies for church-related institutes, such as those related to the Lux Veritatis Foundation and other entities, are added to this, the allegations of a violation of the boundary between the state and the Church gain new light.[1]

At least one more issue remains within the scope of the issue at hand, namely religious instruction in schools. According to Article 12 of the Law - Education System, "1. Public kindergartens and elementary schools organize religious instruction at the request of parents, public secondary schools at the request of either parents or the students themselves; after reaching the age of majority, religious instruction is decided by the students.2. The minister responsible for education and upbringing, in consultation with the authorities of the Catholic Church and the Polish Autocephalous Orthodox Church and other churches and religious associations, shall determine, by regulation, the conditions and manner in which schools perform the tasks referred to in paragraph 1."

At the same time, it is necessary to note that alternative to this religious instruction is ethics (Article 44a).[2]

Nevertheless, the fact of religious instruction in school raises doubts. On the one hand, the outflow of students from religious instruction in schools is emphasized, while on the other hand, statistical

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[1]According to Onet reports, "in the years 2015-2023, as part of open bid competitions announced by Zbigniew Ziobra, who was the disposer of the Justice Fund, the Lux Vertitatis Foundation and the Higher School of Social and Media Culture in Torun were awarded grants totaling PLN 22,147,933.65. Of this, PLN 21,499,908 went to the account of the Lux Vertitatis Foundation.". Per, *Miliony z Funduszu Sprawiedliwości dla imperium Rydzyka. Ministerstwo ujawnia kwoty*, https://businessinsider.com.pl/wiadomosci/miliony-z-funduszu-sprawiedliwosci-dla-imperium-rydzyka-ministerstwo-ujawnia/g2y4z1t.

[2] Detailed conditions for instruction are contained in the Regulation of the Minister of National Education of April 14, 1992 on the conditions and manner of organizing religious instruction in public kindergartens and schools (consolidated text: Dz.U. of 2020, item 983).

data is shown that speak in favor of religious instruction in schools. In light of the latter, according to data for 2023, about 80.3% of students in Polish schools and kindergartens attended religious lessons. At the same time, it should be noted that this is almost 8 percentage points less than four years earlier, as 88% of students attended religious lessons in the 2018/2019 school year (https://www.ciekawestatystyki.pl/2023/07/jaki-procent-uczniow-chodzi-na-religie.html). The noted decline, however, does not change the fact that the number of students attending religion in Poland is still very high. Which, in turn, for opponents of religious instruction in schools is an argument formulated against the Roman Catholic Church regarding state funding of catechists' employment (https://www.ekai.pl/mein-w-polskich-szkolach-religii-uczy-402-tys-katechetow-i-4-tys-nauczycieli-etyki/.). It should be noted that recently the new coalition government has proposed changes in this matter involving a reduction from two to one per week in the number of hours of religion in schools, as well as a change in the rules for grading this subject, so that the grade in religion does not affect a student's grade point average, which was met with a negative evaluation of the proposed solutions by the Polish Episcopate (https://jaw.pl/2024/05/men-zapowiada-zmiany-w-lekcjach-religii-episkopat-protestuje/).

Another sensitive matter in relations between the State and the Roman Catholic Church is the issue of removing crosses in public places in Warsaw.[1] The ordinance on the introduction of "Standards for Equal Treatment in the Office of the City of Warsaw" was issued by Warsaw Mayor Rafal Trzaskowski on May 8, 2024, and was immediately met with a wave of criticism. This is because opponents of such a solution stress that the cross in Poland is not only a symbol of religious worship but also a symbol of history, the struggle for independence and even a symbol of Polishness. Supporters, on the other hand, speak of equality and non-discrimination (https://konkret24.tvn24.pl/polska/zakaz-krzyzy-

[1]Ordinance No. 822/2024 of the President of the Capital City of Warsaw dated May 8, 2024, on the introduction of Standards for Equal Treatment in the Office of the City of Warsaw., https://bip.warszawa.pl/NR/exeres/55281F81-693C-4E0A-B176-97856994CA36,frameless.htm.

hartman-pisze-o-zdjeciu-krzyzy-w-warszawskim-ratuszu-urzad-nie-beda-zdjete-st7936009; K. Broda, Trzaskowski wydał zarządzenie zdjęcia krzyży w urzędach. Gosiewska złożyła formalny sprzeciw, https://www.gazetaprawna.pl/wiadomosci/kraj/artykuly/9511006,trzaskowski-wydal-zarzadzenie-zdjecia-krzyzy-w-urzedach-gosiewska-zlo.html).

Conclusions

The building of relations between the State and the Roman Catholic Church in Poland has been going on for very many years. The development of a normative compromise came with the adoption of the Polish Constitution in 1997, Article 25 of which defined the equality of churches and religious associations and the worldview neutrality of the Republic. The adoption of the Basic Law, although it defined Poland as a secular state, did not, however, lead to the cessation of discussions as to the shape of the relationship between the state and the Roman Catholic Church - on the contrary. It started a discussion that has been going on uninterruptedly for more than 25 years regarding the limits of cooperation between the State and the Church in question. This boundary, as history shows, has been pushed hard. But what can be read from its shifting is a certain regularity in that, to a large extent, relations between the State and the Roman Catholic Church depend on the government, which, as a conservative traditionalist, tightens them by adopting solutions in line with the teachings of the Roman Catholic Church, or, as a liberal, loosens them by undertaking liberal regulations. And the best example of how difficult it is to maintain balance in these relations is shown by Poland's experience over the past 25 years. For on the one hand, that balance is high financial subsidies, laws that are hard to connect and explain to faith itself - such as those regarding the ability to acquire land and the church's interference in abortion issues, and on the other hand, there are the statistics that say more than 71 percent of Poland's population is Catholic and public resistance to removing crosses from public places. These are two sides of the same coin, of a very

delicate matter, the punchline of which is best captured by the phrase "what is divine to God, what is imperial to the Emperor" and it seems that this is exactly how this relationship should be shaped.

There is no prescription for this relationship remains only common sense.

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CONSORTIUM AS AN „ENTITY" IN PUBLIC PROCUREMENT

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***Abstract**: The participation of consortia in public procurement is common, as it gives a better chance of winning a procedure under such a contract. A consortium constitutes a single 'entity' vis-à-vis the contracting authority, whose liability is governed by the law and the contract concluded with the contracting authority. On the other hand, a doubt arises as to whether a consortium constitutes a civil law entity and should be treated as an entity of rights and obligations. It can be assumed that, while from the point of view of civil law a consortium doesn't constitute a separate entity, its legal status is unregulated, as it constitutes a contract concluded between its members. This gives rise to the conclusion that a consortium constitutes a specific legal 'creation' used for the purposes of public procurement. In other words consortium must therefore be regarded as a form of joint venture, i.e. a grouping of entrepreneurs who enter into a contract for a specific purpose, but which has no institutionalised form and can't be treated as a separate entity under civil law.*

***Keywords**: consortium; public procurement; leader; liability; contracting authority; contractor.*

Introduction

Joint Venture Agreements (JVs) include various forms of economic cooperation, i.e. those aimed at achieving a specific economic goal. This is particularly important in public procurement, where the

cooperation of several (usually smaller) entities increases their potential in various respects (experience, financial resources, human factor, machinery, etc.), as they are unable to meet the conditions for participation in the procedure or bear the risk of the contract on their own. Such cooperation makes it possible to obtain and then execute a contract. Opening up the possibility of competing for the award of a public contract to the widest possible group of entities is intended to increase the competitiveness and effectiveness of the procedures, ensuring the most harmonious development of the entire economy.

Joint bidding is common in public procurement procedures, especially using the consortium formula. In such a case, the consortium appears as a single 'entity', although in legal terms it isn't a civil law entity and has no legal personality. It may be argued, however, that no separate legal entity is created as a result of the conclusion of such an agreement; it's the members of the consortium – despite the conclusion of the agreement – who remain legal entities, regardless of whether they all act as a single entity vis-à-vis the contracting authority. Thus, under both EU and national law, a consortium doesn't enjoy legal capacity, legal capacity, judicial capacity or procedural capacity. It's also important to note that the contracting authority may not impose on joint tenderers any requirements connected with the performance of the contract other than in relation to individual tenderers, if this isn't justified by the nature of the contract and proportionate to its subject matter.

The essence of a consortium

The consortium agreement hasn't been regulated in international law and the Polish Civil Code, nor has it been comprehensively covered in any other normative act. In Polish law, either the implementation of a joint venture or the concept of a 'consortium' is referred to directly in: Article 58 of the Act of 11 September 2019 – Public Procurement Law[1],

[1] Consolidated text Official Journal of the Republic of Poland (OJ RP) 2023, item 1605, as amended.

Article 73 of the Act of 29 August 1997 – Banking Law[1], Article 2(3) and Article 24 of the Act of 26 June 2014 on Certain Contracts Concluded in Connection with the Implementation of Contracts of Fundamental Importance for State Security[2], Articles 14a and 15a of the Act of 29 July 2005 on Public Offering, Conditions Governing the Introduction of Financial Instruments to Organised Trading, and Public Companies[3], Articles 165 and 365(15) of the Act of 20 July 2018 – Law on Higher Education[4], although not every piece of legislation explicitly refers to this concept (reference is made to a joint venture or federation). With regard to European law, reference should be made to Article 19(2) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on Public Procurement, repealing Directive 2004/18/EU[5], which refers to a 'group of contractors'.

A consortium is a manifestation of the needs of practice in relation to business dealings, in particular in order to increase the capacity of entities that would otherwise be forced to act (perform) alone. The members of a consortium therefore conclude a contract that meets certain characteristics. The basis for the creation and subsequent operation of a consortium is a contract for joint action by the partners (consortium members) who, by concluding such a contract, act as independent and autonomous entities (entrepreneurs). Consortium members exercise freedom of contract (contractual freedom) to a broad extent, i.e. they may arrange the consortium relationship at their own discretion, as long as its content or purpose do not contradict the properties (nature) of the relationship, the law or the principles of social co-existence (Article 353^1 of the Civil Code). The consequence of a breach of the limitation of the principle of freedom of contract is the recognition of a legal act (agreement) as having been performed outside the scope of statutory authority, and therefore invalid in whole or in part pursuant to Article 58

[1] Consolidated text OJ RP 2023, item 2488, as amended.
[2] Consolidated text OJ RP 2022, item 1218.
[3] Consolidated text OJ RP 2022, item 2554, as amended.
[4] Consolidated text OJ RP 2023, item 742, as amended.
[5] Official Journal of the EU L No. 94, p. 65, as amended.

§ 1 and 3 of the Civil Code (Kozieł, 2023, p. 753). This sanction may, in certain cases, be excluded by the law in favour of another sanction that is better adapted to the particular case of the consequences of a defective action (Machnikowski, 2005, p. 353 et seq.).

Consortium members may conclude a contract that corresponds both to their common purpose (the intended undertaking) and to their individual objectives and needs. Within the framework of this freedom, the parties to a civil relationship may conclude not only a named contract (a contract provided for by law and therefore corresponding to a normatively defined type of obligation), but also an unnamed contract (a contract not regulated by law and therefore not corresponding to a normatively defined type of obligation). Such an unnamed contract is, among others, a consortium agreement.

The possibility to establish a legal relationship (in this case, a consortium relationship) means, first of all, the possibility to establish performance obligations incumbent on either or both parties to the contract; to determine the circumstances upon which performance is to be performed; to decide whether the performance obligation is to be performed personally by the debtor or whether it may be performed by another person (Machnikowski, 2023, art. 353^1, side number 8). Incidental and ancillary rights and obligations are also relevant. In doing so, the parties to a consortium agreement should have regard to both the internal relationship (between the consortium members) and the external relationship (between the consortium members and third parties). For, on the one hand, it is a contract concluded between at least two entities, and on the other hand, its purpose is the joint implementation of a specific economic undertaking, the execution of which would exceed the individual capabilities of each of the participants.

Neither in the doctrine nor in the judicature has a uniform legal characterisation of a consortium agreement been developed, and – as has been pointed out – it isn't regulated by law, so it isn't possible to define the features of this agreement on the basis of statutory criteria. It's generally accepted that a consortium is a contractual legal relationship between entrepreneurs aimed at working together to implement a specific

business venture. Thus, a consortium agreement is intended to be temporary in nature, limited by the duration of an established task or several tasks. Members of a consortium assume in advance that the legal relationship between them is not permanent, and that it'll cease to exist if they fail to obtain a public contract (fail to win a tender), or if, having obtained such a contract, they implement the subject of the agreement concluded with the contracting authority (the investor). The members of a consortium thus jointly bear the risk and obtain benefits in connection with the implementation of a specific economic undertaking.

Types of consortia

The diversity of factual and legal situations makes it impossible to give a uniform legal qualification to a consortium and to put this type of agreement into a single scheme. This is because everything depends on whether the members of a consortium disclose to the outside the legal relationship linking them and how they arrange it. This first criterion makes it possible to distinguish: (1) open (external) consortia – externally (vis-à-vis third parties), all consortium members act in a joint name, bearing joint liability, and they usually grant a power of attorney to one of them (the consortium leader), acting within the framework of the consortium agreement; (2) secret consortia – externally, one consortium member acts in its own name and as an indirect substitute; (3) internal consortia – consortium members act externally on their own, and the agreement is limited to provisions concerning the coordination of the activities of individual participants[1]. In the case of so-called construction (investment) consortia, there are usually external consortia, when the consortium members define in the contract the scope of work of the individual participants performing the entrusted task independently and at their own expense; the function of the consortium agreement is then to

[1] See the Order of the Supreme Court of the Republic of Poland of 6 March 2015, III CZP 113/14.

share the risk of contract performance and the division of obligations under the quality guarantee granted[1].

Taking into account the second criterion, it's possible to speak of a consortium as a civil partnership (the material elements of a civil partnership must occur[2]), its subtype or a consortium of an independent nature. Where it is apparent from the content of the legal relationship that the consortium agreement displays the essential features of a civil partnership, the provisions of the Civil Code on civil partnerships (Articles 860 et seq.) should be applied to it. If the contract does not show all the features of a civil partnership (in particular, there are no common assets and organisational ties), it should be qualified as a non-named contract similar to a civil law company, and the provisions on civil partnership should be applied, as a rule, per analogiam. The differences between a civil law partnership and the degree of organisational unity on the part of the consortium members indicate that these provisions should be applied with caution. Since the consortium members did not conclude a civil partnership agreement, but chose a more flexible form of cooperation adapted to their needs, it is the agreement and the intention of the parties, and not the rules governing a civil partnership, that should be decisive. If, on the other hand, the consortium agreement does not exhibit the features of a partnership agreement, the application of the provisions on that agreement shouldn't take place.

As a general rule, a consortium doesn't operate in the form of a civil partnership unless the parties have shaped the legal relationship between them in such a way that the structural requirements characteristic of such a partnership are met. Elements distinguishing a consortium agreement from a civil partnership agreement include:

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[1] See the judgment of the Supreme Court of the Republic of Poland of 20 November 2014, V CSK 177/14, „Monitor Prawa Bankowego" 2015, No. 10, p. 43.

[2] Pursuant to Article 860 § 1 of the Civil Code, by the contract of a civil partnership, the partners undertake to pursue a common economic goal by acting in a specified manner, in particular by making contributions; see the judgment of the Supreme Court of the Republic of Poland of 13 October 2011, V CSK 475/10.

- the orientation towards joint action for the purpose of realising a specific business venture;

- the temporary nature of the contractual relationship and the lack of intention to continue cooperation after the performance of the contract for which it was concluded.

- the appearance of consortium members in external relations independently and autonomously;

- the absence of a single organisational and legal form;

- definition in the contract of the individual tasks of the consortium members;

- lack of an extensive organisational link between the parties;

- no common property of the parties, including no obligation to make contributions.

A distinction is also made between centralised and decentralised executive consortia. A centralised consortium is considered to be one which provides for the function of a leader with extensive powers to represent the consortium as a whole in its legal relations with the contracting authority. The obligatory relationship arising from a public procurement contract is shaped between this consortium (group of consortium members) and the contracting authority in such a way that the individual consortium members are co-contractors of a joint investment task in a multi-entity but bilateral obligatory relationship (the internal division of works between the consortium members is indifferent for the contracting authority). In a decentralised consortium, on the other hand, the individual participants are able to act independently and enter into a direct obligatory relationship with the contracting authority in their own name and on their own account. While concluding specific agreements with the contracting authority, the consortium participants may act within the framework of the general consortium agreement, but within the limits of participation in the joint venture indicated in that agreement[1].

[1] See the judgments of the Supreme Court of the Republic of Poland: of 7 November 2014, IV CSK 95/14; of 10 September 2015, II CSK 630/14; of 31 January 2023, II CSKP 584/22, „Orzecznictwo Sądu Najwyższego Izby Cywilnej – Zbiór dodatkowy" 2024, No. 1, item 4.

Consortium members competing for a public contract under EU law

According to Article 19(2) sentences 1 and 2 of Directive 2014/24, groups of economic operators, including temporary associations, may take part in procurement procedures, without the contracting authorities being able to require them to have a specific legal form in order for such groups to submit a tender or request to participate. An economic operator is to be understood as any natural or legal person, public entity or group of such persons or entities, including a temporary association of undertakings, which offers on the market the execution of works or a work, the supply of products or the provision of services (Article 2(10) of Directive 2014/24).

Linked to the above is the principle of non-discrimination expressed in Article 19(1) sentence 1 of Directive 2014/14: "Economic operators which, under the law of the Member State in which they are established, are entitled to provide the services in question, may not be rejected solely on the ground that, under the law of the Member State in which the contract is awarded, they would be required to be natural or legal persons.". The organisational forms permissible under public procurement law under which economic operators operate must therefore be assessed in the light of the provisions of the national law in which the cooperation formula in question is established (Pawelec, 2017, art. 19, side number 2).

As pointed out in the case law, Member States have the possibility to authorise certain categories of economic operators to provide certain services; in particular, they may or may not allow non-profit-making entities whose main purpose is to carry out scientific and teaching activities to operate on the market depending on whether such activities are compatible with their statutory objectives. Nevertheless, where such entities are entitled to offer certain services on the market, national law may not prohibit them from participating in a public

procurement procedure for such services[1]. The term 'economic operator' in Article 2(1)(10) of Directive 2014/24 should be interpreted 'broadly' to include any person or entity operating in the market, 'irrespective of the legal form which those persons or entities have chosen for the purpose of carrying out their activities'[2].

Thus, both entities with a permanent structure (e.g. natural persons, legal persons) and 'entities' set up specifically for this purpose (in particular consortia) may compete for public contracts. Consequently, a national rule providing for the automatic exclusion of permanent consortia and their constituent entrepreneurs, irrespective of whether or not the consortium in question participates in a public contract on behalf of and in the interests of the companies that submitted the tender, constitutes discriminatory treatment to the detriment of that form of consortium and is therefore incompatible with the principle of equality. Even if the treatment in question were to be applied indiscriminately to all forms of consortium or if the national court were to find that there are objective elements inherent in the distinction between the situation of a permanent consortium and that of other forms of consortium, such an exclusionary rule is by no means compatible with the principle of proportionality. A systematic exclusion rule involving an absolute obligation on the contracting authorities to exclude the entities concerned, even where the existing relationships between the latter do not affect their conduct in the procedures in which they participate, runs counter to the Community interest in ensuring the participation of as many tenderers as possible and goes beyond what is necessary to achieve the objective of ensuring the application of the principles of equal treatment and transparency. Alternatively, such a restriction may be justified to the extent that it pursues a legitimate objective of general

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[1] See, e.g., the judgments of the CJEU: of 23 December 2009, C-305/08, CoNISMa, EU:C:2009:807, para. 47-49; of 18 December 2014, C-568/13, Data Medical Service, EU:C:2014:2466, para. 36; of 6 October 2015, C-203/14, Consorci Sanitari del Maresme, EU:C:2015:664, para. 35.

[2] See the judgment of the CJEU of 11 June 2020 r., C-219/19, ANAC, ECLI:EU:C:2020:470, para. 22.

interest, and to the extent that it's appropriate to guarantee its attainment and doesn't go beyond what is necessary to attain that objective[1]. However, EU law doesn't preclude a national provision under which members of a company established for a particular purpose (a consortium), without legal personality, which has participated as such in a public procurement procedure and hasn't been awarded the contract, only all of them together – either as partners or on their own behalf – may bring an action against the decision awarding the said contract, and according to which a single member of such a consortium may not individually – either as a partner or on its own behalf – bring an action against the decision awarding the public contract. This is subject to the condition that this national rule does not prevent or unduly impede the application of Community law; this is particularly the case where national law allows for different solutions to be adopted by members of a group of economic operators[2].

Article 19(2) of Directive 2014/24 entitles the contracting authority to specify the fulfilment of the conditions for participation of the consortium in the procedure, which should be limited to the technical manner of fulfilling or documenting the conditions for qualification, provided that such requirements are objectively justified and proportionate. Additional (other) conditions, not foreseen for entities participating individually in a public contract, may not be introduced. The clarification can take place in the contract documents, but also at the level of national legislation. This may concern, in particular, the designation of all members of the consortium or the appointment of a representative by the consortium members to liaise with the contracting authority.

The Directive doesn't derive from the rules on cooperation between members of a group of economic operators (consortium) as to their liability towards the contracting authority. These rules should

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[1] The judgment of the CJEU of 23 December 2009 r., C-376/08, Comune di Milano, ECLI:EU:C:2009:808, para. 37-40, 44.

[2] See the judgment of the CJEU of 8 September 2005, C-129/04, FOREM; ECLI:EU:C:2005:521, para. 77.

therefore result from national law (Pawelec, 2017, art. 19, side number 7). If joint and several liability of the consortium members is established, which is best from the point of view of the contracting authority and to which reference is made in recital 15 of Directive 2014/24, the organisational form may be specified when such a group is awarded the contract. However, the power of the contracting authority to require groups of economic operators to adopt a particular legal form, in so far as this is necessary for the satisfactory performance of the contract (Article 19(3) of Directive 2014/24), shouldn't lead to exclusion from the procedure solely on the basis of this criterion.

Consortium members competing for a public contract under Polish law

Similarly, as follows from Article 7(30) of the Public Procurement Law – a contractor may be any civil law entity, i.e. a natural or legal person, or an organisational unit which is not a legal person, to which legal capacity is granted by law (art. 33^1 of the Civil Code – e.g. a partnership or a capital company in organisation). The Public Procurement Law doesn't provide for the contracting authority's right to limit the possibility for contractors jointly applying for the award of the contract to participate in the procedure. There are also no provisions limiting the number of such contractors. Any restriction of the possibility for more than one contractor to compete for the award of a contract makes it difficult for smaller entities to participate in the procedure, acquire new competences and experience, and thus closes access to the procurement market, with the effect of limiting competitiveness. Therefore, for example, there are no grounds for allowing contractors who have entered into a civil partnership agreement, but not those who are bound by a consortium agreement, to compete jointly for the award of

a public contract[1] – such distinction constitutes an infringement of the law.

However, economic operators competing jointly for the award of the contract shall attach to the request to participate in the procedure or to the tender, respectively, a statement from which it follows which works, supplies or services will be performed by individual economic operators, and if their tender has been selected, the contracting authority may request, prior to the conclusion of the public procurement contract, a copy of the agreement regulating the cooperation of these economic operators (Articles 59 and 117(4) of the Public Procurement Law) (Czerwiński, 2020, p. 266 et seq.). *Ratio legis* of those rules is to make it possible to verify at the stage of selecting the contractor whether the planned division of tasks between the consortium members ensures the real use of their declared resources in order to confirm that the conditions for participation in the procedure are met, and it's only in the consortium agreement that it's specified in detail to what extent a given consortium member will perform the contract[2]. This is justified in particular in the case where the contracting authority has reserved a specific manner of contract execution by consortium members. This is because it makes it possible to verify whether the contractors' agreement actually corresponds to the contracting authority's requirements regarding contract performance and the content of the previously submitted declaration. While the conditions for performing the contract should be the same for individual contractors and consortium members, if it's justified by the nature of the contract, the contracting authority may reserve special conditions for the performance of the contract for consortium members (e.g. as regards the division of tasks during contract performance, assumption of risk, financial burdens). In addition, pursuant to Article 60 of the Public Procurement Law, the contracting authority may reserve the obligation for individual contractors jointly applying for a public contract

[1] The judgment of the Regional Court in Warsaw of 15 September 2022, XXIII Zs 110/22.

[2] See the judgment of the National Board of Appeal of 18 January 2022, KIO 3795/21.

to perform personally the key tasks relating to a works or services contract and works related to the deployment and installation under a supply contract.

If there is a discrepancy between the required contract performance and the contractors' contract, the contracting authority may refuse to conclude a public procurement contract and request the contractors to amend the contract between them in order to bring it into line with the provisions of the contract documents regarding the contract performance requirements. If the contracting authority hasn't specified the requirements related to the execution of the contract by contractors jointly tendering for the contract, a copy of the contract will be provided to the contracting authority for information only (Jarnicka, 2023, art. 59, thesis number 2).

If contractors apply jointly for the award of a contract, they appoint a proxy to represent them in the contract award procedure or to represent them in the procedure and conclude the public procurement contract (Article 58(2) of the Public Procurement Law). This may be an external entity, but in practice it is usually one (usually the largest) of the consortium members – the leader. This power of attorney is a generic power of attorney, so it should indicate the activities that the attorney is authorised to perform. With regard to contractors competing jointly for the award of a contract, the contracting authority may also define the requirements related to the performance of the contract in a different manner than with regard to individual contractors, if this is justified by the nature of the contract and proportionate to its subject matter (Article 58(4) of the Public Procurement Law). This is a solution in line with Directive 2014/24. Therefore, if the contracting authority does not specify such requirements, consortium members are free to shape their obligations during the execution of the contract; however, this doesn't change the principle of their liability towards the contracting authority.

Liability of consortium members

As a result of a joint bid, an obligation is incurred concerning their common property (consortium members) (Pieróg, 2015, p. 134; Sieradzka, 2015, p. 26.). As indicated, Directive 2014/24 doesn't regulate the liability of consortium members, leaving the regulation of this matter to national legislation, while somehow suggesting – as the best solution – joint and several liability. Such a regulation can be found in Polish law, since if contractors have jointly competed for the award of a public contract, have concluded a contract with the contracting authority (usually through a leader), each of the consortium members becomes a party to that contract and incurs a joint and several liability for the performance of the contract and the payment of a performance bond (Article 445(1) of the Public Procurement Law)[1] – this is joint and several liability of the debtors, which doesn't apply to a public procurement procedure (Sieradzka, 2022, p. 982), but only from the time the contract is concluded. Accordingly, the investor (ordering party) has the right to demand the fulfilment of all or part of the performance from all debtors jointly, from several of them or from each of them individually, and the satisfaction of the creditor by any of the debtors releases the others; until the creditor is fully satisfied, all joint and several debtors remain obliged to perform (Article 366 § 1 and 2 of the Civil Code). This is the case irrespective of the internal relationship within the consortium. The consortium leader is therefore not liable alone, but represents the consortium members until the termination of the power of attorney (in particular as a result of the termination of the power of attorney).

The principle arising from Article 445(1) of the Public Procurement Law should be understood broadly, i.e. that it also covers

[1] This rule shall not apply to a contract awarded by way of an innovation partnership to economic operators competing jointly for the award of the contract; in such a case, the consortium members shall be liable for the performance of the contract and the lodging of a performance bond for the part they perform in accordance with the contract concluded between those economic operators.

liability for compensation for damage caused by non-performance or improper performance of an obligation and a claim for performance of the contract in accordance with the content of the obligation (Lic, 2008, pp. 113-114). Within the framework of the principle of freedom of contract (Article 353[1] of the Civil Code), the members of a consortium may shape the principles of liability in internal relations (within the consortium) and external relations (as to solidarity). There is no doubt, however, that the principles of liability introduced in the internal relationship, which haven't been directly or indirectly recycled into the external relationship (i.e. into the contract linking consortium members with the ordering party), aren't binding on its counterparties (therefore, a provision of the consortium agreement excluding joint and several liability of consortium members towards the ordering party will be void - Jerzykowski, 2021, art. 445, thesis number 2; Giordano, 2022, p. 35; Nowicki, 2023, art. 445, thesis number 2). Obligation relationships belong to those categories of civil law relationships that create ties of a relative nature between their participants, meaning that they are only effective between their parties[1]. Accordingly, such consortium arrangements don't affect their joint and several liability vis-à-vis the contracting authority; they are, however, relevant for settlements between consortium members on a recourse basis.

Potential acquired within a consortium

In the case of joint performance of a contract, each participant in the consortium acquires experience in relation to the performance of that contract. Since the contractors are jointly and severally liable for the performance of the contract, they also jointly acquire the necessary experience in performing the work that is the subject of the contract. Therefore, each of them may, in subsequent public procurement procedures, use the reference documents obtained confirming proper

[1] See the order of the Supreme Court of the Republic of Poland of 6 March 2015, III CZP 113/14.

performance of the jointly executed subject matter of the contract. This experience can't, however, be limited only to the activities actually carried out by the individual consortium members[1].

It would therefore seem obvious that such potential could be used by all contractors in subsequent public procurement procedures. Nevertheless, in the judgment of 3 July 2017[2] The CJEU pointed out that Article 44 in conjunction with Article 48(2)(a) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts[3], in conjunction with the principle of equal treatment of economic operators, must be interpreted as not allowing an economic operator participating individually in a public procurement procedure to rely on the experience of a group of economic operators of which it was a member for another public contract, if it didn't actually and specifically participate in its performance. As the current Directive 2014/24 doesn't contain any regulation to the contrary, this view could be considered valid, despite the acceptance of joint and several liability of consortium members for the performance of the contract[4].

Following the above the judgment of the CJEU, the National Board of Appeal accepted that it's necessary to examine the actual participation of the entity claiming to have performed a previous task under a public contract in its performance[5]. If the joint venture entities

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[1] The judgment of the National Board of Appeal of 2 September 2011, KIO 1794/11.

[2] C-387/14, Województwo Łódzkie, EU:C:2017:338, thesis 2.

[3] Official Journal of the EU L No. 134, p. 114, as amended.

[4] Compare K. Kuźma, W. Hartung, *Doświadczenie konsorcjum a doświadczenie członków konsorcjum*, „Zamówienia Publiczne Doradca" 2017, No. 6, p. 61 et seq., who believe that, in the light of the Tribunal's judgment cited above, the problem of the extent of experience gained by individual consortium members (and, at the same time, the possible negative consequences resulting from improper contract performance) needs to be reconsidered and resolved in Poland, and perhaps also a discussion about abolishing or limiting the statutory joint and several liability of contractors acting in a consortium.

[5] The judgment of the National Board of Appeal of 21 December 2018, KIO 2534/18.

were organisationally linked and the subject matter of the contract was a whole from which the work couldn't be separated and attributed to specific entities, it follows from the very nature of the integrated consortium activity that the work is performed jointly. When the contractor has a real influence on the execution of the project, the possibility of relying on the experience gained as part of an integrated consortium cannot be excluded[1].

Therefore, the assessment of experience gained within a consortium should be approached individually in each case, taking into account above all the content of the condition for participation in the proceedings, specific activities of the contractors during the implementation of the investment indicated in confirmation of meeting this condition and the actual possibility of separating and dividing tasks between individual members of the consortium. It's also important how a contractor invoking experience and knowledge gained in the course of a task performed by a group of contractors demonstrates these circumstances, be it by submitting required lists, references, additional explanations, consortium agreements, invoices for performance of individual elements of the contract, internal arrangements between consortium members, other arrangements. It therefore appears that in order to resolve the issue of whether a given contractor, as a member of a consortium, may rely on experience gained within such a group, the most important factor will be the evidence presented to the contracting authority confirming the actual scope of activities performed by a given entity and the relevance of these activities to the entire subject matter of a given contract[2]. An economic operator acquires real experience not by virtue of the mere fact of being a member of a group of economic operators and whatever contribution it has made to that group, but solely by virtue of its direct participation in the performance of at least one part of the contract which the group of economic operators is required to perform in its entirety. An economic operator may not rely on the

[1] The judgment of the National Board of Appeal of 30 July 2019, KIO 1350/19.
[2] The judgment of the National Board of Appeal of 30 March 2021, KIO 565/21.

performance of services by other members of the group of economic operators in the performance of which it has not actually and specifically participated[1].

Conclusions

The purpose of this study was to present the legal status of a consortium, both in terms of national and EU law, and to show that it isn't a civil law entity that could acquire rights, incur obligations, sue and be sued. All these characteristics are only enjoyed by the members of a consortium who enter into a contract in order to increase their capacity (in all aspects) to win a public procurement procedure, conclude a contract and then perform the subject matter of that contract. A consortium is therefore not an institutionalised form of doing business, it is a contract that its parties can enter into under freedom of contract. Such an arrangement is desirable as it allows an entity with lesser potential to group together and win a public contract. As has been shown, any restriction that would lead to the elimination of economic operators competing jointly for the award of a contract is contrary to EU and national law, unless it is justified by the nature of the contract and proportionate to its subject matter. Situations where certain requirements imposed by the contracting authority on the members of a consortium meet those objectives should be treated as exceptions which cannot be interpreted in an extensive way.

A consortium must therefore be regarded as a form of joint venture, i.e. a grouping of entrepreneurs who enter into a contract for a specific purpose, but which has no institutionalised form and can't be treated as a separate entity under civil law.

[1] The judgment of the National Board of Appeal of 22 June 2022 r., KIO 1397/22.

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REPARATION OF DAMAGE IN THE POLISH CRIMINAL LAW SYSTEM

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Abstract: *One of the basic functions of criminal law is compensation. This publication deals with this aspect, understood as the problem of adjudicating various types of compensation for damage against the background of criminal proceedings. Indeed, in the Polish criminal law system, compensation is not limited solely to the issue of reparation of damage and compensation of harm caused by a crime. Criminal courts also adjudicate in cases concerning compensation for wrongful conviction, detention or pre-trial detention, as well as in very specific compensation cases which are conducted on the basis of the Act of 23 February 1991 on the recognition as invalid of judgments issued against persons repressed for activities for the benefit of the independent existence of the Polish State (the so-called "February Act"). In the latter two cases, therefore, it is a question of compensation, or reparation, due from the State Treasury as a result of improper action by public authorities. The article is an attempt at a comprehensive, holistic approach to the title issue.*

Keywords: *injury; harm; compensation; reparation; criminal law; February law; restorative justice.*

Introduction

The aspect of compensation is extremely important in criminal law. Within the framework of the Polish legal order, it has undergone constant evolution over the years. It has been influenced not without influence by the correlation of needs: to hold the perpetrator criminally

responsible and to ensure proper protection of the interests of persons injured by criminal behaviour (Zgoliński, 2019, pp. 28 – 29).

A milestone against this background turned out to be the amendment of the Criminal Code made on the basis of the Act of 20 February 2015 amending the Act - the Criminal Code and certain other acts (Journal of Laws, item 396). At that time, the legislator implemented a new catalogue of compensatory measures, which were given a different character than before. However, most importantly, from the systemic point of view, compensation in criminal law is not limited only to compensation issues arising against the background of the committed crime. Indeed, a completely separate issue is compensation for persons who have been wrongfully deprived of their liberty by state authorities. Compensation to persons repressed for activities in favour of the independent existence of the Polish State is of yet another nature. The sources of these compensations remain, as a rule, different, which means that the level of their regulation also differs. However, the common denominator here is the realisation of the function of justice, the immanent connection of these compensations with criminal law sensu largo and their vindication within the framework of proceedings conducted by criminal courts.

Moreover, from the substantive law side, the relationship of these institutions with civil law appears to be extremely close. It results, for example, from identical concepts and the necessity to apply relevant regulations and compensation mechanisms, which remain specific to civil law. The systemic approach to the issues in question therefore makes a comprehensive discussion of these issues indispensable. Only in this way is it possible to present their complexity properly.

1. Compensation in terms of substantive criminal law

When analysing Polish substantive criminal law, one should start with the observation that the concept of "damage" here has its own specificity, separate from civil law (Zgoliński, 2018, p. 233).

At the level of civil law, "damage" has no normative specification. It only represents the results of certain interpretative

procedures. The situation is analogous in criminal law. For this reason, it is reasonable to use the expression "criminal damage" or "criminal damage". The accuracy of this thesis is not affected by the fact that the Criminal Code recognises reparation of damage as a compensatory measure.

However, the term clearly indicates that its source remains the criminal act. Moreover, many criminal law provisions use the expression "consequences of the prohibited act". It is necessary to share the view of W. Kubala (Kubala, 1975, p. 74) that this term is synonymous with the concept of damage (cf. Article 6 § 2 of the Criminal Code, Article 15 § 2 of the Criminal Code, Article 101 § 3 of the Criminal Code), although the concept of "effect constituting the hallmark of a prohibited act" is definitely broader than damage itself. In these cases, the effect indicated directly in the content of the provision, which, inter alia, is treated as damage, will be relevant. However, this effect will not always be exclusively reduced to it. In addition, the damage is also specified within the framework of the individual offences. To illustrate this issue, it can be pointed out that, for example, legally relevant in Article 41a of the Criminal Code or Article 199 § 2 of the Criminal Code is damage to a minor, and in Article 282 § 1 of the Criminal Code damage to another person. Similarly, under Article 190 § 1 of the Penal Code, Article 278 § 4 of the Penal Code, Article 279 § 2 of the Penal Code, Article 284 § 4 of the Penal Code, Article 285 § 2 of the Penal Code, Article 286 § 4 of the Penal Code, Article 287 § 3 of the Penal Code, Article 289 § 5 of the Penal Code, damage to another person or a person close to him/her will be relevant. The Polish Penal Code also provides for a gradation of damage. It distinguishes comprehensive damage from partial damage (Article 46 § 1 of the Penal Code,). In addition, there are concepts such as significant damage, damage of a great magnitude, material damage, other serious damage. It also distinguishes between causing damage and the threat of damage (threatened damage - Art. 115 § 2 CC). It also divides damage into repaired damage and damage agreed on the manner of reparation (Art. 60 § 1 point 1 of the Criminal Code, Art. 66 § 2 of the Criminal Code).

In the most rudimentary respect, compensation issues are located in the general part of the Penal Code, in Chapter Va of the Penal Code, entitled "Forfeiture and compensation measures". As a result of the code amendments, as of 1 July 2015, the provision of Article 46 § 1 of the Penal Code stipulates that in the event of conviction, the court may order, and at the request of the victim or other entitled person shall order, applying the provisions of civil law, an obligation to repair, in whole or in part, the damage caused by the offence or to compensate for the harm suffered. However, the civil law provisions on the possibility of awarding an annuity do not apply. The wording of the provision therefore allows for the conclusion that the provisions of civil law will be directly applicable to this compensation measure, with one minor exception, directly specified in the wording of the provision. In turn, the definition of damage, according to Article 361 of the Civil Code, includes the compensation of damage. The damage itself is of a quantifiable nature.

When deciding on damages, the court should precisely determine its amount. The simplest method for the bodies applying the law is the objective method, which consists in considering the damage to a specific good in its detachment from the property of the injured party and possible consequences of the event. However, as it seems, the most authoritative method is the differential method, which boils down to the comparison of three property states of the injured party, i.e. current, previous and hypothetical (potentially possible if the damage had not occurred) (Pisuliński, 2017, p. 66). In each case, the determination of the amount of damage suffered is made more difficult in the face of the determination of lost benefits and non-property damage. In this type of cases, in place of reparation of damage or compensation, it becomes expedient to adjudge a reference referred to in Article 46 § 2 of the Criminal Code. Then, the injured party will still have an open path to claim compensation for damage or harm within the framework of separate civil proceedings (see Article 46 § 3 CC).

As far as non-material damage is concerned, the determination of its extent and magnitude is fundamental for the determination of an appropriate sum to compensate it monetarily. The "appropriate" sum referred to in Article 445 § 1 of the Civil Code does not mean a

completely arbitrary sum to be determined arbitrarily by the court. Its proper determination requires taking into account all the circumstances that may be relevant in the circumstances of the particular case. It is indisputable that both the circumstances affecting the amount of compensation and the criteria for their assessment should be considered individually, in relation to the specific person of the injured (Judgment of the Supreme Court of 26 November 2009, III CSK 62/09, OSNC-ZD 2010, no. 3, item 80, of 17 September 2010. II CSK 94/10, OSNC 2011, no. 4, item 44). The principle of comprehensiveness and individualisation should be advocated, which on the one hand means taking into account all the circumstances of the case relating to the extent and magnitude of the harm, and on the other hand taking an individual approach to each case (Judgment of the Court of Appeal in Gdańsk of 18 December 2014. II AKa 430/14 KSAG 2015, no. 1 pp. 167-170) . The amount of compensation cannot be determined with the same precision and using the same assessment criteria as in the compensation of property damage. After all, the moral damage that is the subject of compensation in the context of monetary damages is a non-material damage. By its very nature, this does not translate directly into a specific property value. Hence, the institution of compensation falls within the sphere of judicial law, in which there is a relatively broad discretion of the court, which is obliged to determine the amount of compensation due, taking into account all the factual circumstances of the case. Compensation here takes place at the level of human experience, which is the interface between pecuniary and non-pecuniary assets. It goes without saying that the compensation must be holistic and cover all the physical and mental suffering suffered. The monetary sum awarded as compensation will not remove the non-pecuniary damage. Instead, it is intended to provide the victim with a degree of compensation that partially alleviates the suffering suffered. The amount awarded is therefore intended to be a rough equivalent for the non-economic damage suffered by the injured party. It should compensate for physical and mental suffering and help to overcome negative experiences. The purpose of compensation is to provide the victim with a real economic value, roughly balancing the

non-material damage suffered. It also follows from the compensatory nature of compensation that it should represent an economically perceptible economic value. (Zgoliński, pp. 235 – 236).

The current wording of Article 46 § 1 of the Code of Criminal Procedure allows for the possibility of simultaneously awarding an obligation to make reparation for damage and compensation for damages.

The court is even obliged to award both of these forms of reparation in a situation where the entitled party has made his or her claim and, obviously, the necessary prerequisites for such an award have been met.

The award of a compensatory measure is made without taking into account the sentencing directives. Indeed, it is not a punitive measure, but a compensatory measure with a civilian tinge. The principle of individualisation of damages will not apply here. The court, applying the principles of civil law, is obliged to seek to determine the full amount of damages. The circumstances and conditions on the part of the accused, in particular his financial situation, are of no relevance here (Judgment of the Court of Appeal in Katowice of 3 March 2016, ref. no. II AKa 15/16, LEX no. 2087695) .

Even the imposition of a long term of imprisonment or the most severe punishment of life imprisonment does not therefore exclude the possibility of imposing an obligation under Article 46 § 1 of the Code of Criminal Procedure. Otherwise, this would directly contradict the essence, purpose and nature of the compensation measure in question.

It is also worth mentioning in this section that the jurisprudence of Polish common courts as well as that of the Supreme Court, on the other hand, rejects the concept of allowing interest for late payment to be awarded. In the doctrine one can find opinions, albeit expressed against the background of the previous legal state, approving such a jurisprudential approach (Bróżek and Ziółkowska, 2013). The prevailing view, however, is that criminal law damages do not include interest. Divergences also arise on the issue of the statute of limitations of the claim. The majority view is that the relevant provisions of civil law will apply here. This interpretation seems to be in line with the principle lege

non distinguente nec nostrum est distinguere (what the law does not distinguish, that should not be distinguished). Only that the wording of Article 46 § 1 of the Criminal Code refers to "adjudication". Assuming a literal interpretation, it would have to be considered that this is the extent to which the provisions of civil law will be applicable. This issue should therefore, as it seems, be clarified by law. Such a procedure would eliminate the doubts outlined.

Closing this strand of considerations, it should be pointed out that reparation of damage may also be ordered as a probationary measure, which follows from Article 72 § 2 of the Code of Criminal Procedure, although this is excluded in the case of an award of a compensatory measure. The obligation to compensate for damage imposed in a criminal sentence on the basis of Article 72 § 2 of the Code of Criminal Procedure contains a compensatory element, although it is primarily of a penal nature. The condition for the admissibility of adjudicating the obligation to compensate damage - both under the provision of Article 46 § 1 of the Criminal Code and Article 72 § 2 of the Criminal Code. - is that a judgment of conviction has been rendered, in which the guilt of the accused is established, which thus means that the perpetrator has been definitively attributed with the commission of the offence from which the damage resulted or which caused the harm to the injured party. On the other hand, a judgment rendered in criminal proceedings obliging the convicted person to make reparation for the damage pursuant to Article 72 § 2 of the Code of Criminal Procedure excludes the re-adjudication in civil proceedings of the compensation covered by that judgment (Article 199 § 1 item 2 or Article 355 § 1 of the Code of Civil Procedure; Judgment of the Supreme Court of 20 December 2018, II CSK 754/17, OSNC 2019, no. 10 item 102).

Just a cursory characterisation of reparation in substantive criminal law in such a broad sense leads to numerous discrepancies in the practice of justice. Without going into the details of this issue - given the nature of the present study - we can content ourselves with stating that they generally result from the fact that the obligation to compensate for damage is not uniform in nature. It is, in principle, a compensatory

measure, but it can also be one of the conditions of probation. However, it is also important to note that the adjudication of damages claims itself can take place both in criminal proceedings and in separate civil proceedings (Bróżek, 2023, pp. 118 -134).

Although there is a so-called anti-accumulation clause (Article 415 of the Code of Criminal Procedure), it is not able to cope with all the problems arising from this background. An obligation to compensate for damage shall not be adjudged if the claim arising from the commission of an offence is the subject of other proceedings or the claim has already been validly adjudicated in other proceedings. This prohibition applies to every case of imposing a criminal-law obligation to pay compensation as defined by law, and it is irrelevant whether the claim adjudicated in civil proceedings has been successfully enforced. The purpose of the anti-accumulation clause is, in principle, not to duplicate enforcement titles. The adjudication in civil proceedings of a claim arising from a committed offence that has been subject to an obligation to make reparation on the basis of Article 72(2) of the Code of Criminal Procedure is therefore permissible because a criminal court judgment adjudicating an obligation to make reparation within a specified period of time does not constitute a court judgment adjudicating a property claim, because as long as the period specified therein has not expired, the criminal court judgment is not suitable for court enforcement, in view of the impossibility of granting it an enforceability clause (Cf. the judgment of the Court of Appeal in Krakow of 21 October 2015, II AKa 205/15, LEX No 1927557) .

2. Compensation in criminal procedure

Article 77(1) of the Constitution of the Republic of Poland should be taken as the starting point for the characterisation of further solutions presented in this study. In accordance with this regulation, every citizen has the right to compensation for damage caused to him/her by an unlawful action of a public authority body. This provision undoubtedly constitutes the constitutional basis for the solutions contained in the Code of Criminal Procedure. It is worth adding that constitutional protection

covers any damage to protected goods, both of a pecuniary and non-pecuniary nature (Judgment of the Constitutional Court of 4.12.2001, SK 18/00, OTK ZU 8/2001, pos. 56). However, the scope of this protection is not perceived uniformly, as one may encounter both judicature (Judgment of the Constitutional Tribunal of 7.02.2005, SK 49/03, OTK ZU 2005/2, item 13) , as well as doctrinal positions (Bosek, 2006, p. 134) stating that it does not extend to the protection of damage of a non-economic nature.

It should not be objectionable to state that the issues of compensation which are the subject of the criminal-procedural regulation contained in Chapter 58 of the Code of Criminal Procedure. are of a specific nature. They are, moreover, special provisions in relation to civil law regulation. As rightly indicated by W. Jasiński, "the forms of deprivation of liberty not covered by the former are not outside the scope of State Treasury liability, which could be a strong argument in favour of the broadest possible regulation of them in the Criminal Procedure Act.

The difference between the norms of Chapter 58 of the Code of Criminal Procedure and the general rules provided for in the [Civil Code] lies solely in the established scope of liability. Thus, in this context, it should be stated that *de lege lata* the sense of singling out the special regime of liability regulated in the [Code of Criminal Procedure] is to cover such penalties and measures, which should be assessed according to the criterion of wrongfulness and not only wrongfulness" (Jasiński, 2023, pp. 105 et seq). This remains somewhat consistent with the view of M. J. Dębowski, who noted that "Compensation of damages resulting from legal events not mentioned in the provisions of Chapter 58 of the Code of Criminal Procedure. may be claimed under the general rules of civil law. [...] The modes of the Code of Criminal Procedure. and those of the Civil Code differ primarily in the principles of liability. The regulations of the Code of Criminal Procedure. adopt the principle of risk, while the Civil Code. - unlawfulness" (Dębowski, 2021, pp. 5 et seq.).

In accordance with the wording of Article 552 of the Code of Criminal Procedure. a defendant who as a result of the resumption of proceedings, cassation or extraordinary complaint has been acquitted or

sentenced to a lighter punishment shall be entitled to compensation from the State Treasury for the damage he/she has suffered and compensation for the non-material damage resulting from the execution against him/her, in whole or in part, of a punishment which he/she should not have suffered. This provision also applies if, after the conviction has been overturned, the proceedings have been discontinued due to circumstances that were not taken into account in the earlier proceedings. The right to compensation and damages also arises in connection with the application of a protective measure, of course under the conditions set out above. Compensation and reparation also arise in the event of unquestionably wrongful provisional arrest or detention.

It is not possible to claim compensation or reparation for wrongful prosecution if there has been an acquittal or if the proceedings have been discontinued. Nor is it possible to claim compensation solely on the basis of a conviction if the sentence imposed has not been enforced, a precautionary measure order, an order for pre-trial detention or a detention order, which subsequently turned out to be unjust, has not been enforced (Świecki, 2024).

Claims for damages shall become time-barred one year from the date the judgment giving rise to the right to compensation and damages becomes final, in the case of pre-trial detention - from the date the judgment concluding the proceedings becomes final, and in the case of detention - from the date of release. In the event of the death of an entitled person, the right to compensation is vested in a person who, as a result of the execution of a sentence or unjustified pre-trial detention, lost the maintenance due to him/her from the entitled person by virtue of the law or the maintenance permanently provided to him/her by the deceased, if considerations of equity speak in favour of granting compensation. In these situations, a claim for compensation must be made within one year of the judgment becoming final or within one year of the death of the accused.

It should be noted that the criminal court conducts compensation proceedings according to the provisions of the Code of Criminal Procedure. However, it remains a *strictly* compensatory proceeding. The general rules for awarding damages, which have already been described

above, will therefore apply here. As a general rule, the damage resulting from wrongful imprisonment is not the sum of lost earnings, but the difference between the state of assets that would have existed if the victim had not been deprived of liberty and the actual state of affairs at the time when freedom was regained. The occurrence and extent of such damage depends on whether and what earning capacity the injured person would have had if he or she had remained at liberty, and to what extent he or she would have actually used it, what expenses he or she would have incurred for his or her own and his or her family's maintenance, the upbringing and education of his or her children, cultural, entertainment and other needs, whether and how much he or she would have devoted to saving or increasing his or her fixed assets, what losses he or she might have been exposed to (Judgment of the Court of Appeal in Gdańsk of 28 February 2013, II AKa 39/13, LEX No. 1294737) . Compensation is compensatory in nature and thus leads to the compensation of the assets that would have existed if the unfavourable circumstances for the applicant in the form of deprivation of liberty had not occurred.

Undoubtedly unfair is such a deprivation of liberty, which was applied in violation of the rules concerning it and in a situation where it caused distress that the person concerned should not have suffered in the light of the totality of the circumstances established in the case. It should be noted, however, that if the accused has gone into hiding or persistently failed to attend summonses, then the detention or pre-trial detention cannot be assumed to be undoubtedly unjust. In such a situation, there is no violation of the provisions (mainly of Chapter 28 of the Code of Criminal Procedure.) This is because it is a situation when the state authority, in the only effective way, by applying an isolation measure, fulfilled its statutory obligation (resulting from Article 2 of the Code of Criminal Procedure), and the accused of a crime, being under a statutory obligation to do so (resulting from Article 75 § 1 of the Code of Criminal Procedure), did not appear for summonses.

4. Compensation under the so-called "February Act"[1]

The content and objectives of the February Act also remain consistent with Article 77(1) of the Polish Constitution. The meaning of the Act of 23 February 1991 on the recognition as invalid of judgments issued against persons repressed for activities in favour of the independent existence of the Polish State is conveyed already in its first sentences. In a normative manner, judgments issued by Polish law enforcement and judicial authorities or by non-judicial authorities in the period from the commencement of their activities in the Polish lands, starting from 1 January 1944 until 31 December 1989, were deemed invalid if the act charged or attributed was connected with activities for the independent existence of the Polish State or the judgment was issued because of such activities. Judgments issued for resisting the collectivisation of the countryside and compulsory deliveries were also declared invalid.

This law is undoubtedly part of the so-called law of the transition period, associated with the political transformation that took place in Poland in 1989. By assumption, it was to constitute a certain symbol. In a normative way, it distinguished between the present jurisprudence of common courts and earlier rulings, issued at a certain time, in situations where the act concerned independence activities. Such rulings became null and void by operation of law. In the context of historical events, and in particular the repressive actions of the Polish organs *sensu largo of the judiciary*, the adopted normative solution is undoubtedly right and necessary. However, it is necessary to emphasise the rather narrowly defined framework of the State's liability for damages. What is important, various manifestations of repression, which are not directly connected with the execution of a ruling or a decision of state bodies of the past

[1] In the literature on the subject one can also find the name Rehabilitation Act, see e.g. P. Mierzejewski, The so-called Rehabilitation Act against the background of the jurisprudence of the Supreme Court, Studia Iuridicia 1996, no. 31, pp. 117 - 145, M. Sokołowski, Property claims of the successors of a repressed person, Palestra 1995, no. 3 - 4, pp. 55 et seq.

period, remain outside its scope. As an example, we can mention here dismissals from work, the necessity to hide from repressions or even leaving the country for reasons lying in the repercussions of activity for the independent existence of the Polish state. A. Adamczyk and M. Adamczyk aptly point out against this background. Adamczyk and M. Adamczyk that "Reparation to which a victim of repression is entitled should be linked directly not to the fact of issuing a ruling, but to the fact of enforcing a ruling which has been annulled, and not only a ruling on deprivation of liberty, but all other rulings which caused damage or harm, including rulings on sentencing to a fine or awarding legal costs" (Adamczyk and Adamczyk, 2015, pp. 9-21).

The point of the February Act is to do justice to those who acted for the independent existence of the Polish State. These were usually actions undertaken with a view to achieving a profound political transformation in the future. They were aimed directly or indirectly at overthrowing the state system of the time. At the time they were carried out, they were perceived as particularly socially harmful and consequently met with a drastic state reaction. The February Act materialised two objectives. Firstly, it removed from legal circulation unlawful judgements that were highly questionable in the prism of the general axiological assumptions of democratic states. Secondly, it enabled wronged parties to seek compensation and reparations. Importantly, the canvass for entitlement to compensation is the activity for the independent existence of the state. This element cannot be presumed, but must be demonstrated in the process.[1] This is because it constitutes a sine qua non for the claim for compensation.

In the event of the death of the entitled person, the claim for compensation by operation of law passes to the spouse, children and parents. The claim for compensation or reparation must be submitted to

[1] Judgment of the Court of Appeal in Katowice of 1 December 2011, II AKa 466/11, LEX no. 1129762, judgment of the Court of Appeal in Katowice of 14 April 2011, II AKa 98/11, LEX no. 1267274, judgment of the Court of Appeal in Lublin of 16 December 2010, II AKa 295/10, LEX no. 785262.

the district court or military district court, respectively, which issued the decision declaring the decision invalid, within 10 years from the date it became final. These entitlements shall also apply to persons, living now or at the time of their death in Poland, repressed by Soviet law enforcement and judicial or extrajudicial bodies, acting on the present territory of Poland in the period from 1 July 1944 to 31 December 1956, and on the territory of Poland within the borders established by the Riga Treaty, in the period from 1 January 1944 to 31 December 1956, for activity in favour of the independent existence of the Polish State or because of such activity. The demand for compensation and reparation shall be submitted to the district court in whose district the person making the demand resides; this court shall have jurisdiction to hear the case. It should be noted here that activity for the benefit of the independent existence of the Polish State, with regard to persons repressed on the territory of Poland within the borders established in the Riga Treaty outside the present territory of Poland, should be understood as activity in the period from 17 September 1939 to 5 February 1946. In this case, too, a demand for compensation and reparation for damage and harm resulting from the issuance or execution of a decision should be submitted to the regional court in whose district the person submitting the demand resides. However, the provisions of Chapter 58 of the Code of Criminal Procedure, with the exception of Articles 554 § 2a and 2b and Article 555, apply mutatis mutandis in the proceedings for compensation and reparation. Importantly, the claim is, as a rule, not entitled to persons whose activity, during the period on which the decision was declared invalid or declared invalid, constituted a denial of activity for the independent existence of the Polish State, so, for example, perpetrators of criminal acts. This is important insofar as independence activities were often undertaken, as it were, in parallel with common criminal activities, such as robberies or robberies. For these persons, the February Act explicitly denies the right to compensation. This is a just solution. The State Treasury is also entitled to compensate for the damage suffered and to make reparation for the non-material harm suffered by persons who, in the period from 1 November 1982 to 28 February 1983, performed active military service to which they were conscripted for activities in favour of

the independent existence of the Polish State. In addition, the child of a mother deprived of liberty against whom a ruling has been declared invalid, who was in prison or other place of confinement with her mother, or whose mother was in prison or other place of confinement during her pregnancy, is also entitled to compensation from the State Treasury for the damage suffered and to reparation for the harm suffered.

The decision may also be annulled in such a case at the request of the child and, in the event of the child's death, also at the request of the child's spouse, children and parents.

The normative construction adopted in the February Act dictates the obligation to apply the provisions of the Code of Criminal Procedure located outside Chapter 58 if their appropriate application is possible. The lack of relevant solutions in the Code of Criminal Procedure justifies the use of relevant regulations of the Code of Civil Procedure (Supreme Court judgment of 22 March 2023, I KA 22/22, LEX no. 3512750) . In compensation cases conducted on the basis of the February Act, the problem of awarding interest for delay is also topical. However, it seems that the prevailing view is that in the case of these claims certain amounts should be awarded with interest at the statutory rate. This follows from the content of Article 359 § 2 of the Civil Code, which provides that if the amount of interest is not otherwise specified, statutory interest is due. The State Treasury is obliged to pay the awarded compensation and reparation, and until a final decision on the above issue is taken, it is not bound by an obligation relationship with the applicant. with the applicant. Decisions issued pursuant to Article 8(1) and (4) of the February Act become enforceable only after the judgment becomes final, and it is only from that moment that it may be assumed that the State Treasury should pay the benefit, and since it is only with the issue of a final judgment that the amount of the benefit is known, it is appropriate to award compensation with statutory interest from the date the judgment becomes final (Supreme Court decision: of 4 November 2021, II KK 495/21, LEX no. 3333572). The demand for statutory interest for delay is not justified, as it was envisaged as an instrument for disciplining debtors on the grounds of private law relations. In the

circumstances of the present case, such circumstances do not arise, as the State Treasury is obliged to pay the adjudged amount, while the amount of the benefit is known only from the date of the court decision on the subject becoming final (Judgment of the Court of Appeal in Szczecin of 1 June 2023, II AKa 44/22, LEX no. 3609247) .

Conclusions

In conclusion, it should be recognised that the main task of criminal law is to achieve the objectives set before it. The leading objectives in this branch of law are: retributive, punitive and preventive. There should be no doubt that the most important is the realisation of the protective function. However, compensation is also important. On the other hand, all these objectives can only be achieved if the law provides adequate means of reaction, i.e. legal instruments aimed directly at materialising these objectives. As it seems, from a systemic point of view, there are no grounds for criticism. Wronged persons are constitutionally and statutorily guaranteed access to appropriate mechanisms to claim compensation. On the other hand, the right to compensation may arise from various titles. The substantive legal positioning and shape of the de lege lata institution of compensation secures the interests of the wronged parties to the crime as much as possible. This safeguard refers both to the scope of compensation and to the uniformity and efficiency of the proceedings. Currently, the court may directly apply the norms of civil law, as *expressis verbis* stipulated in Article 46 § 1 of the Criminal Code. (with the exception, of course, of the possibility to award annuities). It is therefore fully legitimate to refer to the principles of interpretation developed in civil law, which are well-established and unquestioned. This, in turn, completely eliminates previously existing problems, such as those related to joint and several reparation of damage or the issue of awarding interest (Gensikowski, 2015, pp. 77 – 78). The provisions contained in the Code of Criminal Procedure, on the other hand, are of a different nature. The provisions of civil law will also apply in these proceedings. The regulation contained in Chapter 58 of the Code of Criminal Procedure, however, concerns

damages resulting from other sources than the claims asserted on the basis of Article 46 § 1 of the Criminal Code. This is because it concerns the legal framework for compensation for wrongful acts of state bodies. Similar in nature to the criminal-procedural solutions are the special legal regulations that have been adopted in the February Act, with a much broader scope. It is not limited to procedural law only. It also contains in its content provisions of substantive law, such as those that establish the circle of persons entitled to claim compensation or reparation in the face of the death of an entitled person or that allow for the payment of the costs of commemorating a deceased person who was unjustly repressed.

However, it can be assumed that after the period of increased interest in the regulations introduced on the basis of this Act, its application will gradually diminish over time. However, it completes the entirety of the compensation solutions on the level of Polish criminal law and allows them to be described as comprehensive.

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THE ORIGIN AND EVOLUTION OF THE CONCEPT OF THE RIGHT TO HEALTH PROTECTION IN THE AGE OF ARTIFICIAL INTELLIGENCE AND SUSTAINABILITY

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Abstract*: The concept of the right to health care, from the perspective of the constitutional provisions of the Republic of Poland, goes beyond the traditional interpretation of the state's obligations towards citizens. In the light of the Constitution of the Republic of Poland, the state's obligation is not only to ensure access to medical care at an appropriate level, but also to implement extensive preventive and health promotion programs. Such commitment reflects an understanding of health not only as freedom from disease, but as a state of comprehensive physical, mental and social well-being. In this context, the constitutional guarantee of the right to health care is an expression of recognition as a fundamental human right, inextricably linked to personal dignity and equality before the law.*

Keywords: *right to health; health promotion programs; health recources.*

Introduction

The concept of the right to health care, from the perspective of the constitutional provisions of the Republic of Poland, goes beyond the traditional interpretation of the state's obligations towards citizens. In the light of the Constitution of the Republic of Poland, the state's obligation is not only to ensure access to medical care at an appropriate level, but also to implement extensive preventive and health promotion programs.

Such commitment reflects an understanding of health not only as freedom from disease, but as a state of comprehensive physical, mental and social well-being. In this context, the constitutional guarantee of the right to health care is an expression of recognition as a fundamental human right, inextricably linked to personal dignity and equality before the law.

In the context of analyzing international standards on health rights, it is necessary to draw attention to the fact that the obligation of states to ensure a high standard of health care is not limited to national frameworks. The commitment at the global level to the implementation of the right to health is directly related to the ratification by states of numerous international agreements and conventions, which implies their international legal obligations in this area. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICCPR) is one of the key provisions, establishing the right of every person to achieve the highest attainable standard of physical and mental health. This Covenant establishes the right of every person to achieve the highest possible standard of physical and mental health, thereby underlining the universality and indivisibility of human rights in the context of health care. The process of its formulation was a reflection of complex international negotiations, taking into account a wide range of political and ideological perspectives, which had a significant impact on the final wording of the provisions.

The origin and evolution of the right to health protection

The evolution of the right to health protection (Jose, pp. 5 – 8) in the system of system of human rights protection elaborated by the Council of Europe reflects the process of dynamic development of legal norms that adapt to constantly changing social and health realities, showing health as a legal category with a wide range of meanings (Peer, pp. 4-8).

Health, as an integral part of the individual and social well-being, has acquired a strong normative foundation in the form of Article 3 of the European Social Charter, which is an expression of the Member States

obligation to ensure the protection of human health. The Council of Europe, through its institutions and legal mechanisms, promotes health not only as a universal value, but also as a human right, requiring its members to actively work to protect and promote it (Tabaszewski, pp. 585-589).

It is highlighted that this dimension of the right to health obliges the Member States to ensure equal access to health services for all citizens, to protect vulnerable groups and to promote preventive measures. Therefore, the evolution of the right to health protection within the framework of the Council of Europe shows its shift from a value particularly appreciated by everyone to a legal category with broad normative and institutional support, which is a key element in shaping Member States' health policies. This process, including both the consolidation of health as a human right and the development of institutional structures aimed to protect it, underlines the Council of Europe's role in promoting health as a fundamental human right, which has important implications for health policies and health systems of the Member States (Surówka, pp. 92-107).

The institutional aspects of health care within the Council of Europe show the involvement of various bodies and committees, such as the Committee of Ministers and the Parliamentary Assembly, which play a key role in shaping health policy at international level. Their activities focus on a wide range of issues, from access to medicines, to combating illicit trafficking in psychoactive substances or bioethics and consumer health protection. In addition, the Council of Europe's cooperation with other international organizations, including the World Health Organization, represents the strength of international synergies in the field of health, which was particularly evident at the Oslo meeting, focusing on health seen from the perspective of human rights and dignity.

The dynamic evolution of the right to health protection (Rife, pp. 613-622) within the Council of Europe's human rights system manifests itself through the continuous development and adaptation of legal norms in response to evolving social and health realities. This process illustrates how health, understood not only as an inseparable

attribute of the individual and common good, but also as a fundamental social value, has acquired a strong normative basis, especially through its incorporation into Article 3 of the European Social Charter (Tabaszewski, pp. 584-587).

Thus, the Council of Europe, using its institutions and legal mechanisms, effectively promotes health not only as a universal value, but above all as a human right, which imposes on the Member States not only a moral but above all a legal obligation to act actively for its protection and promotion. This perspective underlines the importance of health as a legally protected category, requiring States and their authorities to continuously commit to and improve health care standards.

The impact of artificial intelligence and sustainability on the right to health protection

On the other hand, the legal dimension of the right to health protection imposes a particular responsibility on Member States to ensure equal access to health services for all citizens, without discrimination, as well as to provide special protection of vulnerable groups and the commitment to promote preventive measures. This development of the right to health protection in the context of the activities taken by the Council of Europe demonstrates its transformation from an individually appreciated value to a fully-fledged legal category, supported by an extensive normative and institutional mechanism. This evolution, which includes both the strengthening of health as an inviolable human right and the development and reinforcement of the institutional structures dedicated to its protection, underlines the key role of the Council of Europe in promoting health as a fundamental human right. The implications of this process for health policies and health care systems in the Member States are significant, offering new perspectives and tools for effectively addressing contemporary health challenges at international level (Surówka, pp. 92-107).

One of such tools could be artificial intelligence, which in the future will certainly be a powerful device serving to ensure equal access

to health services for all citizens, which will be the subject of my research as part of my doctoral dissertation.

Population ageing, as a result of global demographic change, puts pressure on health protection systems, increasing the demand for extensive medical care, as well as modern technologies such as artificial intelligence. This requires the Member States of the Council of Europe not only to increase their budget allocations dedicated to health, but also to strategically plan and manage health resources to meet the growing health demands of society. Thus, the issue of accessibility and quality of health care for the elderly and people with chronic diseases is a matter of particular concern and analysis in the context of the implementation of the right to health protection (Kursa and Afelt, pp. 95-116).

Obligations of the state towards citizens

However, while progress in the field of medicine and biomedical technologies creates new therapeutic and diagnostic opportunities, it raises challenges related to the cost of implementing innovative solutions. One of such solutions could be artificial intelligence. Investments in modern health technologies are essential to raising health care standards, but their high costs may limit the availability of advanced therapies for all patients. Therefore, Member States are faced with the task of ensuring a balance between innovation and universality of access to healthcare, which requires them to develop effective models of healthcare financing and resource allocation strategies (Kawałko, pp. 328).

Inequalities in access to health services pose a major challenge to the realization of the right to health protection. In this context, normative and political actions at the level of the Council of Europe are aimed at minimizing such disparities by promoting health policies that ensure fair access to high-quality health services. Such actions include, among others, the development of health programmes targeting socially and economically marginalized groups in order to increase their access to essential medical services (Lach, 79 (2)).

The development of the concept of health understood as a legal category within the Council of Europe reflects a comprehensive approach to the protection of human health, combining normative, institutional and international cooperation. The implementation of the right to health protection in the context of demographic, economic and technological challenges require Member States to continuously commit to the improvement of health systems and thus to the use of modern technologies, including artificial intelligence. These actions are essential to ensure equal access to health services, which is a key element in the implementation of the right to health protection as a fundamental human right.

Concluding remarks

The state, as the main legal guarantor of the right to health protection, is faced with the imperative of taking decisive actions aimed at adequately meeting the health needs of citizens. This includes investments in infrastructure and medical staff, as well as the formulation and implementation of health policy strategies that effectively address the comprehensive health needs of the population, promote a healthy lifestyle and act preventively against diseases. It is important that the health sector financing mechanisms correspond to the socio-economic specificity of a given country, while guaranteeing universal and fair access to health care for all layers of society. The implementation of the right to health protection in the context of demographic, economic and technological challenges require Member States to continuously commit to the improvement of health systems (Rife, pp. 613-622) and thus to the use of modern technologies, including artificial intelligence. These actions are essential to ensure equal access to health services, which is a key element in the implementation of the right to health protection as a fundamental human right.

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THE IMPACT OF ECONOMIC AND CULTURAL FACTORS ON MEDICAL COMMUNICATION IN THE EU

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Abstract: *Medical communication within the European community space is shaped by the fundamental principles of bioethics, which mold it and contribute to the construction of an effective dialogue between patients, medical staff, and other parties involved in making ethical and moral decisions. Additionally, medical communication is influenced by various economic and cultural factors. The financial conditions of healthcare institutions determine the resources available for treatments, new technologies, and access to quality care services. On the other hand, the cultural diversity of patients can shape how they perceive illness, treatment, and communication with medical staff. Exploring the interaction between economic and cultural factors helps us recognize complex ethical situations, especially in the context of allocating limited resources and accessing medical services. Therefore, to address the existing challenges in the medical sector, effective and equitable solutions are needed that reflect the economic and cultural diversity of the region, while ensuring equitable access to high-quality medical care.*

Keywords: *medical communication; bioethics; economic factors; cultural factors.*

Introduction

Communication is a complex process that significantly impacts the field of medical science and healthcare, contributing to the establishment and strengthening of the relationship between healthcare professionals and patients, as well as addressing various ethical and moral dilemmas. Medical communication within the European community space is shaped by the fundamental principles of bioethics (patient autonomy, non-maleficence, beneficence, and equality in patient treatment), which mold it and contribute to the construction of an effective dialogue between patients, medical staff, and other parties involved in making ethical and moral decisions. Additionally, medical communication is influenced by various economic factors (such as the single market, economic and monetary union, structural and cohesion funds, competition policy, investments in research and innovation, etc.) and cultural factors (such as traditions, customs, language, religious practices, etc.).

Considering the described context, our study aims to analyze how the essential principles of bioethics, together with economic and cultural factors, influence medical communication practices within the European healthcare system.

Medical Communication Guided by Bioethical Principles

In the specialized literature, there are numerous viewpoints regarding the emergence of *bioethics.* It is generally accepted that discussions about bioethics began after 1946, following the Nuremberg Trials (1945-1949), which highlighted the low regard for human life and the ways in which it could be legally protected. The „Nuremberg Code", drafted in 1949, is often cited as the first document of bioethics, marking the start of a wave of ethical concerns that exceeded initial expectations (Leabu, 2021).

The term *bioethics* is relatively new in academic language, based on the Greek words for „life" (bíos) and „morality" (êthos). It was used by American biologist and oncologist Van Rensselaer Potter in his work

„Bioethics, Science of Survival. Perspectives in Biology and Medicine" in 1970, arguing for the creation of a new discipline that would integrate biological science with human values. Later, in his work „Bioethics: Bridge to the Future", he discussed the discrepancy between the humanities and environmental sciences, emphasizing the importance of interdisciplinary approaches to humanity's critical problems, highlighting the need to regulate interventions on human life in the face of scientific discoveries in biology and medicine. These ideas laid the foundation for the new discipline - bioethics, as both a theoretical and practical field (Potter, 1971).

Currently, *bioethics* constitutes a segment of applied ethics, integrating legal, philosophical, social, and medical perspectives to address ethical dilemmas arising from advances in biology and medicine, as well as interactions with the non-human biological environment. This discipline emphasizes the analysis and promotion of moral norms and values, the protection of human life and health against technological and scientific developments. *Bioethics* explores both broad themes (such as the importance of human life, the ethical challenges of biomedical innovations, ethical education, and the formation of ethics committees, etc.) and specific issues related to advanced biotechnologies (such as cloning, gene therapy, the use of stem cells, transplants, in vitro fertilization, and life extension, etc.) (Spînu, 2023, pp. 45-49).

The fundamental principles of bioethics were introduced into the academic discourse by Tom Beauchamp and James Childress through their work „Principles of Biomedical Ethics" (Beauchamp and Childress, 1979). In the authors' opinion, the principles of respecting individual autonomy, beneficence, nonmaleficence, and justice constitute a crucial moral foundation for healthcare professionals. These principles assist in resolving ethical dilemmas in medical practice and biomedical research, influencing both the thought process and communication methods within the professional framework.

Referring to the context of communication, we must highlight the following aspects:

- adhering to the principle of patient autonomy will facilitate an effective, constructive, and beneficial dialogue, respecting the inherent right of patients to make deliberate and informed choices regarding their medical treatment;
- respecting the principles of nonmaleficence and beneficence will encourage empathetic communication and active listening, contributing to the reduction of stress associated with illness and improving the psychological state of the patient;
- the principle of equity will increase the effectiveness of communication in the practice of medicine, promoting respect and equal rights for all patients; communication being based on mutual respect, equality, and active patient participation in making decisions about their care.

Therefore, *medical communication* is influenced by the fundamental principles of bioethics, such as patient autonomy, non-maleficence, beneficence, and equality in treatment. These play a crucial role in shaping and enhancing effective dialogue between patients, healthcare professionals, and other entities involved in ethical and moral decision-making processes.

The Influence of Economic Factors on Health Communication

In general, the economic context in which healthcare systems operate can affect access to medical care, the quality of services provided, and the ways in which medical information is communicated between healthcare professionals and patients. It is well-known that economic factors, including the single market, economic and monetary union, structural and cohesion funds, competition policy, investments in research and innovation, as well as foreign trade, exert a significant influence on the healthcare sector. These factors impact access to healthcare services, the quality of care provided, and the interaction between patients and doctors. Economic factors can alter the culture within healthcare institutions and management approaches:

- *The EU Single Market*, established in 1993, is one of the European Union's greatest achievements. It ensures that goods, services, people, and capital can move freely across the entire EU territory: „the four freedoms" (European Council, 2024). The EU Single Market influences medical communication by facilitating the exchange of information and practices between member states, standardizing regulations concerning the quality and safety of medical care, and promoting the mobility of healthcare professionals. This contributes to improving access to high-quality medical care for EU citizens and fosters innovation and efficiency in the healthcare system through collaboration and the sharing of best practices. An example can be seen in "Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No. 1024/2012 on administrative cooperation through the Internal Market Information System ('IMI Regulation'). According to this, professional qualifications are recognized across EU states, facilitating the mobility of medical workers (doctors, nurses, pharmacists) within the Union (European Parliament, 2013).
- *The Economic and Monetary Union (EMU)* is the result of economic integration in the EU. The euro was introduced as the common currency in the eurozone. All EU member states, except Denmark, are required to adopt the euro after meeting the convergence criteria. The Eurosystem, which includes the Executive Board of the European Central Bank and the governors of the central banks of the eurozone, sets a single monetary policy (Scheinert, 2024). A specific example of how the Economic and Monetary Union (EMU) influences medical communication in the European Union can be linked to how economic policies affect the funding and allocation of resources for the health systems of member states. In the context of the EMU, member states are often required to maintain low budget deficits and manage public debt, according to the Stability and Growth Pact. This can limit government spending, including in the health sector. For instance, budgetary restrictions may lead to reductions in medical staff and increased

pressures on doctors and nurses, affecting the quality of communication with patients. A notable example was observed in Greece during the sovereign debt crisis when austerity measures imposed to comply with the EU's bailout conditions led to significant cuts in health funding.

- *The Structural and Cohesion Funds* in the EU are financial instruments through which the EU mitigates economic and social disparities between regions, aiming to reduce inequalities between prosperous areas and less developed ones in EU member countries. Through these financial resources, many regions have managed to overcome poverty (European, Commision, 2024). In Romania, the Cohesion Policy 2021–2027 was launched, bringing Romania 46 billion euros for strategic investments in safer hospitals, transport networks, modernization of water and sewage infrastructure, and support for the business environment. The largest allocation from the Health Program 2021–2027, with a total budget of 5.88 billion euros, is designated for hospital infrastructure (2.8 billion euros) and will finance the three regional hospitals in Iași, Cluj, and Craiova, works for 7 county hospitals, and 20 small public, municipal, and town hospitals (Structural Founds Team, 2023). Thus, the EU's Structural and Cohesion Funds can influence medical communication by supporting the development of health infrastructure and information systems.
- *The main objective of EU competition rules* is to ensure the proper functioning of the EU's internal market. The Treaty on the Functioning of the European Union (TFEU) aims to prevent instances of competition restriction and distortion, such as cases of abuse of dominant positions, anti-competitive agreements, and mergers and acquisitions that reduce competition. Additionally, state aids are prohibited when they lead to distortions of competition, though they can be authorized in certain cases. A notable example of how EU competition policy influences the medical sector is the regulation of the medical equipment market. By monitoring and controlling mergers between major medical equipment manufacturers, the European Commission ensures that no market structures are formed that restrict innovation or artificially increase prices. Such control was evident when the Commission blocked a merger between two industry giants because it would have reduced

competition and could have led to higher prices for essential medical devices (European Parliament, 2017). EU competition policy can stimulate research and help create a balance between the need for innovation and the necessity of maintaining affordable prices for all patients.

- Investments in research and innovation in the EU mean investing in the future of the union. These investments help us compete globally and maintain our unique social model. They improve the daily lives of millions of people here in Europe and around the world, contributing to addressing some of our major societal challenges (EU, 2024). New achievements facilitate effective communication between healthcare professionals and patients, improving understanding and management of issues. Innovation also contributes to the creation of advanced educational tools and the improvement of access to health information, allowing patients to participate more actively in decisions related to their own care. Additionally, economic factors can influence the availability and access to continuing medical education for healthcare professionals, thus affecting the quality and efficiency of communication in the medical field. A continuity of studies would help medical staff become well-prepared professionals and effectively respond to new challenges. For example, continuous learning in the field of digital health technologies can allow doctors to use telehealth to provide advice and care remotely, which is particularly valuable in rural areas or for patients who cannot easily travel.

Therefore, it is essential that the healthcare system remains flexible and responsive to economic changes to ensure that medical services are not compromised. This requires a proactive approach in budget planning and resource allocation, so that even during periods of financial constraints, the quality of care is maintained at high standards. Medical institutions must prioritize investments in technology, education, and infrastructure, as well as develop cost management strategies that do not sacrifice the effectiveness or accessibility of care. Additionally, special attention must be given to the training and retention of medical staff.

The Influence of Cultural Factors on Medical Communication

Cultural diversity significantly influences medical communication, as differences in language, beliefs, values, and traditions can affect the interpretation and approach to ethical dilemmas in medicine.

- Linguistic diversity can create barriers in the understanding and effective transmission of medical information between patients and healthcare professionals. This is particularly relevant for migrants or travelers. Linguistic discrepancies can hinder access to adequate care and affect the quality of the medical care received. Thus, multilingual communication skills and translation tools would play a crucial role in improving access to healthcare services and ensuring equitable care (Spînu, 2021, p.218).
- Differences in beliefs within the European Union can significantly influence medical communication. These differences require a sensitive and respectful approach from healthcare professionals to ensure that medical care aligns with patients' values and beliefs. This involves, for example, adapting medical practices and communication styles to preferences related to treatments, procedures, or even interactions between individuals of the opposite sex, highlighting the importance of intercultural training for medical staff.
- Differences in values and traditions among EU member states can have a significant impact on medical communication. These can influence patient expectations, how they wish to receive medical information, and decisions regarding treatment. Healthcare professionals must be aware of these differences and adapt their communication to ensure clear understanding and effective collaboration with patients from diverse cultural backgrounds, thus promoting the best outcomes in patient care.
- Integrating cultural nuances into discussions about ethical issues, such as end-of-life care, is essential for effective and empathetic communication in medicine. Recognizing and respecting the cultural, religious, and personal values of patients can help improve the quality of care and support patients and their families in making difficult decisions.

This requires a sensitive and culturally tailored approach for each patient, promoting an open and respectful dialogue.

- Integrating cultural nuances into discussions about informed consent is crucial for medical ethics. This involves careful and respectful communication of medical information, taking into account the patient's cultural context. Understanding and respecting beliefs, values, and cultural traditions can influence how patients perceive informed consent and treatment decisions, thereby contributing to better collaboration between the patient and the healthcare professional.
- Integrating cultural nuances into discussions about confidentiality in medical ethics is vital. Various cultural conceptions of privacy and confidentiality can affect patients' perceptions and their expectations regarding confidentiality in medical care. By recognizing and respecting these differences, healthcare professionals can improve the trust relationship with their patients, ensuring that they feel comfortable sharing essential personal information for proper care.

Cultural differences in the perception of health and illness can influence the prioritization of health funding allocation. In some cultures, there may be a greater emphasis on preventive care or traditional remedies, while in others, the focus may be on advanced medical technologies. This dynamic can create ethical dilemmas when limited resources must be distributed among various needs and cultural values, complicating decisions regarding which treatments or services to fund.

Case Study

In line with what has been discussed, there is an interest in the attitudes of medical students of various ethnicities towards the impact of economic and cultural factors on medical communication. In this context, I conducted a survey among approximately 120 Romanian, Russian, and Indian students who are studying at the Nicolae Testemițanu State University of Medicine and Pharmacy. The questionnaire included the following questions: 1. To what extent do you believe that economic factors affect communication with patients? (Scale: 1-5, where 1 = Not at

all, 5 = Extremely); 2. Do economic constraints influence the doctor's ability to provide information or services to patients? (Frequently, Occasionally, Rarely, Never); 3. How often are cultural barriers encountered in medical communication? (Daily, Weekly, Monthly, Rarely); 4. To what extent are communication strategies adjusted based on the cultural background of patients? (Scale: 1-5)

According to the results, the majority of respondents acknowledge the decisive impact of economic factors on medical communication and support the promotion and respect of bioethical principles in the doctor-patient relationship. Cases where economic constraints affect the doctor's ability to provide information or services to patients are also frequent. Cultural barriers and communication difficulties are reported daily in the interaction between doctor and patient. Accordingly, various communication strategies are applied. Nevertheless, respondents maintain an optimistic attitude towards their future mission, overcoming the challenges they face.

Conclusions

Medical communication within the European community space is shaped by the fundamental principles of bioethics, which mold it and contribute to the construction of an effective dialogue between patients, medical staff, and other parties involved in making ethical and moral decisions. Additionally, medical communication is influenced by various economic and cultural factors. The financial conditions of healthcare institutions determine the resources available for treatments, new technologies, and access to quality care services. On the other hand, the cultural diversity of patients can shape how they perceive illness, treatment, and communication with medical staff. Exploring the interaction between economic and cultural factors helps us recognize complex ethical situations, especially in the context of allocating limited resources and accessing medical services. Therefore, to address the existing challenges in the medical sector, effective and equitable solutions are needed that reflect the economic and cultural diversity of the region, while ensuring equitable access to high-quality medical care.

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PREVENTION VERSUS STATE INTERVENTION IN THE PROTECTION OF MINORS

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Abstract: *The framework legislation on the rights of the child sets out a number of guiding principles to ensure the normal development of the minor within the natural family or through substitutes provided for this purpose. However, there was a need to introduce additional instruments to be regulated by means of a special piece of legislation. It could even be argued that the newly established system directly competes with the system of special protection for vulnerable minors. Public authorities with competences in this field intervene in cascade, preventing or intervening as appropriate, work together on three levels (local, county and national), address interdisciplinary practical situations and provide interchangeable solutions, in the best interest of the child.*

Key words: *prevention; intervention; separation; reintegration; vulnerable minor.*

Introduction

The regulation on children's rights, seen both from the perspective of the recognition of these prerogatives and in terms of their protection, is ensured through Framework Law no. 272/2004, with subsequent amendments. However, there was a need for law 156/2023 to detail a series of peculiarities generated by practice, in the sense that there must

be a concrete way for the State to prevent, as far as possible, the risk of separation of the minor from his or her natural family.

Although Law 272/2004 established measures for the special protection of vulnerable minors, they did nothing but intervene after the moment when the question of state intervention was raised in order to adopt a solution compatible with the concrete situation of the beneficiary. In other words, special protection measures are ordered after the situation requiring such intervention occurs, but the solutions proposed by the new normative act analysed in this way try to intervene in advance, to minimize the risk of affecting the harmonious development of the minor and implicitly to reduce the number of beneficiaries of the special protection system.

The two normative acts are based on the same principles: the best interests of the minor; the physical, mental and moral development of the minor by means of any measures aimed at limiting the risk of separation from the biological family; the prevalence of keeping the minor in the family to the detriment of any alternative solutions as long as the best interests of the child are thus ensured, and last but not least taking the minor's opinion on any of the measures that may be ordered, where possible, in accordance with his/her age and degree of understanding.

The intervention of the bodies designated by the new regulation must be carried out within a short period of time, compared to the moment when the risk of separation of the minor from his family of origin is identified, so that the effect produced is the expected one and there is no need after this moment to institutionalize the minor when the situation could not be managed through preventive measures. An effective response in a risk situation is our ability to identify the potential risk, to sense a danger before it becomes critical" (Ardelean, 2018, pp.303-304).

We are dealing in such conditions with two possible actions of the state: prevention and intervention. If the first comes to be valued, there will be no need for the second, and if the first fails, it will be necessary to act in the second way.

Prevention versus state intervention in the protection of minors

The separation of the minor from his family involves several working hypotheses. The reference to the term family also assimilates unmarried parents who live with the child and who take care of his/her upbringing and maintenance. Such a provision excludes any form of discrimination between children in and out of wedlock. First of all, a distinction must be made between family reasons leading to such a solution, and hypotheses generated by the profile of the minor that require such intervention. It is also important to note that as regards the reasons that determine the intervention depending on the particular situation of the minor's family, they are also divided into two subcategories, namely those based on objective factors (poverty status) and those based on subjective factors (abuse and intra-family violence).

As is well known, parental authority is a genuine obligation for the family vis-à-vis the minor (even if it includes rights in respect of him/her). In this regard, there are also the sustained efforts of the state through which it was managed to reduce the number of children in residential centers, until their recent abolition. The alternative solution adopted was reintegration into the natural or extended family (Pătrașcu, 2014, p.187).

Sometimes the state of poverty leads to the objective impossibility of ensuring normal development in all respects for the minor. Two terms come into question here, namely monetary poverty and extreme poverty, as defined by the text of the law. In the first case, we are dealing with a level of financial resources below the level determined by the reference social indicator, barometer used to substantiate the determination of the amount of social allowances and other types of aid granted by the state or other public authorities - for example, unemployment benefit.

This threshold is taken into account for the calculation made by reference to the monetary value resulting for each member of the reference family, including any type of income or financial support. Currently, the value of the indicator is 660 lei, which is adjusted annually with the inflation index communicated by INS for the previous year,

which does not really cover the fluctuations of the purchasing power of the citizen, especially during periods of economic instability.

The other situation that requires state intervention for the status of extreme poverty has as reference the impossibility of ensuring for the upbringing and education of the minor the basic needs classified as essential, namely the existence of a home connected to electricity and heated.

The state of health of family members must also be taken into account when assessing a risk of separation of the minor from the family, as lack of income or inability to take the necessary steps to access social assistance benefits may constitute absolute impediments. Disability can also be a barrier, although the state and in such situations "attaches great importance both to the social model in understanding and explaining disability and to the individual one[...] where the importance of vocational guidance and training is supported." (Dicu, 2018, p.180-181).

Poor intra-family interactions materialized in acts of violence of various types are also arguments that lead to the separation of the minor from the family because the environment is not conducive to the assimilation of the necessary moral benchmarks, does not ensure the positive definition of the child's personality. These incidents may occur not necessarily directly on the minor, as it is known that intra-family abuse can generate a significant negative effect on the child. The different forms of child abuse[...] have an increased risk of developing internalization/externalization problems, but also an increased likelihood of aggression and delinquency." (Gal, Buta and Băban, 2016, p.194).

On the other hand, the profile of the minor must also be analysed in order to assess the need for intervention by the competent authorities.

Leaving home, consuming alcohol or prohibited psychotropic substances, attempting suicide and dropping out of school shall constitute elements giving rise to a risk of separation." School deviance is often intertwined with juvenile delinquency, the correlations between these two variables being so strong that they can hardly be dissociated. In the school environment, young offenders are undisciplined, restless and tend to cheat, often being expelled from class or school." (Turliuc, 2007, p.71).

Here, although formally we cannot discuss the concrete fault of the family because we are dealing with the non-compliant conduct of the child, it should not be omitted that the expression of the minor in the community is a consequence of the lack of supervision or disinterest on the part of the parents in this regard."[…] Family support is essential for the rehabilitation of minors, and when it is lacking, the consequences of the lack of such support have a negative impact on children's behaviour." (Cătărău, 2019, p.237).

The lack of active involvement from the family occurs when it expects to be informed about such an event, being extremely few situations in which we have to deal with accessing parenting skills training programs. (Rădoi, 2015, p.168).

There is also a constant concern to ensure the continuity of the educational process for minors, given that according to their age, they must be engaged in one of the compulsory forms of education (up to and including the tenth grade). We mention some of the national programs aimed at combating this phenomenon: "strategy to reduce abandonment; early school education 2015-2020, implemented through the ESF Human capital programme, [...] the school for all programme introduced with the anti-poverty strategy package adopted in 2016, [...], the motivated teachers in disadvantaged schools programme, [...] improving the curriculum of primary and lower secondary schools" (Olteanu, 2021, p.80).

It is possible to prevent dropout and limit vocational training opportunities when there are cases in which age-appropriate enrolment in school has not been achieved or when the minor concerned belongs to the category of those with special educational needs and the family of origin does not have the capacity to understand the way forward for their inclusion.

The career counsellor whose services will be qualified as qualitative when "the results obtained by his clients, the proper solving of their problems, the employment and satisfaction offered by the profession and career" can also play a decisive role here (Bersan, 2016, p.28).

The commission of delinquent acts by the minor leads to two types of approaches, one prizonocentric and the other restorative. The latter must prevail, especially since educational measures dedicated to minors have such an objective: ”deterrence, rehabilitation and inability of the person to commit new crimes”. (Sandu and Unguru, 2016, p.172).

There are also established other cases in which it is considered generic in the normative act under analysis that there are circumstances for establishing the separation of the minor from the family, if there is no appropriate intervention in support of him: lack of documents necessary to identify the natural person, family members returning home after serving a custodial sentence, families in which the minors return after a period of one year from a country where they had migrated.

The permanent involvement of local structures and, more specifically, of public social assistance services in community life will ensure the identification of these possible risks, and prompt intervention will avoid taking measures to separate the child from the family, which would further imply the initiation of the necessary procedures for the establishment of measures for the special protection of the minor. We are dealing with a concrete form of social management, where the principle of supremacy of objectives (best interests of the child) and at the same time the principle of participatory management (integrated approach to the risks of separation from the natural family) are eloquent. (Lis, 2012, p.52).

As in any other situation where we talk about prevention, the costs affected by such an activity carried out through community bodies is much less expensive compared to the effort required by institutionalizing the minor separated from the family, which means a much more laborious activity undertaken through DGASPC structures and courts, respectively.

"[...] The social problems that have emerged over time have imposed the emergence of a new intervention methodology. [...] Modern areas of intervention are linked to the emergence of new social problems that have come to the attention of public or non-governmental social assistance services, such as drug addiction [...]'. (Buzducea, 2009, p.78.)

The determination of the need for intervention shall be made on the basis of an assessment carried out by SPAS and translated, where appropriate, into a dedicated service plan. The assessment focuses on three coordinates: ensuring the level of subsistence for the minor from the perspective of basic needs, the interaction between minors and other family members and last but not least the influence that the family and social plan may have in the immediate future on the development of the minor.

The service plan will extend over a period of 12 months, during which the community social worker will have to check by field trip whether the initially identified aspects are still maintained and if there are indications that things are starting to correct based on those established. Thus, a scale of the risk of separation of the minor from the family is also drawn, depending on the number of situations identified following the initial assessment. The frequency of revaluations is determined by means of this classification, i.e. we are dealing with semi-annual visits if we have up to ten reasons for separation, respectively quarterly visits if those identified causes exceed the ceiling mentioned earlier.

The destination of the different forms of support provided on the basis of the service plan relates, on the one hand, to the needs identified for the child, but the attention paid to the family must not be neglected, which in turn may be the cause, or if not at least an enabling factor, of the minor's situation of vulnerability.

SPAS is also responsible for identifying all public and private structures in the vicinity that could provide counselling, education, social, medical, legal, habilitation or rehabilitation services.

Local collaboration is also formally achieved by setting up consultative community structures, which can act in the socio-medical, school, pedagogical, psychological, delinquency prevention, etc. area.

From a functional perspective, cases of risk regarding the separation of the minor from the family of origin are methodologically coordinated by appointing a coordinator at DGASPC level. The policy of managing this issue is based on ANPDC. As such, there are three levels

of intervention for the issue of the risk of separation of the minor from the family of origin: local, county and national.

For the functioning of these mechanisms, the establishment of a national database called the National Observatory of the Child is initiated. The introduction of this information will be done locally, by the social worker or social assistance technician.

The way of working in relation to the vulnerable minor is based on the case management technique. An interdisciplinary approach is mandatory where integrated community services are established.

In order to ensure the financing of this new way of intervention in social assistance, it is established that 50% of the funds necessary for this new system are provided directly from the state budget, from VAT rates broken down for this purpose. There is also a way to penalize local structures that have not generated the expected results: where special measures are adopted to protect the minor, the funds mentioned above will be reduced by 25% if this occurred without their prior involvement. In other words, prospecting for practical hypotheses that could lead to such effects is extremely important. The limits within which annual prevention plans can be developed will be influenced by such a sanction applicable together with the necessary checks. The involvement of local partners is thus essential in ensuring the success of such endeavours.

The problem arising from the perspective of legislative correlations and the technique of constructing normative acts is represented by the fact that, until the moment of writing this study, the methodological norms for the functioning of the database of the National Observatory had not yet been adopted.

A term of one year is established, during which local public authorities with competences in the field, namely SPASs, will have to complete the database of the National Observatory.

Conclusions

Correlating the two plans by which the state tries to manage the minor's problem as well as possible will take time. However, the fact that the separation of the minor from the family becomes a distinct subject,

treated by an independent normative act, contributes to the reassessment of the minor's position in society. How the state treats the future of its own citizens is relevant through such an approach. The efficiency of newly designed preventive activities will also materialize in reducing costs within the national child protection system.

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ADMINISTRATIVE CHANGE OF NAME FOR MINORS AND PERSONS WITH INTELLECTUAL AND PSYCHOSOCIAL DISABILITIES

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Abstract: *In Romania, the right to request an administrative change of name is granted to all Romanian citizens, whether domiciled in the country or abroad, as well as to stateless persons domiciled in our country.*

Foreign citizens, even if they are domiciled in Romania, as well as stateless persons who are not domiciled in our country do not have the possibility to request an administrative change of name or surname.

In the case of minors and adults with intellectual and psychosocial disabilities, given that we are in the presence of persons lacking legal capacity or with limited legal capacity on a case-by-case basis, the legislator has laid down special requirements regarding the possibility of changing the name by administrative means, which we have dealt with in this article.

Keywords: *change of name; minor; person protected by special guardianship; person protected by legal counseling; procedure.*

Introduction

The name is a complex concept, being since ancient times (Dogaru & Cercel, 2007, p. 114) one of the basic elements through which the individual person identifies himself in society and family.

The Romanian legislator, both in the provisions of the Civil Code (Law no 287/2009) and in the Law no 272/2004 on the protection and promotion of the rights of the child and in Law no 119/1996 on civil status documents[1], uses the notion of "name" in two senses: a broad and a narrow one.

Lato sensu, name means both surname and forename, and *stricto sensu*, name means only surname. However, the term "name" is predominantly used in its broad sense. According to Art 83 of the Civil Code: "the name includes surname and forename".

The binary structure of the name has led part of the doctrine (Boroi, 2008, p. 418) to state that the name brings together two non-patrimonial subjective civil rights of the natural person, i.e., the right to the surname and the right to the forename. For our part, we consider, along with other authors (Chelaru and Chelaru, 2023, p. 102, Dogaru and Cercel, p. 119; Genoiu, 2019, p. 307, Ungureanu and Munteanu, 2013, p. 183 etc), basing our opinion on the provisions of Art 82 of the Civil Code, according to which every person "has the right to the name established or acquired, according to the law", that we are in the presence of a unique subjective right in the structure of which there are two elements: surname and forename.

Being considered a non-patrimonial personal right, doctrine has highlighted the following legal characteristics of the right to a name: absolute, inalienable, imprescriptible, legal, personal, unitary and universal.

By way of exception to the rule that the right to a name can only be exercised in person, the representation of a minor, as well as of an adult benefiting from a special guardianship measure in the case of an administrative change of name is allowed.

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[1] Republished in the Official Gazette no 339/18 March 2012 with the modifications and amendments brought by the Law no 105/2022 for the modification and amendment of the Law no 119/1996 on civil status documents, as well as for the repeal of the Government Ordinance no 41/2003 on the administrative acquisition and change of name of the natural persons, published in the Official Gazette no 412/29 April 2022.

1. Subjects that may require administrative name change in Romania

The right to request an administrative change of name is recognized to all Romanian citizens by the provisions of Art 85 of the Civil Code and by Art. 41^1 Para 1 of the Law no 119/1996, republished, which states rules similar to those of the Civil Code. Thus, Romanian citizens can obtain, under the law, an administrative change of surname and first name or only one of them if there are good reasons[1]. Given that the law does not distinguish, we believe that this right is enjoyed by both Romanian citizens domiciled in the country and those domiciled abroad. This solution also follows from the provisions of Art 41^3 Para 1 of the Law no 119/1996, which refers to Romanian citizens domiciled abroad and those who have never been domiciled in Romania, as well as from Art 106 Para 1, sentence II of the Methodology for the uniform application of the provisions of Law no 119/1996, as subsequently amended[2].

At the same time, this right is also recognized by Art 41^2 of the Law no 119/1996 for non-nationals domiciled in Romania.

An analysis of these provisions shows that foreign citizens, even if they are domiciled in Romania, and stateless persons who are not domiciled in our country, are not entitled to request an administrative change of name or surname (Chelaru & Chelaru, p. 129, Trușcă, 2013, p. 130).

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[1] These are expressly provided for in Art 41^1 Para 2 Let a)-o) and Para 3 Let a)-j) of the Law no 119/1996 on civil status documents, the list being illustrative and not exhaustive.

[2] (…) in the case of a Romanian citizen domiciled abroad, the request for a change of name shall be submitted to the S.P.C.L.E.P. or, as the case may be, to the town hall of the administrative-territorial unit of the last place of residence in Romania, and if he/she has never been domiciled in Romania, to the D.S.C. – Sector 1.

2. On the protection of minors and adults with intellectual and psychosocial disabilities through civil law means

From a legal perspective, the protection of the individual means all legal provisions designed to ensure equal and non-discriminatory protection of the individual.

We are in the presence of a complex, interdisciplinary legal institution in which the civil law plays the main role (Lupulescu and Lupulescu, p. 227).

The civil legal norms protect and guarantee the subjective civil rights of each person equally and without any discrimination, as stated as fundamental principles in Art 26 and 30 of the Civil Code.

Where certain categories of natural persons, who either because of age or physical or mental health are unable to manage their property or protect their interests adequately, the legislator of the Civil Code has enshrined special protection measures in Title III *Protection of the natural person* (Art 104-186) of Book I and in Title IV *Parental authority* in Book II[1].

According to Art 105 of the Civil Code "Minors and those who, although capable, due to old age, illness or other reasons provided by law, are unable to manage their property or protect their interests in appropriate conditions, are subject to special protection measures".

Protective measures are listed in Art 106 of the Civil Code. Thus, the protection of the minor is carried out by the parents, by the institution of guardianship, by foster care or, where appropriate, by other special protection measures specifically provided for by law, and the protection of the adult is carried out by the institution of the measure of judicial counselling or special guardianship or curatorship (Duminică, 2023, p.67) or another measure provided for by law.

[1] As amended and supplemented by Law no 140/2022 on some protection measures for persons with intellectual and psychosocial disabilities and amendment and supplementation of some normative acts.

The need to protect these categories of persons has also been considered in the matter of administrative changes of name or surname, given the implications not only of a legal nature, but also of a psychological and emotional nature that a change of name or surname implies.

3. Exercising the right to request a change of name in the case of an adult with intellectual and psychosocial disabilities

In its current form, art. 41^4 Para 4 of the Law no 119/1996 states that for a person placed under a restraining order, the request for a change of name shall be made by the guardian, with the consent of the guardianship court.

Since the provisions of the Civil Code on injunctions have been declared unconstitutional and new regulations have been adopted in the field of protection of persons with intellectual and psychosocial disabilities, namely special guardianship and legal counselling, to which reference has already been made above, it is necessary to amend this paragraph to bring it into line with the new provisions.

We consider that in the case of a person protected by special guardianship, the request for a change of name is made by the guardian, with the consent of the guardianship court, and in the case of a person protected by legal counsel, we consider that the person can make the request personally with the consent of the guardian, without the need for consent from the guardianship court.

4. Exercising the right to request a change of name for minors

The change of the minor's surname or forename may be made at the same time as the change of the parents' name or later for good cause. If both parents request a change of surname, the change of the minor's surname is mandatory and is done *ex officio*. The change of the child's first name may be requested at any time.

In accordance with the provisions of Art 41^4 of Law no 119/1996, for a minor, the request for a change of name is made by the parents or,

with the consent of the guardianship court, by the guardian. If the parents do not agree on the change of the child's name, the guardianship court will decide.

We consider that the opinion of the family council is also necessary for a minor protected by guardianship, given that Art 136 of the Civil Code establishes that measures concerning the person of the minor are taken by the guardian, with the opinion of the family council, with the exception of measures of a current nature.

If the request to change the minor's name is made by one of the parents, the consent of the other parent, expressed in authenticated form or before the civil registrar, is also required.

Parental consent to change the minor's name may be superseded by a court order. Some courts have granted such applications for the substitution of parental consent, applying the principle of the best interests of the child and the principle of listening to the child's views and taking into account the child's age and maturity[1]. For example, in one case the court held that the minor's natural father did not actually agree to the change of his child's name. When heard in court, he pointed out that it was the child's wishes that mattered. The court, when hearing the minor, proceeded to verify this aspect and found that the change of name was the minor's wish (…) (Decision no 750/13 August 2020, Negrești-Oaș Court, accessed via the Sintact Module on 19.02.2024).

In another case, the court reasoned that it was in the best interests of the minor to bear the same surname as the parent to whom she was entrusted for her upbringing and education and who represents the minor (Decision no 6870/7 December 2017, Brăila Court, accessed via the Sintact Module on 19.02.2024).

On the other hand, there have also been courts which have held, also under G.E.O no 41/2003 on the acquisition and administrative change of

[1] As an example, see the Decision no 5441/17 September 2019, Brăila Court; Decision no 210/28 January 2019, Sighetu-Marmației Court; Decision no 750/13 August 2020, Negrești-Oaș Court; Decision no 6870/7 December 2017, Brăila Court accessed via the Sintact Module on 19.02.2024.

names of natural persons[1], that applications to substitute the consent of one of the parents are unfounded, holding that to issue a judgment requiring the defendant to appear to give his consent, or, in this case, to substitute his consent, would imply circumvention of the legal provisions of Art 7 Para 1 of G.E.O no 41/2003, which provide that in the event of disagreement between the parents, the guardianship authority shall decide and issue a decision. Thus, the court observes that the guardianship authority does not supersede the consent of the other parent either but issues a decision based on the request of one of the parents, which may be an approval or rejection (Retea, 2022, pp. 393-399; Decision no 6563/6 June 2019, Timișoara Court, accessed via the Sintact Module on 19.02.2024).

Both under the old regulations, but especially in the current legislative context when the legislator has expressly provided that the guardianship court has the power to rule on disagreements between parents regarding the change of the child's name, we believe that the court can issue a decision to replace the agreement of one of the parents, applying the principle of the best interests of the child, the principle of listening to the child's opinion and taking account of his or her opinion, taking into account the age and degree of maturity of the child, as well as of the principle of interpreting each legal rule relating to the rights of the child in relation to all the regulations in this field, principles laid down in Art 6 Let a), h) and l) of the Law no 272/2004 on the protection and promotion of the rights of the child.

According to Art 2 Para 6 of the Law no 272/2004, in determining the best interests of the child, courts must take into account at least the following criteria: a) the child's needs for physical and psychological development, education and health, security and stability and belonging to a family; b) the child's opinion, according to age and maturity; c) the child's history, taking particular account of situations of abuse, neglect,

[1] Repealed by Law no 105/2022 amending and supplementing Law no 119/1996 on civil status documents and repealing the Government Ordinance no 41/2003 on the acquisition and administrative change of names of natural persons, Official Gazette no 412/29 April 2022.

exploitation or any other form of violence against the child, as well as potential risk situations that may arise in the future; d) the ability of the parents or carers to meet the child's specific needs; e) maintaining personal relationships with people to whom the child has developed attachment relationships.

At the same time, under Art 29 of the Law on the protection and promotion of the rights of the child, in such a procedure it is mandatory to hear and take into account the opinion of the child who has reached the age of 10, and children under the age of 10 may also be heard, the latter's opinion being taken into account in relation to their age and degree of maturity. Listening to the child's opinion is a principle relevant to the whole issue of respect for the rights of the child, being at the same time the principle that must accompany the practical application of all the principles regulated in Art 6 of Law no 272/2004. The principle recognizes the child as a being in his or her own right, with the capacity to participate and express his or her views on all matters of direct concern to him or her, and thus able to influence the decisions of the competent bodies which, in turn, are obliged to give due weight to the views expressed (Drăghici, 2013, pp. 62-63).

The agreement will not be necessary if the other parent is deprived of capacity by a special guardianship measure or is declared dead or has lost parental rights.

In the case of a minor who has reached the age of 14, the application must also be signed by the minor. If the child's parents are deceased, unknown, placed under special guardianship or legal guardianship, declared judicially dead or missing or deprived of parental rights and guardianship has not been established, if the child has been declared abandoned by a final court decision, as well as if the court has not decided to entrust the child to a family or a person, under the law, the request for changing the name of the minor is made by the public structure specialized in child protection under the county council or the local council / district council of Bucharest municipality (Art 41^4 Para 5 of the Law no 119/1996).

All these rules on changing the name of minor children will apply both to children of the marriage and to those outside the marriage, in view of the provisions of Art 448 of the Civil Code, which enshrines full equality between children of the marriage and those outside the marriage.

Conclusions

It is certain that the rights and obligations in the legal relationships in which a person enters can only be enforced if he or she has a legally established identity. Thus, one of the rights inherent to the human being is the right to identity, and the main dimension of this is the right to a name. Although we are in the presence of a right of personality which is exercised as a rule only in person and not by representation, the legislator has nevertheless chosen to establish special requirements for the administrative change of name in the case of minors and adults with intellectual and psychosocial disabilities. This choice is justified by the important consequences that the change of name has on the legal, social and personal life of the individual.

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HUMAN TRAFFICKING IN ROMANIA

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Abstract: *Human trafficking aimed at sexual exploitation and forced prostitution is in continues to grow at the level of the European Union. The Romanian authorities as well international organizations identify some major obstacles they face in within the approach of this dynamic phenomenon. Existing policies are not clear enough and structured, thus presenting gaps in the recognition of the determining elements the involvement of female persons in human trafficking. The existing laws present a limited applicability and an absence of national public will to invest more in research and protection efforts, and on the other hand, they are predominant corrective measures, thus neglecting the integration of the socio-economic framework necessary to create a overview. Organized groups exploit considerably the vulnerabilities they identify at the level of Romanian legislation. The Romanian authorities face different challenges and support the need to change the paradigm created at level of policy making.*

Keywords: *human trafficking; victims; legislation; protection*

Introduction

Human trafficking is a complex problem affecting society contemporary, having devastating consequences for the people involved

and, at the same time, representing a violation of fundamental human rights. In the international context, Romania, as a member state of the European Union, has the responsibility to implement and respect international standards and treaties aimed at combating human trafficking.

This article explores human trafficking in Romania, highlighting the challenges, responses and needs in terms of victim identification and assistance. The traffic of persons, a serious crime with a profound impact on victims and society, continues to it represents a major problem globally and nationally. In the Romanian context, this phenomenon complex manifests itself through various forms of exploitation, including forced labor, exploitation and forced begging, particularly affecting vulnerable groups.

In the global context of the fight against human trafficking, Romania is faced with unique and complex challenges. This article aims to provide an in-depth insight into human trafficking in Romania, emphasizing the implementation and impact of the Mechanism National Identification and Referral of Victims of Trafficking in Persons (MNIR) (https://anitp.mai.gov.ro/the new national mechanism for identifying and referring victims of human trafficking was adopted/).

Through analysis legislation, national strategies and inter-institutional collaboration, the article highlights progress and the challenges in combating this phenomenon in Romania, offering a valuable perspective for understanding and dealing with one of the darkest crimes of our time.

National Mechanism for the Identification and Referral of Victims of Trafficking in Persons (MNIR)

Human trafficking is a serious violation of human rights and a problem persistent global problem, which requires a multidimensional and coordinated approach. In Romania, implementation of the National Mechanism for the Identification and Referral of Trafficking Victims Persons (MNIR) (https://www.mai.gov.ro/ press-release-655/) marks a

crucial step in the fight against this phenomenon. Through analysis detailed analysis of the structure, functionalities and impact of the MNIR, a better understanding can be obtained deep analysis of the dynamics of human trafficking in Romania and the way in which the system of identification and referral contribute to the protection and assistance of victims as well as to improvement coordination between the various entities involved in combating human trafficking.

The National Mechanism for the Identification and Referral of Victims of Trafficking in Persons (MNIR) represents a strategic and structured response to this problem, providing a framework for coordinating and improving victim identification and assistance efforts. It is analyzed the role and functionality of the MNIR in detail, highlighting the importance and benefits of implementing a such a system in improving the response to human trafficking.

By clearly defining terms, processes and responsibilities, MNIR contributes to strengthening the legislative and institutional framework, thus improving the capacity of the authorities and a organizations to effectively address human trafficking. The article emphasizes the need for a united and committed approaches, recognizing the challenges and complexities of human trafficking and the need for continuous collaboration between different agencies and organizations to ensure effective protection and assistance to victims.

In Romania, human trafficking is a worrying reality, with implications profound for victims and society as a whole. In recent years, the country has been recognized in mainly as a source, but also as a destination and transit point for victims of trafficking people. Forms of exploitation range from forced labor and sexual services to begging forced and organ trafficking. Human trafficking presents a diversity of victims, including men, women and children, with a preponderance of cases in certain regions and communities vulnerable.

Efforts to combat human trafficking included improving the framework legislation, strengthening institutional capacities and promoting cooperation at the national level and international. However, challenges remain, including identifying and effectively assisting a victims, as well as adapting to the ever-changing methods of traffickers.

Mechanisms and Modalities

a) Traffickers' methods

Traffickers use a diverse range of methods to recruit, transport and exploit victims. These methods are often adapted to exploit specific vulnerabilities of individuals or groups. Some of the most common tactics include:

Forging promises: Traffickers can promise high-paying jobs, education or a better life in other regions or countries. In reality, these offers are meant to deceive and lure victims into the traps of exploitation (https://www.cpe.ro/wp-content/uploads/2016/03/Education guide for the prevention of human trafficking.pdf).

Coercion and violence: Traffickers often use violence or threats of violence to control the victims. This may include threats to victims or a their families.

Exploitation of personal relationships: In some cases, traffickers may be acquaintances or even members of the victim's family. They take advantage of the trust and access to the victim to recruit them and exploit.

Abuse of authority or a situation of vulnerability: Traffickers identify and exploit vulnerabilities such as poverty, lack of opportunities, political instability or discrimination, to recruit and maintain their victims.

Examples from MNIR may include detailed cases illustrating these methods, providing a real perspective on how traffickers operate in Romania and beyond the borders his (The hidden faces of human trafficking in Romania. Four shocking stories and a statistic, Free Europe Romania (https://romania.europalibera.org/a/interviu trafic persoane romania ue/32230391.html).

b) Victims' vulnerabilities

Victims of human trafficking often have certain vulnerabilities that make them more vulnerable susceptible to recruitment and exploitation. Recognizing and understanding these vulnerabilities are

essential for prevention and effective intervention. Among the most common vulnerabilities include:

Poverty and lack of economic opportunities: Lack of access to education and places of decent work can push individuals to look for desperate solutions, making them vulnerable to the false promises of traffickers.

Lack of education and awareness: People who are not aware of the risks human trafficking or warning signs can more easily fall prey to traffickers.

Instability and conflicts: Situations of political instability, conflicts or disasters natural disasters can erode social structures and create conditions in which human trafficking can flourish.

Discrimination and marginalization: Discriminated or marginalized groups, including ethnic minorities and people with disabilities can be specifically targeted by traffickers due to lack of protection and reduced access to resources.

Identifying these vulnerabilities within the MNIR allows authorities and organizations develop more effective prevention and intervention strategies, adapt support services and create awareness programs that reach the most at-risk groups human trafficking.

The legislative perspective

In Romania, the legal framework for combating human trafficking is composed of a set of national laws and regulations aligned with international standards and directives. The central element of this framework is the Penal Code, which defines human trafficking and determine the applicable penalties. In addition, Romania has ratified numerous treaties and conventions international, including the UN Protocol to Prevent, Suppress and Punish Trafficking in people, especially women and children.

The legislation reflects a complex understanding of trafficking as a crime and includes provisions specific for the protection and assistance of victims. MNIR, as part of this legal framework, details processes and protocols for victim identification and coordination between different

agencies and organizations. It also underlines the importance of victim and witness protection in the framework judicial processes.

Definition of human trafficking

a) Internationally

A comprehensive definition of Trafficking in Persons was provided by the Protocol against human trafficking adopted within the United Nations Organization by Resolution 55/25 of the General Assembly and entered into force at the end of 2003. It was interpreted as being a globally applicable legal instrument that described the crime of trafficking of people. Thus, art. 3 of the Protocol defines trafficking in persons as "the recruitment, the transport, transfer, shelter or reception of persons, by threat of recourse or by resorting to force or other forms of coercion, by kidnapping, fraud, deception, abuse of authority or a situation of vulnerability or by offering or accepting payments or advantages to obtain the consent of a person having authority over another for the purpose exploitation. Exploitation includes, at least, exploitation through prostitution of another person or other forms of sexual exploitation, forced labor or services, slavery or similar practices slavery, the use or removal of organs" (Art. 3, Protocol on the prevention, suppression and punishment of human trafficking, especially of women and children, in addition to the United Nations Convention against Transnational Organized Crime);

The protocol aims to standardize national laws to criminalize the trafficking of persons, thus facilitating international cooperation in the investigation and sanctioning of cases of human trafficking. In addition, the Protocol also targets victims of human trafficking, respectively protecting them and providing assistance by recognizing and respecting rights globally recognized fundamentals.

In the scope context, it is specified that the Protocol shall become active when the aforementioned crimes have a transnational dimension and groups are involved criminal, taking into account the purpose of protecting the victims of this crime. In that in this way states are

encouraged to adopt legislative measures to criminalize the trafficking of persons, the aim being to reach an international consensus on this criminal offence. However, the Protocol did not require signatory parties to use in legislation own the same terminology, but created a conventional obligation in their charge regarding adjusting national laws to reflect agreed concepts.

b) At the European level

Global developments along with regional factors have generated high concern with regard to human trafficking at the level of the European Union. Being in a situation that required taking some measures, the European Union adopted a series of legal instruments necessary to prevent as well as combat this global phenomenon which presented a continuous evolution.

Human trafficking has developed over time in various forms, and this one diversification helped exploit loopholes in existing regulations. Legislative efforts of The Union urged member states to take into account this complex evolution and adapt national legislation to everyday reality and analyze the challenges they face.

In the context of the increase in the phenomenon of human trafficking at the global level, it determined The European Union to develop updated legislation in the form of a new folding directive on the reality known to citizens. Thus, the member states were obliged to adopt it, however the way of transposition was left to their discretion. Therefore, the Directive was developed 2011/36/UE (Directive 2011/36/EU of the European Parliament and of the Council of April 5, 2011 (https://eur lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:101:0001:0011 :ro:PDF) of the European Parliament and of the Council of April 5, 2011 on the prevention and combating human trafficking and protecting its victims.

Through the provisions of the European Directive, the material element of the crime of human trafficking, namely the recruitment, transport, transfer, harboring or reception of persons, including the exchange or transfer of control over such persons 's actions listed must be

undertaken in the following ways: threats or forms of constraint; fraud or deceit; abuse of power; kidnapping; taking advantage of the state of vulnerability of the victim; giving or receiving money or benefits. The purpose of carrying out these actions is to exploit the victims.

The Directive provides for both the basic form of the offense and the aggravated one. To be standardize the punishment, the member states have the obligation to provide in the national legislation o sentence of at least 5 years of imprisonment when the offense was committed in the form of the base. In the case of the aggravated form, the minimum punishment is double, starting from 10 years prison.

c) Nationally

As far as Romanian legislation is concerned, the normative basis is represented by the Law 678/2001 on preventing and combating human trafficking (https://legislation.just.ro/Public/DetailsDocument/32589). Romania's efforts by to prevent and combat human trafficking, as well as the insurance of victims of this phenomenon is carried out in accordance with this law through the lens of the application regulation, but also in parallel to the Action Plan to combat human trafficking. By virtue of these legal provisions, an interministerial working group was established whose role was to supervise, coordination and evaluation of the activities carried out in order to prevent and combat the trafficking of people.

Law 678/2001 not only includes provisions criminalizing certain crimes, but also rules regulating the prevention of human trafficking together with the competent institutions, in agreement with the international commitments that Romania has agreed to. Also this also provides provisions regarding the protection and assistance to be given to victims, but also regulations on international cooperation.

Before being repealed, art. 13 of Law 678/2001 stipulated that recruitment, transportation, transferring, hosting or receiving a person between the ages of 15 and 18, for the purpose its exploitation constitutes the offense of trafficking in minors and is punishable by imprisonment of from 3 to 12 years and the prohibition of certain rights.

With the change of criminal legislation in Romania, the New Penal Code provided by the Law 286/2009 (https://legislation.just.ro/Public/DetailsDocumentPoster/269510) integrated within Title I - Offenses against the person, Cap. VII - Traffic and the exploitation of vulnerable persons, the criminalization rules of Law 678/2001. Thus, a part of the provisions of Law 678/2001 are repealed, this remaining a legal instrument in terms of special investigative techniques as well as anti-trafficking measures of persons and victim counseling. In addition to art. 13 were also abrogated and art. 12 and 15-19.

Analysis of relevant cases and legal precedents provides valuable insight on how the law is applied in practice and the challenges encountered in combating it effective human trafficking. Cases can illustrate success or limitations in identification victims, ensuring their protection and assistance, or in pursuing and convicting traffickers.

Precedents, especially court decisions, show how laws are interpreted and applied they can evolve over time and influence anti-trafficking strategies. Of also, they can highlight the need for legal reform or improvement of the mechanisms of law enforcement.

At the same time, cases and precedents reveal the crucial role of enforcement institutions of the law, the judicial system and non-governmental organizations in the fight against trafficking people. These entities not only enforce the law, but also contribute to the formation of a framework of understanding and developing best practices in victim identification and assistance and follow-up traffickers.

The Victimological Perspective

a) The effects on the victims

Victims of human trafficking often suffer devastating, far-reaching consequences physical trauma and extend to deep psychological, social and economic issues. These effects they can vary considerably depending on the duration and nature of exploitation, but also on the characteristic's individual of each victim.

Social problems: Many victims face social isolation, difficulties in maintaining or building relationships and losing community support. These problems are often intensified by the stigma associated with human trafficking.

Economic Consequences: Exploitation within trafficking often deprives victims of education and job opportunities, leaving them without the resources to escape their abusers and to rebuild his life.

Romania represents specific socio-geographical characteristics that make it susceptible to human trafficking. Located at the intersection of West and East, it provides strategic access points to Asia via Moldova and Ukraine, to Turkey via Bulgaria and the Black Sea, and to the Balkans via Serbia. However, as a member of the European Union, since 2007, the free movement of people, capital, goods and services has turned Romania into a source country that facilitates a quick and accessible flow of people across the borders of the Union.

b) Intervention strategies

To respond to the complex needs of victims of human trafficking, it is essential to multidisciplinary and intersectoral approach. MNIR describes various intervention strategies that involves collaboration between various government agencies, non-governmental organizations and international institutions.

Immediate assistance: Includes emergency shelter, medical care, counseling psychological and legal assistance. These services are essential to stabilize victims and ensuring their safety.

Recovery and reintegration: Long-term strategies aim at social reintegration and economic of the victims. These may include educational programs, vocational training, support to find a job and assistance in developing life skills independence.

Protection and legal representation: Victims often need protection within the framework the legal system, especially when they participate as witnesses in trials against traffickers.

Competent legal representation and witness protection measures are essential for ensuring justice and protecting victims from reprisals.

Personalized support: Recognizing that each victim has unique needs is crucial.

Interventions must be flexible and tailored to respond to the diversity of experiences and needs of individual victims.

c) Prevention and Combat

National and international strategies Preventing and combating human trafficking requires a coordinated response and comprehensive, involving both national strategies and international collaborations. In Romania, The National Mechanism for the Identification and Referral of Victims of Trafficking in Persons (MNIR) is a central pillar in these efforts, reflecting the country's commitment to address this complex phenomenon through a multidimensional approach.

At the national level: Romania has developed legislative and institutional frameworks to prevent human trafficking and to protect and assist victims. These include specific laws, units of specialized police, training programs for professionals and awareness campaigns public. MNIR, in particular, provides a structure through which victims can be quickly identified and referred to appropriate services, ensuring effective collaboration between different agencies and organizations.

At the international level: Romania collaborates with international organizations, neighboring states and other countries to address human trafficking. This includes sharing information, joint law enforcement operations and cross-border projects. International cooperation is vital as human trafficking often crosses national borders and requires a response coordinated on a large scale (Combating Human Trafficking: A New Strategy Focused on Prevention, Disrupting Criminal Activities and on strengthening victims' capacity for action, April 14, 2021, Press release https://ec.europa.eu/commission/presscorner/detail/ro/ip_21_1663?fbclid =IwAR3vkgZ_-MCYBZhG_1roSrf_TtNtg MBjPktwlAiDj-DhPESYIHBP0I8ukwo).

d) The role of institutions and NGOs

Effective collaboration between the various entities involved is critical to a response comprehensive on human trafficking. Government

institutions, non-governmental organizations (NGOs), international agencies and local communities play complementary roles in this effort.

Government institutions: These, including the police, justice and social services, are responsible for law enforcement, victim protection and the prosecution of traffickers. In the in addition, they develop prevention policies, strategies and programs.

NGOs: NGOs are often at the forefront of identifying victims and providing direct services such as shelter, counseling and legal aid. They are, of also active in promoting awareness and training.

Collaboration: MNIR emphasizes the importance of close collaboration between all of these entities. By working together, institutions and NGOs can share resources, expertise and information, thus increasing the effectiveness of efforts to prevent and combat human trafficking.

In conclusion, the following sections of the article will continue to explore the challenges, successes and lessons learned from the implementation of the MNIR and other national and international strategies. Of it will also discuss how collaboration between different entities can be improved and about future directions in the fight against human trafficking (Oleg CASIADI, The role of NGOs and the media in preventing and combating human trafficking, 2-3 June 2016).

Operation "Freedom Recovered"

In the spring of 2019, the Romanian authorities, in collaboration with international agencies, have launched a large-scale operation called "Freedom Reclaimed" to combat an extensive network of human trafficking. The purpose of this operation was to dismantle a network that exploited victims in the purpose of forced labor in agriculture in the rural region of Romania.

The operation began based on information obtained from victims who managed to escape and report the abuses they were subjected to. Many of the victims were from the communities vulnerable, including ethnic minorities and people with limited access to education or

resources economic. Traffickers took advantage of these vulnerabilities, promising well-paid jobs and decent living conditions.

Once they arrived at the promised places, the victims were stripped of their documents and forced to work in inhumane conditions, often without pay and under the threat of violence. In the operation, joint police teams and victim protection experts carried out raids coordinated to several farms and homes suspected of being used for shelter and exploitation of victims.

Following the raids, more than 50 victims were identified and released. These they received immediate assistance, including shelter, medical care and psychological counselling. Each victim a been individually assessed to understand specific needs and develop a personalized plan of assistance and reintegration.

MNIR played a crucial role in coordinating the various agencies involved in the assistance the victims. It ensured that victims received the necessary protection and were informed about their rights, including about the possibility to participate in legal proceedings against traffickers.

In addition to the rescue and assistance of the victims, a major objective of the operation "Freedom Recovered" was the prosecution of traffickers. Several suspects were arrested and charged for human trafficking and other related crimes. The trials involved detailed testimony from victims, often supported by witness protection measures to ensure their safety.

"Reclaimed Freedom" illustrates the complexity and challenges associated with identifying and intervention in cases of human trafficking, as well as the importance of integrated systems such as MNIR in ensuring an effective response and protecting the rights of victims. This it also emphasizes the continued need for vigilance, innovation and commitment in the struggle against this global crime.

Conclusions

Analysis of the National Mechanism for the Identification and Referral of Victims of Trafficking in Persons (MNIR) and the broader

context of human trafficking in Romania highlighted critical aspects of this global problem. Anti-trafficking operations, such as "Freedom Recovered," illustrates the ability of well-coordinated systems to bring about change meaningful and provide real support to victims. However, challenges persist in form the adaptability of traffickers, the need for continued protection of victims and the need to ensure effective prosecution of criminals.

The MNIR, with its well-defined structure and processes, is an important step in the right direction. It is clear that a multidisciplinary approach and inter-institutional collaboration are essential for an effective response. Ongoing training and awareness efforts as well strengthening the legal framework, are also vital for long-term success in combating human trafficking.

In conclusion, human trafficking remains a significant challenge, but with a commitment sustained, innovation and collaboration, significant progress can be made in preventing this crime and in the assistance provided to victims. MNIR and other similar initiatives are essential components of of this effort, and through the continuous improvement of these systems, Romania and the community international can aspire to a future where human trafficking is a relic of the past.

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CONTRIBUTIONS OF THE DOCTRINE AND CONSTITUTIONAL JURISPRUDENCE TO THE CONSTRUCTION OF THE PRINCIPLES OF PROPORTIONALITY AND EQUALITY

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Abstract: *In this study, we propose to analyze some aspects of constitutional doctrine and jurisprudence in shaping and developing the constitutional principles of proportionality and equality of law. We especially emphasize its contribution to the emergence and development of the constitutional control of laws as well as to the edification of some principles of law.*

We mainly analyze the role of judicial practice in the construction of the principle of proportionality in constitutional law, the principle of equality and the interference between the principle of proportionality and the principle of equality. In this sense, we support the role of jurisprudence not only in the correct interpretation and application of the constitutional norms but also in their construction, in the discovery of the existing normative meanings, most of the time only implicitly in the formal expression of the legal norm of the constitutional principles mentioned above. By this, the jurisprudence in constitutional matters is not limited only to the interpretation according to classical methods of the norms of the Fundamental Law, but has an important contribution to the clarification and construction of some principles of law, to the

constitutionalization of the entire legislative system and the judicial practice of all courts.

Keywords: *Constitutional principles; proportionality principle; principle of equal rights; contributions of doctrine; contributions of jurisprudence.*

Introduction

The normative activity of drafting the law must be continued with the activity of applying the norms; in order to apply, the first logical operation to perform is their interpretation. Both the Constitution and the law present themselves as a set of legal norms, but these norms are expressed in the form of a normative text. Therefore, what constitutes the object of interpretation are not the legal norms as such, but the text of the law or the Constitution. A legal text can contain several legal norms. A constitutional norm can be deduced from a constitutional text by way of interpretation. The text of the Constitution is drafted in general terms, which influences the degree of determination of the constitutional norms. Through interpretation, the constitutional norms are identified and determined.

It should also be emphasized that a Constitution can include certain principles that are not clearly expressed expressis verbis, but they can be deduced through the systematic interpretation of other norms. In the sense of what was shown above, it was specified in the specialized literature: "The degree of determination of the constitutional norms by the text of the fundamental law can justify the need for interpretation. The norms of the Constitution lend themselves very well to an evolution of their course, because the text is par excellence imprecise, formulated in general terms. The formal superiority of the Constitution, its rigidity, prevents its revision at very short intervals and then interpretation remains the only way to adopt the normative content, usually older, to the constantly changing social reality. The meaning of the constitutional norms being by their very nature, that of maximum generality, its exact

determination depends on the will of the interpreter" (Muraru et al., 2002, p. 67).

The scientific justification of the interpretation results from the need to ensure the effectiveness of the norms contained both in the Constitution and in the laws, by means of public authorities that mainly carry out the activity of interpreting the norms dictated by the author. These authorities are primarily the courts and the constitutional courts.

The verification of the conformity of a normative act with the constitutional norms, an activity through which the constitutionality control of laws is carried out, does not mean a formal comparison or a mechanical juxtaposition of the two categories of norms, but a complex work based on the techniques and procedures of interpreting both the law as well as the Constitution. Therefore, the need to interpret the Constitution is a condition for its application and ensuring its supremacy. The constitutionality control of laws is essentially an activity of interpreting both the Constitution and the law. It is necessary to have independent public authorities that have the competence to interpret the Constitution and, in this way to examine the conformity between the law and the Constitution. Within the European model of constitutional justice, these authorities are the Constitutional Tribunals and Courts.

I. Contributions of constitutional jurisprudence to the construction of the principles of proportionality and equality

Uniformity was constantly rejected in the jurisprudence of the Constitutional Court, in relation to the interpretation and application of the principle of equality. Strict equality before the law implies that, in case of equal situations, the treatment is equal, without discrimination. (see Tănăsescu, 1999; Ionescu, 2019, pp. 906-907; Deleanu, 2006, pp. 456-462, Muraru and Tănăsescu, 2019, pp. 136-141; Andreescu and Puran, 2018, pp. 217-232). In the hypothesis where the situations are different, the treatment can only be differentiated, which implies the principle of proportionality (Andreescu, 2007; Selejan-Guțan, 2004).

Consequently, the violation of the principle of equality occurs when a differentiated treatment is applied to similar situations or in the hypothesis where the same legal treatment is applied to situations that are by their nature different. Also, the violation of this principle can also occur in situations where there is no objective and reasonable motivation for a differentiated treatment of identical situations or if the unequal legal treatment is not appropriate to the purpose of the law.

The jurisprudence of the Constitutional Court presented an evolution in this sense, starting from admitting that different situations should be treated differently, to recognizing new constitutional principles, namely the right to difference (Muraru and Constantinescu, 1997, pp. 113-114). The Constitutional Court ruled that a difference in legal treatment based on social criteria or categories of civil servants is inadmissible, because it would represent discrimination (Decision no. 6 of February 25, 1993, published in the Official Gazette of Romania no. 61 of March 25, 1993). It admitted that there may be situations that allow particularities, but not every such case justifies a difference in legal treatment, especially in the situation where a different legal treatment would represent discrimination. The constitutional court established that the provisions of the Law on war veterans, regarding the conditioning of the quality of a war veteran, by the circumstance of not having fought against the Romanian army, are unconstitutional. In this case, there is an unjustified discrimination between Romanian citizens and therefore it is necessary to ensure "equality of treatment towards all those who enlisted in foreign armies"(Decision no. 47 of May 17, 1994, published in the Official Gazette of Romania, Part I, no. 139 of June 2, 1994). These are identical situations, which require identical treatment. The Constitutional Court has also applied the principle of equality in other situations, considering either that the situations are so similar that a differentiation of legal treatment is not justified, or, if it exists, it represents discrimination in relation to the criterion used (Decision no. 30 of February 10, 1998, published in the Official Gazette of Romania, Part I, no. 113 of March 16, 1998).

The constitutional court ruled that the principle of equal rights requires the establishment of equal treatment for situations which,

depending on the goal pursued, are not different (Decision no. 1 of February 8, 1994, published in the Official Gazette of Romania, Part I, no. 69 of March 16, 1994). It is interesting to underline the aspect that the assessment of the identity or difference between the situations to which a legal treatment is applied is carried out from a teleological perspective with reference to the goal pursued by the legislator. At the same time, the constitutional court showed that the observance of the principle of equality of rights does not mean the reflection in the legal norm of a complete uniformity of social situations, but, on the contrary, the diversity of social situations can be corrected by the legislator in a proportional way, to bring them to a common denominator (Decision no. 349 of September 24, 2013, published in the Official Gazette of Romania, Part I, no. 708 of November 19, 2013). The express reference to the principle of proportionality means the suitability of the legal norm to the diversity of the reality to which it is applied and, therefore, the general and abstract character of the norm is concretized in relation to this diversity of situations.

The rejection of uniformity and the need to differentiate the legal treatment, depending on the different objective situations, without representing discrimination, is reflected in the jurisprudence of the Constitutional Court. Referring to the different situation of students from private education, and on the other hand, those from state education, the Court found that, once they entered the chosen system, they obey the rules specific to each system. So, in reality, the contested provisions do not establish any discrimination, but offer different solutions for different situations (Decision no. 70 of December 15, 1993, published in the Official Gazette of Romania, Part I, no. 307 of December 27, 1993). In other words, the necessary adequacy of the legal treatment to the objective situation considered represents an application of the principle of proportionality. This rule is formulated in the jurisprudence of the Court as a principle: "The principle of equality before the law implies the establishment of equal treatment for situations which, depending on the purpose pursued, are not different. Consequently, a different treatment cannot only be the expression of the judge's exclusive appreciation, but

must be justified rationally, in compliance with the principle of equality of citizens before the law and public authorities" (Recital 5 from the Decision of the Plenary of the Constitutional Court no. 1 of February 8, 1994, published in the Official Gazette of Romania, Part I, no. 69 of March 16, 1994).

The jurisprudence of our constitutional court confirms this interpretation of the principle of equality, which refers to the equality of citizens before the law and public authorities, and not the equality of legal treatment applied to one category of citizens compared to another. Because the fundamental rights "represent a constant of the citizen's personality, an equal chance granted to any individual", art. 16, para. (1) of the Constitution refers to the equality of rights between citizens, not the identity of legal treatment on the application of some measures, regardless of their nature. In this way, the Constitutional Court justifies not only the constitutionality of the administration of a different legal regime with respect to certain categories of persons, but also the necessity of such legal treatment (Decision no. 213 of May 4, 2004, published in the Official Gazette of Romania, Part I, no. 519 of June 9, 2004).

At the same time, it has been established in jurisprudence that the principle of equality of rights does not imply the uniform legal treatment of all crimes, and the regulation of a sanctioning regime depending on the coverage of the damage caused by the crime committed is the natural expression of the constitutional principle of equality, which imposes that in the same situations to apply the same regime, and to different legal situations, the legal treatment should be differentiated (Decision no. 1214 of October 5, 2010, published in the Official Gazette of Romania, Part I, no. 808 of December 3, 2010).The conduct of investigated persons who can contribute to finding out the truth in certain cases is a situation that implies a differentiated legal treatment. This is a measure of criminal policy, determined by the recrudescence of serious antisocial phenomena that require the establishment by the state of a system of special measures, which are not likely to affect the principle of equality (Decision no. 636 of May 18, 2010, published in the Official Gazette of Romania, Part I, no. 398 of June 16, 2010). The Constitutional Court did

not recognize the existence of discrimination between people who commit the crime of theft and who benefit from the possibility of reconciliation, as a way of removing criminal liability, and people who commit the crime of stealing trees, since they are in different situations, and the legal treatment differently established by the legislator regarding them is based on the objective criterion of the importance of the social value protected by the criminalization norm, the national forest fund constituting an asset of national interest (Decision no. 293 of April 28, 2015, published in the Official Gazette of Romania, Part I, no. 436 of June 18, 2015).

Also, in its jurisprudence, our constitutional court referred to the criterion according to which a legal regime or another finds its application: "When the criterion according to which a legal regime or another finds its application has an objective and reasonable character, and not subjective and arbitrary, being constituted by a certain situation provided for in the hypothesis of the norm, and not by the membership or quality of the person regarding whom it finds its application, so intuitu personne, there are no grounds for qualifying the regulation deduced from the control as discriminatory, so contrary to the constitutional norm of reference (Decision no. 192 of March 31, 2005, published in the Official Gazette of Romania, Part I, no. 327 of June 21, 2005).

At the same time, the jurisprudence of the constitutional court specified that: "We cannot talk about discrimination in the hypothesis that, through the play of legal provisions - thus including through the succession of normative acts over time - certain people can end up in unfavorable situations, thus assessed in a way subjectively through the lens of their own interests (Decision no. 1038 of September 14, 2010, published in the Official Gazette of Romania, Part I, no. 742 of November 5, 2010).

Applying this reasoning of proportionality, the Constitutional Court reached the recognition of a fundamental right: the right to difference. "In general, it is appreciated that the violation of the principle of equality and non-discrimination exists when differential treatment is applied to equal cases, without an objective and reasonable motivation, or if there is a

disproportion (s.n.) between the goal pursued by the unequal treatment and the means used. In other words, the principle of equality does not prohibit specific rules. That is precisely why the principle of equality leads to emphasizing the existence of a fundamental right, the right to difference (s.n.), and to the extent that equality is not natural, the fact of imposing it would mean the establishment of discrimination." (Decision no. 263/2001, published in the Official Gazette of Romania, Part I, no. 762 of November 29, 2001)

The application of the principle of proportionality has as legal consequences the relativization of equality as a principle of law. The jurisprudence of the Court confirms the fact that the principle of equality is a particular case of the general principle of proportionality, because the uniqueness of legal treatment can only be justified in a particular hypothesis, namely when the situations are similar or identical. Starting from the need to differentiate the legal treatment for different situations, the Constitutional Court has consistently considered that a measure of protection applied to some social or professional categories, in special situations, does not have the meaning of a privilege: "A measure of protection cannot have the meaning neither a privilege nor a discrimination, it being intended precisely to ensure, in certain specific situations, the equality of citizens that would be affected in its absence" (Decision no. 104 of October 21, 1995, published in the Official Gazette of Romania, Part I, no. 40 of February 26, 1996). In these situations, the principle of proportionality imposes the necessary adequacy of protection measures to the intended purpose, namely ensuring, in special situations, the equality of citizens.

Applying the same reasoning, which is based on the principle of proportionality, the Constitutional Court found that a regime derogating from the common law in the matter of the enforcement of fiscal claims is justified, in that it provides for the non-lapse of the enforced execution of these claims [art. 137, para. (4) Fiscal Procedure Code]. These special rules of procedure are suitable for special situations, namely the fact that the object of enforcement is the collection of tax debts that are the sources of the state budget, "which represents a general interest"

(Decision no. 432 of October 21, 2004, published in the Official Gazette of Romania, Part I, no. 1176 of December 13, 2004).

According to the principle of proportionality, applied in this matter, the difference in legal treatment must have a rational and objective basis. The provisions of art. II of the Government Emergency Ordinance no. 22/2003 (published in the Official Monitor of Romania, Part I, no. 252 of April 11, 2003) are constitutional because the difference in legal treatment, regarding the granting of compensatory payments introduced by the criticized text, between the exempted category of commercial companies with majority state capital and the other companies is justified by a rational and objective criterion, which consists in the existence of different situations, but also the real possibility of the Government to bear the compensatory payments (Decision no. 457 of December 2, 2003, published in the Official Gazette of Romania, Part I, no. 49 of January 20, 2004). Different legal treatment, determined objectively and rationally by different situations, cannot establish privileges or discrimination. The Constitutional Court rejected the exception of unconstitutionality of the provisions of art. 4 para. (2), lit. a), point 12 of Law no. 543/2002 (published in the Official Monitor of Romania, Part I, no. 726 of October 4, 2002), noting that, according to the criticized legal provisions, all criminals in the same situation benefit from or are exempted from pardon, "in relation to the nature of the crime and its content, in the legal formulation in force at the time the crime was committed". In the opinion of the Constitutional Court, convicts who committed crimes in different periods, when the criminal law regulated the content of the respective crimes in different versions, are in different situations, which justifies the application of a different legal treatment "according to the free option of the legislator, without being able to consider the establishment of privileges or discriminations" (Decision no. 546 of December 7, 2004, published in the Official Gazette of Romania, Part I, no. 107 of February 2, 2005).

In the same sense, the Constitutional Court ruled that the withdrawal by the authority that issued the notice, authorization or attestation, which results in the legal termination of the individual employment contract, for

the conclusion of which the existence of these documents is a mandatory condition, does not represent a discriminatory legal treatment, but the application of a differentiated legal treatment in relation to the different situation in which certain categories of employees find themselves, who opt for the exercise of certain professions or trades (Decision no. 545 of December 7, 2004, published in the Official Gazette of Romania, Part I, no. 85 of January 5, 2005).

Unlike these situations in which the principle of proportionality was observed, in others, the Constitutional Court found that the difference in legal treatment no longer has a rational and objective justification, a fact that results in a disproportionate and discriminatory treatment between people in the same situation.

Thus, our constitutional court found the unconstitutionality of the provisions of art. 15, para. (1) from Law no. 80/1995, regarding the Statute of military personnel (published in the Official Monitor of Romania, Part I, no. 155 of July 20, 1995) which allows the granting of paid leave for raising a child up to 2 years old only to active military women, not to male military personnel (Decision no. 90 of October 4, 2005, published in the Official Gazette of Romania, Part I, no. 245 of March 24, 2005)[1]. The legislator can establish derogatory measures from the common regulations, with the following conditions: the existence of different situations; there must be a rational and objective justification; the different legal treatment should not create an obvious disproportion between the different categories of persons; derogatory measures should not be discriminatory. Or, in this case, the constitutional court justifiably found that the complete elimination of certain categories of people from the benefit of a form of insurance provided by law for all insured persons

[1] Instead, the Constitutional Court found the constitutionality of the provisions of art. 38, para. (4), art. 50, para. (11) and art. 194 of Law no. 19/2000, because the right of citizens to pension is regulated both by general laws and by special laws regarding some socio-professional categories that are found in particular situations. Therefore, the regime established by the criticized regulations is reasonable and justified, because the people it refers to are in different situations. (Decision no. 116 of November 16, 2005, published in the Official Gazette of Romania, Part I, no. 228 of March 18, 2005).

violates the constitutional principle of equality, representing discrimination, because active military personnel do not differ from the other categories of insured.

Applying the same legal reasoning, the Constitutional Court found the unconstitutionality of art. 362, para. (1), lit. d) from the previous Criminal Procedure Code (Decision no. 482 of November 9, 2004, published in the Official Gazette of Romania, Part I, no. 1200 of December 15, 2004). The criticized legal provisions, which provide that the injured party can appeal regarding the criminal side of the case, and the civil party only regarding the civil side, are contrary to the constitutional principle of equality. These two parts of the criminal process are in an identical situation, namely in the situation of a person injured in his rights by committing the crime. Consequently, the inequality of treatment in terms of access to appeals is unjustified, including in terms of the proportionality criterion, because the defendant, the injured party, the civil party and the civilly responsible party have the same status, i.e. they are parties to the criminal process.

The Constitutional Court specified that the legislator is free to establish conditions for the occupation of certain positions or the exercise of certain professions. In the hypothesis in which the legislator intends to introduce an exception to these conditions without respecting the constitutional requirements, the premises are created for discrimination between persons who, although they are in objectively identical situations, benefit from a different legal treatment, which contravenes the provisions of art. 16 para. (1) of the Constitution (Decision no. 117 of March 6, 2014, published in the Official Gazette of Romania, Part I, no. 336 of May 8, 2014).

The interference between the principle of equality and the principle of proportionality also exists in the case of the protection of national minorities. As shown in the explanatory report on the Framework Convention for the Protection of National Minorities (adopted by the Committee of Ministers of the Council of Europe from Strasbourg on 10.11.1994), states can adopt special measures to promote full and effective equality between persons belonging to a national minority and

those belonging to the majority. Such measures must be appropriate to the intended purpose. This requirement expresses the principle of proportionality, which is applied in order to avoid violating the rights of others or discriminating against other people. The principle of proportionality requires that these protection measures are not extended, in time and scope, beyond what is necessary, in order to achieve the proposed goal.

The Constitutional Court applied the principle of proportionality, analysing the constitutionality of some provisions from the former Education Law no. 84/1995. The Romanian state, in the areas traditionally inhabited or by a substantial number of persons belonging to national minorities, if there is a sufficient demand, as far as possible, must make efforts so that the persons belonging to national minorities "benefit from appropriate opportunities to learn their minority language. The application of these measures will be done without affecting the learning of the official language, or teaching in this language."

The measures taken by the state for the protection of national minorities must not contravene the requirements of the principle of equal rights of citizens and therefore there must be "a reasonable ratio of proportionality between demand and possibilities, between demand and the means used, or between the means used and the goal pursued". (Decision no. 117 of March 6, 2014, published in the Official Gazette of Romania, Part I, no. 336 of May 8, 2014)

Regarding the principle of equality, applied to the exercise of the right to vote, it can also involve proportionality. The material conditions for exercising the right to vote may be different depending on the diversity of situations. This reality implies a differentiated legal treatment, appropriate to each concrete solution, which represents a relationship of proportionality. In the doctrine, it was specified that "the legislator can set up as many different legal regimes as he encounters particular situations, without respecting the strict equality imposed on him with regard to the right to vote" (Tănăsescu, 1999, p. 219).

The constitutional principle of equality has applications in electoral, jurisdictional, fiscal matters, etc. In all these areas, the principle of

proportionality is also applied, which implies the right to differentiation in legal treatment if the situations are different.

For our research topic, we chose to analyse the application of the constitutional principle of proportionality in fiscal matters for two reasons: the constitutional text [art. 56 para. (2)], evokes the general principle of justice and equity, and secondly, the jurisprudence of the Constitutional Court is richer in this matter than in other areas, regarding the interference between the principle of equality and the principle of proportionality.

The application of the principle of proportionality in the fiscal field results from the provisions of art. 56 para. (2) of the revised Constitution. "The legal taxation system must ensure the fair placement of fiscal burdens." These provisions must be analysed through a systematic interpretation of the relevant constitutional texts, respectively the provisions of art. 56, para. (1), which establishes the obligation of citizens to contribute through taxes and fees to public expenses and the provisions of art. 139, according to which taxes and fees can only be established by law or, as regards local taxes and fees, they are established by local and county councils, in accordance with the law. In accordance with the provisions of art. 56, para. (3), any other benefits are prohibited, except for those established in exceptional situations by law.

The principle of equality before the tax law, but also the need for a ratio of proportionality between the possibilities of citizens and their contribution to public expenses was enshrined by the French Declaration of the Rights of Man and of the Citizen (1789)[1]. The Romanian constitutional provisions in the matter are similar to the existing regulations in the constitutions of other states. Thus, the provisions of art. 53 of the Italian Constitution establish the obligation of everyone to participate in public expenses, in proportion to their own capacity, and the fiscal system operates on progressive principles. Similarly, the

[1] Art. 13 stipulated that: "For the maintenance of the public force and for administrative expenses, a joint contribution is necessary. It must be distributed among citizens, equally, in relation to their possibilities."

Spanish Constitution establishes in art. 31, the obligation for all citizens to contribute to public expenses, depending on their possibilities, through a fair tax system, based on the principles of equality and progressivity.

The provisions of art. 56, para. (2) of the Romanian Constitution have the significance of a principle of social justice and equity. As a principle of social justice, the fair placement of fiscal burdens corresponds to the social character of the state, taking into account the need to protect the most disadvantaged social strata. As a principle of equity, it aims not to distort equal opportunities, which excludes any privilege or discrimination. The provisions of art. 56, para. (2) of the Constitution assume a necessary adequacy between everyone's contribution and his possibilities. This adequacy can be imagined either in the form of a strict equality of everyone's contribution, or in the form of a necessary proportionality between everyone's income and his share of burdens (Tănăsescu, 1999, p. 194). The ratio of proportionality between everyone's contribution and their possibilities also implies the possibility of reduction or exemption from the obligation to pay the tax if their situation requires it.

The particularities of the principle of equality, applied in fiscal matters, were highlighted in legal doctrine, but also in the jurisprudence of the Constitutional Court. Equality before the fiscal law is based on the universality of participation in fiscal duties, which is a specific principle of fiscal policy. According to the provisions of art. 56, para. (1) of the Constitution, all citizens are obliged to contribute to public expenses. This obligation implies the idea of equality before the tax law, without any privilege or discrimination.

The expression of the principle of equality, applied in this field, is uniformity. The application of the constitutional principle of equality in fiscal matters is translated into a very simple requirement, even if quite compelling for the legislator: "in order for the rule of universality to be strictly respected within the same category of taxpayers, both privileges and discriminations are formally prohibited" (Tănăsescu, 1999, p. 175).

The tax law can take into account the objective differences that exist between the different categories of taxpayers, but any differentiated legal regime must be justified by an objective difference in situation, in

relation to the purpose of the law. In this sense, the notion of category plays an important role in terms of the principle of equality in fiscal matters, and uniformity is not contrary to a certain cross-categorical differentiation.

The tax can be presented in proportional, progressive or regressive percentage rates. In the specialized literature, it has been shown that the specificity of the tax, regardless of its form, "exists in the proportionality ratio that is established between the taxable mass and the levy, because in tax matters, proportionality is the true image of the principle of equality" (Tănăsescu, 1999, p. 194).

In this case, proportionality represents a mathematical ratio, which can realize the idea of social justice, which is realized through fair distribution of fiscal burdens, depending on the possibilities of each taxpayer. Tax progressivity is a particular aspect of the principle of proportionality, applied in this matter, in the sense that the fair distribution of tax burdens means: the higher a person's income, the higher his tax contribution. Consequently, proportionality is an expression of material equality, "when the quota increases at the same time as the taxable mass, we find ourselves in the presence of a progressive quota, an expression of material equality, which seeks to equalize real incomes through the tax (Tănăsescu, 1999, p. 203).

The Court applies the provisions of art. 56, para. (2) of the Constitution, specifying the constitutional requirements that the law must comply with in matters of taxes and fees. "Taxation must be not only legal, but also proportional, fair and not differentiate taxes based on the criterion of groups or categories of citizens." (Decision no. 6 of February 25, 1993, previously cited)

It is noted that the principle of proportionality is a condition for the constitutionality of the tax law. The Court applies the principle of proportionality, expressed by the provisions of art. 56, para. (2) of the revised Constitution and notes that art. 7, para. 4 of Law no. 32/1991, amended, removes any inequality and discrimination in matters of taxes, being in accordance with the constitutional provisions, according to which, "the higher the total income of a person, the higher his tax

contribution" (Decision no. 91 of October 12, 1994, published in C.D.H. – 1994, p. 287 – 292).

The principle of proportionality was applied by the Constitutional Court in other situations as well. Thus, proportionality presupposes a comparative reasoning that is carried out between taxes and charges, and on the other hand, incomes, salaries or benefits. A tax, to be legitimate, must be justified in a provision of a public authority. Otherwise, it represents a financial impediment to unconstitutionally restrict the exercise of a right. In the same sense, the Constitutional Court established that the judicial stamp, as well as the stamp tax, do not represent a limitation of free access to justice, because justice is a public service of the state and it is fair that part of the expenses are borne by those who appeal at this service.

However, taxes do not represent the price of the service, and the state has the possibility to determine their amount. The Constitutional Court is not in a position to censor the legislator's options and to replace his sovereign and full assessment with his own assessment, because, in this way, he would turn into a legislator, practically subsequent (Decision no. 75/1997, published in the Official Gazette of Romania, Part I, no. 258 of September 29, 1997). Therefore, the establishment by the legislator of some exceptions to the general rule of the payment of judicial stamp fees (exemptions from the payment of the fee), does not constitute discrimination or an infringement of this constitutional principle (Decision no. 29/2000, published in the Official Gazette of Romania, Part I, no. 460 of September 21, 2000). The exclusive right of the legislator to establish taxes or charges and their amount or, as the case may be, tax exemptions or reductions in favour of certain categories of taxpayers, cannot be arbitrary. These measures must respect the principle of proportionality, found in the content of the concept of fiscal justice, in the sense that the measures adopted to favour certain categories of taxpayers must be appropriate to the conjunctural situations, but also to the economic-financial situation of the country, in the respective period. The application of this principle also results from the fact that any differentiation must be justified by the purpose of the law or the economic and fiscal policy of the state. "No constitutional norm forbids

the granting of fiscal facilities to certain categories of taxpayers, for the purpose of the proper implementation of the economic, fiscal and social policy of the state (Decision no. 62/1999, of April 20, 1999 published in the Official Gazette of Romania, Part I, no. 308 of June 30, 1999).

Also, the Constitutional Court declared against the idea of tax uniformity: "The legal regime of taxes is inevitably different, it also involves an economic-financial strategy. The uniformity of the regulations in this field would have the consequence of abolishing all the taxation criteria and the purpose pursued by the legislator through the financial levers"(Decision no. 102 of October 31/1995, published in C.D.H. 1995–1996, pp. 118–125).

The Constitutional Court established that the tax must not be abusive. Thus, it must correspond to the purpose pursued by the legislator and be appropriate to the taxable mass. As we have shown, the taxable mass is the criterion by which the legal regime of the tax varies. Moreover, "the tax is based on a strict concept, regarding proportionality, which refers exclusively to the notion of arithmetic proportion" (Tănăsescu, 1999, p. 195). Consequently, the establishment of a tax without an objectively taxable mass, i.e. an income that cannot be achieved, represents an abusive taxation. "In order to eliminate any possibility of abusive taxation and taking into account the intention of the legislator... it follows that the extension of the obligation to pay the tax, in consideration of non-cultivable land, is unconstitutional, violating art. 53, para. (2) of the Constitution (art. 56 para. (2) of the Revised Constitution n.n.), according to which a tax cannot be established on income that cannot be realized."

Conclusions

The supremacy of the Constitution would remain a mere theoretical matter if there were no adequate guarantees. Undeniably, constitutional justice and its particular form, the constitutionality control of laws, represent the main guarantee of the supremacy of the Constitution, as it is also expressly stipulated in the Fundamental Law of Romania.

The constitutionality control of laws is the main form of constitutional justice and constitutes a basis of democracy, guaranteeing the realization of a democratic government, which respects the supremacy of the law and the Constitution.

George Alexianu considered that legality is an attribute of the modern state. The idea of legality in the author's conception is formulated as follows: all state organs operate on the basis of a legal order established by the legislator and which must be respected.

The same author, referring to the supremacy of the Constitution, affirms with full reason and in relation to today's realities: "When the modern state organizes its new appearance, the first idea that concerns it is that of curbing administrative abuse, hence the invention of constitutions and by judicial means the establishment of a control of legality. Once this abuse is established, a new one appears, much more serious, that of the Parliament. The supremacy of the Constitution and different systems to guarantee it are then invented. The idea of legality thus acquires a strong lever for strengthening" (Alexianu, 1930, p. 71).

The verification of the conformity of a normative act with the constitutional norms, an institution that represents the constitutional control of laws, does not mean a formal comparison or a mechanical juxtaposition of the two categories of norms, but a complex work based on the techniques and procedures of interpreting both the law as well as the Constitution.

Therefore, the need to interpret the Constitution is a condition for its application and ensuring its supremacy. The constitutionality control of laws is essentially an activity of interpreting both the Constitution and the law.

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ASPECT REGARDING THE LEGITIMACY OF TAXATION

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Abstract: *Taxation has always been seen as a necessary evil. In recent years, however, the legitimacy of the levy is increasingly contested. This is because taxation seems more and more excessive, and the benefits of taxation are less and less felt. At a simple glance, the situation seems overwhelming: we owe taxes for the incomes received, but also for the money spent, for those saved, but also for those invested. Apparently, we are captives, chained in this tax system.*

Keywords: *taxation; tax; legitimacy; taxpayer.*

Introduction

Taxation has always been seen as a necessary evil. In recent years, however, the legitimacy of the levy is increasingly contested. This is because taxation is increasingly excessive and the benefits of taxation are being felt less and less. At a simple glance, the situation seems overwhelming: we owe taxes for the incomes received, but also for the money spent, for those saved, but also for those invested. Apparently, we are captives, chained in this tax system. We go to work to acquire this taxable income, with a car for the use of which on public roads we pay tolls, roads for which we have already been tolled, we pay tolls for bridges and highways, to maintain them, we fuel the car with taxable fuel and this one. We arrive at the workplace, in a corporation, most of the

time, a corporation that is also subject to taxation and taxation, in multiple forms. The corporation gives us an income, of which it withholds a percentage for tax. In the end we return home, to a house for the ownership of which you are "taxed" every year, even though it was purchased with a sum of money, for which you have already paid a tax. If we also consider progressive taxation, the situation is even more "rosy". The more we earn and pay, the more taxes the government will demand. Governments seem to have a constant need for resources, which generates taxes whose legitimacy is increasingly questionable. The sun tax is already in place, but also the shade tax, water taxes and oxygen tax.

Where does the state's right to tax come from?

Taxation has always been seen as a necessary evil. However, it has the role of compensating the costs of those services that society wants to be provided by the government. That is why there is almost unanimity regarding the recognition of the state's right to regulate a taxation system, intended to ensure its financing.

Several theories have been put forward to justify the state's right to tax. At their base is the fundamental duty of the state to ensure the common good.

The organic theory is the one according to which the state and the individuals within it are conceived as a single organic entity. However, the state is not a product of nature, it is not a natural organism, but it is a creation of man. In order to support itself and to fulfill its entrusted functions, the state needs resources. The right to tax is a right that the state arrogates to itself by virtue of the fundamental purposes it serves.

Sociological theory is also based on the common good. According to this theory, the main means of ensuring the common good consists in the establishment of absolute power, in a society where *hommo hommini lupus est*. “When two or more men have the same purpose, they become enemies, and each seeks to destroy the other; they find no pleasure even in companionship, that each expects the other to value him as much as he values himself, and contempt or lack of appreciation appears as a reason for conflict" (Socaciu, 2001, p.25).

Hence the need to empower the state, which has the role of a protective gendarme of the general good, as Thomas Hobbes explains in his famous work Leviathan.

Therefore, due to social upheavals, the state comes to arrogate to itself a superior power, representing a force of organized minorities in order to impose against the dominated majority. Thus the will of the holders of power is equivalent to the right, the will of the sovereign is the one that determines the norms of social conduct. "In order to exercise power in the interest of the whole society, it is necessary to establish a taxation system that ensures the monetary means covering the needs of the operation and maintenance of the state apparatus" (Costaș, 2016, p.18).

Social contract theory is an improved formulation of social theory. Starting from the theory of Hobbes, Jean-Jacques Rousseau developed the idea of the social contract. The state is a creation of individuals, it results from their agreement to constitute a higher authority, which generates and ensures the conditions necessary to satisfy, in a unitary manner, individual interests. The state is recognized, in this context, through the social contract, the right to tax. At the same time, correlatively, citizens assume the obligation to bear, to pay, the taxes and fees considered by the state to be necessary to protect the general interest.

The theory of equivalence is attributed to Adam Smith, in whose opinion, the citizens of each state should contribute to the support of the government, in proportion to the income they obtain and enjoy, under the protection of the state. Thus, citizens owe taxes and fees in exchange for the services and benefits they receive from the state. Alvin Hansen, representative of the contemporary doctrine, emphasizes the obligation of citizens to comply with the requirements imposed to have access to these services provided by the state. In his opinion "…taxes are prices set by coercion, for government services" (Hansen, 1941, p.182).

The theory of sacrifice is also based on the idea of forcing the citizen to support the state in the exercise of its functions (Mill, 2001, p.82). According to this theory, the tax is not a consideration for certain

services or advantages, but a duty of all citizens to contribute to the existence and development of the social whole to which they belong. As the state is a necessary product of the historical development of the citizen, the tax is a necessary product of the relationship between subject and power. As a superstructure institution, the state has the possibility to ask its subjects to make a sacrifice to cover public expenses (Popescu and Mitreșan, 2019, p.61).

Finally, according to *the security theory* (Popescu and Mitreșan, 2019, p.61), taxes constitute the insurance premium for the life and assets of taxpayers, based on a "contract" between citizens and the state, for which they pay a kind of insurance premium, in the form of taxes. The level of these premiums (the level of taxes owed) is calculated according to the characteristics of the assets and the taxpayers. However, the state does not assume any formal insurance commitment towards the citizens; the state should not compensate taxpayers if their assets are stolen or destroyed, as happens with insurance reports.

The principle of consent to tax and the principle of legality

Over time, the previously stated theories have often been contested. The need to finance the increasingly diverse and expensive activities of the state has led to constant increases in existing taxes and fees, but also to the emergence of new taxes and fees. In order to be protected from any abusive tendency of taxation, the citizens wanted to be represented in the process of adopting new taxes and fees. Thus, the principle of consent to imposition was established.

The principle is currently enshrined in the constitutions of modern states as a result of the historical evolution of the process of taxation, often marked by violent revolts that erupted in response to the imposition and collection of taxes by sovereigns.

The principle appears in the Magna Charta Libertatum in 1215, it is reaffirmed, centuries later, by the Bill of Rights in 1688. The well-known slogan "no taxation without representation" is enshrined, in the context of British taxation on its American colonies, in February 1768, by publication in -a London Journal of Lord Camden's Speech on the Bill

Declaring the Sovereignty of Great Britain over the Colonies. The principle is also present in the Declaration of Independence of the American states from 1776 and, last but not least, it is stated in the Declaration of the Rights of Man and the Citizen of France, from 1789.

The principle of consent to taxation is the result of the crystallization of legal thinking in a formula that expresses one of the attributes of sovereignty, the imposition of payment obligations on taxpayers by the decision of their elected representatives (in accordance with constitutional procedures). We can say this way, that the principle of consent to taxation is at the basis of the principle of legality of taxation (Ionescu, 2023).

In the Romanian Constitutions of 1991 and 2003, the principle of legality is found today in art. 56 para. 2 and art 139, as follows:

"Art. 56 – Financial contributions.

(1) Citizens have the obligation to contribute, through taxes and fees, to public expenses.

(2) The legal taxation system must ensure the fair placement of fiscal burdens.

(3) Any other benefits are prohibited, apart from those established by law, in exceptional situations."

And

Art. 139 - Taxes, fees and other contributions.

"(1) Taxes, fees and any other revenues of the state budget and of the state social insurance budget are established only by law.

(2) Local taxes and charges are established by the local or county councils, within the limits and under the conditions of the law".

Nullum impositum sine legem means that no tax can be imposed or levied except in accordance with the law. The law designates, in this context, the normative act that emanates from the Parliament. Sometimes taxes and duties are regulated by government ordinances, based on the power delegated by Parliament to the Government. These normative acts of the executive are approved or rejected by law by Parliament, therefore, we remain under the power of *nullum impositum sine legem*.

The regulation of taxes and fees by law provides stability and predictability to the fiscal system and, at the same time, protects the citizen from possible abuses by the local or central public administration. It is appreciated that, in the absence of the constitutional enshrinement of the principle *nullum impositum sine legem*, the central or local bodies of the state could have instituted taxes as they pleased, without observing the rigors imposed by the national fiscal policy (Șova, 2015, p.6). However, although we believe that the legislator's intention was different, in practice, we witness frequent legislative changes in tax matters. Many of these changes are carried out by normative acts lower than the law (decisions, ordinances, norms, instructions), which complete, add to the primary fiscal norm (Udrescu, 2015), thus practically reaching a primary regulation in fiscal matters, through norms inferior to the law. In order for the tax system to be regulated according to the legislator's intentions, respectively to remedy the previously mentioned situation, a series of ferenda law proposals were formulated, among which we mention:

- the regulation of taxes by organic law, respectively their inclusion in the scope of art. 73 para. (3) from the Constitution;
- the exclusion of the Government's possibility to regulate through emergency ordinances in the field of taxation, respectively the amendment of art. 115 paragraph (4) and (5) of the Constitution;
- the amendment and completion of art. 139 of the Constitution, in the sense of clearly specifying the elements of tax and fiscal procedure that are the exclusive object of the law and those that can be regulated by acts inferior to the law;
- the removal of fiscal matter from the scope of regulation of simple ordinances, by moving it into the scope of the organic law, respectively the elimination of legislative delegation, regulated by art. 108 and art. 115 of the Constitution, in fiscal matters (Șova, 2015).

Current trends in taxation

Currently, from a fiscal point of view, we are in an effervescent period, strongly influenced by the entry into force on January 1, 2024 of Emergency Ordinance no. 115/2023 regarding some fiscal-budgetary

measures in the field of public spending, for fiscal consolidation, combating tax evasion, for the modification and completion of some normative acts, as well as for the extension of some deadlines and for the establishment of some measures in the field of European funds management. The ordinance is also nicknamed the "train ordinance", probably due to the changes in the chain, which it brings to a series of normative acts. Regarding the Fiscal Code, the ordinance brings significant changes in the matter of profit tax, micro-enterprise tax, income tax or VAT. All these changes are likely to increase the tax burden imposed on taxpayers, but they obviously lead to an increase in budget revenues.

On the other hand, we cannot overlook the fact that, under some aspects, a decrease in fiscal burdens has been achieved, recalling in this regard the measures that led to the reduction of the sickness tax by 10% from medical leaves or to the possibility of recovering a value from the diesel excise tax granted through a state aid scheme granted to transport companies.

Also in the current period, a reduction of the fiscal burden is desired by reducing labor taxation, although, upon closer analysis, it seems that the budget situation makes such a measure impossible. Only the creation of new jobs or increased productivity would lead to a sustainable increase in wages and taxes collected on their account (Rudnițchi, 2024).

In terms of reducing fiscal obligations, we recall that between these measures and the adoption of the Ordinance for the amendment and completion of GEO 27/2022, which eliminated the sun tax for prosumers and updated the support scheme for all electricity and natural gas consumers, which led to falling prices.

We remind you that at the end of 2018, the European Union issued a directive with the aim of supporting renewable energy. The member states, including Romania, had the obligation to transpose its provisions into national legislation by June 30, 2021. At the end of November 2022, the Ministry of Energy issued a GEO transposing the directive, respectively Emergency Ordinance no. 27/2022 regarding the

measures applicable to final customers in the electricity and natural gas market in the period April 1, 2022-March 31, 2023, as well as for the modification and completion of some normative acts in the field of energy.

It should be noted that the European Union did not impose this tax, but left it up to the member states to tax self-consumption, under certain conditions. The tax is applied on self-consumption, i.e. exactly on the energy produced from the sun, which is consumed by the system owner for his own needs, not on the surplus energy injected into the network. The tax was imposed for a while in Spain and had almost zero financial result, but it deterred the desire of Spaniards to install PV systems for a long time, even some time after it was repealed in 2018.

Staying in the same sphere of efficient use and taxation of natural resources, we mention a recent study, carried out through the use of Artificial Intelligence, on the measures that could be adopted in this regard. Asked about the advisability of water and air charges, ChatGPT generated some interesting responses. According to him, imposing taxes on water and air would be extremely difficult from an ethical and practical point of view, because "air and water are essential resources for the survival of all living things", access to these resources being included in the scope of fundamental rights.

Regarding fiscal policy, ChatGPT also highlighted the fact that "it is good to be vigilant" and "encourage governments to take balanced decisions that ensure welfare and equity for all citizens (...) The government must be transparent about with the reasons for imposing the new taxes, how they will be collected and spent. Fiscal responsibility is essential to maintaining citizens' confidence. Fighting tax evasion and improving collection procedures can bring additional revenue without increasing the tax burden on citizens" (Ichim, 2024).

Conclusions

Concluding the study with these pertinent conclusions from Artificial Intelligence, through ChatGPT, I appreciate that it would be useful to return to the principles of taxation, in order to realize a

rethinking of the tax system. Currently, the fiscal policy, although it has a clear objective, to increase the collected revenues, is no longer coherent, aligned with the principles. Governments should take a closer look at the effectiveness of existing budget spending, identify and eliminate inefficient spending. It should not be forgotten that at the center of the concerns of the tax system, as at the center of the entire legal system, is the individual, to whom the system must guarantee the possibility of exercising fundamental rights under optimal conditions, i.e. it must provide him with the best possible services, in the exchange of support offered.

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ASPECTS OF REGIONAL AND NATIONAL EFFORTS TO RESPOND TO THE NEEDS OF UKRAINIAN REFUGEES

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Abstract: *The invasion of Ukraine by Russia caused an unprecedented exodus of the population (women, children, elderly, in particular) to neighboring areas that could offer them protection, even temporarily. To be able to manage the situation created, the European Union activated (March 2022) the Directive on temporary protection. And Romania responded firmly to the needs of refugees, and not only at the institutional level, but also at the individual level. Measures taken at the regional and national level to respond to the needs of Ukrainian refugees are analyzed in this study.*

Keywords: *invasion of Ukraine; Ukrainian refugees; temporary protection; needs; measures; efficiency.*

Introduction

For more than two years, Ukraine has been invaded by Russia.

The so-called special military operation was categorized as an unprovoked and unjustified invasion, one of the worst episodes in Europe since the Second World War.

It is estimated that this conflict would have caused the displacement of more than 8 million Ukrainians within the borders of Ukraine and the exodus of as many people (women, children, the elderly, in particular) beyond the borders, to neighboring countries that could offer them

protection, even temporary and created Europe's biggest refugee crisis since World War II.

1. The EU response

In this context, and to be able to manage the created situation, the EU activated (March 2022) the Temporary Protection Directive - an emergency system, used in exceptional circumstances, for (https://www.consilium.europa.eu/ro/infographics/ukraine-refugees-eu/):

- granting immediate and collective protection to displaced persons;
- reducing the pressure on the national asylum systems of the EU countries.

According to official information, more than 4.2 million people from Ukraine benefit from this temporary protection mechanism, and the main EU countries hosting such beneficiaries are (https://www.consilium.europa.eu/ro/infographics/ukraine-refugees-eu/):

- Germany (1,235,960 people);
- Poland (955,110 people);
- Czech Republic (369,330 people).

The EU and its member states have given Ukraine and Ukrainians, since the beginning of the invasion, a support of more than EUR 143 billion (https://www.consilium.europa.eu/ro/infographics/ukraine-refugees-eu/):

- EUR 91 billion in the form of financial, budgetary and humanitarian support;
- EUR 33 billion in the form of military support;
- EUR 17 billion in support for refugees within the EU;
- EUR 12.2 billion in grants, loans and guarantees provided by EU member states.

According to official information, the efforts made by the EU were focused on the following directions (https://www.consilium.europa.eu/ro/infographics/ukraine-refugees-eu/):

a) economic assistance: the mechanism for Ukraine; macro-financial assistance; commercial measures; other measures to support the

economy of Ukraine; humanitarian aid; support in matters of civil protection;

b) support for the Ukrainian armed forces: the European instrument for peace; the EU military assistance mission; ammunition and missiles;

c) reception of refugees: the temporary protection mechanism; other support measures for refugees; support for EU countries hosting refugees;

d) investigation and prosecution of war crimes: EUAM Ukraine; Eurojust; The Atrocities Advisory Group;

e) protection of children;

f) peace, recovery and reconstruction.

2. Effectiveness of the Temporary Protection Directive

To verify the effectiveness of the Temporary Protection Directive, research was carried out in 26 countries that implement it (https://data.unhcr.org/en/documents/download/97069).

Key findings and recommendations:

a) findings (https://data.unhcr.org/en/documents/download/97069, pp.4-5):

- the interdependence of the rights guaranteed under the Directive;
- the existence of practical, administrative and legal barriers in the exercise of rights;
- the existence, in the case of people with special needs, of; even greater obstacles in the exercise of rights
- the existence, in the case of people who were offered status through the national asylum system, of several of the challenges identified;

b) recommendations (https://data.unhcr.org/en/documents/download/97069, pp. 6-7):

- greater consistency in the application of the Directive;
- the involvement of refugees in solving challenges regarding the exercise of rights;
- early and systematic identification of people with special needs;

- expanding the applicability of lessons learned from the implementation of the Directive;

- addressing the administrative, practical and legal barriers that stand in the way of exercising rights;

Specific findings and recommendations:

a) registration (https://data.unhcr.org/en/documents/download/97069, p.10):

- improving registration practices;

- the need to obtain accurate information regarding the registration processes, the rights associated with the status of temporary protection beneficiary and translation services at the registration points;

b) appeal (https://data.unhcr.org/en/documents/download/97069, p.12):

- the access of applicants for temporary protection to an effective way of appeal in case of negative decisions;

- the establishment, by the states, of effective appeal procedures for applicants for temporary protection and ensuring the motivation, in writing, of negative decisions;

c) documentation (https://data.unhcr.org/en/documents/download/97069, p.13):

- the immediate renewal, by the states, of the documents issued to the beneficiaries of temporary protection;

- reproduction of positive practices implemented by other countries;

d) freedom of movement (https://data.unhcr.org/en/documents/download/97069, p.15):

- the facility not to give up temporary protection, when they voluntarily return to Ukraine;

- not affecting the status and rights of a beneficiary of temporary protection by a visit to Ukraine lasting less than three months;

e) family reintegration (https://data.unhcr.org/en/documents/download/97069, p.17):

- the need for guidelines regarding the practical application of family reunification procedures;

- the need for fast, efficient and flexible reunification procedures;

f) people with special needs (https://data.unhcr.org/en/documents/download/97069, p.18):

- systematic identification of people with specific needs;

- the need to include identification procedures for persons in high-risk situations, as part of the registration procedures for temporary protection and other forms of legal stay;

- correlating the identification of people at increased risk with the expansion of specialized services, capacity and adequate resources;

g) education (https://data.unhcr.org/en/documents/download/97069, p.21):

- supporting schools for capacity building and offering foreign language courses;

- the involvement of displaced families and communities in the education process;

h) labor market (https://data.unhcr.org/en/documents/download/97069, p.23):

- increasing the offer of childcare services and intensifying the process of learning foreign languages for adults;

- the elimination of administrative, legal or practical barriers to access to a decent job;

i) social protection (https://data.unhcr.org/en/documents/download/97069, p.25):

- ensuring free and efficient access to the process of completing documentation and identity documents;

- reviewing social protection laws and policies to ensure that they are inclusive, non-discriminatory, consistent, clearly formulated;

- effective inclusion and systematic identification of access barriers;

- development of inclusion capacities;

j) health (https://data.unhcr.org/en/documents/download/97069, p.27) - integration of health professionals from refugee communities into national healthcare systems;

k) accommodation (https://data.unhcr.org/en/documents/download/97069, p.29):

- the multidimensional impact of the lack of safe and long-term housing on the ability of refugees to exercise their other rights;

- the need, for people with special needs, of accessible and adapted accommodation, located in areas with access to essential healthcare services.

3. Romania's response

According to the latest official report (https://protectieucraina.gov.ro/1/wp-content/uploads/2024/04/Raport-integrare_feb-2024-RO.pdf), in the period 24.02.2022-29.02.2024, 7,397,495 Ukrainian citizens entered the territory of Romania, of which:

- 4,473 people applied for asylum;
- 177 people obtained a form of international protection;
- 148,844 people benefited from temporary protection.

From the total number of beneficiaries of temporary protection:

- 12.66% represent children aged between 0-6 years;
- 18.86% children aged between 7-18 years;
- 5.43% people over 65 years old.

The response of Romania and Romanians to the needs of refugees from Ukraine was firm, and not only at the institutional level, but at the level of each citizen.

At the institutional level, a clear decision-making and coordination structure has been established; for this purpose, the following were constituted/established (https://gov.ro/fisiere/pagini_fisiere/21.04.2022_-_R%C4%82SPUNSUL_ROM%C3%82NIEI_LA_CRIZA_UMANITAR%C4%82_A_REFUGIA%C8%9AILOR.pdf, pp.3-4):

- High-level decision-making Task-Force, under the coordination of the Prime Minister;

- Operational Task Force - "Ukraine Commission" -, headed by the head of the Prime Minister's Chancellery, to supervise the activities of the ministries involved in managing the flow of refugees in all fields of intervention.

- The Strategic Coordination Group for Humanitarian Assistance, at the level of the Prime Minister's Chancellery, led by a State Counselor, to

ensure the strategic framework for humanitarian response and to facilitate cooperation between agencies and partners at national, European and international level.

The answer was structured on two levels of intervention (https://gov.ro/fisiere/pagini_fisiere/21.04.2022_-_R%C4%82SPUNSUL_ROM%C3%82NIEI_LA_CRIZA_UMANITAR%C4%82_A_REFUGIA%C8%9AILOR.pdf, p.4):

- first response – emergency assistance – the reaction and urgent intervention provided for newly arrived refugees from Ukraine;

- the second response – protection – a mechanism developed to ensure medium and long-term protection and inclusion measures for those refugees from Ukraine who remain in Romania.

To facilitate the access of refugees from Ukraine to official and up-to-date information about the rights and services they can benefit from in Romania, the Government of Romania (through the Department for Community Social Responsibility and Vulnerable Groups) makes available to them the new online platform https://protectionukraina.gov.ro (https://gov.ro/ro/stiri/o-noua-platforma-online-pusa-la-dispozitie-de-guvern-pentru-informarea-refugiatilor-din-ucraina).

This platform is available in Romanian and Ukrainian and currently provides detailed information in the following areas (https://protectieucraina.gov.ro): arrival in Romania; education; health; learning the Romanian language; legal support; temporary accommodation and housing; single children; support for vulnerable people; how to apply for temporary protection; emergency phone numbers; how to work in Romania.

It is stated that the information contained on the platform is the responsibility of institutions with powers and competences in the management of each field.

4. The situation of the integration of Ukrainian refugees in Romania

In the same official information (Government of Romania, Report on the integration of Ukrainian refugees in Romania, period 24.02.2022-29.02.2024, pp. 2-6) the situation of the integration of refugees from Ukraine in Romania is presented in three areas.

a) Accommodation (and food)

By G.D. no. 368/2023 (published in Of. M. no. 654/26.04.2023) established (among others) the amount, conditions and mechanism for awarding the lump sums provided for in art. 1 paragraph (10) and (11) and art. 3 paragraph (2) from G.E.O. no. 15/2022 regarding the granting of support and humanitarian assistance by the Romanian state to foreign citizens or stateless persons in special situations, coming from the area of the armed conflict in Ukraine [art. 1 lit. a)].

This lump sum is made up of an amount to cover accommodation expenses in a differentiated amount, respectively of 750 lei/month for a single person and 2,000 lei/month for a family, as well as an amount to cover food expenses in an amount of 600 lei/month for each person [art. 2 para. (2)].

By G.O. 27/2024 (published in Of. M. no. 268/28.03.2024), the period for awarding the respective amounts was extended until 30.06.2024 (single article).

It was stated that the granting of financial facilities encourages the integration of Ukrainian refugees on the labor market and in the Romanian educational system, favoring their inclusion in the Romanian community (Government of Romania, Report on the integration of Ukrainian refugees in Romania, period 24.02.2022-29.02.2024, p. 2).

b) Access to the labor market

The main indicators regarding the integration of Ukrainian citizens into the labor market in Romania, during the reference period (Government of Romania, Report on the integration of Ukrainian refugees in Romania, period 24.02.2022-29.02.2024, p. 2):

- the number of Ukrainian citizens registered at the Employment Agencies to be employed – 21,513;

- the number of economic operators who declared jobs available for Ukrainian citizens – 629;

- the number of jobs filled through AJOFM/AMOF – 2,858;

- the number of registered active employment contracts – 6,604.

The most active employment contracts registered in the reference period (24.02.2022-29.02.2024) IM in (Government of Romania, Report on the integration of Ukrainian refugees in Romania, period 24.02.2022-29.02.2024, p. 2): Bucharest – 2,710; Timiș – 372; Maramureș – 363; Bistrita-Năsăud – 302; Arad – 252; Cluj – 276; Constanța – 267; Brasov – 255; Ilfov – 213; Sibiu – 195.

The fields of activity with the most employment contracts registered during the reference period (24.02.2022-29.02.2024) are (Government of Romania, Report on the integration of Ukrainian refugees in Romania, period 24.02.2022-29.02.2024, p. 2): manufacturing industry – 1,290; constructions – 1,146; trade – 756; hotels and restaurants – 742; information and communications – 509; administrative services and support services – 468.

It was insisted on the fact that facilitating access to the labor market in Romania is closely related to the medium and long-term integration of Ukrainian citizens into Romanian society (Government of Romania, Report on the integration of Ukrainian refugees in Romania, period 24.02.2022-29.02.2024, p. 2).

c) Access to education

On 29.02.2024, 46,911 children (aged 0-18) benefited from temporary protection; of these, 38,574 were enrolled as students or students in the education systems, as follows (Government of Romania, Report on the integration of Ukrainian refugees in Romania, period 24.02.2022-29.02.2024, p. 5):

- preschool education - 14,290;

- primary education - 10,620;

- secondary education - 13,662.

On the same date (29.02.2024), 73 educational hubs were registered at the County School Inspectorates; they were attended by 9,741 students, of which: 4,166 from the primary cycle, 3,170 from the

secondary cycle and 2,074 from the high school cycle (Government of Romania, Report on the integration of Ukrainian refugees in Romania, period 24.02.2022-29.02.2024, p. 5).

It was recognized that, for the Ministry of Education, a major challenge was the integration of Ukrainian children into the Romanian educational system.

Conclusions

Instead of formal conclusions, we prefer to underline the fact that the measures adopted both at the Union and at the national level present many gaps, some speculated and exploited by the mass media.

However, we should consider the phenomenon, more specifically:

- nature – the invasion of a sovereign and independent state (Ukraine) by one of the permanent members of the UN Security Council (Russia);
- size – approximately 8 million people who left Ukraine taking refuge in neighboring countries;
- the implications – humanitarian, financial, political, military, etc.

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THE SPECIFICITY AND IMPORTANCE OF ORGANIZATIONAL CULTURE IN PROFESSIONAL SERVICES FOR EMERGENCY SITUATIONS

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Abstract: *Professional emergency services are very popular and trusted by the public. This is due, in addition to the characteristic professionalism, to the specific organizational culture of this institution. The binder of the activities that ultimately compete for success is this organizational culture, very strong, through the multitude of elements that define it and that shape the activity and character of the worker in such an institution.*

Beyond these aspects, the importance of organizational culture is also manifested in the act of management, but also in informal leadership in an organization where the activity is carried out most of the time in a team, and the informal leader is the most important person at certain times with risk.

Keywords*: leadership; organizational culture; management; informal leader; ethics; ritual.*

Introduction

The professional emergency services for emergency situations, more easily understood, the military firefighters, is an organization belonging to the Ministry of Internal Affairs and is an integral part of the National System of Order and Public Safety, along with the other "force" institutions of the state. With a specific military character, like any military organization it is strongly influenced by military rigors, strongly hierarchical, having a strong organizational culture and difficult to change, which leaves its mark and influences the activity of its own employees.

Due to the specificity of the activity, military firefighters are one of the few occupations, where tasks are mostly performed in groups, in view of the need for physical security of the employees, but also because of the danger characteristic of the job. The organizational culture of firefighters is very different from that of other organizations, being able to resemble that of miners or other occupations that carry out activities in risky conditions and is much easier to observe from the outside, having a component of traditions and rituals with connections in society, even if it is a military institution, which is usually characterized by a certain degree of opacity.

Management and leadership in the case of military firefighters can be compared to the organizations in the Romanian army, but not in a state of peace but in a state of war, considering that in the case of military firefighters, the specific risk of the function is continuously present. The informal leader has his place well defined within the organizational culture, being the one who inspires and provides safety in case of dangerous situations. Of course, the manager, the formal leader, invested with the authority of the position he occupies, must manage both the usual cases of normal activities, as well as those where the decision is taken at an alert pace and without much time for analysis.

Enjoying a high appreciation of the society and a high degree of trust, the professional services for emergency situations, represent one of the most beautiful jobs, through the noble and humanitarian side of the

activity. This also contributes to building an organizational culture that is based on high values and principles.

Professional ethics and deontology of military firefighters

An integral and defining part of the organizational culture, ethics and professional deontology are an important landmark that is quantified in qualitative indicators in the current activity of military firefighters. There is a special emphasis on this aspect of ethics and deontology, even in the entire ministry that is in the service of the citizen, that comes into contact with the employee and must expect a certain conduct, a certain behavior and, most importantly, integrity professional.

Military firefighters have this aspect, of ethics and deontology, legislated by a ministerial order. Evaluations at the individual level, as well as at the organization level, rely heavily on compliance with ethics and deontology, as provided for in the aforementioned order. What is important again, is that this code is based on some principles that are undeniable. Among the most important principles are integrity, impartiality, legality, transparency, confidentiality.

By complying with this code of ethics and professional deontology, the aim is to achieve the institutional objectives, but also to integrate it into the organizational culture in order to perpetuate the principles and fundamental values promoted by the institution. One of the objectives pursued by the implementation of the code is to increase the prestige of the institution by eliminating acts of corruption among the staff and creating an image of a modern institution at the service of the citizen and governed by some healthy and correct principles. Another objective is to create a zone of safety and respect in terms of the relationship between the employee and the citizen, as well as between the citizen and the institution. Another objective pursued is that of increasing transparency regarding the activities carried out by the institution.

Ethics and deontology are in this case a mechanism or, in other words, a tool for the organization to fulfill its mission and achieve its objectives, strengthening and shaping the organizational culture of the institution.

The rituals and celebrations of military firefighters, an essential component in the organizational culture

Ceremonies, festivities and rituals in the military fire service have a special place in the organizational culture. As in any organization, the specifics of the culture are also given by its customs, as an intangible aspect valued by all members. In the case of the military firefighters, customs and ceremonies occupy a special place, the military firefighters being an institution with a great openness to the general public, especially in the case of students. The military firefighters have a fruitful collaboration with the school inspectorates, this collaboration materializing through collaboration protocols.

Collaboration with schools materializes through school competitions with the theme of emergency situations, through volunteering programs, "open doors" days, demonstration exercises. This closeness to society in general and to students in particular is also reflected by the large number of young people who want to pursue a career in this field.

Part of the National System of Public Order and National Defense, the military firefighters are present at all the ceremonies organized under the auspices of this system, the most significant moment being the celebration of Romania's National Day.

As a component of the organizational culture, the first ritual with which a firefighter has just joined the ranks of the organization is the taking of the military oath, a solemn and meaningful moment for every employee. During the career there are other significant moments, marked as rituals, such as advancement to the next military rank or public reward for special merit. A final, particularly important ritual is going into reserve, i.e. leaving the organization. This ritual is also marked by emotion and significance, the military being given a final public appreciation.

All of these military rituals, customs, ceremonies, as well as partnerships with schools and the volunteer community, build an essential part of the organizational culture of military firefighters.

The formal and informal leader in the organizational culture of military firefighters

The military firefighters, through the current forms of organization, are a very well-hierarchized institution, with many hierarchical levels, characteristic of military institutions. This hierarchy is, moreover, the binder that coagulates all the constructive elements of the organizational culture. The basic organization, however, is the fire crew/team, which usually consists of 2-6 people, depending on the specific work and specialization. The fact that the vast majority of military firefighting work is done in groups of at least 2 people makes the team the basic organization.

As in any group of people or organization, be it formed by the minimum number of 2, there will be a leader and an informal one. In the case of the fire team, the importance of the informal leader is much greater, because the connections between the members of the team and the informal leader depend very much on their physical safety. In other words, the informal leader is the one who bestows the greatest confidence in the context of life-threatening actions, the meritocracy of this leader cannot be questioned. The informal leader is often the subject of stimulating stories or events for the rest of the organization and is looked upon with trust and respect. More often than not, the formal leader in an organization can be the person who accepts risks more easily and volunteers to solve difficult situations, can be the person most followed by colleagues, who instills confidence and inspires at the same time, can be the most charismatic person in the group, may be the person who has the most extensive professional experience, may be the person with the most "seniority" in that group, may be the person who empathizes most easily with his colleagues, may be the person who has qualities that others do not have, but are aware of as positive aspects.

In the case of the formal leader, as in any organization, he must possess certain personal and professional qualities, but more than that, he must be able to create cohesion in the group he leads. Fortunately, the formal leader arrives at that position after a number of other positions have been filled, there being certain requirements, which select possible

candidates, to a sufficiently large number so that there is competition for the position, but also not allowing access to such positions of people who do not have a career path that would allow them to accumulate the experience necessary for the position. The cohesion that is the attribute of the formal leader to achieve, is a preamble of the synergistic effect of the members of the organization, who participate individually but achieve the goals and objectives of the organization collectively.

It is productive for any organization for the two leaders to identify with the same person, or at least to have common ideas that benefit the achievement of institutional goals. Even if the two leaders' differing opinions are not expressed publicly, group members sense these differences in approach, and the result is detrimental to group cohesion. A collaboration between the two is beneficial, starting from the idea that the informal leader has the support of the majority in the organization, and the formal leader has certain objectives to achieve that are not embraced by the group members, but when they come from a reliable person such as the leader informally are viewed in a more pleasant way. Effective management in professional emergency services is often achieved by combining the two types of leadership.

The involvement and giving due importance to the informal leader in making and applying difficult decisions gives a democratic air to an institution characterized by a rather high autocracy. Good collaboration will ultimately contribute to the achievement of the organizational strategy and the interests of the institution.

The management of professional emergency services depends, as in any other organization, on the style that the leader adopts in the relationship with subordinates. In general, the style practiced by managers in this field is an authoritarian one, but the tendency is overwhelming towards a more democratic style, the military firefighters being one of the military structures with a great influence of civil society in their activity, an aspect revealed by the very high public trust in the institution. In cases where the decision must be made in a very short time, in emergency interventions, the authoritarian style prevails, caused by the nature of the decision and the speed with which it must be made.

In the case of authoritarian styles, they can be "masked" by very good communication with subordinates and by transparency in decisions and managerial activity, thus decisions that are not popular at first sight can be explained and accepted in the end. Workplace climate, which is also the manager's attribute and task, is essential in cooperation and collaboration among employees, especially in potentially hazardous workplaces such as military firefighters.

Conclusions

As an overview of the entire range of activities of the professional services for emergency situations, starting from the most visible, that of intervention in emergency situations, to the activity of preventing fires and emergency situations, to the preparation of the population and to increasing the resilience of communities, to the usual ones and other institutions, such as logistics, financial, human resources, public relations activity, it can be found that what these activities have in common is the organizational culture itself. Centralized and uniform training, centralized hierarchical subordination, national development strategies, lead to a uniform activity regardless of the county in which we are located, and also to the approach to the institutional mission and objectives.

From the point of view of the management of these institutions, a lot of emphasis is placed on management performance, through European programs to increase performance and to standardize management. Of course, in imminent situations specific to emergency situations, decision-making suffers, because it is done in conditions of uncertainty and in a very short time, but this is supplemented by the rigors imposed by the military organization, namely the power conferred by the single command. Because of the limited time for reflection in emergency situations, they are prepared from a state of normality, through analysis plans and concepts, which should cover as much as possible of the possible "black" scenarios.

The organizational culture of the professional services for emergency situations, through all the components that make it up (morality, integrity, ethics and deontology, the mission of the institution,

the military but also humanitarian character, the direct relationship with the citizen, the assumed institutional objectives, etc.), impregnates the character and the personality of the employees, through their way of thinking and behaving, which is confirmed by the great confidence continuously present in the institution from the society.

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THE PERSPECTIVES AND CHALLENGES OF ALBANIA'S INTEGRATION INTO THE EUROPEAN UNION

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Abstract: *Since the collapse of the communist regime, Albania has regarded European integration as a top priority of foreign policy. This involves not only meeting political, legislative, and institutional requirements. It also combines Albanian values, democratic principles, and social ideals with European common values, emphasizing freedom and democracy. Albania's transition to democracy has faced many challenges and political and institutional progress in the process of European integration. During this process, Albania experienced difficulties in establishing stable political structures, establishing an effective public administration, organizing fair democratic elections, and promoting social, cultural, and inter-community growth.*

Keywords: *European Union; integration process; institutions; reforms; the Stabilization and Association Agreement*

Introduction

European integration constitutes one of the most important challenges and priorities of Albania's foreign policy after the fall of the communist regime. European integration is more than just fulfilling

political, legislative, technical, and institutional requirements. It involves unifying the values and democratic, communal, and integrative ideals of Albanian society with those of the European community. This is achieved by aligning with the community's values and norms of freedom and democracy, which are highly regarded by Albanians. During Albania's democratic transition period, the process of European Integration faced a range of challenges that needed to be addressed by Albanian society and its political class.

This paper is being presented at a crucial moment in the political developments of Albania. Our country has a clear goal of integrating into the European Union as part of its foreign policy agenda. For Albania to achieve this goal, all political, social, and institutional actors need to fully commit to meeting the EU's integration standards and aligning Albanian legislation accordingly..

Albania emerged from the communist regime at the final moment of the anti-communist revolutions in Central and Southeast Europe. This process resulted in the downfall of the communist regimes in those countries and the establishment of democratic governments.

The European Union needed to take an inclusive approach, looking towards Eastern Europe, Southeast Europe, and the Balkans. However, these countries have undergone opposite dynamics in the development of political processes over the past four decades, creating a significant ideological divide between the EU's core doctrine and these countries. Nevertheless, the European Union embarked on its most significant enlargement initiative during the 1990s early 2000s, and in 2007. The EU admitted into the bloc 10 former communist countries from Central and Eastern Europe, along with Bulgaria, Romania, and one country from the Balkans, Croatia.

In 1997, Albania faced several problems that prevented it from beginning official accession negotiations. These included issues with the parliamentary elections process, the rise of financial pyramid schemes, and civil unrest throughout the country. As a result, Albania missed out on a valuable opportunity. The failure to meet the 1996 electoral standards was a setback in the negative assessment of Albania and its

impact. The overall political situation in Kosovo and the economic situation did not contribute to integration, as political events in Kosovo refocused the attention of the EU and other important international institutions.

The most important political and integration moment in Albania's official relations with the European Union was the signing of the SAA in 2006. The SAA is the most important step towards the declaration of candidature by Albania, the other important step towards paving the way for Albania to take (Reci, 2015).

The European Commission, in recent years in the framework of the Stabilization and Association Agreement has developed numerous instruments to support and effectively promote the integration process of the Balkans into the European Union. The Stabilization and Association Agreement is the foundation of the relationships between the EU and the Western Balkans (Goxha, 2016).

Albania has been recognized for its progress in the construction of a state, the establishment of political institutions, the economic recovery and diplomatic relations. Unfortunately, Albania faces many challenges, which have not only harmed the sustainable political and economic development of the country and the progress of the integration process but also had a significant impact on the image of our country. During the years of democratic transition, Albania has achieved significant milestones in the integration process, consolidating its political and constitutional framework, and carrying out political, social, and institutional reforms.

1. The relationship between Albania and EU

Albania established diplomatic relations with the EU through the signing of the Trade and Cooperation Agreement in 1992. This marked the beginning of Albania's efforts to forge closer ties with the EU and receive its support. Following this agreement, Albania was able to benefit from preferential trade regimes that the EU offered to third countries.

The EU’s main strategy of enlargement is based on conditionality. In 1993, the Copenhagen European Council customized the Copenhagen

criteria, meeting the conditions that determine the success of all countries aspiring to EU membership. The criteria stand for the stability of institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities; the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union; the ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union. In the framework of the dialogue between Albania and the EU, 4 ministry-level meetings and 5 inter-parliamentary meetings were held during 1994 – 1998. There was discussed the legislation approach, custom cooperation, economic and financial issues, agriculture, and infrastructure. Until then, the EU was not concretely involved regarding the membership perspective for the West Balkans countries (Nexhipi and Nexhipi, 2019).

In 1995, the Madrid European Council added two other conditions: adjustment of administrative structures and transposition and implementation of EU legislation into national legislation (Abazi, 2008).

The political crisis of 1997 compounded by the general chaos in the country as a result of the overthrow of pyramid financial schemes, caused the freezing of our country's relations with the EU until an indefinite deadline when the political situation and the general situation were more favorable. Despite the renewal of these relations, as well as the EU's contribution to accelerating reforms, the situation continued to remain unstable. The EU's concern and suspicion about raising contractual relations with Albania to a higher level was fueled by the severe blows that the state and the country's economy had taken, which would take years to recover.

In 1999, the European Commission established the terms for a new approach to the territories of the former Yugoslavia, laying the foundations for the Stabilization and Association process, which is otherwise known as the EU project for Southeast Europe.

The adoption of the Thessaloniki agenda in 2003 marked a qualitative step in the relationship between the European Union and the Western Balkans. One of the major challenges facing the European

Union's policy of the last decade has been the integration of the Balkans into the European Union, which also has a powerful incentive for the modernization, stabilization, and democratization of the region.

After the European Council meeting in Feira in June 2000 and the Zagreb meeting in November 2000, the perspective of the Western Balkan countries for integration into the European Union was strengthened. The decision of the Feira European Council that all countries involved in the Stabilization and Association process are potential candidates for EU membership was an important step towards integration. The meeting in Zagreb highlighted the need to intensify cooperation with Albania by establishing the High-Level Steering Group Albania-EU.

This group aimed to assess Albania's capacity to fulfill the obligations of a Stabilization and Association Agreement with the EU. After three meetings in Tirana, the European Commission drafted an assessment report, which highlighted progress and areas still in need of improvement.

The Commission evaluated that initiating negotiations would be the most effective approach to uphold the momentum in political and economic reforms in the country, even though there were still some tasks left to fulfill the responsibilities of the Stabilization and Association Agreement. In this context, the Commission concluded that the time was right to start a Stabilization and Association Agreement with Albania.

Institutionally and politically, for a country to become part of the European Union, several fundamental criteria must be met, which come from the EU institutions themselves, primarily from the European Commission, which closely monitors the integration work and developments of the states. Firstly, for a country to become a candidate country for the EU, it must meet five basic criteria, steps that are determined by the political, institutional, legislative, and progress of the states involved in this process. The first step is the submission of the document that makes this country an aspirant to be part of the EU. The second step is the signing of the Stabilization and Association Agreement (SAA), the third step is the declaration of candidate status, the fourth step is the opening of negotiations for accession to the EU, and the final step

is the acceptance of the country as a full member of the European Union (Jacque, 2010).

As explained, SAA is a contractual relationship between advanced models, such as the European Union and transitional countries, which aims and tends towards these advanced models. It offers special dynamics in its relations with the EU to assist in improving the level and system of governance.

According to Goxha enlargement process relates not only to the fulfillment of the Copenhagen criteria of the countries that want to be part of the European family but also to the capacity of the European Union to "absorb" new members. This makes the author think that this issue will be in constant change, in the framework of foreign policy pursued by the EU, and also by the political will of the current members.

The Stabilisation and Association Agreement is the first important step on the long road that Albania must take to become a full member of the EU. It is also the most difficult stage for all countries aspiring to become members. Under the provisions of the Agreement, the parties are committed to implementing the whole principles, including human rights, the establishment of a democratic system based on application and observance of the law, the full establishment of a free market economy, the fight against organized crime and the illegal trade in persons.

The most significant political and integrative moment in the official relations between Albania and the European Union, marking a major step forward for Albania, was in 2006 when Albania signed the SAA, the Stabilization and Association Agreement.

The SAA was the most important step that paved the way for Albania to take the next significant step, that of being declared a candidate country. In 2010, Albania achieved another important victory in the political and diplomatic aspects because the visa regime was lifted for Albanian citizens in the Schengen area. This was a significant opportunity for Albanians, like all other nations, to travel freely throughout the Schengen countries (Reci, 2015).

On June 24, 2014, Albania finally received the candidate status after a series of failed attempts. In the subsequent years, despite several

problems, there was notable progress in the integration journey of the country, whose changes have been mostly due to impositions by the EU representatives rather than by the Albanian political elite, which has frequently hampered this process due to lack of political dialogue between political forces (Goxha, 2016). To lead the country to the next station, which is the opening of accession negotiations, Albania continued to actively participate in high-level dialogue meetings as well as in related joint working groups especially regarding the 5 key priorities namely: corruption, organized crime, judiciary, administrative reform, and human rights. Undoubtedly, the consecutive yearly Progress Reports for Albania did note each of the improvements made while at the same time pointing at those that still had some way to go (Cela, 2018).

In its 2018 progress report, the European Commission finally recommended the opening of accession negotiations for Albania. Firmly set on its integration path towards a European future, Albania is among the most enthusiastic countries, remaining untouched by the Eurosceptic wave that has taken over most European Union member states in the post-Brexit era (Western Balkans Fund, 2020). In March 2020 the members of the European Council endorsed the General Affairs Council's decision to open accession negotiations with Albania and in July 2020 the draft negotiating framework was presented to the Member States. After two years the Intergovernmental Conference on accession negotiations was held with Albania and the Commission started the screening process.

2. Albania in the European Union challenges

The country's long isolation and political, economic, and social difficulties make integration a good opportunity for citizens to freely move across Europe. It should be remembered here that this opportunity and convenience are the result of the consolidation of democracy and economic development, which are the main conditions for what can be called developed countries. The integration process must first be understood as a comprehensive reform program to bring Albania closer to the European model of the state, democracy, market economy, and

effective governance, rather than being regarded as a free movement of individuals to western countries.

According to Strati an undeniable hurdle in Albania's EU integration journey is the deeply rooted issue of corruption. Citizens' growing awareness of corruption's pervasive impact on state institutions underscores its significance as a primary obstacle to membership. This issue, while long acknowledged, has gained prominence as a critical factor impeding Albania's progress. The recognition of corruption's pervasive influence highlights an increasing realization of the need for tangible steps towards reform.

The EU is supporting the socio-economic development and reforms in the enlargement region, including in Albania, with financial and technical assistance through the Instrument for Pre-accession Assistance (IPA). IPA III (2021-2027) instrument is to support Albania in adopting and implementing the political, institutional, legal, administrative, social and economic reforms required by those beneficiaries to comply with Union values and to progressively align to Union rules, standards, policies and practices with a view to Union membership, thereby contributing to their stability, security and prosperity (European Commission, 2021).

Albania is the only country from the region that has signed cooperation agreements with all justice and home affairs agencies of the EU. Albania participates in five cross-border cooperation programmes, as well as in transnational cooperation programmes. Albania participates with IPA support in the EU programmes Erasmus+, Creative Europe (Culture and Media strands), Employment and Social Innovation, Horizon 2020, Customs 2020, Fiscalis 2020, Competitiveness of Enterprises and Small and Medium-Sized Enterprises Programme (COSME), Justice, Europe for Citizens and EU Fundamental Rights Agency (FRA) (observer). To improve the accountability of public administration in the country, Albania is participating as an observer in a pilot project under the Technical Support Instrument (European Commission, 2023).

Whether several international organizations (IO) like NATO, OSCE, Council of Europe, and EU, play directly or implicitly an essential role in the Western Balkans democratization process, it is the EU that today occupies the most important place in this region as an international actor (Nasho Ah-Pine, 2011).

Meanwhile, Albania has undergone progress in recent years in the preparation and direct role of European integration in the process of regional economic cooperation. Even considering how the EU bureaucracy approaches the Balkan countries, it should be observed that, despite the different speeds of the European integration process of each country, as stated in the agreements with each of the EU countries, regional cooperation sometimes dominates their cooperation individually with this union. Both processes must continue in parallel, and regional economic cooperation remains a powerful test for each country in identifying and ensuring the benefits of its competitive and comparative advantages. It is estimated that the increase in foreign investors after the accession of certain sectors such as electricity production, public investments in strengthening transmission networks, etc. will contribute to the supply of electricity to enterprises and families.

According to Meksi the political commitment of the EU member states vis-a-vis the Western Balkan partners remains strong, but still more efforts will be needed to see it materialize. The EU integration agenda is the flagship of Albania´s strategic orientation and driver of sustainable development and democracy. However, it remains the country's responsibility to meet the membership conditions.

The obligation to align Albanian legislation with European legislation is derived from Articles 70 and 75 of the SAA. These provisions require Albania not only to technically align its national legislation with that of the EU but also to ensure its implementation and enforcement. Therefore, at the moment of the accession process, various national bodies must be involved in coordinating Albanian legislation with existing EU acquis. Parliament has strengthened its control over the compatibility of the proposed draft laws with the acquis of the EU, ensuring better quality of harmonized legislation. The Parliament has adopted laws aimed at *aligning Albanian legislation with the EU acquis*.

The European Integration Commission (CEI) plays an important role in this process. In the review and approval of the draft legislation on the alignment with the European Union acquis, the CEI proposed 72 amendments to ensure a more accurate alignment of the draft legislation on the European acquis, which was approved in a plenary session (Ministry for Europe and Foreign Affairs, 2022).

The Progress Report for Albania (submitted in Brussels on 08 November 2023) is part of the 2023 Enlargement Package, adopted by the European Commission. The European Commission concluded that Albania has made progress on its path towards EU integration.

Concerning *the political criteria*, Albania's institutions have mobilized considerable resources, to actively participate in the review process and prepare for the next steps of the accession negotiations under the coordination of the chief negotiator and the newly reformed structures of negotiations with the EU. It is important for the Government to prioritize EU-related reforms and ensure that all measures are in compliance with EU standards. The role of civil society, including in the process of negotiating EU accession, must be strengthened. Albania has an average level of readiness to operate the judiciary. The implementation of judicial reform continues, which leads to good overall progress. The interim assessment of all judges and prosecutors (the monitoring process) continued at a satisfactory pace. Albania must ensure the systematic initiation of criminal proceedings against judges and prosecutors whose verification processes have revealed criminal elements.

Despite progress in the fight against corruption and ongoing efforts, corruption remains a serious problem. Overall, corruption is widespread in many areas of public life and business, and preventive measures are still limited, especially in vulnerable sectors. Efforts need to be intensified to implement the legal framework and policies for *fundamental rights*. Progress has been made in the use of alternatives to imprisonment. However, the adoption of remaining enforceable legislation for the protection of national minorities has not advanced.

Furthermore, Albania needs to establish strong legal and institutional guarantees to prevent further breaches of personal data.

Regarding the *economic criteria*, Albania has a level of preparedness between average and good for developing a functional market economy and has made some progress in addressing the recommendations from 2022. Albania has a level of preparedness to cope with competitive pressure and market forces within the EU and has made some progress in structural reforms in the energy market, transport infrastructure, digitalization of the economy, and educational outcomes, although significant gaps remain compared to regional and European levels.

Conclusions

Albania's integration into the European Union is a step forward, but meeting the criteria remains the final goal. It is not enough to translate and adopt EU laws (*acquis communautarie*) in Albania as in any other candidate or potential candidate country. In many cases, impressive European legislation is not applied to local situations.

Furthermore, in the case of Albania, an intensive fight against corruption in vital sectors such as the judiciary and public services is needed, where is proven that there is a high degree of corruption.

Albania has officially opened the accession negotiations based on some important political, economic legislative, and institutional reforms. The European Union is a complex legal, institutional and community structure and a diverse value union. The history of its creation is a story of success and a story of failure. The EU has learned from past mistakes, and treaties are the most important political instruments to advance the integration process. Under these conditions, the European Union cannot accept new members that do not meet political, economic, and institutional standards, or that do not support universal values such as communalism, democracy, freedom and human rights, the development of private property, etc. Western Balkans, including Albania, are still in the process of integration and have not yet become full members of the EU based on these high standards.

We concluded that the integration processes and institutional structures of the EU are highly dynamic, flexible, active and play an important role in global, regional, and European policy. The EU is now a vital reality, serving as a compass for the countries of the Western Balkans, including Albania. In addition, the Western Balkans are crucial for the European Union's efforts to establish a new integrated tradition in the region.

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PROCEDURAL ASPECTS REGARDING THE RESUMPTION OF THE CRIMINAL PROSECUTION

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Abstract: *The existence of the criminal investigation, as a distinct phase of the criminal process, is imposed by the need for certain specialized state officials to carry out specific activities to discover crimes, identify and catch criminals, in order to bring them to criminal liability.*

This first phase of the criminal investigation is comprised of two well-defined moments in time, namely: a triggering moment, which is the beginning of the criminal investigation, and an ending moment, when the criminal case is resolved by the prosecutor. This resolution can either be through prosecution or by a non-prosecution decision.

However, there are situations when, for various reasons, the initially adopted solutions are returned. These will determine the resumption of the criminal prosecution and therefore the postponement of the completion of the first phase of the criminal process. This study will analyze these situations as well as the controversies that have arisen in judicial practice regarding the powers of the prosecutor in such situations.

Keywords: *criminal trial; prosecutor; prosecution.*

Introductory considerations regarding the criminal prosecution and the premises for the resumption of the criminal prosecution

The criminal prosecution is one of the phases of the criminal process along with the procedure of the preliminary chamber, judgment and the execution of criminal decisions. The purpose of the criminal

investigation phase is to gather the necessary evidence regarding the existence of crimes, to identify the persons who committed crimes and to establish their responsibility, in order to determine whether or not it is necessary to order the referral to court.

This first phase of the criminal process is comprised between two well-defined moments in time, namely: the beginning of the criminal investigation and the resolution of the case by the prosecutor by ordering one of the solutions: sending to court or not sending to court (possible either by filing or by renouncing prosecution).

Each of the solutions listed above does not become a definitive solution simply by being ordered by the prosecutor. Possible future circumstances or the analysis of the same criminal file in subsequent phases of the criminal process, may determine the resumption of the criminal prosecution, and therefore the invalidation of any of the solutions initially ordered by the prosecutor as their own way of solving the case.

Art. 332 of the Criminal Procedure Code regulates all cases in which the resumption of criminal prosecution is required. Because among these cases, there is also a situation that is not preceded by a solution equivalent to the "resolution" of the criminal case by the prosecutor upon completion of the criminal investigation, we must highlight it distinctly, in this introductory part of the study. It is about the situation when the criminal prosecution has been suspended.

According to art. 312 of the Criminal Procedure Code, the criminal investigation is suspended by the prosecutor's order:

- when it is established through a medico-legal expertise that the suspect or the defendant suffers from a serious illness, which prevents him from taking part in the criminal trial, and only if, taking into account all the circumstances of the case, the prosecutor assesses that the suspect or the defendant does not he could be heard at the place where he is, or through videoconference, or that his hearing in this way would affect his rights or the proper conduct of the criminal investigation;
- when there is a temporary legal impediment to the initiation of criminal proceedings against a person (the authorization or other necessary prerequisite for the initiation of criminal proceedings is missing);

- during the mediation procedure. [1]

After the suspension of the criminal investigation, the prosecutor returns the case file to the criminal investigation body or may order its takeover and the order to suspend the investigation is communicated to the parties and the main procedural subjects.

We will analyze, in the following, all cases of the resumption of the criminal prosecution, regardless of what was the situation that preceded it: either the resolution of the criminal case by the prosecutor at the completion of the first phase of the criminal process, or the suspension of the criminal prosecution due to distinct reasons that have generated it.

The resumption of the criminal prosecution in the current regulation of the Code of Criminal Procedure

The resumption of the criminal investigation signifies the resumption of the exercise of the procedural function of the criminal investigation.

In order to resume the exercise of this function, the cumulative fulfillment of the following conditions is necessary:

- to restore the procedural framework that allows the execution of criminal investigation documents. This procedural framework, according to art. 332 Criminal Procedure Code reoccurs for the following reasons:

- termination of the cause of suspension of the criminal prosecution;

- the restitution of the case by the preliminary chamber judge;

[1] According to art. 70 of Law no. 192/2006 regarding mediation and the organization of the mediator profession, published in the Official Gazette of Romania, Part I, no. 441 of May 22, 2006, with subsequent amendments and additions, if the mediation regarding the criminal side of the case is carried out after the start of the criminal trial, the criminal investigation or, as the case may be, the trial may be suspended, based on the presentation by the parties of the mediation contract.

- the prosecutor's decision to reopen the criminal investigation;

- there was no cause which, according to art. 16 Criminal Procedure Code, prevents the initiation of the criminal action or the continuation of the criminal process.

1. Resumption of the criminal prosecution after the termination of the suspension case

The reasons for suspension of the criminal prosecution, as they are mentioned in art. 312 Criminal Procedure Code and as I listed them in the introductory part of this study, it does not determine a genuine termination of the procedural function of the criminal investigation, because during the suspension, the criminal investigation bodies are obliged to carry out, according to art. 313 para. 3 of the Criminal Procedure Code, all the acts whose fulfillment is not prevented by the situation of the suspect or the accused, respecting the right of defense of the parties or procedural subjects, specifying that the acts performed during the suspension can be redone, if it is possible, at the request of the suspect or the defendant, after the resumption of the criminal investigation.

For the situation when the suspension of the criminal prosecution was determined by the start of the mediation procedure, Law 192/2006 on mediation and the organization of the mediator profession shows that the suspension lasts until the mediation procedure is closed by any of the methods provided by law[1] , but not more than 3 months from the date on which it was ordered. The criminal trial resumes ex officio, immediately after receiving the report stating that the agreement between the parties has not been concluded, and if it is not communicated, at the expiration of the 3-month period from the date of the order of suspension

[1] Article 56 para. 1 of Law 192/2006 on mediation and the organization of the mediation profession states that the mediation procedure is closed, as the case may be: a) by concluding an agreement between the parties following the resolution of the conflict; b) by the mediator finding that the mediation has failed; c) by submission of the mediation contract by one of the parties.

It should be noted that whatever was the reason for the suspension of the criminal investigation, the criminal investigation body is obliged to check periodically, but no later than 3 months from the date of the suspension order, if the cause that determined the suspension of the criminal investigation still exists.

The order resuming the criminal investigation must be communicated to the parties and the main procedural subjects.

If in the criminal procedural plan, we identify as an effect of the termination of the suspension case, the resumption of the criminal prosecution and therefore the resumption of the criminal process, we also consider it worthy of highlighting the substantive effect of the termination of the suspension case, namely the resumption of the course of the prescription of criminal liability, which had been suspended as a result of the prosecutor's order suspending the criminal prosecution.[1]

Art. 156 para. 2 Penal Code stipulates that the prescription resumes its course from the day on which the cause of suspension ceased. Therefore, the prosecutor's decision to resume the criminal investigation will not have this effect in substantive law, the statute of limitations resuming by law, according to the rule of substantive law, from the date of the actual termination of the suspension case. That is why it is important for the prosecutor to mention in the order by which he orders the resumption of the criminal prosecution, beyond the thorough reasoning of this solution, mentions regarding the termination of the suspension case and the date on which this termination occurred.

[1] According to art. 156 para. 1 Penal Code the course of the limitation period of criminal liability is suspended for the time that a legal provision or an unforeseen or irremediable circumstance prevents the initiation of the criminal action or the continuation of the criminal process. Para. 2 of the same article also shows that the prescription resumes its course from the day on which the cause of suspension ceased.

2. Resumption of the criminal prosecution after the return of the case by the preliminary chamber judge

- According to art. 334 para. 1 Criminal Procedure Code, the criminal investigation is resumed when the judge of the preliminary chamber ordered the return of the case to the prosecutor's office as a result of the exclusion of all the evidence administered during the criminal investigation;

This situation can arise either when all the evidence is excluded by the judge of the preliminary chamber, in which case the restitution operates as a matter of law, or when, without having excluded all the evidence, the prosecutor - in relation to the sanctions applied to criminal prosecution documents - he himself requests the return of the case to the prosecutor's office.

Given the fact that the Code of Criminal Procedure does not expressly specify whether in this case the resumption of the criminal investigation is ordered by the prosecutor, by ordinance, in doctrine, as well as in judicial practice, two opinions have emerged. The first of these, to which we refer (Udroiu, 2023,Volonciu, 2015), was in the sense of the prosecutor issuing the order to resume the criminal investigation and was based on the following arguments:

- the order of restitution of the preliminary chamber judge only fulfils the condition of restoring the procedural framework in which the investigation can be resumed; the preliminary chamber judge does not order the resumption of the criminal investigation;

- the verification of the second condition for the resumption of the prosecution, namely that there has not been a cause preventing the exercise of the criminal action or the continuation of the criminal process, is up to the prosecutor, who will decide to resume the prosecution only if he establishes that this condition has been fulfilled;

- the exercise by the parties and procedural subjects of their procedural rights and at the same time their compliance with their obligations, specific to the criminal prosecution phase, depends on the moment of the resumption of the criminal investigation. That is why the moment of the resumption of the criminal investigation must be precisely determined, and this could only be done by an order of the prosecutor to resume the criminal investigation.

The second opinion outlined in the judicial practice was in the sense of the resumption of the criminal prosecution as a direct effect of the judge's order to return the case, on the grounds that the lack of the prosecutor's order resuming the criminal prosecution will not affect the per se validity of the prosecution acts criminal proceedings carried out subsequent to the restitution ordered by the judge of the preliminary chamber. The acts of criminal investigation are to be evaluated from the perspective of the rights of the interested subjects and will be sanctioned, if necessary, each separately, under the conditions of art. 280-282 Criminal Procedure Code

We underline the fact that the objective of the resumption of the investigation when the judge of the preliminary chamber ordered the return of the case to the prosecutor's office as a result of the exclusion of all the evidence administered during the criminal investigation is the complete restoration of the evidence and, if necessary, the other prosecution documents sanctioned in the preliminary chamber.

It should be noted that after the resumption of the criminal investigation, the prosecutor will be able to issue any of the solutions provided by the law, not being required to order the referral to court, a situation also applicable in the event that the return of the case to the prosecutor's office was ordered at the request of the prosecutor or as a result of his passivity after the sanctioning by the judge of some criminal investigation documents.

- According to art. 334 para. 2 Criminal Procedure Code, the criminal investigation is resumed when the judge of the preliminary chamber ordered the return of the case to the prosecutor's office as a result of finding the provisions provided by art. 346 para.3 letter of Criminal Procedure Code, respectively:
  - the indictment is issued by an incompetent prosecutor according to the matter
  - the indictment is issued by an incompetent prosecutor according to the person's capacity
  - the indictment is drawn up irregularly, and the irregularity was not remedied by the prosecutor within the term stipulated in art. 345 para. 3 Criminal Procedure Code (5-day limitation period), if the irregularity leads to the impossibility of establishing the object or the limits of the judgement. In this last case, there are two hypotheses to be analysed that can determine the return of the case to the prosecutor's office: either the prosecutor does not remedy the irregularities of the indictment within five days, or, after the preliminary chamber judge indicates the irregularities of the indictment, the prosecutor the judge proceeded to remedy them within 5 days, but, even after such an intervention, the judge assessed that the irregularity still exists and proceeded to restitution.

Finding the situations that justify the order by the preliminary chamber judge to return the case to the prosecutor's office pursuant to art. 334 para. 2 Criminal Procedure Code, conduct at the prosecutor's office can be of two types:

- either the prosecutor issuing the indictment proceeds to the appropriate restoration of the notification act and notifies the court again;

- either, the head of the prosecutor's office or, as the case may be, the hierarchical prosecutor superior to the one who issued the indictment, has the competence to order the resumption of the criminal investigation, by ordinance, indicating, at the same time, the investigation documents that must be carried out. We appreciate that, if the superior hierarchical prosecutor only orders the renewal of the indictment, and the prosecutor who issued the indictment finds that the completion of the criminal investigation is required, nothing prevents him from applying art. 323 Criminal Procedure Code regarding the restitution of the case or referral to another criminal investigation body, or to carry out the criminal investigation documents he deems necessary. At the same time, we consider that it is up to the case prosecutor to assess a new referral to court or to adopt another solution.

3. Resumption of the criminal prosecution in case of re-opening of the criminal prosecution

According to art. 335 Criminal Procedure Code, the resumption of the criminal prosecution in case of re-opening of the criminal prosecution is possible in the following cases:

- When the reopening takes place as a result of the hierarchical control both ex officio and upon the complaint against the prosecutor's solution - hypotheses in which the hierarchical control takes into account all aspects of legality or, as the case may be, the validity of the solution and concerns the circumstances that the prosecutor of the case had or should have considered them and the way in which the legal provisions were applied to these circumstances. If, following the control, the superior hierarchical prosecutor refutes the solution, by the same ordinance he will order the resumption of the criminal prosecution by the prosecutor issuing the refuted solution, returning the file to complete the criminal prosecution.

- When the reopening takes place as a result of the appearance of new facts or circumstances from which it follows that the circumstance on which the classification solution was based has disappeared; (new facts and circumstances are considered those that either appeared after the issuance of the decision, or were not known to the prosecutor at that time); It should be noted that in this case of reopening, the power to order the reopening of the criminal investigation belongs to the prosecutor who ordered the initial solution, who revokes his own order and orders the reopening of the criminal investigation.
- In judicial practice, situations arise that require the correct qualification of some requests addressed by petitioners, as such a qualification determines different procedural solutions to these requests. For example, the petitioner's use of the term "reopening" in the complaint against the settlement does not exempt the senior prosecutor from examining whether the complaint is indeed a request to reopen the prosecution for new evidence - in which case it will be assigned for resolution to the case prosecutor - or if it is, in reality, a complaint against the classification - case in which it will be retained and solved by the prosecutor hierarchically superior to the one who ordered the classification.

Likewise, the repeated complaints against the classification must also be carefully analysed, which do not acquire, by the simple fact that they are numerous, repetitive and include the word "reopening", the significance of requests to reopen the process for new evidence, if they do not include show new facts or circumstances, unknown at the time of issuing the classification solution.

Procedurally, the correct qualification of these complaints/ requests of the litigants formulated after the communication of a classification solution, determines a series of consequences in the scope of appeals exercised against the act by which they are resolved. Thus, if the said petition is resolved by the superior hierarchical prosecutor as a complaint against the classification solution, the person who made the complaint only has at his disposal the procedure provided by art. 341 Criminal Procedure Code, respectively - the complaint addressed to the

judge of the preliminary chamber; (the petitioner can no longer address the hierarchical superior prosecutor to the one who rejected his complaint, according to art. 340 par.5 Criminal Procedure Code); instead, the ordinance by which the case prosecutor rejects the request to reopen the investigation can be appealed, under the terms of art. 339 Criminal Procedure Code, to the prosecutor hierarchically superior to the one who rejected the reopening request; instead, the complaint against this act to the preliminary chamber judge is inadmissible.

In the activity of prosecutor's offices, the situation of "repeated complaints" is very common, in which, after the settlement of a case, the injured person submits a new document entitled "complaint", which, however, contains the content of a request to reopen the process, as it shows new circumstances that the prosecutor did not take into account when issuing the classification solution. Because it bears the name "complaint", it can be considered that this document is a notification act within the meaning of art. 289 para. 1 Criminal Procedure Code. So, instead of resolving the request to reopen the prosecution - which is in reality - either by admitting or rejecting, it ends up ordering a new classification solution.

- When the reopening takes place as a result of the suspects or defendant's failure to fulfil in bad faith the obligations subsequent to the waiver of criminal prosecution provided for in art. 318 para. 6 Criminal Procedure Code (to remove the consequences of the criminal act or to repair the damage caused or to agree with the civil party on a way to repair it; to publicly apologize to the injured person; to perform unpaid work for the benefit of the community, for a period between 30 and 60 days ; attend a counselling program). The proof of the fulfilment of these obligations or the justification of the reasons for their self-fulfilment rests with the suspect or the defendant and when they have not been done, the prosecutor is entitled to revoke the waiver of the criminal prosecution ordered initially and, after going through the procedure to confirm the revocation, will order the referral to court.

We make it clear that all cases of resumption of criminal prosecution ordered in case of reopening of criminal prosecution, regardless of who is the holder of the reopening or its cause, are applicable to the provisions of art. 335 para. 4 Criminal Procedure Code regarding the confirmation by the preliminary chamber judge of the reopening of the criminal prosecution. In this regard, the High Court of Cassation and Justice, the Panel for resolving legal issues in criminal matters, established, with a binding nature, that *"the re-opening of the criminal prosecution provided for by art. 335 Criminal Procedure Code is subject to the confirmation of the judge of the preliminary chamber, both following the denial of the prosecutor's solution by the superior hierarchical prosecutor in the procedure provided for by art. 336 Criminal Procedure Code, as well as in the case of the refutation ordered ex officio"* (Decision no. 27 of October 29, 2015).

The re-opening of the criminal prosecution is subject to the confirmation of the judge of the preliminary chamber, within no more than 3 days from the date of issue, under the penalty of nullity. The judge of the preliminary chamber decides by a reasoned conclusion, in the council chamber, with the summons of the suspect or, as the case may be, the defendant and with the participation of the prosecutor, on the legality and validity of the order by which the reopening of the criminal investigation was ordered. The non-appearance of legally summoned persons does not prevent the settlement of the confirmation request.

The judge of the preliminary chamber, resolving the request for confirmation, verifies the legality and validity of the ordinance ordering the reopening of the criminal investigation based on the works and material from the criminal investigation file and any new documents presented. The decision of the preliminary chamber judge is final.

It should be noted that art. 335 para. 6 Criminal Procedure Code, provides for the only exception to the confirmation of the reopening of the criminal investigation by the judge of the preliminary chamber, namely: if the prosecutor hierarchically superior to the one who ordered the solution of not sending to court, refutes it and orders the reopening of the criminal investigation, prior to the communication the ordinance that

includes this solution, the reopening of the criminal investigation is not subject to the confirmation of the judge of the preliminary chamber.

- All cases of resumption of criminal prosecution as a result of the reopening of criminal prosecution shall be supplemented with the one provided by art. 335 para.5 Criminal Procedure Code, according to which in the event that the classification was ordered, the re-opening of the criminal prosecution also takes place when the judge of the preliminary chamber admitted the complaint against the solution and sent the case to the prosecutor in order to complete the criminal prosecution.[1] The dispositions of the preliminary chamber judge are binding for the criminal investigation body.

Conclusions

Illustrating this picture of the situations in which a criminal case is "put back" in the procedural phase of the criminal investigation, after there was a first solution ordered by the prosecutor either to suspend the criminal investigation or to complete the criminal investigation phase by sending to court or through a non-prosecution solution, we can conclude that the current Criminal Procedure Code provides a series of procedural ways to verify and reverify the committed deed and the investigated person so that the principle of finding the truth in any criminal case can really be answered.

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NATIONAL AND EUROPEAN CASE LAW – A REMARK FOR THE HIGH COURT OF CASSATION AND JUSTICE IN PRELIMINARY JUDGMENTS

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Abstract: *The High Court of Cassation and Justicehas the responsibility to ensure consistency and predictability in case law. This is essential to maintain individual confidence in the judicial system and to respect the principle of legal certainty, which is a fundamental element of the rule of law. Consistent case law helps guarantee the right to a fair trial and strengthen the rule of law, giving citizens the confidence that they will be treated fairly and according to the law in any litigious situation. According to art. 126 para. (3) of the Romanian Constitution, the High Court of Cassation and Justiceensures the uniform interpretation and application of the law by the other courts, thus having the fundamental role of resolving or clarifying the legal issues that have created or may create a non-unitary judicial practice through the unification mechanisms regulated by law. One of these mechanisms, of French inspiration, introduced by the new procedural legislation in order to prevent non-unitary jurisprudence, is the preliminary ruling for resolving some legal issues. This mechanism comes to analyze the majority case law, as well as the practice at the European level, imposing its binding considerations and in case the notification was rejected as inadmissible, if the resolution given to the question of law, arising from the majority practice of courts, analyzed by the supreme court, or from the previous ruling of the supreme court, can be found in the recitals. In this sense, it is interesting to analyze the importance of the analyzed national and European jurisprudence in the formation of the panel's opinion that resolves the respective legal issue.*

Keywords: ***c****ase law; preliminary decision; non-unitary practice; European Court of Human Rights.*

Introduction

According to the doctrine, judicial practice, also called jurisprudence, represents the totality of judicial decisions pronounced by courts of all levels.

The term „jurisprudence", also called „customs of the courts", has known several meanings in Romanian law. It meant the science of law created by jurisconsults. (Boghirnea, 2009, p. 62). In a broad sense, jurisprudence refers to all decisions made by courts of law, regardless of the court that issued them or their nature. These decisions can influence the interpretation and application of the law and provide guidance for future cases.

In a narrow sense, jurisprudence focuses on the ability of courts to influence the development and interpretation of the law through their decisions. These decisions may supplement or clarify existing law or set precedents for future cases, even in the absence of a specific legislative rule. Jurisprudence can be a crucial tool in the adaptation and evolution of the law in the face of social, technological, and political changes. Courts may develop new principles or adapt existing legal interpretations to better reflect the needs and values of society at a given time. This process allows the law to remain relevant, dynamic and provide solutions in the context of a constantly changing world.

Judicial practice can include both court decisions that can be considered wrong for reasons such as the incorrect interpretation of the law or its erroneous application to a particular case, as well as decisions that become benchmarks for the improvement of future law enforcement activity.

Decisions that become landmarks are often those that provide a strong and clear case for solving a specific problem. These rulings may establish or clarify the meaning of principles, interpret legislation in innovative ways, or address aspects of the law that were not previously well defined. Thus, they can serve as guides for future courts in resolving similar cases and contribute to the development of jurisprudence in a constructive and useful way. The authority that a court decision has over similar cases is called judicial precedent (Popa, 2021, p. 68). It consists

of judicial decisions which, although they solve specific cases, are of wide interest, because they have value for the future as well, being able to inspire future solutions for similar cases, which is why they are also called „principle decisions" (Popescu, 2002, p. 155).

Such court rulings contribute to the interpretation and application of the law, which can be useful for the subsequent practice in the respective field. In essence, the jurisprudence of the High Court of Cassation and Justice recognizes that Law no. 134/2010 on the Code of Civil Procedure established the possibility for the courts to ask the High Court of Cassation and Justice to issue preliminary rulings to clarify some legal issues. These rulings are essential to the merits of cases and are requested when judges believe that the intervention of the supreme court is necessary to definitively settle a legal issue discussed in the trial.

Through this procedure, the trial court can request the High Court of Cassation and Justice to rule on some essential legal issues, which are of major importance for the resolution of the case. Thus, a uniform and coherent interpretation of the law can be ensured within the entire judicial system, and the judgments issued by the High Court of Cassation and Justice in these circumstances become binding for the lower courts and final for the respective case (Ene-Dinu, 2022, p. 89).

This practice has the benefit of ensuring consistency in the interpretation of the law and providing clarity on key legal issues that may influence court proceedings.

This new competence of the High Court of Cassation and Justice was introduced to prevent the emergence of non-unitary jurisprudence at the level of national courts. By granting binding solutions, both for the court requesting the preliminary ruling and for the other courts facing similar legal issues, consistency, and unity in the interpretation of the law is ensured throughout the judicial system.

The decisions of the High Court of Cassation and Justice in these cases have only prospective effects, which means that they apply only in subsequent cases and do not have retroactive effect. This contributes to the predictability and consistency of judicial decisions over time,

providing a clear framework for the application of the law in all similar cases that may arise in the future.

The High Court of Cassation and Justice exclusively analyzes the specific issue indicated by the judge of the case. This judge, anticipating the complexity of the matter and the risk that it may generate different interpretations within other courts, requests the intervention of the supreme court to issue a decision that provides clarity and establishes a unitary interpretation, applicable at the level of the entire judicial system in the country.

This approach ensures uniformity in the application of the law and prevents divergent interpretations in various courts. By establishing a unified perspective, the High Court of Cassation and Justice contributes to the coherence and predictability of judicial decisions throughout the country.

According to art. 516 para. 5 Civil Procedure Code, after the composition of the panel according to art. 516 para. 4 of the Civil Procedure Code, its president will appoint 3 judges from among the panel members to draw up a report on the appeal in the interest of the law. For the preparation of the report, the president of the panel may request the written opinion of some recognized specialists on the legal question whose release is requested. According to art. 516 para. 7 Civil Procedure Code, the report will include: the options related to the resolution of the legal issue and the arguments in support of each of them; the relevant jurisprudence of the Constitutional Court; the relevant jurisprudence of the European Court of Human Rights; the relevant jurisprudence of the Court of Justice of the European Union; the doctrine in the matter and when required, the opinions expressed by the consulted specialists.

In the present study, we propose to analyze some preliminary rulings issued by the High Court of Cassation and Justice in the resolution of some legal issues to highlight the way in which domestic and European jurisprudence contributes to the interpretation of the normative acts that go through this procedure.

Relevant jurisprudential examination

We can highlight in this study some examples of judgments pronounced in the resolution of some legal issues in which the domestic jurisprudence, as well as the European one, had a decisive role in forming the opinion of the High Court of Cassation and Justice judges and are the basis of the interpretations of the normative act that is the subject of the analysis.

I. A first example in this regard is Decision no. 38/2022 pronounced by the High Court of Cassation and Justice - Panel for the resolution of some legal issues (published in the Official Gazette, Part I no. 671 of July 5, 2022), regarding the resolution of the referral made by the Alba Iulia Court of Appeal - Criminal Division, in File no. 4.184/107/2017/a9.1, by which a preliminary ruling is requested.

The legal issue subject to the analysis of the High Court of Cassation and Justice concerns the legal nature of the term of 6 months during the criminal investigation, respectively 1 year during the trial, during which it is necessary to periodically verify the existence of the grounds that determined the taking or maintenance of the preventive measure, in the interpretation of art. 2502 Criminal Procedure Code.

Taking into account the legal issue under analysis, it was found that the jurisprudence of the Panel for the resolution of legal issues in criminal matters established the inadmissibility of referrals related to legal issues regarding preventive measures, since the clarification of these issues could not influence the decision that will be taken on the merits of the case (in this sense, High Court of Cassation and Justice – Panel for the resolution of some legal issues in criminal matters, Decision no. 11/2014 (published in the Official Gazette of Romania, Part I, no. 503 of July 7, 2014), Decision no. 17/2014 (published in the Official Gazette of Romania, Part I, no. 691 of 22 September 2014), Decision no. 24/2014 (published in the Official Gazette of Romania, Part I, no. 823 of 11 November 2014).

Although this referral concerns preventive measures, these are still procedural measures, which are incidental during the criminal

process and on the resolution of which neither the criminal action nor the civil action depends.

If we refer to the provisions of art. 249 para. (1) of the Code of Criminal Procedure, we note that preventive measures aim either to ensure the enforcement of criminal law sanctions (when they are taken with a view to special confiscation, extended confiscation or to guarantee the execution of the fine), or to ensure the repair of the damage caused by crime or guaranteeing the execution of legal expenses. Therefore, precautionary measures are procedural measures that affect the exercise of the right to property (in components regarding the right to dispose) to ensure the execution of some provisions contained in the court decision by which the criminal action or the civil action was resolved.

By Decision no. 65/2021 of the High Court of Cassation and Justice (published in the Official Gazette of Romania, Part I, no. 81 of January 27, 2022), the Panel for the resolution of some legal issues in criminal matters specifies that the notion of "solution on the merits" must be understood in a broad sense, including not only substantive law issues, but also those of procedural law, provided that the substantive resolution of the case depends on their resolution.

In another decision, in the same context, it was decided as follows; „with regard to the first criterion in relation to which the fulfilment of the condition related to the connection of the legal issue that is requested to be resolved with the substantive resolution of the case is examined, it should be noted that it is also considered fulfilled in the cases where the notification of the referring court refers to the interpretation of procedural norms, it being essential that the resolution of the case depends on the clarification of the legal issue" (Decision no. 7/2020, published in the Official Gazette of Romania, Part I, no. 568 of June 30, 2020).

From the perspective of the condition that the resolution of the case depends on the clarification of the legal issue, we note that in the jurisprudence of the Panel for resolving some legal issues in criminal matters, it was decided, in principle, on the meaning to be attributed to the phrase "legal issue whose clarification depends on the merits of the case".

Thus, in Decision no. 16/2018 (published in the Official Gazette of Romania, Part I, no. 993 of November 23, 2018), the Panel for the resolution of some legal issues in criminal matters stated that „this must be understood as the resolution of the criminal legal relationship born as a result of the violation of social relations protected by the norm of incrimination, including in the aspect of civil consequences, and not the resolution of an incidental request invoked during the trial of the case in the last instance", and in Decision no. 23/2014 (published in the Official Gazette of Romania, Part I, no. 843 of November 19, 2014) it was emphasized that „this condition of admissibility, through the explicit reference to the „substantive" resolution of the case, requires that the resolution of the legal issue which forms the object of the notification to be decisive for the resolution of the criminal action or the civil action in the criminal process".

In Decision no. 2/2022 (published in the Official Gazette of Romania, Part I, no. 234 of March 9, 2022), the Panel for the resolution of some legal issues decided that "in the case brought to trial, the legal issue that was referred to the High Court concerns the preliminary chamber procedure whose object is regulated in the provisions of art. 342 of the Code of Criminal Procedure, situation in which the provisions of art. 453 para. (1) lit. e) from the Code of Criminal Procedure cannot be applied by analogy to these provisions, nor can they be subsumed under the notion of solving the criminal action on the merits of a case. Thus, the High Court was not notified by the Court of Appeal with a case with which it was entrusted to resolve the criminal action on its merits. The conclusion of the judge of the preliminary chamber is a conclusion by which he ruled definitively on the legality of the administration of evidence in two separate files, and not at all in the judicial procedure of solving the criminal action on the merits of the case".

However, in the case that generated the pending legal issue, the panel of the Alba Iulia Court of Appeal is vested with the resolution of the appeal exercised against the decision to maintain the preventive measure previously ordered during the criminal investigation phase. The solution to this legal problem, in the sense of maintaining or terminating

protective measures, is not related to the solution of the criminal or civil action in the criminal case. Moreover, even if the insurance measure had also been ordered for the purpose of recovering the civil damage, the existence, when the judgment that has to be pronounced on the basis of the civil action remains final, of some assets under the power of this measure has an effect only on the method of recovery of the damage, and not of the solution given on the civil action. From the perspective of the theoretical arguments presented in the decisions mentioned above, it can be observed that the insurance measure does not constitute, by itself, a coverage of the damage, having only the role of guaranteeing its repair. At the same time, the existence of this measure is not likely to contribute to establishing the substantive solution of the civil/criminal side in this case, since it will facilitate the recovery of the damage caused by the crime, the covering of legal expenses or the confiscation of assets.

Therefore, the question highlighted in the present notification, which aims to establish the legal nature of the terms provided by art. 2502 of the Code of Criminal Procedure does not meet the analysed admissibility criterion representing an incidental matter, so the answer to this question does not influence the solution that could be given to the legal report of the conflict brought to the judgment nor the resolution of the civil action.

Consequently, considering the interpretations given by the relevant jurisprudence in the case, the referral made by the Alba Iulia Court of Appeal – Criminal Division was rejected as inadmissible.

II. Another example in this regard is Decision no. 64/2023 pronounced by the High Court - Panel for the resolution of some legal issues (published in the Official Gazette, Part I no. 1047 of November 20, 2023), having as its object the notification formulated by the Court of Appeal Bacău - Criminal Section and for cases involving minors and of family in File no. 3.556/103/2022/a1, by which a preliminary decision is requested to resolve some legal issues, including the one related to the following aspect: "If in the procedure provided by article 148 para. (3) of the Criminal Procedure Code, as well as Article 150 para. (5) of the Code of Criminal Procedure, notification to the judge of rights and liberties in order to issue the technical supervision mandate is mandatory if the

prosecutor considers it necessary for the investigator to be able to use technical recording devices, these legal provisions establishing a special procedure derogation from the provisions of art. 139 of the Code of Criminal Procedure, in the case there is a technical supervision mandate, previously issued under these latter provisions."

The supreme court ruled that the undercover investigator or collaborator can wear recording devices, an aspect that emerges unequivocally from the provisions of art. 148 para. (3) of the Code of Criminal Procedure, but only in the conditions in which the judge of rights and freedoms assesses that there is a proportionality between the seriousness of the suspected criminal offense and the strong interference in private life (the investigator or collaborator, participating in the criminal investigation as interlocutors of the person targeted by this have, ab initio, increased possibilities to determine, to surprise, to occasion, to collect data and information, even without exceeding the limits of a passive investigation, by comparison with an object or another person carrying technology of surveillance without his knowledge).

Therefore, the goal pursued by the legislator, that of granting an effective and adequate protection to the private life of the person suspected of committing a crime, in the case of video or audio recordings by an investigator or collaborator, cannot be achieved to the extent that the judge of rights and freedoms, at the time of issuing the technical supervision mandate, under the conditions of art. 139 of the Code of Criminal Procedure, he did not know the use of the undercover investigator or the collaborator and, consequently, he did not have the opportunity to analyse the legality and opportunity of taking photos, video or audio recordings by him.

Limitations to the fundamental rights of individuals must be subject to the test of necessity, proportionality, and subsidiarity, which is why any restriction must take place under strict conditions and, in this case, authorized by the judge of rights and freedoms.

The use of such special methods of surveillance or research involves a high level of interference in a person's private life, an aspect that makes it necessary to refer to the jurisprudence of the European

Court of Human Rights and the Constitutional Court regarding the importance of the control exercised by an independent magistrate (the judge) in cases where such measures are required.

In the pending case, the High Court analysed the jurisprudence of the Court of Strasbourg, referring to the Case of Valenzuela Contreras v. Spain, Judgment of July 30, 1998 (application no. 27671/95, Collection of judgments and decisions 1998 V), and the Case of Roman Zakharov v. Russia (Grand Chamber, application no. 47143/06), Decision of December 4, 2015, by which it was judged that secret surveillance or interception of communications by public authorities constitutes interference by a public authority in the right to respect for private life and correspondence, such interference violating article 8 para. 2 of the ECHR, unless it "in accordance with the law" pursues one or more legitimate aims under paragraph 2 and, in addition, is "necessary in a democratic society" to achieve them (Judgment Kopp v. Switzerland from March 25, 1998, request 23224/94, Reports 1998-II, p. 539, para. 50).

In the same context, the European Court of Human Rights emphasized that "...it is aware of the difficulties involved in the fight against serious crimes and the need for the authorities to sometimes resort to more elaborate investigation methods. The Convention does not prevent, at the stage of preparation of the criminal investigation material and when the nature of the crime can justify it, the use of sources such as anonymous informants... Recourse to such sources is acceptable only if it is accompanied by adequate and sufficient guarantees against abuses, in especially within a clear and predictable procedure for authorizing, implementing and controlling the investigative measures in question" (Judgment of February 5, 2008, in the Case of Ramanauskas v. Lithuania, application 74420/01, Grand Chamber, point 51).

From this jurisprudence, the High Court concluded that the main condition for not having violated art. 8 para. 2 of the ECHR is that the interference must be "prescribed by law", i.e. have a basis in domestic law, which respects all the quality conditions of the law.

Thus, it is not enough that the interference is provided for by a predictable law, with clear and detailed rules, but it is imperative that the

state authorities, when using such special methods of surveillance or research, strictly comply with the legal provisions.

Consequently, the special nature of the procedure that does not allow derogations, the arguments related to the role conferred on the judge of rights and freedoms in the architecture of the criminal process in the context of the separation of judicial functions, the aspects highlighted by the previously mentioned jurisprudence regarding the constitutional and conventional standard of protection of freedoms individual require the conclusion that, in cases where the prosecutor resorts to the procedure provided by art. 148 para. (3) of the Code of Criminal Procedure, he is obliged to notify the judge of rights and liberties even in the case of the existence of a previously issued supervision mandate, a legal requirement which, under no circumstances, can be evaded.

The High Court of Cassation and Justice, based on the interpretations provided by European jurisprudence, admitted the referral made by the Bacău Court of Appeal - Criminal Section and for cases with minors and family cases in File no. 3.556/103/2022/a1, by which a preliminary ruling is requested to resolve the stated legal issue and states that in the procedure provided for by article 148 para. (3) of the Criminal Procedure Code, as well as Article 150 para. (5) of the Code of Criminal Procedure, notification to the judge of rights and liberties in order to issue a technical surveillance mandate is mandatory if the prosecutor considers it necessary for the investigator to be able to use technical recording devices, even if there is a surveillance mandate technique of the same nature previously issued, these legal provisions establishing a special procedure, derogating from the provisions of art. 139 of the Criminal Procedure Code.

Conclusions

The need to carry out an analysis of the role played by national and European judicial practice in the activity of the High Court of Cassation and justice in the pronouncement of decisions regarding the resolution of legal issues is a priority because the activity of interpreting

the law by the High Court ensures the link between the legal norm in its theoretical expression and its practical application. The basis of the study is both the legislation in the field of decisions regarding the resolution of legal issues and the practice of the courts in Romania, the European Court of Human Rights and the Court of Justice of the European Union, jurisprudence analyzed to highlight its role not only in the interpretation but also in the creation of law. The purpose and objective of the paper resides in researching the sources of law, especially the jurisprudence of the European and national courts, with special regard to the decisions regarding the resolution of some legal issues.

Over time, the place and role of jurisprudence in the system of sources of law has fluctuated from the decline in prestige and the concrete meanings of judicial practice to its recognition as a source of law, at least in terms of human rights, but not only, because we have here in view not only the decisions of the ECHR, but also those of the CJEU. The tendency is to have a unitary right both at the national level and at the EU level.

From the analysis of the High Court's jurisprudence, from which I briefly presented in this study some eloquent examples, it follows with certainty that, at least in the matter of decisions regarding the resolution of some legal issues, the supreme court analyzes both the national jurisprudence and the jurisprudence of the CJEU and ECHR. The opinions of national and European judges obviously contribute to the shaping of the opinion of the High Court at the time of the pronouncement of preliminary decisions, thus ending up having a decisive influence in terms of the interpretation and application of the law, thus appearing as genuine sources of law, with an increasingly obvious direct role.

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SETTLEMENT OF LEGAL CONFLICT OF A CONSTITUTIONAL NATURE – MECHANISM FOR REGULATING THE BALANCE BETWEEN THE POWERS OF THE STATE

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Abstract: *Given the particular importance of the social relations regulated by the rules of constitutional law with regard to the principle of the separation of powers in the state, the need arose to state an effective mechanism to ensure balance and loyal cooperation between the powers of the state, guaranteeing cooperation between the various state bodies in the performance of their functions.*

Thus, in a situation where there is a conflict arising from a direct, unmediated violation of the principle of the separation of powers in the state, the competence to solve the conflicting legal situation lies with the Constitutional Court, according to the Constitution.

Keywords: *legal conflict of constitutional nature; public authorities; constitutional jurisprudence; Constitutional Court.*

Introduction

Law no 429/23 October 2003 revising the Romanian Constitution (published in the Official Gazette of Romania, Part 1, no 758/29 October 2003) brought a complement of essence to Art 146 of the Constitution, in the meaning that the Constitutional Court has the power to solve legal conflicts of a constitutional nature between public authorities.

The Constitution does not define the term "legal conflict of a constitutional nature", the court of administrative contentious has established its content each time it has been seized with such a conflict. This is not strictly speaking a theoretical definition, but rather a jurisprudential assessment of the conditions in which the conflict occurred and, above all, of its consequences, consisting of a set of dysfunctions in the activity of certain public authorities provided for in Title III of the Constitution.

The common element of the legal conflicts of a constitutional nature resolved so far by the Constitutional Court consists in preventing the proper functioning – in accordance with the constitutional provisions – of a public authority exercising a certain type of power.

In finding and solving various legal conflicts between certain public authorities, the Court has each time analyzed the institutional and legal context in which such a conflict occurred and its harmful consequences for the act of government.

The jurisprudential qualification by the Constitutional Court of any conflictual situation being the substance of a legal conflict of a constitutional nature, within the meaning of Art 146 Let e) of the Fundamental Law, is neither accidental, nor lacking in theoretical foundation or support of a constitutional text. On the contrary, the Constitution provides the instruments and procedures for the normal functioning of all the mechanisms for the exercise of the three powers of the state, which owe each other institutional loyalty in accordance with the provisions of the Constitution. From this perspective, it is very clear that any conflicting legal situation – which the Court is competent to establish and solve, according to the Constitution – arises from a direct violation of the principle of separation and loyal cooperation of the authorities exercising power in the Romanian State (Decision of the Constitutional Court of Romania, no 85/24 February 2020, published in the Official Gazette of Romania, Part 1, no 195/11 March 2020).

The Court, in its case law, has ruled that a legal conflict of a constitutional nature involves "concrete acts or actions by which one or more authorities arrogate to themselves powers, duties or competences which, according to the Constitution, belong to other public authorities,

or the omission of public authorities, consisting in a decline of competence or a refusal to perform certain acts which are part of their duties. However, such a conflict of a constitutional nature was not created by the statements examined, which did not produce any legal effect, [...] the opinions, value judgments or statements of the holder of a public office concerning other public authorities do not in themselves constitute legal conflicts between public authorities. Opinions or proposals on how a particular public authority or its structures act or should act, even if they are critical, do not trigger institutional blockages if they are not followed by actions or inactions likely to prevent the fulfilment of the constitutional duties of those public authorities. Such opinions or proposals remain within the limits of the freedom to express political opinions, subject to the restrictions laid down in Art 30 Para 6 and 7 of the Constitution" (Decision of the Constitutional Court of Romania, no 53/28 January 2005, published in the Official Gazette of Romania, Part 1, no 144/17 February 2005).

The Court underlined that, in fulfilling their constitutional mandates, the public authorities, through the positions they express, have an obligation to avoid creating conflicting situations between powers. The constitutional status of the President and the Prime Minister, as well as their role in constitutional democracy, oblige them to choose appropriate forms of expression, so that the criticisms they make of certain powers of the state do not constitute elements that could give rise to legal conflicts of a constitutional nature between them (Decision no 453/26 May 2006). At the same time, "no minister may be held responsible for political opinions or actions taken with a view to the drafting or adoption of a legislative act with the status of law (…) immunity from liability for legislative activity is a guarantee of the exercise of the mandate against possible pressure or abuse committed against the person holding the office of parliamentarian or minister, as immunity ensures his/her independence, freedom and security in the exercise of his/her rights and obligations under the Constitution and the laws" (Decision of the Constitutional Court of Romania, no 68/27

January 2007, published in the Official Gazette of Romania, Part 1, no 181/14 March 2017).

By Decision no 108/5 March 2014 (published in the Official Gazette of Romania, Part 1, no 257/9 April 2014), the Court ruled that its intervention becomes legitimate whenever the public authorities and institutions referred to in Title III of the Constitution ignore or assume constitutional powers that create bottlenecks that cannot be removed in any other way. At the same time, by Decision no 417/3 July 2019 (published in the Official Gazette of Romania, Part 1, no 925/10 October 2019), the Court established that unconstitutional conduct valorized in the form of a legal paradigm represents an implicit institutional deadlock.

The emergence of conflicts between public authorities is natural given that they are organized and operate on the basis of the principle of the separation and balance of powers, a principle which implies, within the framework of cooperation, areas of autonomy and independence. There is no doubt that public authorities must always behave loyally. Sometimes, however, this is neglected for various reasons. That is why the Constitutional Court has also stressed that, in fulfilling their constitutional mandates, the representatives of the public authorities, through the positions they express, have the obligation to avoid the creation of conflictual situations between powers (...). It should be noted that Art 146 Let e) of the Constitution does not concern any conflict, probable and possible, between public authorities, but only conflict concerning constitutional powers.

At the same time, legal conflict of a constitutional nature exists between two or more authorities and may concern the content or scope of their powers deriving from the Constitution, which means that they are conflicts of competence, positive or negative, and which may create institutional bottlenecks (Muraru and Tănăsescu, 2008, p. 1404). Moreover, the Court ruled that the text of Art 146 Let e) of the Constitution "establishes the competence of the Court to settle on the merits any legal conflict of a constitutional nature arising between public authorities, and not only conflicts of competence arising between them" (Decision of the Constitutional Court of Romania, no 97/7 February

2008, published in the Official Gazette of Romania, Part 1, no 169/5 March 2008).

Therefore, according to the Court's case law, legal conflicts of a constitutional nature "are not limited only to conflicts of competence, positive or negative, which would create institutional bottlenecks, but concern any conflicting legal situations whose origin lies directly in the text of the Constitution" (Decision of the Constitutional Court of Romania, no 270/10 March 2008, published in the Official Gazette of Romania, Part 1, no 290/15 April 2008).

At the same time, in its case law, the Court has found that the rule regarding the engagement of the competence of the Constitutional Court is that, to the extent that there are mechanisms through which public authorities self-regulate through their direct and direct action, the role of the Constitutional Court becomes subsidiary (Decision of the Constitutional Court of Romania, no 108/5 March 2014, published in the Official Gazette of Romania, Part 1, no 257/9 April 2014; Decision of the Constitutional Court of Romania, no 285/21 May 2014, published in the Official Gazette of Romania, Part 1, no 478/28 June 2014).

Public authorities that may refer a constitutional legal dispute to the Constitutional Court

Based on Art 146 Let e) of the Constitution, according to which the Constitutional Court solves conflicts of a constitutional nature between public authorities at the request of the President of Romania, one of the presidents of the two chambers, the Prime Minister or the President of the Superior Council of Magistracy, it is necessary to clarify: on the one hand, which public authorities are referred to in the aforementioned text, and on the other hand, which public authorities may refer the matter to the Constitutional Court.

In relation to the first aspect, we can appreciate that any public authority can find itself in a conflict of this nature, but the constitutional text concerns only the authorities mentioned by the Constitution. As for the other aspect, the constitutional text is clear, namely: only the public

authorities mentioned in Art 146 Let e) of the Constitution may refer the matter to the Constitutional Court. The text is of strict interpretation. From an examination of the Decision no 435/26 May 2006, it appears that the referral to the Court was made by the High Council of Magistracy as representative of the judicial authority. We believe that such situations may also arise if the mediation conducted by the President of Romania, in accordance with Art 80 Para 2 of the Constitution, fails and the President considers that the conflict can be solved through the intervention of the Constitutional Court.

The Constitutional Court, by Decision no 53/28 January 2005, established that the public authorities which are likely to be parties to the conflict are only those provided for in Title III of the Constitution.

According to the constant jurisprudence of the Constitutional Court, the public authorities that may be involved in a legal conflict of a constitutional nature are only those contained in Title III of the Constitution, namely: the Parliament, composed of the Chamber of Deputies and the Senate, the President of Romania, as a single public authority, the Government, the bodies of central public administration and local public administration, as well as the bodies of the judicial authority, namely the High Court of Cassation and Justice, the Public Prosecutor's Office and the Superior Council of the Magistracy. The Prime Minister or the Minister of Justice may also be a party to a legal dispute of a constitutional nature, when exercising their own powers, the Ministry of Justice or the prefect himself (Decision of the Constitutional Court of Romania, no 417/3 July 2019, published in the Official Gazette of Romania, Part 1, no 825/10 October 2019).

As regards the public authority status of the Ministry of Justice, the relevant decisions are Decision no 270/10 March 2008 (Decision of the Constitutional Court of Romania, no 358/30 May 2018, published in the Official Gazette of Romania, Part 1, no 473/7 June 2018) and Decision no 901/17 July 2009 (Decision of the Constitutional Court of Romania, no 358/30 May 2018, published in the Official Gazette of Romania, Part 1, no 473/7 June 2018), the Court holding that, in this respect, it can fall within the concept of public authority within the meaning of Title III of the Constitution, being an organ of the central public administration.

Ministries are expressly enshrined in Art 116 and 117 of the Constitution as public authorities within the meaning of Title III of the Constitution. However, the body of the Constitution does not mention this ministry as an exponent of the Government but refers to the Minister of Justice. In this regard, Art 72 Para 3, Art 132 Para 1, Art 133 Para 2 Let c) and Art 134 Para 2 of the Constitution are referred to. Thus, the Constitution, recognizes the Minister of Justice as having his own power and authority, being *lato sensu* a public authority in the constitutional relations in which he is expressly named (published in the Official Gazette of Romania, Part 1, no 503/21 July 2009).

The Court, by the same decision, also found that for a public authority to be a party, in its own name, to a legal dispute of a constitutional nature, it must exercise its own jurisdiction. Art 132 Para 1 of the Constitution does not enshrine a competence of the Government, but a distinct and proper competence of the Minister of Justice, who is a member of the Government and heads the Ministry of Justice, which is organized and functions under the Government. According to Art 102 Para 1 of the Constitution, the Government, in accordance with its program of government accepted by Parliament, ensures the implementation of the country's domestic and foreign policy and exercises the general direction of public administration. However, the authority of the Minister of Justice, as provided for in Art 132 Para 1 of the Constitution, is not exercised in relation to the government program, having no contingency with it, but is an expression of a specific power relationship concerning the activity carried out by prosecutors. The authority of the Minister of Justice does not concern an aspect related to the implementation of domestic policy within the meaning of the aforementioned constitutional text, since, according to the case law of the Constitutional Court, it concerns the constitutional powers of the Government regulated in the law on its organization and functioning, adopted pursuant to Article 73 Para 3 Let e) of the Constitution. The authority of the Minister of Justice over the work carried out by prosecutors, although *lato sensu* reflects a matter of domestic policy, as an expression of national sovereignty, does not fall within the normative

content of Article 102 Para 1 of the Constitution. Also, the authority of the Minister of Justice does not concern the central public administration and the Public Ministry, which is not part of the executive power or authority (Decision of the Constitutional Court of Romania, no 358/30 May 2018, published in the Official Gazette of Romania, Part 1, no 473/7 June 2018).

Conditions for the existence of a legal conflict of a constitutional nature and the procedure for solving it

For there to be a legal conflict of a constitutional nature, the following cumulative conditions must be met: the conflict must be legal; the conflict must be of a constitutional nature; the conflict must be between the public authorities referred to in Title III of the Constitution; the conflict must be generated by an institutional deadlock; and the conflict must be real (Decision of the Constitutional Court of Romania, no 26/22 January 2020, published in the Official Gazette of Romania, Part 1, no 168/2 March 2020).

As regards the procedure for solving legal conflicts of a constitutional nature, this is governed by Art 34-35 of Law no 47/1992 (Decision of the Constitutional Court of Romania, no 53/28 January 2005, published in the Official Gazette of Romania, Part 1, no 144/17 February 2005; Decision of the Constitutional Court of Romania, no 270/10 March 2008, published in the Official Gazette of Romania, Part 1, no 290/15 April 2008; Decision of the Constitutional Court of Romania, no 1560/18 October 2009, published in the Official Gazette of Romania, Part 1, no 21/12 January 2010).

The complaint may come from the President of Romania, one of the Presidents of the two Chambers, the Prime Minister or the President of the Superior Council of Magistracy.

The elements that the complaint must contain are the public authorities in conflict, the legal texts on which the conflict is based, the presentation of the factual situation regarding the position of the parties and the opinion of the author of the complaint.

After receiving the referral, the President of the Constitutional Court will communicate it to the public authorities in conflict, asking them to express, in writing, within the set time limit, their views on the content of the conflict and possible ways of resolving it. At the same time, he shall appoint a judge-rapporteur.

According to the provisions of Art 35 Para 2 of the Law no 47/1992, on the date of receipt of the last point of view, but no later than 20 days after receipt of the request, the President of the Constitutional Court sets the time limit for the trial and summons the conflicting parties. The debate will take place on the date set by the President of the Constitutional Court even if any of the public authorities concerned does not meet the deadline for submitting its point of view.

The debate takes place on the basis of the report presented by the judge-rapporteur, the request for referral, the points of view presented by the parties, the evidence taken and the submissions of the parties.

The decision solving the legal conflict of a constitutional nature shall be final and shall be communicated to the author of the complaint, as well as to the parties to the conflict, before its publication in the Official Gazette of Romania, Part I.

Conclusions

A conflict of a constitutional nature must arise out of or be intrinsically linked to the exercise of proper powers of constitutional rank.

The separation of powers in the state does not mean the absence of a control mechanism between the powers of the state; on the contrary, it refers to the existence of a mutual control and a balance of power between them, since respect for the Constitution and other normative acts is an obligation incumbent on both citizens and public authorities.

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THE HABITUAL OFFENCE

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Abstract: *The habitual crime is a form of the natural unity of crime, which consists in repeating the incriminated act in such a way as to reveal a habit of the perpetrator, an occupation of the perpetrator, in such a way as to attribute to the set of offences the social danger of the crime.*

Keywords: *phenomenon; offence; natural unit of offence; social danger; criminal code.*

Introduction

The habitual crime is a form of the natural unity of crime, which consists in repeating the incriminated act in such a way as to reveal a habit of the perpetrator, an occupation of the perpetrator, in such a way as to attribute to the set of offences the social danger of the crime (Bulai, Filipaș and Mitrache, 2001, p. 219).

The offence of habitual crime, unlike continuous or complex crime, was not explicitly regulated in the general part of the 1969 Criminal Code, nor in the new Criminal Code. It is, however, a form of the legal unit of the offence, since it is the result of the will of the legislator, who decides whether to criminalize each act or whether, on the contrary, to impose the requirement of repeatability of acts in order for them to be covered by criminal law.

Since it is a creation of the legislator, the fact that an act is usually a criminal offence always follows from the content of the incrimination. Most often, habitual offences are easy to identify, as the legislator uses the phrase "repeatedly" (Art. 223 Para 1 of the Criminal Code) or "habitually" in the incrimination rule.

1. The conditions of the habitual offence

In order to be in the presence of a habitual crime, the following conditions must be cumulatively met: the plurality of homogeneous acts committed at different intervals of time; individual criminal irrelevance of the acts committed; unity of will; unity of active and passive subject.

a) Plurality of homogenous acts committed in time.

As the very definition of the offence implies, it usually involves the commission of a plurality of acts in order to reach consummation. For example, according to Art. 208 Para 1 of the Criminal Code, it is an offence for a person to "repeatedly follow a person without right (...) or to watch his home (...)". Thus, a single act of prosecution will not achieve the constituent element of the offence, as it must be committed repeatedly. As regards the number of acts necessary for the existence of the offence, the law does not specify, nor could it, since the finding of habitual criminality does not depend exclusively on the number of such acts. Thus, what is important is the time elapsed between two consecutive acts, the circumstances in which these acts were committed, the nature of the act, etc.

We ask the question whether "the material element of the offence under consideration consists of a single act, composed of a plurality of material acts, or of several repeated acts?" We have noted that the doctrine uses the following phrases to highlight the material element of the offence: "a set of identical acts which do not have their own criminal feature" (Tănăsescu, C. Tănăsescu and G. Tănăsescu, 2002, p. 459); "consists of an act prohibited by criminal law"; "is carried out by the repetition of acts of the same kind by a sufficiently large number"

(Mitrache and Cr. Mitrache, 2014, p.316); "a plurality of similar material acts" (Mitrache and Cr. Mitrache, 2014, p.316), etc.

Looking at the rules criminalizing habitual or simple repetition, we deduce that the legislator attributes the characteristic of repeatability of the action (as an essential requirement of the material element). By way of example, we list the following: "repeatedly claiming..." (the offence of sexual harassment, Art 223 of the Criminal Code); "to repeatedly..." (the offence of exploitation of begging, Art 214 of the Criminal Code); "giving money with interest as a hobby..." (the offence of bribery, Art 351 of the Criminal Code).

Thus, in a broad sense, we could consider that the material fact is repeated and, in a narrow sense, the action.

b) Individual criminal irrelevance of the acts committed.

As the very definition of the offence itself usually implies, the acts that fall within its structure, considered individually, are not criminal. They acquire this feature only as a result of their integration into a series of similar acts and in so far as they prove the existence of habitual conduct. In most cases, the constituent acts of the offence of habitual criminality, considered individually, constitute offences.

Therefore, the single action carried out by the perpetrator does not have a criminal feature, so that until it is acquired, it will only represent a material act. The plurality of material acts will form a single action.

c) Unity of will

In order to bring together the plurality of acts committed at different times in the structure of a crime unit, a unity of the subjective element is also necessary. However, it should be emphasized that in this hypothesis there is no need for a specific criminal resolution in the sense that we have seen in the case of a continuous offence. Indeed, in the case of the usual offence, a generic resolution is sufficient, regardless of whether at the time of the initial offence the perpetrator has accounted for the number of acts and the circumstances in which he will commit them.

In order to observe the perpetrator's habit of committing the crime, he should constantly repeat the same criminal will (more than three times), over a certain period of time (a week, from day to day, etc.), and his "addiction" is often ended by the intervention of others.

d) Unity of active and passive subject

Like the other forms of the unit of crime, the requirement of unity of the active subject is also imposed in this case. As regards the passive subject, it is usually a single subject, since most offences usually affect abstract, general social values – public morality, public health, rules of social coexistence – so that the passive subject is the society.

In the hypothesis that we would have as main passive offender the determined natural or legal persons, we believe that the unity of the passive offender is a condition for the existence of the customary offence (Art 208, Art 223 of the New Criminal Code).

1. A parallel with the complex and continuous offences

The habitual offence is distinguished from the complex offence and the continuous offence.

The complex offence involves several different material acts, whereas the offence usually does not exist from a criminal point of view until the repetition of the first completed act.

With regard to the continuous offence, each act of execution fulfils the content of the offence (Bucur, 2009, p.116), which makes it possible to punish even the first act, whereas in the usual offence the first act has no criminal relevance.

2. Consummation and exhaustion of the offence usually

The habitual crime is an atypical form of crime which is not susceptible to attempt (Boroi, 2014, p. 238), but is susceptible to a more than perfect form, in the sense that it is prolonged in time after having reached the moment of consummation, incorporating further repetitions of the crime. The legal consequences of committing the crime are usually

linked to the time of the offence. This moment is marked by the commission of the last repetition, in relation to which the applicable law is determined, the incidence of acts of clemency, the date on which the limitation period for criminal liability begins to run. It has been pointed out in the doctrine that however many successive actions there may be, they achieve a single content of offence.

The fact that the perpetrator continues to commit similar acts after the offence has been committed does not transform the ordinary offence into a continuing offence, since the acts committed after the offence has been consumed will be integrated into the content of the same ordinary offence in simple form.

If a final court decision has been ruled, this puts an end to the criminal activity, and acts committed after this date will be included in another offence committed as a repeat offence (Supreme Court, Decision no. 74/1976, R.R.D no 5, 1977, p. 65).

3. Sanctioning

Like the complex offence, the habitual offence does not entail an aggravation of the perpetrator's criminal liability.

Accordingly, the penalty for this offence will be that provided for in the incriminating provision, with the application of the general individualization criteria laid down in Art 74 of the Criminal Code. Although the law does not explicitly provide for it, in this case too it is possible to recalculate the penalty if other acts forming part of the content of the same offence are subsequently discovered. Thus, the court will impose a single penalty for the whole offence, which may not be less than the penalty imposed for part of the constituent acts of the offence.

4. Example of a habitual offence – Harassment (Art 208 of the Criminal Code)

At the time of the adoption of the Criminal Code (Law no 286/2009), the offence of harassment was a real novelty in the Romanian criminal

justice system, as it had not previously been stated. Thus, there were a number of doubts as to the need to criminalize this offence. The answer was suggested by the social reality itself.

Not infrequently, in practice, situations have been observed where the perpetrator follows the victim, creating a state of insecurity. However, the pursuit usually took place in public, without any act of threat, coercion or any other action that would have been covered by any legal text. Therefore, even if there was a negative side to such behavior, the police were conveying to the victim that being stalked was not a crime. In other words, under the old rules there was no incriminating text protecting the physical or mental freedom of the person.

In the explanatory memorandum to the Criminal Code, the legislator emphasizes that the offence is a response to the many cases in which various people, especially women, are waited for and followed on the street or in other public places or are harassed by phone messages or on various social media applications, all with the aim of creating a state of fear or concern for the targeted person. According to a report published by the European Union Agency for Fundamental Rights (FRA), around eight out of ten young women between the ages of 16 and 29 fear an episode involving harassment.

According to Art 208 of the Criminal Code, harassment is the act of a person who repeatedly follows, without right/legitimate interest, a person or surveils his home, workplace or other places frequented by him, thus causing him a state of fear, and is punishable by imprisonment from 3 to 6 months or a fine.

The provisions of the Criminal Code also criminalize as harassment the making of telephone calls or communications by means of long-distance transmission which, by their frequency or content, cause the person to feel fear. This form of the offence is punishable by imprisonment for a term of one to three months or a fine if the act does not constitute a more serious offence.

Since the legislator has required a certain degree of repeatability, the harassment belongs to the category of habitual offences (an offence whose material element is achieved by repeating the typical action several times).

Conclusions

The Criminal Code, in its general part, does not define or refer to the habitual offences.

Therefore, the legal content of the offence of habitual criminality includes the requirement of repetition of the act, the material element of which is always made up of repeated actions which show that in the behavior of the perpetrator such activity has become habitual.

The offence is usually characterized by the fact that, from the objective point of view, it is always composed of several actions which, considered separately, do not fall under the criminal law, but which become punishable as soon as they are repeated and reveal a skill, an indulgence on the part of the perpetrator. Repetition is therefore a constituent feature of the content of such an offence.

As such, the habitual offence should not be confused with the continuous offence, where each act of execution realizes the content of the offence and which acts are brought together by the legislator in view of the single, common offence resolution for these acts of execution.

The offence is usually not likely to be committed in the attempted form, but only in the completed form. In this offence, the moment of consummation (of the production of socially dangerous consequences) does not, in principle, coincide with the moment of exhaustion of the criminal activity.

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LEGAL RELATIONSHIPS OF PARTICIPANTS IN THE SPECIAL PROCEDURE OF GUILT AGREEMENT

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Abstract: *The special criminal procedure, based on the guilt agreement rules, involves several legal ratio both during the investigation and judgment stages of criminal proceedings. Achieving the functions of accusation and judgment is possible under the terms and conditions established by the legislator in a special procedure, derogatory from the ordinary one. Several legal relationships are occurred in this context. It is firstly about the legal relationship of prosecutor and defendant, then it is followed by those involving the lawyer and defendant, and, finally, the judge and defendant. The current paper focuses on researching the main principles which guide the special criminal procedure of guilt agreement, as well as its foreground legal relationships occurred by the appropriate judicial bodies, lawyers and defendants. The study on the current topic is characterized by a conceptual approach both of doctrine and jurisprudence in criminal matters. The conclusions gathered from the study have stated that the legal relationships during the guilt agreement special procedure mean an important key-point in achieving due process.*

Keywords: *criminal proceedings; due process; guilt agreement; judicial bodies; jurisprudence in criminal matters; legal relationships; special criminal procedure.*

Introduction

The new profile of criminal procedure, adopted and implemented in criminal justice in Romania, once the new Code of criminal procedure has entered into force (Law no. 135 of 2010 on the Code of Criminal

procedure of Romania, published in the Official Journal no. 486 of 15 July 2010, into force from the 1st of February 2014), means a new era of judgment, on the one hand, and a real progress in achieving the functions of criminal proceedings, on the other hand. Multiple sides of criminal justice have been changed, from the investigation procedure to solving the criminal cases through pronouncing definitive judicial decisions. All of them are currently associated with the new principles of criminal justice, characterized both by classical issues and European requirements (McBride, 2018).

The whole process of changing justice in criminal matters has also been viewed in the special procedure of guilt agreement, based on the defendants' request to plead guilty (Redlich, Bibas, Edkins & Madon, 2017) in order to obtain certain advantages from the judiciary. In fact, the advantages are not insignificant, due to the fact that the legislator has stipulated them expressly within the Code of criminal procedure of Romania. The main purpose of the advantages is to create a legal and permissive framework for those defendants who would like to renounce to the ordinary procedure and therefore admit that their criminal cases should be solved in a particular special criminal procedure.

Taking into account the doctrinal references which has been stated during the years in the field of solving the criminal cases through the special procedure of guilt agreement (Bălan, 2017), the current paper is designed to highlight some pertinent analyses of the literature in relation with the complex framework created by the legal relationships which exist between participants in the guilt agreement procedure (Coscas-Williams and Alberstein, 2019). Moreover, the same is true in the field of the judiciary, in those criminal cases which have been solved by using the same special criminal procedure.

Therefore, the current paper has the main aim to obtain relevant argued results and advance some conclusive remarks in accordance with the case-law solutions, also presented in the matter of practice. In order to achieve these goals, an in-depth research analysis has been conducted on the current topic of the legal relationships which are established between participants during the special procedure of guilt agreement. The research activity has been focused on the following headlines:

(a) What kind of legal relationships are established during the special criminal procedure of guilt agreement?

(b) Who are the main actors' which definitely act in achieving the special criminal procedure?

(c) How much could the legal relationships influence the manner in which the courts of law pronounce the definitive decisions?

(d) Are there drawbacks in following the guilt agreement procedure related to the legal relationships between participants?

All these questions are covered by a series of arguments which are usually arisen in a special procedure, as the guilt agreement procedure is, derogatory from the ordinary procedure. In this new context, created through the defendants' decision to admit their guilt, it is relevant that other legal relationships are configured by several features. In some cases, there are only one main relationships and other secondary ones, but, in most criminal cases, the legal relationships established between participants in the special guilt agreement procedure are created through the main principles of their content.

In this judicial context, one pertinent question should be asked: Why a special procedure is necessary to characterize the legal relationships established between participants? Actually, the answer is determined and subordinated to other major issues which feature the procedure in which, firstly, the defendant has the main role along with the prosecutor. This judicial environment is specific to the investigation stage of criminal procedure.

Secondly, the defendant also establishes a legal relationship with the judges, once the criminal case follows the judgment stage of criminal procedure. These would be only two judicial positions the participants in criminal procedure of guilt agreement achieve while they pass from a judicial stage to another one (Păcurariu, 2020).

Nevertheless, taking into consideration the importance of the main role and judicial position of lawyer, its situation cannot be disregarded neither in the investigation nor in the judgment stages of criminal proceedings. This is because the lawyers' judicial relationships are always analysed in accordance with the entire legal framework

characterized by particular cases determined by the special procedure of guilt agreement. No relationship should be considered by its own judicial status in the special criminal procedure, the fact that could generate errors. Consequently, in the next chapters, a relevant approach will be provided on the topic of the legal relationships of participants in the special procedure of guilt agreement.

2. Specific legal relationships during the investigation stage

The criminal procedure of guilt agreement is characterized by a series of specific processual relationships established between different participants in the special procedure. In the matter of fact, the judicial goal of criminal proceedings cannot be achieved in missing specific judicial relationships covered in this context (Ferré Olivé & Morón Pendás, 2020). First of all, it is necessary to point out the participants in the special procedure of guilt agreement, in order to emphasize the structural relationships defined in these circumstances. In a limited enunciation, they include defendant, prosecutor, lawyer, court of law. Other processual relationships are featured in the same context, but they do not present relevance for the current topic and, consequently, will not be discussed during the current chapter.

2.1. Legal relationships between defendant and case prosecutor

From a pertinent remark, it is obvious that, by far, one of the most conclusive relationships established during the investigation stage of criminal proceeding involves the defendant, on the one hand, and the public prosecutor (it refers to the case prosecutor), on the other hand. Actually, they are the main participants who sign the guilt agreements and, for this reason, the analysis covers them particularly. First of all, it should be pointed out that both of them are entitled to initiate the special procedure which involves the guilt agreement with the consequence of derogatory procedure, and advantages for the parties involved (Carić, 2018).

On the one hand, the defendant is the participant who could propose to the case prosecutor to sign the guilt agreement, once he agrees to admit

the guilt and renounce to the ordinary procedure. Doctrine in criminal matters speaks about the processual privileges the defendants renounce to, in cases in which they prefer to follow the special procedure. In the matter of fact, there is no renunciation to the main processual advantages, because they are more favoured by the special procedure they are involved in (Criminal Decision no. 79/A/2018 of the High Court of Cassation and Justice of Romania, available online at https://www.scj.ro/).

On the other hand, the case prosecutor is the judicial body who delivers the accusation (Kaija, 2018) and can manage the processual situation in such a manner to present the advantages of the guilt agreement special procedure. In these criminal cases, the legal conditions should imperatively be respected. Otherwise, the guilt agreement cannot be signed by the participants (defendant and case prosecutor) or, if it is signed, the court of law is entitled to decline it and send it back to the investigative bodies in order to follow the ordinary procedure.

Taking into account these remarks, it could be advanced the idea that the defendant and case prosecutor are the main participants in the special procedure who shall decide if the guilt agreement will be or will not be signed. No one has the processual right to impose them to do a specific processual act in order to sign the guilt agreement and thus follow the special procedure.

2.2. Legal relationships between case prosecutor and higher prosecutor

As presented in the previous paragraph, it could be created the confusion that the only one participant in the special procedure of guilt agreement is the case prosecutor. In the matter of fact, it is the truth, but in a limited sequence, provided by signing the guilt agreement. Actually, the case prosecutor is the only one participant – judicial body – entitled to sign the guilt agreement, along with the defendant. Once this issue is clarified, it is pertinent to emphasize the processual relationship which is established between them. The case prosecutor and the higher prosecutor establish two kinds of judicial relationships during the special procedure of guilt agreement.

One of them refers to the manner in which the limits of guilt agreement are entailed. From this point of view, in the matter of the guilt agreement limits, the case prosecutor does not have any judicial capacity to enforce it. In this situation, the main role belongs to the higher prosecutor, who shall determine the limits in which the guilt agreement will be signed. No one can be involved in discussions or other appropriate solutions to influence the decision the higher prosecutor will make in those criminal cases in which a guilt agreement will be signed.

The second relationship established in the investigation stage of criminal proceedings refers to the procedure of approval the guilt agreement, after its signing by the defendant and the case prosecutor. In this context, it is obvious that the defendant does not have any processual relationship with the higher prosecutor, neither at the moment of establishing the limits of the guilt agreement, nor at the time of its approval. This means that the defendant cannot be involved in any processual relationship either direct or indirect with the higher prosecutor.

2.3. Legal relationships between defendant and lawyer

The processual relationship established between defendant and his/ her lawyer is not less important, than the two ones discussed in the above sections. As the Code of criminal procedure provides at Article 480 (2), the lawyer's presence during the special procedure of guilt agreement is compulsory, especially at the time of signing the agreement. Otherwise, it is concluded that in missing lawyer from the procedure of signing the guilt agreement, it will not be approved by the court of law.

Assessing the legal conditions, the participants in the guilt agreement procedure should meet, the situation seems to be very objectively clarified by the legislator, through determining the parameters in which the further context of the special procedure will be configured. In these circumstances, it is impossible to discuss about the guilt agreement signed between defendant and case prosecutor in the investigation stage without the presence of the defendant's lawyer. One question is arisen in cases in which the chosen lawyer is not present in the special procedure to respect the procedural rules. In these

circumstances, the prosecutor is then entitled to appoint an *ex officio* lawyer to carry out the legal rights of defendant.

Analysing the three processual relationships provided above, it could be concluded that the process of developing the justice in criminal matters during the investigation stage is optimized by a series of processual relationships. They are thus organized around the legal provisions regulated by the Code of criminal procedure, in terms and conditions which characterize the entire criminal proceedings, but, more particularly, the special procedure of guilt agreement.

In fact, there are other subsequent processual relationships which occur during the investigation stage, but the last ones do not influence it substantially. They suppose the relationships between defendant and civil party, between defendant and injury person, or even between prosecutor and these participants. In missing relevant argues to emphasize the necessity of developing real discussion on these relationships, they will consequently not be highlighted any more.

3. Specific legal relationships during the judgment stage

The second stage of criminal proceedings also involves a series of processual relationships in which the participants in the criminal case will carry out particular rights and duties connected to the fair trial rights (Helm, 2019a). The same is true for the court of law which is entitled to pronounce the legal decision based on the guilt agreement processual context. Finding truth in criminal case it judges means a full responsibility to assure that the judicial decision-making process will provide the appropriate solution at the end of judgment (Watson, 2021), according to the main standardized principle of criminal proceedings of beyond reasonable doubt (Criminal Decision no. 107/A/2020 of the High Court of Cassation and Justice of Romania, available online at https://www.scj.ro/).

In this judicial environment, beside the processual relationships established in the investigation stage, other ones are successfully developed subsequently. It should be pointed out that some of them

reveal a continuation of the first stage in which particular processual relationships are also achieved. This situation is highlighted by the fact that, although the participants – prosecutor and defendant – sign the guilt agreement, the criminal case is not finalized in the investigation stage, but it continues to develop itself under the judgment stage of criminal proceedings, where the court of law becomes the main participant, as judicial body invested by law to solve it legally and in reasonable time (Bălan, 2021).

3.1. Legal relationships between defendant and court of law

It is obvious that, once the criminal case succeeds to judgment, other particular processual relationships are established. They belong to diversified participants, both judicial bodies and defendant, and precede the sentencing (Flynn and Freiberg, 2018). Moreover, other subsequent processual relationships are met in the judgment stage, but they are subordinated to the main relationships and, for this reason, the situation will not be discussed herein.

One of the most significant relationships is now established between court of law and defendant (Gormley, Roberts, Bild & Harris, 2020). First of all, it could be pointed out that the court of law, meaning the court of first instance, is the judicial body called to applied the legal provisions of the Code of criminal procedure regarding the special procedure of guilt agreement. From a procedural perspective, it should verify if the guilt agreement meets the legal conditions. In these circumstances, there are two solutions which could be pronounced by the court of law.

– Admitting the guilt agreement, in those criminal cases in which it meets the legal conditions (Criminal Decision no. 107/A/2020 of the High Court of Cassation and Justice of Romania, available online at https://www.scj.ro/).

– Dismissing the guilt agreement, in cases in which at least one condition is infringed.

In order to adopt these solutions, the courts of law are entitled to pronounce decisions through the *de facto* situation established in the criminal cases they are invested with (Weigend, 2021; Ashworth, 2015),

which are called by doctrine as tactical decisions (Helm, 2019b). In this regard, there is no reason to consider that the guilt agreement could be validated in missing one or many conditions. Nevertheless, the court of law is also entitled to send the case back to the case prosecutor, if the specific circumstances state that the guilt agreement has been signed through infringing some legal conditions. The situation is determined by the fact that the processual relationship established between defendant and court of law allows the last authority to assure the legal context in which the guilt agreement has been signed.

Actually, this kind of processual relationship does not exclude the primary relationship established between defendant and prosecutor at the investigation stage, but it is an intrinsic subsequent one, determined by the stage position in which the case is situated. On the one hand, it is obvious that, as long as the criminal case pursues the investigation stage, the main processual relationship should be strengthened between defendant and case prosecutor. On the other hand, it is natural that, in the judgment stage, the processual relationship will be established between defendant and court of law.

In both cases presented above, the legal situation imposes that the defendant's rights during the criminal proceedings must be assured by the judicial bodies – the prosecutor in the investigation stage and the court of law in the judgment stage. The judicial bodies are firstly responsible to respect the defendants' processual rights, as they are obliged to observe that they do not respect the obligations they are responsible for. This situation creates a relationship between court and sentencing process (Henham, 2023).

3.2. Legal relationships between defendant and prosecutor

In the process of validating the previous statement, it is also very important to admit that the first processual relationship established between defendant and prosecutor is not closed once the criminal case goes to the court of law. Maintaining such a relationship is determined by several syllogisms. One of them refers to the fact that, during the judgment stage, the case prosecutor is the judicial body which stands for

accusation, in terms and conditions stated by the guilt agreement. No other judicial bodies are entitled to do so, neither the court of law, nor the higher prosecutor.

The *de facto* circumstances provide that the court of law is still able to manage the legal relationship between defendant and prosecutor, which creates the premises for advancing the idea that this kind of relationship is indirectly established. This means that the relationship established between defendant and court of law is primarily directed as the main relationship, while the relationship established between defendant and prosecutor is an intermediate one. The position of defendant is not vitiated by the conclusions the case prosecutor will assert through the guilt agreement. It is more particularly connected to the other processual relationships organized around the court of law, on the one hand, and prosecutor and defendant, on the other hand.

As a conclusive remark, it could be emphasized that the processual relationship established between defendant and prosecutor during the judgment stage is as important as the guilt agreement is by law asserted by the case prosecutor. Consequently, the judgment stage is not possible to be achieved in missing the processual relationship between defendant and case prosecutor.

3.3. Legal relationships between court of law and prosecutor

Another relationship, a judicial one, is established between court of law and prosecutor. If the main duty of prosecutor has been already highlighted during the previous section, it is now the time to develop certain pertinent statements regarding the processual relationships between court of law and prosecutor. From the beginning of criminal proceedings, the case prosecutor is the judicial body having the main role in the special procedure of guilt agreement, especially during the investigation stage, when it is required that the guilt agreement should be signed under the terms of legality.

Moreover, the prosecutor's duties are expressly regulated by Article 483-484 of Code of criminal procedure. A relevant issue is stated by the fact that the prosecutor decides if the guilt agreement goes to the court of law. Once the court is invested through the guilt agreement, the

simplified special procedure begins in the judgment stage by derogation from the ordinary procedure. This means that the case does not follow the intermediary stage of preliminary room, and other formalities specific to this stage are avoided. It is, in fact, a simplification from a common ordinary criminal procedure which is advanced in other criminal cases in which the defendants do not admit the guilt and choose to solve their criminal cases through the ordinary procedure instead of the special one.

The processual relationship established between court of law and prosecutor is covered by a series of judicial elements, which could arise in the first instance. The court of law will begin its duty through verifying the legal conditions in which the guilt agreement was signed. The situation differs from a case to another one. A particular situation arises in cases in which the guilt agreement does not meet the legal conditions expressly imposed by the Code of criminal procedure. In this circumstance, the court of law will provide the prosecutor with no more than 5 days to remove the deficiencies, according to Article 484 (1) of Code of criminal procedure.

A subsidiary processual relationship is now established between court of law and chief prosecutor, which is responsible in supervising the procedure in which the case prosecutor will remove the deficiencies the guilt agreement was assigned with. Equally, other subsequent relationships are established between court of law and other parties than defendant and the injured person. This kind of relationships is provided by law in the respect of the injured persons and parties' rights during the judgment stage. However, these processual relationships do not influence in any manner the special procedure due to the fact that these participants' presence in the courtroom is not compulsory. Consequently, the court of law may provide them to present their statements, if present, or it proceeds to pronounce the sentence accordingly.

3.4. Legal relationships between defendant and lawyer

The presence of the defendant's lawyer in the courtroom involves a particular discussion regarding the main role it has during the judgment stage. It could be pointed out that if the lawyer's duty is expressly

specified by the legislation for the investigation stage, the same is not true for the judgment stage. Nevertheless, an unusual situation can be seen in the legal provisions. It refers to the presence of the defendant's lawyer in the courtroom next to the defendant and other participants.

In the matter of fact, it appears in this context as a form of self-application of control (Auerhahn, 2012). First of all, it should be stated that the legislation does not imperatively regulate the lawyer's presence in the judgment stage of criminal proceedings. The legal provisions on guilt agreement only specify that "At the appointed time the defendant, the other parties and the injured person are cited."[1] The same article provides that the court of law will proceed in making decision after procedure of hearing defendant and his lawyer, and, if present, the other parties and injured person. Analysing the above-stated legal provisions, it could be observed that the cited participants are limited to defendant, civil party, civil responsible party and injured person. No regulation is provided referring to the defendant's lawyer, which makes the practitioners analyse the legal provision and advance the idea that it is not a compulsory solution.

Nevertheless, in respecting the principle of the right to defence, the defendant is entitled to call for a lawyer in order to defence his processual rights during the judgment stage of the guilt agreement special procedure. It is obvious that this right cannot be infringed neither in the investigation stage, nor in the judgment stage. Moreover, in some specific cases, expressly regulated by Article 90 of Code of criminal procedure, a lawyer can be appointed by the court of law at the defendant's request in those criminal cases in which he does not have a lawyer called by himself.

Regarding the presence of the defendant's lawyer in the courtroom, it was several times discussed by the doctrine in criminal matters, which has expressed certain pertinent points of view on this topic. Some of

[1] According to Article 484 (2) of the Code of criminal procedure of Romania, modified through Article II point 122 of the Government Emergency Ordinance no. 18 of 2016, published in the Official Journal of Romania no. 389 of 23 May 2016.

them encourage the lawyer's presence in the courtroom during the judgment, while other ones do not see any impediment his absence. These ambiguities should be returned into a practical manner in which the solution could pertinently be clarified in relation with the topic itself. This seems to be a stringent requirement in the matter of practice, when referring to one of the most important rights of defendant – the right to defence.

As a conclusive remark, it should be mentioned that the solution came from the jurisprudence, which has clarified this controversial situation stated in practice (Dolj Court of Law, Criminal Sentence no. 571 of 5 October 2017. Available online at: https://www.jurisprudenta.com) and concluded that the defendant, present in the courtroom, will be assisted by the lawyer, either appointed by himself, or ordered by the court of law *ex officio*.

Conclusions

Taking into consideration the analyses carried out on the topic of the legal relationships of participants in the special procedure of guilt agreement, some relevant conclusive remarks have been expressed. First of all, as a general conclusion, the special procedure of guilt agreement supposes a particular criminal procedure which generates no less than seven processual relationships between participants.

Three of them are proceeded during the investigation stage of criminal proceedings, when the main role belongs to defendant, on the one hand, and to the case prosecutor, on the other hand. Other subsequent relationships are also developed between defendant and his lawyer, and between case prosecutor and higher prosecutor.

Secondly, referring to the processual relationships established during the judgment stage, the same is true on the main participants involved. They refer to relationships established between defendant and court of law, on the one hand, and between prosecutor and court of law, on the other hand.

Moreover, they are covered by other kinds of processual relationships, also established between defendant and his lawyer, and last but not least between defendant and case prosecutor. A specific interest is given by the relationships established between defendant and lawyer, which is present in the courtroom, next to the other participants, as provided by the Code of criminal procedure.

Thirdly, in this general procedural context, it is obvious that the special criminal procedure of guilt agreement is not possible to be achieved in missing all these processual relationships present both in the investigation and judgment stages of criminal proceedings, as they were analysed in the current paper.

Finally, it could be emphasized that the legislator should be more specifically when providing who the participants present in the courtroom during the judgment at the moment of analysing the guilt agreement are, in such criminal cases in which the court of law is invested through the procedural means of guilt agreement.

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COMPARATIVE ANALYSIS BETWEEN PATRIMONIAL RESPONSIBILITY IN THE CASE OF PRISON POLICE OFFICERS AND MATERIAL LIABILITY OF MILITARY

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Abstract: *In order to hold employees liable for damages caused, the legislator has established special rules, derogating from the Labour Code, for prison police officers and military.*

Although the rules established by the legislator regarding the responsibility of the categories of public officials with special status under analysis share common features, a recent decision of the Constitutional Court has created a distinct legal perspective regarding the obligation to pay damages caused to the employing authority by eliminating the institution of imputation decisions.

Keywords: *public officials; liability; Constitutional Court; damages; imputation decisions.*

Introduction

In employment relationships, the institution of liability is governed by specific norms, derogating from the norms of common law.

Thus, labour legislation operates with the concept of "patrimonial responsibility (art. 254 of Labour Code) " as a variety of civil liability under common law, corresponding to the protective architecture

characteristic of labour law regulations. The notion of patrimonial responsibility has replaced the previous concept of "material liability" operated by the previous Labour Code. However, this concept has survived within the scope of norms applicable to military (Ordinance no. 121/1998). Regarding public officials, the Administrative Code (art. 499 from GEO no. 57/2019) consecrates their generic "civil" liability, without specifying whether it is contractual or tort liability. Nevertheless, for certain categories of public officials with special status, liability is qualified as "patrimonial," similar to the liability established by the Labour Code. In view of the inconsistent use of these concepts by the legislator, we will qualify the specific liability of a certain category of employees not based on the name conferred by law, but based on the substance of the type of liability itself.

Thus, the status of prison police officers is governed by Law no. 145/2019, which qualifies them as public officials with special status under Article 1. Unlike public officials, for whom the Administrative Code provides the possibility of engaging civil liability, in the case of prison police officers, the law provides that causing damages to the institution's assets triggers patrimonial responsibility.

Although the legislator has established the notion of patrimonial responsibility, considering the regulatory framework, we believe that, in fact, it meets the conditions of material liability. In this sense, some specialized authors have also opined, "As the responsibility of prison police officers is regulated (Articles 147-152 of Law no. 145/2019), it is, in reality, a material liability, not apatrimonial one. This conclusion is supported by the method of recovering damages (by issuing an imputation decision or undertaking a payment commitment) (Ticlea 2020).

Material liability" represents a form of legal liability, consisting of the obligation of military and other personnel to repair, within the conditions and limits provided by law, the damage caused to the employing unit, due to their fault and in connection with their work (High Court of Cassation and Justice, Decision no. 477/2009, Bulletin of the Cassation Court no. 2/2009, pp. 5-6 and "Dreptul" no. 11/2009, p. 238). Thus, according to Article 2, corroborated with Article 9 of

Government Ordinance no. 121/1998, regarding the material liability of military - republished, for damages caused with guilt by military, including those on missions outside the country, students from institutions for police officer training, as well as civilian personnel working within the Ministry of National Defence, Ministry of Internal Affairs, Romanian Intelligence Service, Protection and Guard Service, Foreign Intelligence Service, and Special Telecommunications Service, in connection with the performance of military service or service duties related to the training, administration, and management of financial and material resources under the administration of the aforementioned public authorities, they are held materially responsible.

We note that, regarding the categories of personnel to which Government Ordinance no. 12/1998 applies, by Decision no. 258/2023, the Constitutional Court found that the provisions of Article 9 final paragraph of Government Ordinance no. 121/1998 regarding the material liability of soldiers are constitutional insofar as they do not apply to police officers. Military' liability for damages is contractual liability based on fault. It has "a reparative character, and the party obligated to cover the damage is the employee, namely the military. However, it also presents some differences from patrimonial or civilliability. The first difference is that material liability is a limited liability; it concerns only actual damages (damnumemergens), not unrealized benefits (lucrum cessans), as in the case of patrimonial or civil contractual liability." (Ticlea and Ticlea, 2014)

This aspect arises from the provisions of Article 11, according to which "In determining material liability under this ordinance, the damage to be repaired does not include the unrealized benefits of the injured public institution" (Art. 1, Ordinance no. 121/1998).

In some situations, repairing the damage is even more limited. We refer to the situation regulated in Article 13, paragraph 1, according to which, for damages caused to the military unit during training, military are held materially responsible, up to the limit of three net monthly salaries, calculated at the date of the damage was found. The remaining

difference, part of the damage, which exceeds the attributable amount, is deducted from the accounting records of the injured military unit.

Regarding the configuration of military' material liability and the patrimonial responsibility of prison police officers, we will further make a comparison of these, intended to highlight the elements of similarity between the liability for damages of the two categories of personnel. Although the normative acts regulating the status of the two professions establish conceptually two different forms of liability - patrimonial and material, "the reparative liability of police officers - officials with special status –they resembles, up to identification, the material liability of military." (Georgescu, 2011, p. 23).

But the analysis will also highlight the differences determined by the implementation of Decision no. 649/2022 [A/R] regarding the exception of unconstitutionality of the provisions of Articles 2, 14, 15, 16, 19, 20, 22, of Article 23 paragraph (3), and of Articles 25, 27-43, and 47 of Government Ordinance no. 121/1998 regarding the material liability of military, differences reflected in the manner of recovering damages caused to the employer.

At the same time, we intend to demonstrate that the jurisprudence of the Constitutional Court has evolved towards extending the institution of employees' liability for damages to other categories of employees, aiming to establish a unified practice that guarantees the respect of the principle of legal security, the civil rights of all workers, regardless of the form in which they perform a professional activity.

1. Conditions for Engaging Liability

Both for prison police officers and for military, incurring liability for damages caused in the performance of official job duties presume the existence of an unlawful act, the damage caused, the guilt of the person, as well as the causal link between the act and the damage caused.

The unlawful act consists of the violation or non-performance of the job obligations assigned to them by the applicable legal acts, regulations, or job descriptions, in the case of prison police officers, respectively, the performance of military service or job duties.

By damage, we understand the harmful result, which has a patrimonial nature, as a consequence of the violation or impairment of the rights and legitimate interests of a person.(Salavastru, 2020).

The causal relationship between the unlawful act and the damage always presume that the damage is the consequence of the unlawful act. In the specialized literature, it has been considered that the causal relationship must be the result of the unlawful act committed by the employee in connection with their work. (Stefănescu, 2017, p. 892).

Guilt is the mental attitude the author had at the time of committing the act. (Georgescu, 2011, p. 12)

It always presume, regardless of the form, consciousness of the social significance of the actions.

Guilt implies a conscious attitude of the author towards that act and its consequences, without which liability for damages cannot exist.

In addition to the conditions mentioned above, another specific condition must be met, namely the quality of the person at the time of committing the unlawful act. It is envisaged the quality qualified as prison police officer, military, or civilian personnel is considered.

When the mentioned conditions are met cumulatively, liability for the damages caused can be triggered. However, as an exception, even if the necessary elements of material liability are met, the person who caused the damage is exempted from liability if the expendituresof investigation, establishment of material liability, and recovery of damages exceed its amount, in which case the damage is deducted from the accounting records.

The patrimonial liability of prison police officers is engaged in the following situations:

a) for damages caused with guilt in the assets of the National Administration of Penitentiaries or, as the case may be, of the units under its subordination;

b) for the non-repayment within the legal term of the amounts improperly granted to them;

c) for the non-repayment within the legal term of the value of goods received that were not owed to them and cannot be returned in kind, as well as for services that were unduly provided to them.

Correlatively, the material liability of military is engaged in the case of the occurrence of damages, in the cases defined in Article 12, as follows:

A. In the case of asset managers, for damages caused by them in their own asset management, or:

a) when, according to legal provisions, the duties have been exercised by a delegate of theirs or by a commission, and a damage is found, if it is not proven that it occurred in the absence of the asset manager;

b) when they have received goods in quantities less than those recorded in the accompanying documents or with apparent defects, without preparing and signing a statement of findings;

c) when they have not requested, in writing, specialized technical assistance upon receiving the goods, although it was necessary.

B. In the case of military, for damages caused when they receive, transport, store, and release material goods and valuables, without having the quality of asset managers within the meaning of the law.

C. In the case of commanders or unit chiefs, when:

a) they have not ensured, at the written request of the asset managers, in the cases provided by law, specialized technical assistance upon receiving, transporting, storing, inventorying, and distributing material goods and other valuables;

b) they have not taken the necessary measures to remedy the deficiencies reported in writing by the asset managers;

c) they have substituted themselves to the asset managers in the exercise of their duties;

d) they have given managers or other military responsible for material goods, illegal or incorrect orders that have led to damages;

e) damages have resulted from the failure to enforce rights to compensation for causing damages;

f) damages have resulted from the failure to pursue sums due for any reason and for which there is an enforceable title;

g) they have not taken the necessary safety measures to keep material goods and other valuables in good condition.
D. In the case of the author, when the damages are caused in other situations than those provided in Article 6 paragraph (1).
E. In the case of the guilty person, if the act causing the damage constitutes a criminal offense.

In the situations mentioned above, liability is individual and personal, the person who caused the damage being obliged to repair it.

However, there are situations, strictly regulated by law, when liability is subsidiary. As shown (Plenary Session of the Supreme Court, Guidance Decision No. 5 of June 26, 1974, in Collection of Decisions for the Year 1974, p. 14. supra, Țiclea & Țiclea, 2014), "the intervention of subsequent liability is required for justice reasons, as it is evident that the obligation of the recipient to return what was received without right must take precedence, and only if the employer's patrimony cannot be restored, those who, through their actions, facilitated its diminution must be liable.

The subsidiary nature of patrimonial liability leads to the conclusion that, whenever it is established that the recipients of payments, goods, or services do not actually have such an obligation (to repair the damage), since they were legally entitled to them, this liability cannot subsist."

In the case of prison police officers, subsidiary liability occurs under the conditions regulated by Article 148 paragraph (2) of Law no. 145/2019. Thus, the amounts improperly granted, the value of goods distributed beyond legal rights, or services unduly provided to employees, students from training institutions of the penitentiary administration system, minors from re-educationcentres, and persons deprived of liberty are recovered from those at fault for the damage, only if the sums, goods, or their value cannot be recovered from those who benefited from them.

In the case of military, we consider the situations regulated by Article 17 of Government Ordinance no. 121/1998, which occur when the insolvency of the direct author of the damage is found, when are

obliged within the limit of the value of the damage those military guilty of:
a) failure to comply with legal provisions regarding engagement or appointment to the position of asset manager, as well as failure to establish guarantees by the asset managers;
b) failure to take measures to replace asset managers or persons managing material goods, without being asset managers within the meaning of the law, although they were informed in writing and motivated that they do not fulfil their duties properly;
c) failure to conduct inventories within the legal deadlines and conditions, if this could have avoided causing the damage;
d) failure to take or delayed to take measures to recover damages, by constituting as a civil party, not issuing the imputation decision, or other precautionary measures;
e) failure to comply with any job assignment, if, without violating it, the damage would not have occurred.

Also, the value of goods distributed beyond legal rights to military on time, to high school military students, military students, as well as minors from re-educationcentres, pre-trial detainees, and convicts, is recovered from those at fault for the damage (Article 18 paragraph 2).

Liability can also be joint in the case regulated by Article 14 of Government Ordinance no. 121/1998. Joint liability is still personal liability, but it represents a multitude of individual liabilities of employees with concurrent guilt in causing a single prejudice. (Țiclea & Țiclea, 2014).

Thus, if the damage was caused by several military, the material liability of each is established, taking into account the extent to which they contributed to its occurrence. If it cannot be determined to what extent each contributed to causing the damage, the material liability of the military involved is established proportionally to the net salary as of the date of the damage occurred.

In asset management where the handling of goods is done collectively or in successive shifts, without handing over the asset management between shifts, the material liability is established

proportionally to the time worked by each asset manager since the last inventory of goods.

In such a case, the employer cannot demand the obligation of all employees involved to pay the total amount, since it is a joint patrimonial liability, not a solidary one. (Decision No. 4036/R/2007, in Uță, Radu and Cristescu, p. 66. Supra, Țiclea and Țiclea, 2014)

2. Administrative Investigation

a) Specific Rules Regarding Administrative Investigations Conducted in Cases of Damage Caused by Penitentiary Policemen

The existence of the wrongful act committed by a penitentiary policeman, consisting of the breach or non-performance of the duties incumbent upon them by the current normative acts, regulations, or job description, the damage caused, the guilt of the person, as well as the causal link between the act and the damage produced, are established following an administrative investigation by an administrative-jurisdictional investigation body.

The administrative investigation is conducted by a committee composed of at least 3 members, appointed by written order of the leader of the affected institution. The appointment of the committee is made by the superior hierarchical leader if the leader of the affected institution is connected to the damage caused. The committee members will be replaced whenever it is found that any of the persons appointed to the administrative investigation committee are connected to the damage caused.

The term for conducting the administrative investigation and registering the investigation report is 45 working days from the date of the appointment of the administrative investigation committee. This period can be extended by up to 45 working days if complex investigations are required. The extension of the deadline is decided by order of the person who appointed the administrative investigation committee, at the request of its members.

According to Article 149 paragraph 4, the administrative investigation committee has the obligation to establish the following elements:
a) the existence/non-existence of the damage;
b) the value of the damage, in a determined amount;
c) the causes and circumstances of the damage;
d) the person or persons responsible for causing the damage;
e) the fulfilment of the mandatory conditions for establishing patrimonial liability and the causes of exoneration from liability;
f) the guilt of each co-author and their contribution to causing the damage;
g) the evidence on which the conclusions of the administrative investigation committee are based;
h) the conclusions and proposals of the administrative investigation committee.

The right of the person under investigation to be heard regarding the circumstances in which the damage occurred is guaranteed, and they may provide written explanations.

The failure to appear before the committee or refusal to provide written explanations does not prevent the conclusion of the investigation.

The position of the person under investigation will be recorded in a minutes signed by the members of the administrative investigation committee in all cases.

The convocation of the persons under investigation regarding the occurrence of the damage is done through a communication procedure with acknowledgment of receipt. If the summoned individual refuses to sign, proof of the summons is communicated by registered letter with declared content and acknowledgment of receipt. If even through this means of communication the summons could not be made, the affected institution will proceed with posting the proof of summons at the residence of the person under investigation regarding the occurrence of the damage. The posting operation is recorded in a minutes, which will be signed by a witness who cannot be an employee of the penitentiary administration system.

At the request of the affected institution, the posting procedure can also be carried out through an institution in the penitentiary administration system closer to the residence of the person under investigation regarding the occurrence of the damage than the affected unit. The proof of diligence in summoning the person under investigation before the administrative committee is of major importance in the investigation; the lack thereof leads to the nullity of the decision taken by the investigation body.

The result of the administrative investigation is recorded in an administrative investigation report, which will include the elements provided for in Article 149 paragraph 4. The administrative investigation report will be accompanied by annexes supporting the findings. After completing the investigation, the report is registered with the institution where the investigation was conducted and presented to the institution's leader or, if applicable, to the superior hierarchical leader for the necessary measures to be taken.

The date of registration of the report on the existence of the damage is practically important, as it marks the beginning of the period for issuing the imputation order. The deadline for issuing the imputation order is at most 30 days from the date the damage is found. The right to issue the imputation order expires within 3 years from the date of the damage.

The imputation order is communicated to the liable party within 15 working days of issuance date and can be contested by the personnel concerned within a maximum of 30 days from the date of communication at the administrative litigation court, without prior administrative proceedings.

The final imputation order as a result of the non-introduction or rejection of the action before the administrative litigation court constitutes an enforceable title.

The recovery of damages, as well as the reimbursement of sums or payment of the value of goods that cannot be returned in kind or of services not owed, can be made through a written payment commitment, provided that the party responsible for the damage acknowledges the

amount specified therein and assumes the obligation to pay it. The existence of a written payment commitment does not exclude the conduct of an administrative investigation.

According to Article 152 paragraph 2, the payment commitment constitutes an enforceable title if it clearly and precisely includes all the elements; otherwise, it has no legal effect, and the imputation order will be issued within the legal deadlines and conditions.

b) Specific Rules Regarding Administrative Investigations Conducted in Cases of Damage Caused by Military Personnel and Civilian Staff

The commander or chief of the unit who has ascertained or become aware of the occurrence of damage, orders, by immediate order, the conduct of an administrative investigation.

The investigation of damages is usually carried out by the administrative investigation committee of the unit where they occurred, with some exceptions provided by law.

The deadline for conducting the administrative investigation and registering the administrative investigation report is at most 180 days from the date when the commander or chief of the unit where the damage occurred or, if applicable, the commander or chief of the higher echelon or the commander or chief of the specialized control structure, ascertained or became aware of the occurrence of the damage.

The deadline for conducting the administrative investigation and registering the administrative investigation report is a prescription deadline, subject to the conditions for exercise provided by civil law. Ordinance no. 121/1998 expressly regulates the causes of suspension, stipulating that if, for well-founded reasons, the conditions for completing the administrative investigation within the 180-day deadline are not met, the commander or chief of the higher echelon may approve the suspension of the administrative investigation until the cause that prevented the conduct of the administrative investigation is eliminated.

The request for suspension will be accompanied by documentary evidence of the invoked reason (Article 21, para. 3 of Government Ordinance no. 121/1998).

The legislator has not provided how much the investigation deadline can be extended by the effect of its suspension. We consider that

the maximum term of the investigation is implicitly limited, considering that, according to article 22, the material liability of the military for the damages caused can be established only if they have been ascertained within a maximum of 3 years from their occurrence. The 3-year term is a statute of limitations, the non-exercise of the subjective right within the established term, resulting in its impediment, under the conditions of the law, of its commission (Article 2545 of the Civil Code).

The investigation into the circumstances in which the damage occurred is carried out with the convocation of the person involved, who has the right to present written explanations and evidence in defence. The failure to appear or refusal to provide written explanations does not prevent the conclusion of the administrative investigation.

The decision on the result of the administrative investigation is made by the commander or chief of the unit where the damage occurred or, if applicable, the commander or chief of the higher echelon or the commander or chief of the specialized control structure that ordered the conduct of the investigation.

The results of the administrative investigation recorded in the investigation file are implemented by the competent commander or chief. For making the decision, the commander or chief who ordered the conduct of the investigation is obliged to analyse the validity of the findings and proposals of the administrative investigation committee. If it is considered necessary to complete the administrative investigation, it will be conducted so that the commander or chief of the unit can make a decision on the investigation within 30 days from the registration of the administrative investigation report.

The commander or chief of the higher echelon or the commander or chief of the specialized control structure that ordered the conduct of the investigation may decide:

a) to deliver the administrative investigation file to the legal department within 15 days from the approval of the administrative investigation report, for the initiation of a civil action before the competent administrative litigation court;

b) to notify the criminal investigation authorities when the damage was caused by acts that may constitute criminal offenses;
c) to deduct from the accounting records the value of the damage caused by acts or circumstances for which no material liability is established, under the conditions established by instructions, by the leaders of the public authorities mentioned in Article 2 of the ordinance.

3. Effects of Constitutional Court Decision no. 649/2022

Before the pronouncement of Decision no. 649/2022 by the Constitutional Court, the obligation of military and civilian personnel to pay compensation for damages caused, as well as the obligation to refund amounts received without right, was done through an imputation decision. The imputation decision issued as a result of administrative investigation constituted an enforceable title. Covering damages, as well as refunding amounts or paying for the value of goods that could no longer be returned in kind or for undue services, could also be done through a written commitment from the party concerned. The commitment to payment also constituted an enforceable title from the date of its signing.

The commander or head of the unit that issued the imputation decision or whose financial body received the payment commitment, as well as the commander or head of the higher echelon, when finding that the imputation was totally or partially unfounded or illegal, could cancel or reduce it within a maximum of 3 years, through another decision, if a court decision on the appeal against the imputation decision or payment commitment had not been issued in the meantime.

Partial or total annulment of the imputation decision was done at the request of the party concerned, ex officio, or following the finding of groundlessness or illegality of the imputation by the commander (head) or bodies of the unit or from higher echelons, following the administrative investigation and based on the administrative investigation report. In all situations, annulment or reduction of the imputation decision was done through another written instrument.

The dissatisfied person could file an appeal within 30 days from the date of notification, under signature, of the imputation decision or from the date of signing the payment commitment, if they considered that the imputation or deduction was made without basis or in violation of the law, or if, after signing a payment commitment, they found that, in reality, they did not owe, partially or totally, the amount claimed by the unit. The appeal was resolved by the commander or head who issued the imputation decision or whose commission conducted the administrative investigation regarding the damage for which the payment commitment was signed.

Verification of the validity of the appeal could be done directly by the head of the unit or by an appeal resolution commission appointed by him, with the commission members not necessarily having participated in the administrative investigation.

The dissatisfied military (civilian personnel) with how their appeal was resolved had the possibility to address the administrative courts under the conditions of Law no. 554/2004.

As can be seen, the procedure for recovering damages caused to the unit's assets was cumbersome and did not provide enough guarantees that the imputation was made objectively and impartially, being able to intervene for arbitrariness in decision-making by the competent authority. In this context, the exception of unconstitutionality was filed in File no. 30.512/3/2021 of the Bucharest Tribunal - Section VIII, Labour Disputes and Social Insurance, against Government Ordinance no. 121/1998 regarding the material liability of military, in its entirety. The Constitutional Court admitted this exception under the provisions of Articles 25, 27-43, and 47 of Government Ordinance no. 121/1998 on the material liability of military.

To arrive at this decision, the Court took into account the following aspects:

- Although initially the legislator granted enforceability to the imputation decision through the regulations of the old Labour Code (valid until 2003), the new Labour Code eliminated the institution of the imputation decision, the execution of any decision of the employer regarding the

liability of employees for damages to be made based on a court decision, in accordance with constitutional provisions, but without violating the principles of contractual freedom. Thus, the right of the employee to consent voluntarily to the recovery of any damages caused by them without waiting for a court decision is not restricted.

- Until the Court's analysis, there was no correlation between the regulation of the imputation decision as an enforceable title and the entire legislative framework in the field, failing to ensure legal certainty, precision and clarity, which should govern the legislative system.
- By granting enforceable character to the imputation decision, the rule of law principles and legal certainty were violated, thus allowing for arbitrariness and subjectivism to intervene.

We observe here a change in the perspective of the Constitutional Court. On other occasions, the Court found that the legal provisions regulating the right of some employers to issue imputation decisions are constitutional. Thus, in the considerations of Decision no. 481/2005 regarding the exception of unconstitutionality of the provisions of Article 73 paragraph (1) of Law no. 188/1999 on the Statute of Public Officials, considerations also reiterated in Decision no. 456/2015 regarding the exception of unconstitutionality of the provisions of Article 85 paragraph (1) of Law no. 188/1999 on the Statute of Public Officials, the Court observes that *"by the criticized text, only in the case of damages caused to the assets of the authority or public institution where the public officials carries out their activity, as well as in the caseof non-repayment within the legal term of the amounts wrongly granted, the issuance of an order or an imputation decision by the public authority is provided, or, as the case may be, the assumption by the person concerned of a payment commitment. This is a specific, much simplified and operational way of covering damages, explainable through the specific authority relationship between the leader of the authority or public institution and the public officials subject to the rigors of a special statute, which distinguishes them from the person employed under an employment contract."*

The analysis made in Decision no. 649/2022 shows a change in the Court's view on the legality of issuing imputation decisions by the

employer in whose assets the damage occurred and denies the right of the public authority to establish and recover the damage through an act issued precisely by the entity in whose assets the damage occurred.

But, under this aspect, the question arises as to the extent to which the imputation decision can still be used in the case of other categories of public officials, including police officers from penitentiaries, for whom the method of recovering damages derogates from the principles established by labour law.

To answer this question, we will start precisely from the arguments retained by the Court in the content of Decision no. 465/2015.

The essence of the reasoning is the fact that the specific authority relationship between the leader of the authority or public institution and the public officials subject to the rigors of a special statute is different from the employment relationship arising from an employment contract.

However, from the perspective of the characteristics it reveals, the service relationship does not differ substantially from the employment relationship.

Thus,

- both the legal relationship arising from the conclusion of an individual employment contract and the service relationship have a contractual nature, based on the will of the parties;
- work performance represents the object, respectively the cause, both in the individual employment contract and in the case of the service relationship;
- the execution of the individual employment contract, as well as the execution of the public function, supposes a relationship of subordination of the natural person (employee/public officials) to the employer, respectively to the public authority (institution) (Georgescu, p. 256);

Similar elements are also found regarding working hours, granted rights (salary, annual leave, sick leave), the possibility of delegation or detachment, the right to join trade unions, etc.

In relation to the public officials, who is subordinate to the authority, it does not exercise the prerogatives of public power, but behaves like a

true employer. Its acts are unilateral, like those of any employer as a rule. (Georgescu, p. 256)

Therefore, we consider that the regulation of rules derogating from the principles of patrimonial liability established by the Labour Code is not justified.

Holding public officials accountable requires meeting the same conditions as for employees: the existence of an unlawful act, the damage caused, the guilt of the person, as well as the causal link between the act and the damage caused.

According to the provisions of Article 500 of the Administrative Code, in the case of civil liability of public officials, the defining element for the recovery of damage caused to the authority is precisely the decision (order/directive) of imputation as a unilateral act of the leader of the public institution; the only case in which recovery is ordered by the court being the situation of damage caused to third parties by public officials.

Under these conditions, in our judgment, the position of the Constitutional Court is a correct one, the decision/directive of imputation being a legal instrument that must be eliminated from all regulatory acts that regulate it, including from the Administrative Code and Law no. 145/2019 on the liability of police officers from penitentiaries for damages. The need to respect the civil rights of employees and to eliminate any form of discrimination against them compared to other categories of employees requires such an approach that provides guarantees of a fair and impartial process.

Conclusions

Considering that police officers in penitentiaries and military belong to the same category of officials (public officials with a special status), and their liability for damages caused presents elements of similarity, as shown in this analysis, we believe that a unified approach to their liability for damages is necessary and bringing it into line with the provisions of the Labour Code, as decided by the Constitutional Court.

To make this possible, harmonization with the provisions of the Constitution, of the regulations on the liability of employees for damages caused to the employing unit, can be done either by invoking the exception of unconstitutionality of the relevant provisions of the Administrative Code and Law no. 145/2019, or by amending the Administrative Code and Law no. 145/2019, in this sense.

We appreciate that any democratic society must adopt a legislative system consisting of laws that include a clear description of the nature of liability and the procedure to be followed for the repair the damages caused to the assets by any type of employees (including public officials and those with a special status). Additionally, we believe that there must be a unification of legislation regarding liability for damages resulting from work-related activities.

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(R)EVOLUTION OF INSOLVENCY LAW UNDER THE IMPACT OF ARTIFICIAL INTELLIGENCE (AI). TRANSFORMATIVE TECHNOLOGIES - CHALLENGES AND PERSPECTIVES

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Abstract: *It is said that all is interconnected in the Universe, and Artificial Intelligence (AI) shows us every day this need for interference and integration into a system of "all disciplines, eras and minds". Inevitably, we go beyond the narrow framework of monodisciplinarity in favour of innovation and creation "reborn" from transdisciplinary approaches, this being the new reality in which legislation is taking shape and reforming. The acceptance and deepening of these interrelationships and mutual influences between human rights, digitalisation, technological transformation, economy, artificial intelligence and data security will generate a significant impact on the evolution of mankind, by re-establishing the constitutional models of states and adapting to the new socio-economic landscape. Moreover, in a context in which the rapid progress of AI has captivated the world, it was urgently necessary to regulate a transparent, safe and human-centered trajectory, which is why the EU Parliament voted in plenary, on 13 March 2024, the EU act on artificial intelligence, hailed as the first "hard law" legislation on AI at global level.*

It is also said that innovation arises from the mixture of already existing ideas, which is why, through this research, we aim to explore the role of artificial intelligence (AI) and its potential in transforming and reshaping the global economy, to reflect on the potential of Artificial Intelligence in business sustainability, in global insolvency practices, as well as on the digital future of restructuring debtors in difficulty, by reference to research and practices debated and nuanced in the international landscape and not promoted and addressed at the level of the national doctrine and vision of insolvency practitioners. The digital age of insolvency certainly requires a holistic approach, and the "embrace" of innovation outlines a successful "journey" in the procedure of restructuring, reorganization or bankruptcy of professional debtors, our research pursuing an interjurisdictional vision.

In essence, the central objective of our research is to analyse and evaluate the digital transformation in the insolvency area based on current progress, but also the potential for further transformation, by identifying the latest generation "algorithms" in the fight against financial difficulties. In this regard, we will "put under the magnifying glass" digital tools with a predictive role in the intelligent management of restructuring and insolvency procedures, but also transformative methods and technologies to simplify the activity of insolvency practitioners, such as the use of systems based on artificial neural networks, robotic automation of processes and acceleration of repetitive tasks, the creation of platforms that allow virtual tours of the assets of the insolvent debtor by creditors and not only, all this creating opportunities to reform legislation and ensuring the success of global and local insolvency practices, which will help shape and strengthen a "rescue culture", in line with ethical guidelines in business.

This is how, behind the eternal conventional walls of the complicated and "thorny" realm of difficulties in business and insolvency, we discover limitless and profound transformations that shed light on the balance between human expertise and the digital age. In the context in which AI has become the matrix force for the economy and society, let us therefore open the doors to experiencing its benefits and pitfalls.

***Keywords**: insolvency; restructuring; artificial intelligence; artificial neural networks; comparative law; digitalisation; transition; efficiency; emerging technologies; transdiciplinarity.*

Introductory and conceptual considerations. "Navigating" insolvency law through the digital age

In fact, this research highlights the deep awareness of the "mixer" of information in which we are all engaged every day, in a kind of "whirlwind" of globalisation, interconnectedness, transdisciplinarity, innovation, the fulminant evolution of technology, which we try most of the time to slow down or at least to understand its meaning, to accept it and to enter openly into its scope, because this is the way, this is our future, that of humanity. And yes, technology has begun the process of "re-laying" legislation, "invading" every segment of the law branches and revolutionising their structure. New technologies, which subtly and surely penetrate everything that means legislation, economy, business environment, education, research fields and disciplines, have made their way to *transdisciplinarity*, given the omnipresence of the technical component in our lives.

It is not by chance that we "savour" more and more often such "cocktails" of research, and we say "cocktails of research" in a positive and deeply admiring sense, the development of "multifaceted" views on disciplines and the tendency to interconnect them becoming part of the need for progress, part of the mission of research as support for knowledge and adaptation of the law. And we use this plastic, metaphorical language, precisely to reinforce the idea that the encounter with such research approaches and trends, arouse in us, researchers, "an even greater thirst" for knowledge, exploration and penetration into somewhat "untangled research areas". This is also the beauty of research... to enter paths barely "glimpsed" by doctrine, "unpaved" and to open in your turn new ramifications and "intersections" of analysis and research, arousing interest and call to that road on which you have just stepped. In the light of this inter- and transdisciplinary approach we have recently identified in the literature an *in globo* and of perspective research of the legislative future under the influence of digital transformations, the author (Popa Tache, 2024, pp. 1-14) creating a perfect symbiosis between international cooperation, digitalisation and

security. The same author, who relies on the idea of transdisciplinarity in research and even the implementation of an international chair of transdisciplinarity, brings to the attention of the national education, echoing also at international level, the subject *Law of communications and new technologies* (Popa Tache, 2023), a subject still "discreet" in the presentation palette of the subjects in the National Higher Education Plan, as an urge to adapt specialists to the latest trends of the society in which we live, a society deeply imprinted by elements of interconnection. In fact, we are also talking about the promoter of international investment law in Romania (Popa Tache, 2020).

Such research opens horizons to new subjects such as *artificial intelligence law*, which "insistently" claims its own regulation, by revealing the facets, legal implications and risks of technology. In reality, interdisciplinarity and transdisciplinarity are only answers to the diversity of social changes, and the "decompartmentalisation", the "decomposition" of a subject or even the "assembly" of a new one, as a milestone in the progress of science, implies an analysis passed through the filter of the challenges of the globalized world, the law being "a living instrument", "shaped" and "reshaped" constantly by the given context. In respect of AI challenges, there are numerous legal reactions and attempts are made to coagulate regulations in this area, which hardly take shape due to the complexity of the field, French professors-researchers of the University of Paris or Sorbonne anticipating not long ago the crystallization of an "Artificial intelligence law" – "Droit de l'intelligence artificielle" (Bensamoun and Loiseau, 2022), a stand-alone law built by virtue of its own principles and institutions of operation, which leans on areas such as ethics, law of persons, liability and insurance law, autonomous vehicles, justice, criminal law, intellectual property, personal data, labour law, health law, military law, administrative decision making and cyber security, civilian drones and even international law.

We must give the law the "right" to permeate all aspects of life, and the future alongside AI is inevitable. That is why the power of the law remains in the capacity of permanent adaptation to the complexity of our world, and this can be achieved through what we call

transdiciplinarity, a phenomenon capable of creating the necessary bridges between science, law and morals or faith, through a complex vision of reality. Moreover, the Charter of Transdisciplinarity, adopted in 1994, took into account the idea of opening all subjects to what they have in common and to what lies beyond their borders, in the hope of reaching a higher degree of analysis, capable of interpreting the planetary complex dimension, in order for humanity to face the contemporary danger of the material and spiritual self-destruction of our species, including through an uncontrolled evolution of AI (Popa Tache and Săraru, 2023).

How else could we talk today about technological transformations, artificial intelligence, law, business and national and cross-border insolvency, all merged into a single argumentative "picture"?

In this large "picture of answers and questions", AI has become a global priority, being defined by the organization for Economic Cooperation and Development (OECD) as being that "machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments aimed at responding to a certain set of objectives. It uses computer-generated and/or human-input data and inputs for the purpose of (i) perceiving real/virtual environments; (ii) producing an abstract representation of these perceptions in the form of models; and (iii) using model inferences to formulate different outcome options" (https://www.cdep.ro/afaceri_europene/afeur/2022/st_3516.pdf.).

Also, according to the proposal of *Regulation of the European Parliament and of the council laying down harmonised rules on artificial intelligence* (Artificial Intelligence Act) *and amending certain Union legislation*[1], "AI is a fast-evolving family of technologies that can bring a wide array of economic and societal benefits across the entire spectrum

[1] Document 52021PC0206, Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (*Artificial Intelligence Act*) and amending certain Union legislation, COM/2021/206 final - https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A52021PC0206.

of industries and social activities". It is essential to mention that the vote in plenary of the EU Parliament on this proposal for a regulation took place on 13 March 2024, in brief *AI Act*, which aims to protect fundamental rights, democracy, the rule of law and environmental sustainability in respect of high-risk AI systems. The legislative act will ensure a leading role in the field for Europe, imposing obligations depending on the potential risks of AI and the expected impact (https://www.europarl.europa.eu/news/ro/press-room/20240308IPR19015/legea-privind-inteligenta-artificiala-pe-adopta-un-act-de-referinta).

Timidly stepping into this new legal realm open to reflection and practical applications of the most innovative, we aim to integrate the field of insolvency into the digital dimension and to discover together the way forward for the technological transformation of insolvency and the reform of the legislation in the field, by creating contingency points with AI, identifying nuanced answers, full of realism and even imbued with optimism, too little promoted and addressed at the level of the national doctrine and vision of insolvency practitioners.

Without some "wave" of irony, one wonders what an algorithm might know about insolvent trading[1] and how could it empathise with a debtor in financial difficulty, when the stigma of bankruptcy is omnipresent internationally? *What would be the potential of AI in the revolution and evolution of insolvency?* Can AI provide real judicial reorganization solutions and innovative strategies for distressed businesses?

Starting from an overview of the impact of AI on the economy, we will try to narrow the analysis framework and explore closely the impact of AI and transformative technologies on the insolvency field, thus realizing the profiles of the future of national and cross-border

[1] Surprising or not, but ChatGPT answered this question and created a real content of realistic data and explanations on corporate insolvency in Australia – *What does an algorithm know about Insolvent Trading and Liquidator Referrals?,* 04/04/2023 - *https://rodgersreidy.com/what-does-an-algorithm-know-about-insolvent-trading-and-liquidator-referrals/.*

insolvency, the opportunities to avoid financial difficulties through new emerging and disruptive technologies, the likely path to the transformation of the insolvency practitioner profession, the tools and techniques for predicting insolvency as well as the way forward for debtors. We will thus discover together the potential of AI in the reshaping and success of global, national and restructuring insolvency practices, through personalized insolvency solutions and low costs offered by AI, but also the importance of vigilance and cyber security. It is essential to "sift through" the sustainable benefits and opportunities to improve insolvency and restructuring proceedings from the ever larger and more diverse amount of data provided by the (r)evolution of such algorithms.

Because yes, today we are talking about a new socio-economic landscape, "metamorphosed" by emerging and disruptive technologies, with the potential to radically change the way an industry or society works, by creating new business opportunities and the development of a digital economy. Let's not forget about *cyberspace, cloud computing, blockchain, "Internet of things", quantum communication or smart contracts, Big Data, ChatGPT, Technology-Assisted Review (TAR), electronic business, electronic seals, computer security* or the possibility of creating a virtual world through the so-called *metaverse,* a kind of 3D rendered internet that will incorporate aspects of our lives, such as traveling online, trying on digital clothes through our own avatars or attending virtual concerts with the help of augmented reality glasses and VR headsets. Emerging technologies analysts point out that this "*is the next evolution of connectivity, where all these things begin to come together in a perfect, parallel universe, so that you live your virtual life in the same way that you live your physical life*" (https://www.euronews.ro/articole/ce-este-metaversul-cum-functioneaza-si-cum-ne-poate-influenta-viata.).

We must be aware that AI does not only involve automation, but the ability to mimic human cognitive abilities, an aspect metaphorically captured by researchers (Canuto, 2024) from the University of Pennsylvania, according to which "AI is not just the design of a robot

that will put a screw in a machine on a production line, but the design of a robot that knows how to interpret that the machine has broken down or that the screw is crooked and that will be able to react, offer solutions and make decisions in this unexpected situation".

In addition to the wars in Gaza and Ukraine, the global economic crisis and climate change, the revolution caused by artificial intelligence was a key theme at the Annual Meeting of The World Economic Forum 2024 in Davos. Thus, according to the report (https://www.bursa.ro/raport-prezentat-la-davos-economia-globala-va-slabi-in-2024-24966151) unveiled at Davos, generative AI will this year boost manufacturing efficiency by 79% and innovation by 74% in high-income economies. Indeed, many companies are increasingly interested in generative AI, but issues of ethics, data security and accountability still create barriers and challenges in implementation, but not for long.

AI has not only left its mark on the market and the economy in general, but has also begun the transformation process in terms of introducing insolvency into the multifaceted sphere of digitization, there still being a "thirsty space" to absorb technology even after the pandemic increased its adoption in insolvency processes. Moreover, at national level, the modernization of the Insolvency Law towards digitization was achieved, on the one hand, through the transposition at national level of Directive (EU) 2019/1023 on restructuring frameworks, second chances and debt remission, based on Law no. 216/2022 for amending and supplementing Law no. 85/2014 on insolvency prevention and insolvency procedures and other normative acts (published in the Official Gazette no. 709 of 14 July 2022, date of entry into force: 17 July 2022), thus ensuring a modern support for the practice of insolvency, and on the other hand, under the impact of COVID-19, a real catalyst for the reform of the insolvency field (Didea and Ilie, 2021, https://revista.universuljuridic.ro/2021/04/). In this respect, the foundations have been laid for communication by electronic means, as well as for organizing online meetings of creditors or auctions on the recovery of debtors' assets, measures that only facilitate the conduct of pre-insolvency and insolvency proceedings.

Definitely, transformative technology has accelerated the processing time of insolvency cases, facilitated international cooperation and allowed a much more transparent assessment of a company's financial situation through advanced data analysis tools, providing real-time insights. Moreover, the technology has also greatly improved the possibility of identifying and tracking the assets of the insolvent debtor spread across different jurisdictions, so as to ensure a fair distribution among creditors. However, the integration of technology into insolvency practices has come with a set of challenges, such as the possibility of owning digital assets such as cryptocurrencies, which raise questions due to their volatile nature and the difficulty in determining the applicable legal framework.

We are living a remarkable chapter of the existence of humanity, a chapter imprinted by the fulminant evolution of technology and the unknown, and exploring the advantages of strengthening the bridge between insolvency and cross-border technology becomes a necessity, because yes, it is its time, of artificial intelligence. There are three trends that will influence and revolutionize cross-border insolvency: digital assets and cryptocurrencies, technological tools such as AI and blockchain, which will help analyse large volumes of data, identify hidden assets of debtors in financial difficulty or fraudulent transactions and, last but not least, cyber security, a concern that will result from the other "facet" of AI, which besides facilities and creating technological dependence, can also generate risks regarding data security. AI is certainly on the "stage" of the global re-establishment of society and economy.

AI: "ally" in the success of global insolvency and restructuring practices. "Algorithms" to fight financial difficulties -international perspective

As we continue to focus on the insolvency area, we ask ourselves: what will 2024 bring for business, for the economy? And a starting point in our "connected" AI analysis, we believe, would be to define *the*

current purpose of insolvency, purpose outlined in the light of the development of a "*rescue culture*", which we have developed in numerous specialized articles (Didea and Ilie, 2021, https://revista.universuljuridic.ro/2021/04/, Didea and Ilie, 2023, pp. 391-409, https://www.upit.ro/_document/298096/e-book_iccu2023.pdf) as a much more positive view of insolvency in favour of which we have chosen to base our research arguments, constantly promoting it throughout these years. Why do we consider it appropriate to highlight the current purpose of insolvency? Precisely in the idea in which AI can contribute to achieving this goal and to its consolidation in the socio-economic landscape, eliminating as much as possible what we still call the stigma of the insolvent debtor.

We can say with certainty that law no.85/2014 on insolvency prevention and insolvency procedures it has enjoyed increased attention in recent years, and its attention is due to its socio-economic dimension which gives it an uninterrupted and alert pace of legislative reform. Currently, the national insolvency law enjoys the transposition of Directive 2019/1023 on preventive restructuring frameworks, on discharge of debt and disqualifications, an European legal instrument of the type *hard law* which covered two important levels, namely: harmonisation/uniformity of legislation at EU level in the field of insolvency; and *developing a rescue culture* which can be achieved, on the one hand, through solid insolvency prevention procedures and, on the other hand, by promoting and accessing the judicial reorganization procedure in the insolvency phase. Moreover, we note that including the purpose of the insolvency law has acquired new dimensions that crystallize a more complex vision of the insolvency institution, besides the second chance offered to insolvent debtors, merging it or rather bringing it to the fore also that of prevention. Thus, the purpose of the law becomes "*the establishment of insolvency prevention procedures to which debtors in difficulty may have recourse and, respectively, of collective insolvency procedures to cover the debtor's liabilities, in which the debtor benefits, where possible, from the chance to recover*

their activity".[1] It is important to point out that not only at the Union level, but also at the global level, we are dealing with a (r)evolution of insolvency in most systems of law, which develops a new facet of this institution by outlining a *"rescue culture".*

Under the "dome" of these considerations we will also develop the interference between the field of insolvency with AI, answering questions such as: *Can AI prevent financial, economic crises? Can optimize make the decision at the macro and microeconomic level? How much has "embraced" this "insolvency world" of the benefits of AI to date, and what is the added value for the future of insolvency in an era of digitization and globalization? Can AI become an "ally" of the debtor for the successful implementation of a judicial reorganization plan or for making a correct decision, in the sense of reorganization or liquidation of their business, anticipating economic changes and potential profit results? Can AI increase the effectiveness of early warning tools on the difficulties a company may face? Is AI able to provide tailored specialist assistance to a debtor in financial difficulty, so that it adopts the optimal solutions for the recovery of the business in a timely manner? Can AI become a real support in the work of insolvency practitioners? Can AI provide the necessary support in the (r)evolution and success of insolvency practices, with an impact on the effervescence of restructuring and reorganization cases?*

If so, the global challenge remains in building trust in generative AI, but also in identifying the balance between performance, evolution, digitization, security and ethics, even more so in a "chameleonic" and dynamic field such as insolvency, where bankruptcy, judicial reorganization or restructuring become "mirrors of the same reality". The way of regulation and management at global or national level is reflected in the very evolution of the socio-economic landscape, digitization being the "keystone" of facilitating access and business opportunities for

[1] Art. 2 of Law no. 85 of 25 June 2014 on insolvency prevention and insolvency procedures, published in the Official Gazette no. 466 of 25 June 2014, as amended by Paragraph 1, Article I Of Law no. 216 of 14 July 2022, published in the Official Gazette no. 709 of 14 July 2022.

companies to penetrate the international market, allowing access to information and resources.

Looking ahead, we expect an acceleration of insolvencies in 2024, with the economic and geopolitical context remaining on the line of contrasts according to statistics and macroeconomic indicators, for the third consecutive year the world economy slowing to 2.2% in 2024, after 2.6% last year (*The barometer of sectoral and country risks COFACE*, Q4 2023, 06/02/2024 - https://www.coface.ro/Stiri-Publicatii/Stiri/Barometrul-riscurilor-sectoriale-si-de-tara-Coface-T4-2023). Moreover, in 2023 the number of insolvencies worldwide increased by 7%, for 2024 a new acceleration of 9% being foreseen, and their number could reach record levels in the business world, given that so far there has been a number of insolvencies above pre-pandemic levels in most advanced economies (https://www.allianz-trade.com/en_BE/news/latest-news/insolvency-outlook-2024.html). Of course, Romania also faces an increasing dynamics in the number of insolvencies in 2024, compared to the same period last year, the data being alarming since the first quarter of this year. Thus, according to the National Trade Register Office, the number of insolvencies increased by over 13% in the first two months of the year, compared to 2023 (https://www.onrc.ro/index.php/ro/statistici?id=252).

Will 2024 be the "year of insolvencies"? With the hope that there is still a "light at the end of the tunnel", we believe that a rebalancing of the economic context would occur through the revision of the insolvency regulation, and AI can be one of the triggers of the efficiency of insolvency procedures, by shaping the confidence in such procedures, much more transparent, much more predictable, thanks to new technologies that can thus be implemented and integrated to these practices, with a focus on cross-border technology. Moreover, the use of technology for asset tracking, data analysis, communication, cooperation and coordination in cross-border insolvency proceedings has long been a reality, and AI is only revolutionizing these mechanisms that have already made their mark on the insolvency field. We are talking, for example, about the CLOUT tool used by legal professionals, including the insolvency field, in the use and implementation of UNCITRAL texts

(United Nations Commission on International Trade Law), such as the UNCITRAL Model Law on cross-border insolvency[1], the Romanian insolvency jurisprudence being recently published on this platform, which opens the way for an exchange of views and experience in the management of reorganization and bankruptcy cases by promoting and knowing the best international practices in the insolvency field. Moreover, there is also a joint initiative UNCITRAL and the World Bank Group, reflecting the need for judicial capacity building on international best practices in the field of insolvency law, intended to serve as a platform for courts, especially in developing countries, with the aim of exchanging views in the management of internal insolvency cases and promoting UNCITRAL's legislative guide on insolvency law and World Bank principles for effective insolvency and Creditor/Debtor regimes.[2] An important role in the consolidation and dynamism of digitization will also be played by the *Regulation (EU) 2023/2844 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation*, applicable from 1 May 2025, representing, at the same time, an important step for the development of cooperation and communication in cross-border insolvency, by regulating the use of videoconferencing or other distance communication technology, the

[1] The most important legal tool produced by UNCITRAL is the model law on cross-border insolvency, developed in 1997 to help states "equip" their insolvency laws with a modern legal framework so that cross-border insolvency proceedings can be addressed more effectively. In the July 2018 session, UNCITRAL adopted and promulgated the model law on the recognition and enforcement of insolvency judgments (ML IRJ), accessible at - http://www.uncitral.org/pdf/english/texts/insolven/Interim_MLIJ.pdf, developed in recent years by UNCITRAL Working Group V and designed to complement the model UNCITRAL cross-border insolvency law - ML CBI (1997), accessible at http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf.

[2] *UNCITRAL-World Bank Group Judicial Capacity-Building Initiative on International Best Practices in the Area of Insolvency Law - https://uncitral.un.org/en/content/uncitral-world-bank-judicial-capacity-building-international-best-practices-area-insolvency*.

application of electronic signatures and electronic seals, the legal effects of electronic documents and the electronic payment of taxes.[1] Through the European E-Justice Portal, an European electronic access point will be created, used for electronic communication between natural and legal persons and competent authorities, including with regard to the submission by a foreign creditor of an application for admission of the claim in an insolvency procedure according to art. 53 of Regulation (EU) no. 2015/848 on insolvency proceedings.

Not long ago, and not at all by chance, we also put under the "magnifying glass of research" (Didea and Ilie, 2024, pp. 1-41, https://investmentlaw.adjuris.ro/anul4nr1.html) the need to increase legal certainty for cross-border investments through the efficiency and effectiveness of national insolvency procedures, reflected in indicators such as transparency, regulatory quality and legislative harmonization, the dynamic area of Insolvency and restructuring becoming a "key criterion" for cross-border investors, as a result of the progressive globalization of the market and the increasing internationalization of enterprises.

Artificial intelligence (AI) has already begun the process of socio-economic transformation, and if at Union level we are about to enjoy a regulatory instrument of the type *hard-law*, we will find that there are highly rated states that do not yet have a specific AI regulatory framework, such as, for example, Canada. However, Canadian companies and researchers are positioning themselves at the forefront of this transformation, Canada being a founding member of *The Global Partnership on Artificial Intelligence*[2]*(GPAI),* a multi-stakeholder

[1] Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation - https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=OJ:L_202302844.

[2] The 2023 GPAI Summit was held in New Delhi, India, from December 12-14, 2023, bringing together experts in science, industry, international organizations and academia

initiative to promote the responsible development and use of AI based on respect for human rights, inclusion, diversity, innovation and growth. Incidentally, in September 2023, François-Philippe Champagne, Minister of Innovation, Science and Industry announced the implementation of the Voluntary Code of Conduct on the Responsible Development and Management of Advanced Generative AI Systems *(Loi sur l'intelligence artificielle et les données,* 2023 - https://ised-isde.canada.ca/site/innover-meilleur-canada/fr/loi-lintelligence-artificielle-donnees*),* which gives Canadian companies, on a temporary basis, common standards and allows them to demonstrate, voluntarily, that they develop and use generative AI systems responsibly until official regulations come into force, respectively *Artificial Intelligence and Data Act* (AIDA). This is nothing more than an important step towards strengthening Canadians' confidence in its systems. AIDA provides a balanced approach to AI regulation that will support responsible innovation and ensure international market access for larger Canadian businesses, while taking into account the needs of small and medium-sized enterprises and propelling the full potential of AI into the business environment.

The new *algorithms* for the functioning of AI are based on automatic learning mechanisms, AI being able to self-train, that is, to imitate the processing of information by the human neurological system. In this regard, algorithms can easily create mechanisms for preventing insolvency, identifying preventive restructuring strategies or judicial reorganization, since AI is able to quickly collect a large number of data, configure the position of a business in a particular market, and based on a statistical analysis of past data and the trajectories of companies that have failed in business to signal insolvency risks. Such algorithms capable of machine learning make it possible to quickly identify the trends and weaknesses of a business and even allow for early warning, making automatic predictions. Such algorithms have already been tested in France, in pilot experimental projects throughout the national territory,

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to foster international cooperation on AI-related priorities such as: responsible AI, data governance, the future of work and innovation and commercialization - https://gpai.ai/.

with the idea of creating and integrating a *national digital prevention service, coordination, assessment, risk and intervention* of the State in supporting businesses in danger of insolvency, an important role in identifying a danger of failure being played by the General Directorate of Public Finance, as well as the Committee of the Department for Examining Business Financing Issues. The primary goal is to detect the first signs of "economic fragility" in advance, followed by providing personalized recovery support (*L'IA, un outil pour mieux prédire les faillites d'entreprises, 14 February 2024 - https://theconversation.com/lia-un-outil-pour-mieux-predire-les-faillites-dentreprises-198631*). Incidentally, as early as 2021, the French press (Le Figaro, 3 June 2021) was talking about "*Bercy Algorithm*", which will go through the data of companies in difficulty and detect those "running out of steam".

The fact is that the introduction of AI in our daily life will have the effect of modifying the manifestation of already existing risks but also determining the emergence of new risks, the challenge of companies being precisely the efficient and rapid identification of these risks, their supervision and control and even the transformation into opportunities. Thus, the results of AI systems will depend on the quality and quantity of data in the construction of algorithms, since the decisions made by man through the filter of his analysis will gradually be discarded, the new generations relying on statistical methods and very complex parameters, which can make the final decision even more difficult for people to interpret and explain. Not to mention the possibility of failure of AI systems and the risks related to the transformation of skills models (*Intelligence artificielle: quelles évolutions pour les profils de risques des entreprises ?*, 2024 - https://www2.deloitte.com/fr/fr/pages/risque-compliance-et-controle-interne/articles/intelligence-artificielle-quelles-evolutions-pour-profils-de-risques-des-entreprises.html).

As we try to shape an idea of AI systems and answer the questions we outlined at the beginning of this section, we will find that the effects of AI are already felt and quite pronounced in the field of insolvency, compared to other areas of law, precisely because insolvency law is in itself an interdisciplinary matter, and not a pure one of law,

which intersects very much with the world of economy, business, a world already seized by digitalisation.

As mentioned above, the EU Directive 2019/1023 itself had a profound impact on the digitalisation of insolvency mechanisms, which aimed mainly at facilitating and simplifying the insolvency procedure, reducing the duration and costs related to restructuring, mentioning in its content that the support of SMEs is needed in order to ensure low-cost restructuring. In this regard, the European Commission has recommended the need to develop model restructuring plans tailored to the needs and specificities of SMEs, to be made available in *electronic format* as well as insisting on *early warning tools*, taking into account the limited resources of SMEs for the hiring of experts. The solution for SMEs could even be AI systems. Moreover, the proposal for an EU regulation on AI specifies the need to identify measures to support innovation and SMEs, so that regulatory testing spaces and real-life testing will be mandatory at national level, and SMEs and start-ups will have access to these tools to develop and train innovative AI before they are placed on the market.

At the same time, we must recall that at international level, too, the foundations of a law on a simplified insolvency regime for micro enterprises have been laid (*Draft legislative guide on insolvency law for micro and small enterprises, https://documents-dds-ny.un.org/doc/UNDOC/LTD/V21/074/07/PDF/V2107407.pdf?OpenElement*), Working Group V of UNCITRAL providing, after long efforts, a model agreed by states and specialists for a simplified insolvency regime for microenterprises. As a consequence, the evolution of AI remains a segment with great potential in supporting SMEs, by streamlining and simplifying insolvency procedures, but also by preventing insolvency, in particular by reducing the costs of expertise and consultancy.

The potential for innovation and revolutionisation of insolvency proceedings through AI systems and applications is very large. In this regard, we emphasize some directions:

a. AI and prevention of failures in business. Artificial neural networks.

Essentially, the chance of survival of companies will depend on the speed with which they react to warning signals, to the options offered by legislation and more recently by AI systems, using the opportunities of permanent connection to information and vibrating in unison with technology, this being the path to performance and economic stability.

It should be noted that Law no. 216/2022 transposing at national level the EU Directive 1023/2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, triggered an important alignment for Romania to the requirements of the European Union, optimizing three important levels, namely the introduction of innovative concepts such as *early warning* and resizing the concept of debtor in difficulty, early restructuring through pre-insolvency procedures, respectively the restructuring agreement and the arrangement with creditors, applicable to the subjects of the restructuring still viable from the economic point of view, but also the judicial reorganization from the stage of the insolvency state installation, by introducing elements that shape the culture of prevention and rescue in business. The "time" element has gained an essential role in the new legislative formula in which special attention is paid to the pre-insolvency moment, being established early warning tools, but also mechanisms for the accountability of specialists who will have the role of collecting data about entrepreneurs, about companies, data that will be able to provide in a timely manner a picture on the risk of getting into difficulty and overcoming the liquidity and solvency border.

Thus, in the content of Law no. 85/2014 - Insolvency Code was introduced *Chapter III - Early Warning*[1], which regulates strategies and concrete warning measures, namely: alerting professionals by the fiscal

[1] According to the Insolvency Law, "*early warning means alerting a circumstance that may give rise to the debtor's state of difficulty or insolvency and that may signal the need to act without delay, with the benefit of receiving free information on recovery solutions*".

body about non-performance of obligations, providing free of charge information on recovery solutions provided by law through an internet page, but also warning through alert notifications automatically transmitted through the electronic communication system owned by ANAF in connection with non-performance of obligations to the State budget, to the State social insurance budget or to the unemployment insurance budget (for example, the virtual private space).

Moreover, the Ministry of Economy, Entrepreneurship and Tourism will create on their own website a section dedicated to information and guidance in the field of early warning, which will include detailed information on economic indicators, *diagnostic programs*, list of insolvency practitioners, as well as information on support programs or facilities (including mediation service), the possibility of providing guidance and assistance services through *electronic systems available (*or even the formation of a network of early warning mentors selected from the private sector*)* but also the implementation of a hotline for guidance and assistance in order to access recovery solutions.

These legal provisions encourage innovation and leave an "open path" for AI to intervene in this segment and develop new advanced digital early warning tools over time, with countries such as France already starting testing such mechanisms, as exemplified above. That is why, in France, as in Italy, the law transposing the restructuring directive does not include such provisions, precisely because the system of French law was already centred on restructuring and prevention, and there was developed the system *signaux faibles* through a State start-up in the form of an *AI-based platforms* and it detects the risks of companies by accessing the results obtained by the authorities that have as their duties the taking of measures for restructuring and prevention, such as, for example, the Direction Générale des Entreprises (Sandu, 2023, https://www.universuljuridic.ro/avertizarea-timpurie-si-mentorii-insolventei/). Also, Greece has *Law no. 4738/2020 on debt settlement and facilitating a second chance* (entered into force on 1 January 2021) by an electronic early warning mechanism that classifies debtors into

three levels of insolvency risk, i.e. low, medium or high, a mechanism supervised by the Special Secretariat for Private Debt Management and designed for both natural and legal persons.

Gradually, AI will replace in all jurisdictions traditional statistical techniques as tools for predicting failures and making financial decisions, the future being the use of algorithms that involve the use of a complex set of data. The Ideal is for technology to improve the process both before, through prevention and during insolvency proceedings, AI and machine learning providing predictive insights for making smart decisions.

Insolvency prediction represents a highly sensitive stake due to the "wave effect" and the unique characteristics of this field, through the potential for destabilization "in domino" of an entire economic and social sector, which is why the importance of early warning has become a fundamental principle that gravitates on insolvency.

"Unveiling" entire research files of recent years, we gladly note the fact that there is a great interest in this area, numerous studies and experiments have been carried out to identify models of predicting the insolvency of a company in certain conditions, industries, countries and various businesses (Kliestik, Nagy and Valaskova, 2023). Insolvency prediction systems and models have been developed, such as those based on logistic regression (LR), on support vector machines - SVM[1], decision

[1] The method constitutes a supervised learning algorithm that classifies the samples into two groups – bankrupt and non bankrupt, with the maximum possible gap between these categories based on the training samples. The total accuracy obtained was 96.1% for the one-year interval and 95% for the two-year interval (Kliestik, Nagy, & Valaskova, 2023) - https://www.mdpi.com/2227-7072/12/1/8.

trees - DTs[1], finally taking shape AI techniques based on artificial neural networks (ANN[2]).

This constant effort to improve the accuracy of prediction and early warning techniques is truly "rolled" into the future by new AI systems, which hold the potential to revolutionize such mechanisms. The creation of such mechanisms is based on a historical process, on certain macroeconomic indicators, similarities between companies that have failed and companies that have not failed in business, defining insolvency criteria, evaluating or comparing the success of companies, being almost impossible to take into account the dynamics of socio-economic factors "prefaced" many times by the reality of health or economic crises, crises that have shown us that the reaction and resistance to stress and failure can take various forms. That is why the field of insolvency prediction

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[1] This approach is not based on coefficients or calculations, but only on the rules of division. The main challenge is the risk of overadaptation, its strengths include results that are easy to interpret, model flexibility, insensitivity to missing data, and no requirement for a normal distribution (Ptak-Chmielewska, 2019) - https://www.mdpi.com/1911-8074/12/1/30.

[2] *A neural network* it is a type of mathematical model that is inspired by the structure and functioning of the human brain. *Neural networks* are used to achieve various types of machine learning, such as supervised learning, unsupervised learning. Artificial neural networks characterize assemblies of simple processing elements, strongly interconnected and operating in parallel, which aim to interact with the environment in a way similar to biological brains and which exhibit the ability to learn. They are composed of artificial neurons, are part of artificial intelligence and have their origin, like artificial neurons, in biology. Such implementations of neural networks related to the business sector are found in: financial forecasts, market research, data validations based on classifications and patterns, risk management or marketing forecasts - hhttps://ro.wikipedia.org/wiki/Re%C8%9Bea_neural%C4%83.

ANN-based models are often referred to as "black boxes" because of their inability to explain the rationale behind classifying a sample viewed as insolvent or not, a critical aspect of such classification. However, these models achieve high accuracy and have gained increased use with technological advances. The basis of these models is the neuron that converts inputs into outputs through activation functions. For development see (Iturriaga, 2015) - https://www.sciencedirect.com/science/article/abs/pii/S0957417414007118?via%3Dihub

remains alert and constantly evolving, due to the absence of an exact procedure for applying criteria, conditions and indicators, despite extensive research the determination of the superiority of any method remaining unclear. In order to obtain reliable results, AI will have to identify complex models, managing a huge number of data, due to the very wide spectrum of factors that can influence the activity of a company, accurately predicting its evolution and path being almost impossible to achieve.

There are also researchers (Iturriaga and Sanz, 2015) who proposed hybrid models based on the combination of ANNs (artificial neural networks) with a self-organizing map (SOM), a model that allows bankruptcy warning one year before, while the self-organization map also provides a visual representation of data from 2-3 years before the onset of insolvency. At the same time, in 2019 was introduced a model based on *fuzzy sets*, ANN and DT methods, which allows some prediction of a decrease in business efficiency up to 10 years prior to insolvency (Korol, 2019). A recent study (Letkovský, Jenčová and Vašaničová, 2024) conducted at a University in Slovakia, in the light of a study concerning the development of models for the prediction of the insolvency of the chemical industry in Slovakia, based on the classical methods, but also on the light of the new AI technologies. In this study, a multitude of financial and economic indicators considered essential for prediction were used and applied to 1221 companies operating in the chemical industry. The research led to the conclusion that all the methods used generated a good prediction, AI-based algorithms having the ability to provide much faster, secure and covering results over a larger time horizon, since within traditional methods a noticeable decrease in prediction accuracy was identified as the prediction time horizon expanded.

At national level, such experiments and studies have been conducted based on artificial neural networks (Prodan-Palade, 2017) in order to predict the global liquidity and solvency rates of a company. The research was based on a sample of Romanian entities, based on financial and accounting information from 2010-2014, with which neural networks were built by using a combination of financial indicators selected

according to the specialised literature. The result of the accuracy of the forecasts was impressive, which demonstrates that the symbiosis of these algorithms and the discovery of new AI tools in this area can revolutionise the economy in general and the prevention capacity of professional debtors in particular through successful restructuring and avoidance of bankruptcy proceedings. At the same time, the examination and "scanning" of the real financial position in the current and prospective economic landscape of a company "into the abyss", through complex AI-based algorithms models, can change the horizon of action of both the debtor and the creditors or financiers, in the sense of assuming a successful judicial reorganization or bankruptcy procedure, through an orderly liquidation (and here we are considering the so-called "zombie companies").

Sometimes, avoiding insolvency comes down to the speed of reaction, and technology can help speed up the action of the "actors" in this "thorny" process by quickly connecting to market trends, developing trading, risk management and quality control algorithms, "juggling" with AI algorithms capable of timely handling an impressive number of data. Among the various applications of AI, one area stands out particularly, and that is the prediction of variable phenomena, from weather conditions to stock market trends to the prediction of insolvency and business failure, or even the first "fragility" signals of a company.

b. ***Innovative strategies offered by AI to debtors in financial difficulty***

The "nuances" of technological transformation highlight the key positive changes that can occur in the business environment, providing multi-sided perspectives. The emergence of digital technologies such as *blockchain* or *smart contracts* have certainly simplified the tasks of the administrators, improving and accelerating the decision-making process.

Blockchain Technology[1] provides a transparent and secure record, which can influence and revolutionise, for example, the asset tracking procedure or influence the vote of creditors. Blockchain has huge potential to transform long-term business models and certainly strategies for managing and responding to financial difficulties and insolvency, constantly generating new foundations for global economic and social systems. The original Blockchain application has "matured" over the years, developing new applications of the technology, known generically as Blockchain 2.0 for more sophisticated smart contracts, reaching up to the Blockchain 5.0 model, which takes the next step towards the industry also known as the "Fifth Industrial Revolution" and involving the convergence of AI with blockchain technologies, the capitalization of cyber-physical systems (CPS), robotics, IIoT, Big Data, as well as human - automated system interaction.

An interesting impact of AI began to "shape" the principle "*pacta sunt servanda*", "disrupting" the practice of traditional contracting. And here is an analysis that requires a sensible and careful tendency towards benefits and risks, with the legality of smart contracts becoming a real challenge in an AI world. The literature defines the smart contract as "a computer code that creates an agreement that executes and applies itself, being automatic and enforceable" (Milk, 2017, https://www.tandfonline.com/doi/full/10.1080/17579961.2017.1378468). The traditional legal contract "metamorphosed" into types of smart contracts, such as the one located in the Blockchain network, acquires

[1] A blockchain is a decentralized, distributed and public "ledger" consisting of a list of chained "blocks". The blockchain is used to record transactions and the records cannot be changed retroactively without altering subsequent blocks. The first blockchain was conceptualized in 2008 by an anonymous person who identified himself as Satoshi Nakamoto. In 2009 it was implemented in the cryptocurrency bitcoin, serving as a public and decentralized registry for all transactions. Blockchain is a technology for storing and transmitting information, which is based on the principle of distribution and security and which records transactions and events on a permanent basis. At the same time, it can secure cryptocurrency storage, transactions between cryptocurrencies and the information relationships that support the purpose of each cryptographic project. - https://ro.wikipedia.org/wiki/Blockchain.

legal force through data and information rules, and can be generated in the future even by AI through the interpretation and application of the principles of common law (Vos, 2019). We believe that they represent a major opportunity for insolvent debtors, managers in general and SMEs in particular, as they help to lower the costs of contracting, consulting and negotiating, increase the speed with which contractual relations can be executed, eliminate the risk of a particular clause being cancelled, ensure certainty, transparency of clauses and reduce potential disputes related to the interpretation of the contract, thus facilitating day-to-day trade. (Marcusohn, 2022, https://www.juridice.ro/496182/contractele-inteligente-o-noua-etapa-in-cadrul-dreptului-contractelor.html).

As a consequence, such technologies guarantee a check on ownership transfers, avoiding disputes and strengthening investor confidence. An AI-based system allows, for example, the analysis of a scenario *in globo*, by simulating the impact of different market conditions on cash flow, by assessing potential risks, by "predicting" the probability that the debtor will pay their debts or not, which allows creditors to adjust the terms or take preventive measures in working with them.

It is obvious that algorithms play a central role in insolvency proceedings, in the sense that companies can analyse historical financial data, perform predictive analysis, analyse customer behaviour and market trends, so as to make informed decisions before deciding on the next step, namely whether or not to assume a recovery plan, judicial reorganization or directly bankruptcy. Careful predictive analysis to identify cost reduction opportunities through supply chain optimisation and the possibility of renegotiating contracts can lead to a successful pre-emptive restructuring of the debtor. The examples are countless. Thus, when a debtor goes through a reorganization procedure, it can use an automated system to track creditors' requests, monitor court hearings and ensure that deadlines for filing documents are met. Or, for example, when a debtor goes bankrupt, blockchain technology can guarantee transparent verification of property transfers.

Adopting technological advances is no longer an option, and the important thing is awareness, access to AI and the desire to act, to identify real solutions.

c. AI can revolutionise and streamline insolvency proceedings – "the way forward" and the future of insolvency law

What will be the impact of AI on the business environment and what will be the "propagation wave" of technology on the insolvency of a company? If we turn to AI and ask such a question to Chat GPT itself, we will be surprised to find that it offers us a multitude of solutions to streamline insolvency proceedings through digitalisation and transformative technologies. In this sense, Chat GPT exposes us to the possibility of quick and orderly recovery of the debtor's assets, AI being able to analyse financial data and identify possible suspicious actions of the debtor, allowing liquidators to recover more assets. At the same time, AI can automate the process of distributing payments to creditors, analysing their claims and the regulations regarding the distribution order, thus reducing the risk of errors and improving the efficiency and time of running a traditional insolvency procedure. AI can also assess creditworthiness and determine credit scores by analysing factors such as the history of payments and outstanding debts, in which context it can provide statistics of success of a judicial reorganization plan by optimizing investment portfolios, but also risk mitigation strategies, following the analysis of market trends, economic indicators and potential risks (Restructuring, Turnaround & Insolvency, *The Impact of AI on the Insolvency Industry*, 20 APRIL 2023, https://www.cornwalls.com.au/the-impact-of-ai-on-the-insolvency-industry/).

Among the primary strategies for restructuring or reorganizing a company should be the "Digital Maturity Assessment", namely the technological infrastructure, data management practices and digital culture of the organization. Only agile professionals can quickly reorient themselves when they fall into financial difficulty, and making informed decisions based on relevant data, automation (*due diligence*) and process

optimization becomes crucial. The way forward remains, of course, "absorbing" the technology wherever is possible.

According to a study by insolvency experts of the *Insol International* (Colston, Toms, 2019, https://brownrudnick.com/article/insol-international-the-role-of-artificial-intelligence-ai-and-technology-in-global-bankruptcy-and-restructuring-practices/) most likely we will see a transformation impacted by AI only among large companies and large companies of insolvency professionals, being important to identify at the level of each jurisdiction ways of support from the government and for SMEs, through the allocation of technology and innovation funds, but also through programs to educate insolvency practitioners.

d. Potential implications of AI in transforming the role of insolvency practitioners

Living among digital assistants (Siri, Alexa, Cortana), autonomous machines or intelligent systems capable of making predictions, we realize that AI will revolutionise the labour market and the way of work, and digital skills, collaboration with robots, flexibility and diversity in the work process will become a normal thing in the near future.

Starting from the premise and belief that humans will not be replaced by robots, we will relate strictly to AI support in the work of insolvency practitioners and the ability to improve efficiency in several ways, overcoming the potential of confrontation between "human lawyers" and "digital lawyers". *Exempli gratia*, ROSS Intelligence is the first AI-based search tool used by a law firm to identify insolvency-specific data, with the machine learning used by ROSS being later extended to other areas. Interestingly, Ross was programmed "to understand human language, postulate hypotheses when asked, search and generate answers and references where it argues its conclusions" (https://www.publika.md/supercomputerul-ross-primul-robot-avocat-din-lume-ce-functii-poate-indeplini_2624), learning from their own

experiences and having the ability to monitor legislation and court decisions around the clock.

Let's not forget that there are many professionals, including lawyers or liquidators, who use GPT Chat for writing reports or identifying similar cases. Interestingly, AI, such as ChatGPT, can write an email to the court to request a postponement, identifying appropriate and compelling reasons for obtaining a ruling in this regard.

AI, however, has limits, which is why human strategic thinking is still needed for negotiations in judicial restructuring or reorganization proceedings, with human interactions being irreplaceable in business play and decisions. Moreover, we believe that the future of insolvency professionals is that of "collaborating" with AI effectively and responsibly.

AI becomes a way of leveraging expertise and innovation through significant strategic opportunities and benefits for clients, especially since traditional insolvency and bankruptcy procedures involve a multitude of activities such as managing a large number of documents, from financial statements and creditor records, to contracts and correspondence, manual data entry, which in turn generate administrative costs. Modern technology systems can automate such routine tasks and facilitate the administration of an insolvency file, contributing to a significant reduction in the time and effort required for the analysis. At the same time, machine learning algorithms can identify relevant patterns, correlations between information or even errors, providing practitioners with valuable information in a timely, fast and accurate manner, which helps to identify potential risks and inconsistencies, without having to manually go through a large volume of documents.

At the same time, the use of machine learning algorithms can contribute to the rapid identification of similar cases, international regulations or useful examples in motivating and managing the insolvency case. AI can prepare a memorandum of information and optimize the workflow, ultimately reducing delays and costs, which is actually the expected goal for the success of a judicial restructuring or reorganization (*How artificial intelligence can assist insolvency*

practitioners in India, November 2023 - https://www.aarnalaw.com/how-artificial-intelligence-can-assist-insolvency-practitioners/).

Also, Technology-Assisted Analysis - *TAR* is a mechanism that deserves to be defined here, in the sense of support for insolvency professionals at the level of reviewing and coding documents, registers or records, being able to digitize large amounts of data. TAR is already part of the landscape of electronic document communication approaches, thus saving valuable time and costs, and according to studies conducted, 35% of insolvency professionals already enjoy TAR technology (Kamalnath, August 2023). Surely this "digital arsenal" will gradually transform the activity of the insolvency practitioner profession but also of the courts, the latter recognizing TAR technology as an innovative and extremely useful method in the field of activity (*The Impact of AI on the Insolvency Industry, 20 APRIL 2023, https://www.cornwalls.com.au/the-impact-of-ai-on-the-insolvency-industry/*).

The fact is that AI will not replace professionals, but professionals who embrace AI can replace those who don't, with technology revolutionising the way professionals approach problems, make decisions and implement strategies, and as these technologies are developed, the benefits will be even more pronounced, leading to a future in which insolvency and restructuring are more predictable and effective.

Recently, the research of major universities, such as the University of Melbourne, Australia (Insolvency & Intelligent Systems Research - https://fbe.unimelb.edu.au/accounting?a=2543916), have led to the construction of intelligent technologies such as insolvency, capable of explicitly representing the knowledge of expert insolvency practitioners in a testable form. The results provided an in-depth understanding of the decision-making processes used by insolvency practitioners in dealing with companies in financial difficulty. At the same time, INCASE, a case learning software, containing rich problem-based descriptions from fifteen different judicial reorganizations, was also developed, facilitating the rapid transfer of knowledge to junior insolvency professionals. According to the researchers, the data is being analysed and the results will be available in the near future.

e. AI – a communication "convector" between stakeholders in insolvency proceedings

Effective communication with stakeholders is crucial in insolvency proceedings and digital platforms can facilitate such interactions in real time, allowing close collaboration between the debtor and other stakeholders. Collaboration tools based on *cloud*, for example, can facilitate collaboration between creditors, debtor, insolvency professionals, potential financiers and courts on reorganisation plans, terms and votes in this case, asset tracking and recovery, in particular in cross-border insolvency proceedings (*Innovation en matière de faillite. Naviguer dans la faillite à l'ère numérique : stratégies innovantes pour les entreprises en difficulté*, 14 March 2024, https://fastercapital.com/fr/contenu/Innovation-en-matiere-de-faillite-Naviguer-dans-la-faillite-a-l-ere-numerique---strategies-innovantes-pour-les-entreprises-en-difficulte.html).

AI can play an essential role in the way creditors act, by making insolvency proceedings more transparent and increasing their confidence in the stake of a possible restructuring or judicial reorganization plan. We are talking here about the development of tools that will facilitate the communication but also the access of creditors to information, to the control and evaluation of the debtor's assets or even the development of algorithms capable of establishing the repayment capacity of professionals in financial difficulty by examining trends arising from data rather than credit rating. For example, Mitsubishi Financial Group, one of the world's largest lenders, launched in 2019 a digital transformation initiative focused on the use of AI and machine learning, integrating a credit assessment system into its data-driven online loan model that evaluates transactions made in accounts of businesses in real time (*Outils d'IA dans le domaine de l'insolvabilité*, 2023 - https://www.dwpv.com/sites/Insolvency/Trends-2023/Issue9/FR/2/index.html).

Interested parties may also use AI to assert their rights and interests in the context of insolvency proceedings. Although AI cannot

replace lawyers or insolvency practitioners, it can acquaint interested parties with specific language, providing explanations needed to make a decision. One such potential ally is even Chat GPT, which can answer multiple and complex questions. In other words, AI can reduce the costs of expert advice, serve as a source of knowledge and processing of complex data in order to make a correct and predictable decision by all parties involved in insolvency proceedings. Of course, still in the experiment period, such advanced technologies as GPT Chat can also create pitfalls, which is why verification and accuracy in data and information management is often required. Very interesting how, the US Bankruptcy Court for the Northern District of Texas recently issued, more precisely in March 2023, an order relating to the use of procedures generated by AI. According to this order, the court requires that when filing a procedural document whose content was generated using generative AI, including Chat GPT, Harvey AI or google Bard, the lawyer, or unrepresented person, once again verify the accuracy of the content by consulting case law reports or databases and traditional legal tools, since AI systems are not required to be accurate and comply with the rules of law and the U.S. Constitution. The order comes amid a case in New York State in which lawyers presented fictitious research generated by GPT Chat. Such measures have also been taken by the courts of Canada, which in fact reminds us that AI is still at the beginning of the road and human intervention cannot be excluded from the act of trial and procedure.

f. AI can be a useful tool for regulatory bodies and courts in insolvency proceedings

Most likely, the use of AI by the legislator will allow in the near future to quickly adapt to economic and social reality by analysing large amounts of data in a very short time and identifying the needs of society and regulatory gaps. It is obvious that law-making will have to keep pace with the thundering evolution of AI. For example, AI can improve the way in which debtors are liable for insolvency, as it can detect potential

fraud in insolvency proceedings and identify suspicious patterns and behaviour, such as illegal transactions or transfers of property.

Let's not forget that AI is able to reproduce functionalities such as reasoning, creativity and language. Big Data and AI, two promising emerging technologies in all aspects of life, especially in the economic and financial sphere, involve three key elements such as speed, volume and variety and their transformation into knowledge, conclusions and actions, elements almost intangible to human capacity. Analysis of large data sets can reveal trends and hidden anomalies, the information obtained can be transformed by AI into complex results highlighted in intuitive charts or graphs. Of course, all this also involves cybersecurity measures, data protection in the event of insolvency being very sensitive. The current trend is the use of AI specifically for anticipating business failures, using artificial neural networks. Interestingly, mentions of AI in global legislative procedures are 6.5 times more numerous than they were in 2016, with bills containing the phrase "artificial intelligence" being adopted in 127 countries in 2023.

However, the use of AI in judicial decision-making processes by allowing programmable and predictable judicial outcomes also entails a multitude of risks and challenges, in particular with regard to respect for the right to a fair trial. At the same time, however, we must also consider opportunities such as increasing the level of provision of justice, accessibility and leaving the path open for faster and less costly justice. Incidentally, the storage and organisation of available legal information in huge quantities becomes impossible to control only by the human mind. AI already makes its presence felt through the possibility of online transmission of court hearings, online hearing in criminal matters, carrying out digital reconstructions, electronic communication of procedural documents, consultation of the electronic file, etc.

Surely AI revolutionises not only the economy, legislation and implicitly insolvency, but our very way of existing, of relating, of understanding the meaning of life, "unlocking" a whole new world of innovation. We wonder if the electronic judge will appear – *cyber justice* or what a regulatory proposal made by a robot will look like.

A survey conducted in Australia on the use of technology in the mechanisms of investigating everything that means insolvency proceedings found that the percentage is astonishingly high, from the use of the electronic portal that allows the insolvency practitioner to access online customer data to the use of Google and Facebook query and search software to locate company executives, assets and business locations (Kamalnath, 2023).

Interestingly, the UK began to use AI in dispute resolution, being issued a *Guide* with recommendations for judges, court clerks and IT professionals, as well as for litigants and their lawyers on the use of AI (Busuioc, 2024).

Also, in Colombia or Finland, (Polanía Tello, 2022, https://www.dlapiper.com/en/insights/publications/panorama/2022/colombia-is-using-ai-to-improve-insolvency-proceedings) attempts are made to streamline insolvency procedures through AI, being already implemented systems capable of drafting a court decision based on existing documents on file due to the capacity of AI for self-learning, this decongesting the effervescence of insolvency cases pending before certain courts. *The question is: Can AI influence the fairness of a process? Can we rely on these AI-generated "robotic judges" who "tirelessly apply the same high legal standards to any court decision, without falling prey to human error such as bias, fatigue and ignorance of the latest technical knowledge?*" (Tegmark, 2019, p. 120). In this context, we could say that AI technology could play an essential role in eliminating suspicions about possible discretionary decisions and especially can provide support to magistrates by freeing them from certain tasks and the "burden" of preliminary decisions related to the analysis of certain data and figures. They would have the time to focus more rigorously on the finesse, complex elements that involve interdisciplinary analysis and that a robot certainly cannot yet define.

"Merging the act of justice with AI", in a balanced and ethical way, becomes an opportunity especially in the case of courts that face a very large number of applications for opening insolvency, whose late management could "cost the life" of a company, but also the fate of

employees. Not to mention the potential for AI involvement in law enforcement and updating, with so-called "robot legislators" needed in the future for the law to keep up the accelerated pace of technological development. *But can the law allow itself to be "shaped" and "normalized" by algorithms?*

Returning to the insolvency field, we will highlight the potential of AI in resolving restructuring agreements or pre-court reorganization negotiations, through the possibility of resolving disputes online, on certain platforms and without human intervention. These arrangements are particularly useful for SMEs, which cannot afford additional costs for expert advice, travel or long-term formal procedures. AI will thus provide a "personalised diagnosis", which can be "drawn up" or not later by the court, depending on the decisions of the parties involved. Moreover, the simplification of insolvency procedures for SMEs is a subject that has been hotly debated by Union and international bodies in recent years, and AI could be one of the solutions. And pre-insolvency procedures can be supported by AI technology, of course, while maintaining the possibility of challenging some measures/decisions taken by AI in the management of such a procedure, the confidentiality and data security remaining also major problems.

The active support of the State and implicitly of the legislator remains essential for formal insolvency proceedings to effectively, ethically and legally integrate technology.

g. Instead of *conclusions* - The need for business ethics and insolvency: Balance between performance, technological evolution, digitalisation and security

"*Any sufficiently advanced technology is indistinguishable from magic*" (Clarke, 1984). Magic or not, these words awaken in us the same "spark of wonder" even in the year 2024. AI reveals its fantastic potential to revolutionise the world, a world whose future lies under the "magic wand" of transformative technology. The last few years have been marked by an intense and permanent concern that concerned the ethical, legislative, social and economic dimension of AI, preoccupations that

will materialise in the shortest time in an artificial intelligence law and certainly in an AI right in its own right, capable of potentiating the capacity of AI in achieving its objectives to bring benefits to humanity.

AI has acquired complex valences and has "invaded" all aspects of life, from the socio-economic, to the political and legal, this "spider" domain that will be found "in everything and everywhere" urgently requiring the provision of an ethical, legal, security and dialogue framework. Humanity almost feels "small and powerless" in the face of creation and also the greatness of the AI "universe". „*What is a man in infinity*"? (Blaise Pascal) *Has AI become capable of reproducing the essence of intelligence: human thought?* No matter how great the tendency to reproduce human behaviour, we must realize, however, that AI is not endowed with human emotion, critical thinking or morality, and the need for ethics in regulating AI remains a key landmark open to research, in order to reach a safe and reliable area.

Creative thinking, the emotional aspect of all relationships and authenticity, remain the qualities of a human manager, not an AI robot. Taking decisions when talking about the business world, or even the "world of insolvency", involves a dynamic and interdisciplinary analysis, which certainly requires human reasoning. AI systems can analyse large databases but cannot guarantee nuanced decisions, such as debtors or insolvency practitioners, who have the ability to "navigate" through "emotionally charged" situations, which AI cannot do. After all, human judgment, empathy or adaptability, are qualities deeply rooted in the practice of insolvency. But the future of business, the economy and not least insolvency, may well be shaped by a "harmonious blend" between AI and human expertise. There will be a strong link between competitiveness and a company's ability to use and absorb digital innovation, and security and trust must be the foundation of this new digital economy.

In this immersive "maze" of AI, ethics and legislation play an essential role in maintaining a balance, with a deep and accelerated interest of international and Union bodies in this direction. We remind you here in summary and as example (for development see Duminică and

Ilie, 2023, https://jolas.ro/wp-content/uploads/2023/06/jolas19a3.pdf.) some steps in this regard, respectively *European Ethical Charter on the use of artificial intelligence in judicial systems and their environment*, adopted on 4 December 2018 by the European Commission for the Efficiency of Justice (CEPEJ), through which five ethical principles were drawn up in the form of a guide on the approach to AI for decision-makers, as well as the "*Recommendation on the ethics of artificial intelligence",* a first global agreement on ethics adopted in November 2021 by the 193 member states of UNESCO, thus becoming a first "set" of common, universal standards, stemming from the phenomenon of globalization. Moreover, on 30 March 2023 UNESCO again called on governments to implement much stronger ethics rules in AI, the director-general of the UN education, science and culture body, Audrey Azoulay, stating in Paris that "*this is the challenge of our times*". As we mentioned in our research, the first legal instrument of this type being on the table of European leaders is legal instrument of *hard law* on AI, which relies on perfect coordination and "supple" legislation, technologically neutral, proportionate and adapted to the demands of the future, but above all human-centred and guided by *ethical principles.* At national level, too, numerous steps were taken, on 4 May 2023 the Romanian Committee for Artificial Intelligence being founded, its main objective being to create an artificial intelligence ecosystem based on excellence, trust and respect for ethical principles.

The prospects are numerous, but challenges remain. As the co-rapporteur of the Civil Liberties Committee, Dragoș Tudorache says: "*The EU has achieved results. We linked the concept of artificial intelligence to the fundamental values that underlie our societies. However, we will have much work to do outside the AI Act itself. AI will force us to rethink the social contract (...) AI is a starting point for a new governance model built around technology. Now we need to focus on putting this law into practice*".

A restart is also required in research, through the transdisciplinarity approach, defined by what is between, over and beyond any discipline. If we accept the idea of transdisciplinarity, we realize, in fact, the complexity of this "legislative world" but also the

subtle links between disciplines, reconfigured by AI. After all, "*imagination is the true land of scientific germination*"(Causse, 2023, https://uca.hal.science/hal-03999299/document). Indeed, AI Act is a precondition for hedging risks, but "*the rest remains free for creativity and positive thinking*" (vice-president of the European Commission, Vera Jourova).

All that remains is to embark on this fascinating journey to the digital future and embrace innovation and AI, with enthusiasm and inspiration, for a successful "journey" through the "world of insolvency" and the creation of adaptable business models, changing for the better the culture of the economy.

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THE IMPLEMENTATION OF WORK TICKETS AND FORMALIZATION OF DOMESTIC WORK IN ROMANIA. TAXATION AND SOCIAL PROTECTION ASPECTS

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Abstract: *One of the activities in Romania that has been and continues to be largely conducted in the informal economy is that of services provided by individuals in households, such as domestic cleaning, cooking, gardening, childcare, and eldercare, among other household activities. Most often, these services are offered on an occasional basis, and payments from the beneficiary to the provider are made in cash and rarely taxed. This phenomenon is not unique to Romania; it is encountered in many other European countries, which are concerned with taking necessary measures to regulate this social reality normatively. On the one hand, it is necessary to regulate the exercise by individuals who provide domestic services of the fundamental right to work, based on a legal relationship established through the agreement of the parties. On the other hand, it is necessary to protect the public interest represented by the inclusion in the formal economy of inactive persons and unemployed individuals predisposed to engage in household activities, within a flexible legal framework that also grants them insured status in the public pension system and health insurance system. This study aims to analyse how Romania has sought to regulate the protection of domestic workers, as well as the taxation of their work, including*

through the implementation of a digital platform for managing work tickets for domestic workers.

Key words: *domestic services; the fundamental right to work; the protection of domestic workers; taxation; work tickets.*

Introduction

Romania assumed several reforms through the National Recovery and Resilience Plan (PNRR) approved by the European Commission on 27 September 2021 and by the Council of the European Union by the Implementing Decision of 3rd November 2021. In the contents of Component 13, Social reforms, Pillar V, Health, and economic, social and institutional resilience, the introduction of the work tickets and the formalization of work for domestic workers is set out as one of the main measures to be taken within the social reform, being the object of Reform R4 whose responsibility comes to the Ministry of Labour and Social Solidarity and to the National Agency for Employment (ANOFM), it aims at fighting the undeclared work activities from the informal economy in the sector of domestic services, and increasing the incomes to the State budget. The reform will be implemented gradually during 2022 – 2026 and consists in ensuring the legal framework and in the operationalization of an electronic platform managed by ANOFM through its territorial structures. Pursuant to the commitments assumed through PNRR, the electronic platform of registration the performance of the domestic activities will manage all the measures adopted by the lawmaker and reaching the targets established, including those related to the registration of a number of 30,000 beneficiaries that will use the services of domestic activities carried out by domestic providers paid exclusively through tickets for domestic activities, and of a number of 60,000 domestic providers previously registered as unemployed or inactive individuals, until the end of the implementation period.

In accordance with the policies with regard to stimulating employment and encouraging flexible work forms, they adopted Law no. 111/2022 on regulation the domestic provider activity whose main goal is to reduce undeclared work in this regard. Thus, as a measure of fighting the phenomenon of undeclared work (Nenu, 2014, pp 81-91) in the domestic field, they introduced an instrument called domestic activity ticket (service voucher). The measure introduced by means of the law is meant to formalize the already existing occasional work relationships, but in a simplified way, so that the registration of domestic beneficiaries, of household activity providers and of the payments between them, by means of domestic activity tickets, be as easy, flexible and unbureaucratic as possible. This way, both the domestic beneficiary and the domestic provider are motivated to formalize the occasionally performed work relationships between them. Also, the law ensures the possibility of the low qualified/educated workers to perform paid activities within a legal framework.

We appreciate that the legislative document answers to the contemporary social reality where most of the low-educated citizens of the country used to perform their activity without benefiting from social protection measures.

1. The current legislative regulation of the work of the domestic activity provider: at the same time offering the opportunity to benefit from social, respectively the insurance in the pension and the health systems.

The main regulations introduced by Law no. 111/2022 on regulation the domestic provider activity (published in Official Journal, Part I, no. 402 of 27 April 2022, amended by OUG 38/2024 for amending and adding Law no. 111/2022 on regulation the domestic activity provider – the Romanian Government, published in Official Journal, Part I no. 388 of 25 April 2024), derogatory from the provisions of Law no. 53/2003 – Labour code (Republication (r1) in Official

Journal, Part I, no. 345 of 18 May 2011, subsequently amended and added), as republished, with further amendments and additions, in the sense that a natural person, named provider, performs a domestic activity for the benefit of another natural person named beneficiary, based on a legal relationship established by the parties` agreement, without the obligation of a written document. The payment of the activity performed by the domestic provider is made based on some domestic activity tickets, available in printed form or on electronic support, the nominal value of a ticket being 15 lei on the date of adopting the law. The payment is made exclusively based on the domestic activity tickets, whose number is mutually established between the parties. The value of the work performed is negotiated according to the intensity and duration of the domestic activities performed, as there is no correlation between the value of the ticket and the hour of work performed.

The beneficiaries can purchase the domestic activity tickets from the employment agencies, from the universal service provider or by payment order/ transfer into the bank account indicated by the domestic provider through the electronic platform of registration of the performance of the domestic activities. The domestic providers exchanges tickets into money, withholding tax income and state social insurance contributions from their nominal value. As a tax facility, the basis of calculation for which the income tax quota is applied, respectively the social insurance contribution quota, is 50% from the ticket nominal value. Upon exchanging a certain number of domestic activity tickets, as the minimum value of the monthly contribution cannot be less than 25% from the value of the gross minimum salary at national level guaranteed for payment, the domestic provider shall benefit from insurance within the state social insurance system and the health insurance system. Also, public and private employers cand grant domestic activity tickets to their own employees, as a bonus.

The lawmaker defines the notions used within the domestic provider work in the contents of Law no. 111/2022, as follows:

- domestic activity is the occasional, non-qualified activity performed by a domestic provider in the household of the domestic beneficiary, at the residence of the domestic provider or in any other

place necessary to its performance; the domestic activity is not performed for a commercial purpose and shall not be executed in the benefit of some third parties;

- domestic provider is a natural person who can perform domestic activities in one or more households, in exchange of some payments granted exclusively in the form of domestic activity tickets, under this law; a domestic provider can also be the informal carer – non-qualified person, member of the family, a relative or any other person, who offers personal care, respectively the help for performing basic and instrumental activities of daily life, by the person who has lost his/her functional autonomy – as defined in art. 6 letter ș) from Law on social assistance no. 292/2011 (Published in Official Journal, Part I no. 905 of 20 December 2011, amended by the following legislative acts: OG 31/2015; OUG 82/2016; L 79/2017; L 110/2017; L 194/2018; L 231/2020; L 100/2024), who is not a member of the domestic beneficiary`s family and who did not sign an informal care agreement with the public service of social assistance, pursuant to the provisions of art. 13 of Law no. 17/2000 on social assistance of elder persons (Republished (r3) in Official Journal, Part I no. 868 of 29 August 2024, amended by OUG 106/2024). A person can be a domestic activity provider only if he/she is at least 16 years old.

- domestic beneficiary is the natural person for whom the domestic provider shall perform domestic activities;

- domestic activity ticket is the voucher designated for the payment of the domestic activities performed by the domestic provider;

- household is the entirety of the immovable assets, consisting in the building s for dwelling, their corresponding annexes, yards and gardens, as well as the movable assets used in performing the domestic activities.

The domestic activity can be performed in the domestic beneficiary`s household, at the residence of the domestic provider or in any other place necessary to its performance, mutually established and it is mandatory to be mentioned in the contents of Law 211/2022, i.e.: cleaning/hygiene of the dwelling; gathering the vegetal waste from the garden, maintaining green spaces; maintenance and irrigation of saplings

and plants; pruning trees; planting trees and bushes, planting saplings; ironing; manual or automatic washing of clothes; washing carpets; preparing food; setting and serving meals; cleaning up and washing up; feeding and/or caring pets; walking dogs or other pets; transporting pets to/from the veterinary clinic; cleaning and maintaining pools/fish tanks; shopping; cutting and splitting fire wood; carrying fire wood and materials; washing and cleaning vehicles; harvesting fruit and vegetables; window and carpentry washing; whitewashing tree trunks; carrying out body hygiene for dependent persons; transferring and mobilizing dependent persons; facilitating communication of dependent person with other persons; loading and unloading of domestic items; facilitating the moving of dependent persons inside; facilitating the moving of dependent persons outside; accompanying dependent persons to socialising activities and/or socializing with dependent persons.

2. Rights and obligations of the domestic activity provider and of the domestic activity beneficiary.

By derogation from the provisions of the Labour Code, the rights and obligations of the domestic activity provider and beneficiary, are not subject to the principle of protection that the employee enjoys, as part of a typical and classical legal work relationship (Athanasiu, 2019, pp. 19-42). The domestic provider and the domestic beneficiary establish a legal relationship by their agreement without written form and mandatory contents, as provided by the Labour Code in case of the individual work agreement. The domestic provider and beneficiary agree upon the number of hour or the amount of work and upon the payment corresponding to the domestic activity. The domestic provider`s payment is made exclusively with domestic activity tickets. The daily duration of performing domestic activities for a domestic beneficiary cannot exceed 12 hours, respectively 6 hours for domestic providers between 16 and 18 years of age.

2.1. The domestic provider has the following rights:

- to payment for the activity performed, pursuant to the agreement with the domestic beneficiary and pursuant to the provisions of this law;

- to respect the dignity in performing the domestic activities;
- to protection against any form of abuse, harassment or violence;
- to be verbally informed regarding the use of different tools and/or devices offered by the beneficiary in order to perform domestic activities, before performing the activity;
- to benefit from the capacity of an insured person within the social security system;
- to be informed by the domestic beneficiary with regard to the rights and obligations that he/she has pursuant to this law.

2.2. The domestic provider has the following obligations:

- to perform the domestic activities that he/she is paid for, pursuant to the agreement with the domestic beneficiary;
- not to transmit to third persons any data or information that he/she has become aware during the performance of domestic activities;
- to inform the domestic beneficiary, by any means of communication, in due time, when he/she cannot respect the schedule of performance of the domestic activities mutually established with the domestic beneficiary;
- to properly use their own tools and/or devices necessary to perform the domestic activities, or the ones offered by the domestic beneficiary;
- to sign in the corresponding box from the domestic activity ticket that he/she was informed regarding the rights and obligations under this law.

2.3. The domestic beneficiary has the following rights:

- to verbally establish with the domestic provider, the domestic activities and the schedule of carrying them out, before starting them verbal;
- to verify the modality of accomplishment of the activities by the domestic provider;
- to use the domestic activity tickets granted by the employer, provided in art. 11 para.1 from this law, for his use and benefit.

2.4. The domestic beneficiary has the following obligations:

- to ensure proper conditions for the performance of the domestic activities;

- to purchase the domestic activity tickets;

- to use the domestic activity tickets as the only form of payment for the domestic activities performed;

- to make the payment pursuant to the agreement with the domestic provider and to the provisions of Law no. 111/2022;

- to keep the confidentiality of the domestic provider`s personal data;

- to inform the domestic provider, by any means of communication, in due time, when he/she changes the schedule of performance of the domestic activities mutually established with the domestic provider;

- to inform the domestic provider regarding the proper use of the tools and/or devices in case the beneficiary offers them in order to perform the domestic activities;

- to fill in the domestic activity tickets on hard copy with the date of granting them, name and surname of the domestic provider and his/her personal identification number, as well as with the date when the paid domestic activities were performed;

- to fill in the domestic activity tickets on hard copy with his/her personal data regarding name, surname and personal identification number;

- to inform the domestic provider regarding his/her rights and obligations pursuant to the provisions of this law;

- to sign, in the corresponding box from the domestic activity ticket, that he/she agrees with his/her rights and obligations under this law.

3. Methodological enforcement aspects of Law 111/2022 on regulation of the activity of the domestic provider

In accordance with the provisions of art. 17 and art. 19 of Law no. 111/2022 on regulation of the activity of the domestic provider, the Ministry of Labour and Solidarity submitted to the Romanian

Government the methodological regulations of enforcement of the law (The methodological regulations of enforcement of provisions of Law no. 111/2022 on regulation of activity of domestic provider, of 23.06.2022, were approved by government decision HG 822/2022 on 27/06/2022, published in Official Journal, Part I no. 631 of 27 June 2022, Correction 2023; amended by HG 860/2024).

In the contents of the regulations, it was established the modality to grant domestic activity tickets, regulating aspects related to:

3.1. The modality by which the domestic beneficiary uses the domestic activity tickets

- by creating an online account for registration into the electronic platform for registration of performing domestic activities;
- establishing the template of the domestic activity ticket both on pater and electronic format. It contains fields especially designated to the information with regard to: identification of the domestic beneficiary and provider, data regarding the validity of the ticket, including the mandatory security elements; the elements provided in the format proposed by the methodological regulations for the hard copy tickets, will be taken into account for the conclusion of the printing agreement;
- establishing the template of request by which the domestic beneficiary requests the reimbursement of the value of unused domestic activity tickets;
- specifying the time limits and the modality regarding the reimbursement of unused domestic activity tickets by the domestic beneficiary, respectively until the end of the 30th calendar day from the date of expiry of the validity registered on the domestic activity ticket, as well as the time limit in which he/she is paid up the value of the tickets;
- introducing the template of request by which employers, on behalf of the employees, address to employment agencies to request the start of the procedure to sign an agreement regarding the acquisition of domestic activity tickets;
- establishing the modality by which the domestic beneficiary and the employer can request to employment agencies the granting of a number of 50, respectively 75 free tickets as a result of the acquisition of

a number of at least 600 tickets in a calendar year; introducing templates of request regarding granting free tickets. The description of the methodology with regard to granting domestic activity tickets by employers to their own employees.

3.2. Exchange of domestic activity tickets into money by the domestic provider by regulation of the:

- modality by which the domestic provider can exchange domestic activity tickets into money, both the hard copy and the electronic one, by addressing to employment agencies or to the universal service provider, respectively online by means of the registration on the electronic platform.

- specification of time limits in which the domestic activity ticket purchased by the beneficiary and granted to the domestic provider can be exchanged into money.

- establishment of the template of payment slip drawn up by employment agencies by which the domestic provider receives the values in money of the exchanged domestic activity tickets on hard copy.

3.3. Tax obligations

- description of the steps made by the employment agencies in order to withhold the income tax and the state social security contribution owed by the domestic provider, including the time limits they have to fall within;

- specification of the time limits that the domestic provider will have in view when exchanging the domestic activity tickets in order to benefit from the status of insured person in the state social security system and in the health social security system;

- the template of the certificate proving the compliance of the conditions provided in art. 9 para.5 of Law no. 111/2022 on regulation of the activity of the domestic provider, in order for the domestic provider to acquire the capacity of insured person in the health social security system.

3.4. The electronic platform for registration of performing the domestic activities.

- the facilities offered by the electronic platform, purchased by the Ministry of Labour and Social Solidarity, and operational at the level of

employment agencies, in the process of managing the implementation of legal provisions on the activity of the domestic provider.

- the modality of usage of the electronic platform by the domestic beneficiaries and providers.

Conclusions

The adoption of Law 111/2022 is an important step in the implementation of reform no. 4 provided in the Romanian National Recovery and Resilience Plan. Thus, both the institutions involved in the reform implementation, and the domestic beneficiary and provider benefit from an easy system of management and access of domestic activity tickets. Using this payment instrument, respectively the domestic activity ticket, the domestic provider acquires the quality of an insured person in the social security system and in the health social security system. Thus, they offer the domestic providers the opportunity to benefit from the status of insured person both in the state social security system and in the health social security system, by facilitating the access to the basic medical health services package in case they are not insured.

An important category of potential beneficiaries of Law no. 111/2022 is the lower-secondary educated unemployed persons who represent over 30% from the number of the unemployed individuals registered in the records of the National Agency for Employment.

Another category of potential domestic activity providers is represented by the persons beneficiary from the minimum inclusion income, granted based on Law no. 196/2016 on minimum inclusion income (published in Official Journal, Part I no. 882 of 03 November 2016, with further amendments and additions).

As a result of the PNRR commitments within Component no. 13 – Social reforms (https://mfe.gov.ro/pnrr/), reform 4, Introduction of work tickets and formalization of work for domestic workers, the aim is that, from the possible categories of the above-mentioned vulnerable persons, until the end of 2024, a number of 20,000 persons become domestic providers, and until the end of the PNRR implementation

period, their number to reach the value of 60,000 persons. Thus, they offer the persons who wish to have the capacity of domestic persons the possibility to exchange their status from inactive person on the labour market into a person who takes part in the formal economy.

The adoption of Law 111/2022 has also an impact on the economy, contributing to the increase of the employment of the active population and to the decrease of the poverty rate, by completing the incomes of beneficiaries of minimum inclusion income with the occasional incomes obtained from performing domestic activities, at the same time allowing the unemployed individuals registered at the National agency for Employment to continue to benefit from the rights and measures provided by Law no. 76/2002 on the unemployment insurance system and stimulation of employment (Published in Official Journal, Part I no. 103 of 06 February 2002, with further amendments and additions).

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DEVIATIONS IN RESEARCH ACTIVITY

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Abstract: *The relevance of the research and its quality is imposed in art. 3 line.1 letter b) of L.nr.199/2023 is directly related to the progress of knowledge and the socioeconomic environment, as not only through education but also through research activity does the education system meet the needs of society.*

Academic freedom leaves the research activity up to the educational community members. Still, there are legal constraints aimed at ensuring a level of its quality, the main tools used by the legislator being the regulation of deviations from good conduct in scientific research activity and their consequences.

A fabricated, falsified, plagiarized result obtained entirely through the contribution of others or AI technology is not research within the meaning of the law, does not support progress, is dangerous, and must be removed.

Keywords: *research; the relevance of research; rules of ethics in research activity; deviations.*

Introduction

The Higher Education Law requires that research activity carried out within higher education institutions be characterized by originality and relevance for the progress of knowledge and the socioeconomic environment, two distinct conditions, treated differently, including from

the perspective of deviations from the rules of good conduct in research activity scientific.

We focused on originality in a previous study (Tabacu, 2023), mainly from the perspective of the tools or means that universities have at their disposal, significantly to determine the degree of originality of the works, leaving open the discussion on the relevance of the research activity carried out within them, a matter that depends on the idea of research quality.

About originality, the higher education law (Law no. 199/2023) first generically imposes the obligation for the research to be original, all types of works (bachelor's, master's, doctoral, scientific articles, projects, patents, books, etc.) (art.18 para.a)) being targeted, after which it refers concretely to postgraduate theses, both within the scientific doctorate university study programs and for the professional doctorate, regarding which it shows that their purpose is the creation of original knowledge (art.61 para. 6.a) and b)), and regarding the habilitation theses it requires that they reveal the achievements professionals that are characterized by originality (art.69 para. 5.a).

At the same time, the relevance of the research, a quality of it, is imposed in art. 3 lin.1 letter b) of the law in direct connection with the progress of knowledge and the socioeconomic environment, as not only through education but also through research activity does the education system meet the needs of society (Drăghici, 2023, p. 228).

However, the law expressly refers only in the case of the doctoral thesis to the need for it to reveal original scientific knowledge, which is internationally relevant (art.61 para. 6.a)), and for the habilitation thesis to present the relevance of academic, scientific, and professional contributions, which at first glance could lead to the wrong conclusion that the rest of the specific research activity carried out in the university environment (master theses, scientific articles, projects, patents, books, etc.) should not present relevance for knowledge, respectively for social and economic evolution.

The quality of education is determined not only by the learning environment (Gheoculescu, 2023, p. 239) but also by the connection with research and innovation (art. 223 para. 3). Also, art. 3 letter b) of the

above-mentioned law requires that research be relevant for the progress of knowledge and the socioeconomic environment, without distinguishing between types of research or its results, which determines the direct consequence that all research activity should have relevance to the world and its evolution.

The law guarantees the members of the university community academic freedom (Tabacu, 2023, p. 44), representing a principle of the national higher education system (Iancu, 2023, p. 221); under this freedom, having the possibility, among other things, to carry out research and creative activities following the criteria of academic quality.

It follows that the research activity is at the discretion of the academic community members. Still, there are legal constraints aimed at ensuring a level of its quality, the main tools used by the legislator being the regulation of deviations from good conduct in scientific research activity and the consequences of them.

Deviations

Between novelty and relevance, research conditions, there is an intrinsic link because if the research is characterized by originality in the sense of discovery, plus newly added value, it is possible to retain the requirement of relevance for the socio-economic environment and progress in general.

Even if, as I have shown on other occasions, the novelty of the theme does not automatically reveal originality (Rughinis and Voinea, 2018, pp.15-22), the hypothesis of the emergence of a new reality or new types of relationships being discussed, if the way of treating, explaining, clarifying, developing or combating the theme in the research material respectively it is original, it also appears as relevant for progress. It has been suggested in the cited literature above that "scientific research achieves its goal if it makes the authors and readers of the reports learn something that is not already known in the scientific community interested in that discipline."

Academic freedom and in research activity does not open the possibility for members of the educational community to publish any studies or articles, to obtain and carry out national and international grants, under any conditions, but these must have relevance for society and the progress of knowledge.

In this context, it becomes clear that even well-documented research, which has no relation to the socio-economic environment's real needs and is not helpful for evolution, only apparently satisfies the purpose of the study. Thus, the preparation of material that reproduces a previous report, that reproduces a law, that presents an economical, social, legal, or other situation, which has been revealed before, that does not bring any clarification in the respective field but only presents a situation known, without new results, interpretations, comments, criticisms or proposals, does not meet the value sought by the legislator.

Given that the research activity is imposed on the members of the academic community, especially the teaching staff, as a criterion for evaluation and to ensure promotion to a higher position, the members of the educational community will be permanently concerned with fulfilling the requirements in the field of research, be they related to the number of articles, number of citations, participation in conferences or research contracts or grants. This concern must not go beyond what is expected, necessary, and reasonable in developing real research that meets the requirements of originality and relevance.

To warn about the obligation to observe good conduct in the research activity, Law no. 199/2023 provides, on the one hand, deviations from the norms of ethics and deontology in the activity of university research and, on the other hand, deviations from the standards of ethics and deontology in the activity of communication, publication, dissemination and scientific popularization, to distinguish between the documents specific to the stage of research development and the subsequent ones, which relate to dissemination to the public.

Compared to the facts regulated in the category of misconduct, it follows that the legislator is concerned with realizing a real, unfalsified, valuable research activity; only this can be relevant for progress and evolution. At the same time, any hostile attitude shown to the researcher

or his activity by other people, members of the academic community, must be rebuked and sanctioned, to allow the completion of the research activity.

Partially taking from the provisions of Law no. 206/2004 regarding good conduct in scientific research, technological development and innovation, the current higher education law prohibits the preparation of results or data and their presentation as experimental data, as data obtained through calculations or numerical simulations on the computer, or as data or results obtained through analytical calculations or deductive reasoning (art.168 para. 1.a) from Law no. 199/2023). It is under discussion the imagining of non-existent results, the invocation of data that have not been received but which are desired, pursued by the researcher, and which would impact the respective field. The gravity of this situation, similar to the crime of intellectual forgery, is special since the researcher not only did not obtain those results as a result of the research activity carried out but also presents them, reports them, thus launching an unrealistic hypothesis in the respective field, which passes of the limits of a simple lie, sometimes accepted in various social environments. The author does not just lie, he falsifies, imagines, creates results that do not exist, which are fictitious and which he brings to the field, trumpeting a success about those results, from which other researchers in good faith can go astray in their research activity.

Another severe act is falsifying experimental data, data obtained through calculations or numerical simulations on the computer, or data or results obtained through analytical calculations or deductive reasoning (art.168 para. 1.b) from Law no. 199/2023). Here, the researcher obtains specific results at the end of the research activity. Still, these are not the desired ones or that would be likely to change something in the level of knowledge from that moment, so he changes their content, changes them, modifies them, selects them, separating and presenting only the desired ones, depending on an ideal result pursued, proposed from the beginning of the research or identified along the way and which would be helpful in that field.

This is where the crime of intellectual forgery can truly be found because, when preparing the results, the researcher presents a different reality than the one obtained at the end of the research activity. The law defines the falsification of research results by referring to art. 169 letter c) to selective reporting or rejection of data or unwanted results, manipulation of representations or illustrations, alteration of the experimental or numerical apparatus to obtain the desired data, without reporting the alterations made, to distort the scientific truth.

Not far away, deliberately hindering, hindering, or sabotaging the research activity of other people represents another fact that reveals, in addition to its serious content from the perspective of the impossibility of carrying out the research activity, an essential problem of morality of the lack of verticality of the author academic community member of the fact. Various material elements of the act are presented, for example, the unjustified blocking of access to the spaces intended for university research, damage, destruction, or manipulation of experimental apparatus, equipment, documents, computer programs, data in electronic format, organic or inorganic substances or of the living matter needed by other people for the research activity.

Also, plagiarism falls into this category of deviations from good conduct in research activity, as it represents taking over the activity or research results of another person without revealing this, with the consequence that that research is presented as belonging to the plagiarist. Beyond dishonesty and theft, the deception perpetrated on all those who trust in the said research, plagiarism is dangerous because it automatically eliminates the condition of the relevance of the said research results since it has already been done previously by another person.

At this point, regarding the concrete violation of the rules of good conduct in the activity of carrying out research, several alarm signals have been issued lately regarding the publication of unreal, false research or taken from other people, the particular volume high in the last period of retracted works as a consequence of the identification of deviations revealing an unhealthy practice in research activity, a rush to increase the

number of contributions that count for establishing a particular score in the university career.

Thus, a study carried out by Nature magazine (Van Noorden, 2023, p.480) revealed that in 2013, there were approximately 1,000 things withdrawn due to the identification of deviations from the norms of good conduct in research, while in 2022, there were 4,000, and in 2023, over 10,000 of withdrawn works and it has been stated that this is only the tip of the iceberg. It was found that the published works contain gibberish, fraudulent citations, and plagiarism, and the number of articles produced by the so-called "paper mills," entrepreneurs who sell fake works, amounts to hundreds of thousands, not considering the works that, although genuine, may be scientifically flawed.

When the author chooses to proceed fraudulently to subsequently declare a research activity, either to fulfil his duties, to access a higher position to be promoted, or to obtain a higher salary, the seriousness of the act is amplified.

Attitudes that fabricate results or replace those obtained with fictitious ones, hide unwanted results, or selectively present only a part that the researcher follows, publish the same work more than once, and enter false information in requests are not allowed for grants or repeated funding of the same results is requested.

Indeed, suppose there is a question of differences of opinion, experimental conception or practice, different interpretations of the same data with the related argumentation, or the presentation of contradictory data. In that case, it cannot be considered a violation of the norms of good conduct in research.

Unfortunately, the practice reveals a series of serious facts that violate the ethical norms in the research activity, and that must be censured and sanctioned because it determines irrelevant research that does not achieve its goal, that creates danger for society, or even the lack of research activities, so necessary for progress.

One obvious problem is that of cross-citations, genuine citation networks managed by a single point of command (Else, 2022), which coordinates them so that authors and works are cited that the referencing

author does not know, has not read, but is "served" by the broker. It turns out that it's just a simple sign-up in a network, and the coordinator keeps pointing out the works to be cited so that the base work is also cited by someone completely unknown.

Another fraudulent method in the field of citations concerns the situation where a group of determined people, without resorting to a professional coordinator, agree to divide the group into several teams (of several people, for example, 3), which will carry out work in co-authorship, in which they cite members of another team who do not cite these authors in response but authors from another team, so that reciprocity cannot be identified, to create the appearance of independent, genuine citations, which effectively aim to reveal the research being done sending.

Similarly, when the group members cite each other excessively to determine concrete consequences, perhaps the artificial increase of the Hirsch index (Popescu, 2018, p.47), which represents a criterion for evaluating the research activity, which is thus altered, was identified.

Problems can also arise when a work is sent to several journals at the same time to obtain a faster review and even acceptance for publication, communication between editors regarding the identification of such a situation being difficult in the context in which the work and the author are confidential and the laws that regulate free competition and prohibit anti-competitive agreements are not favorable to such collaborations between publishers (Else, 2022). Developing software to identify such situations based on the identity of the images used in the work, titles, or summaries (Else, 2022) could be a solution.

Attempts are being made to take direct measures against these practices; the Committee on Publication Ethics (COPE - non-profit organization on ethics in academic publishing, Eastleigh, UK), and the International Association of Scientific, Technical and Medical Publishers (STM - a global trade association based in The Hague, the Netherlands develops STM Integrity Hub) - Oxford organizing a summit in May 2023 - UNITED2ACT, which brought together leading researchers international, independent analysts of research integrity, as well as representatives of funding bodies and publishers (Liverpool, 2023), who

proposed, among other things, the measure for binding the author to present the experimental data on which the research is based, all the more so as currently the use of AI in research is becoming more common. It is difficult to distinguish between research that only uses AI and fake research that is entirely the result of using AI. Also, the problem of identifying some communication channels between editors for reporting possible paper mills was raised.

The use of AI in research activity cannot automatically be considered a deviation from the rules of good conduct within this activity. Still, producing a work entirely with artificial intelligence harms the prestige of the school, the researcher, and the university environment in general, as it lacks all the contribution of the "author," who thus claims to be the creator. While accepting the use of ChatGPT for writing a paper, with the author taking the outcome, including ethical responsibility for it, it was noted that lucidity is needed in deciding when, how, and why to use AI, as it should only help and not to replace the concrete research activity (Basgier, Sharma, 2023).

In various fields, many regulations and codes containing rules on the use of AI have been researched and found to reveal basic rules or principles that appear regulated in all of them as a common trunk (Corrêa, Galvão, Santos, Del Pino, Pinto, Barbosa, Massmann, Mambrini, Galvão, Terem, de Oliveira,). For example, the principles of transparency/explainability, reliability/security/trust (using AI is safe and robust, providing accurate information), justice/equity/non-discrimination, respect for privacy, and responsibility/responsibility were retained among the first five. The latter aims to hold the developers of AI technologies responsible for their actions and the impact caused by their technologies on humans and the environment. It is also crucial in maintaining the autonomy of human decisions during human-AI interactions. It is also essential that human training and education be related to technological progress, as more people as possible should have access to such technologies and know how to use them properly.

They support some safety using these tools but do not provide certainties; one of the concerns of researchers regarding the use of AI is

the well-being of future generations, which must be considered given the constant development of AI, which must be addressed by understanding its lasting consequences, of the impact on the environment and non-human life.

That is why, even from a general perspective, the use of AI must be carried out with caution by people who have the ability to use it. When it comes to research, this attention must increase, since without human control or intervention, it reaches a double violation of ethical norms: on the one hand, because the reported research is not the actual result of human effort, of the holder who arrogates it to himself, and on the other hand, because the result can be flawed, i.e. irrelevant research or even erroneous, which does not contribute anything to progress, on the contrary, it blocks it.

Similarly, the seriousness of the act is evident when authorship is claimed over commissioned works or to which only other people have contributed, whether they accept this or do it for a fee.

Deviations from good conduct in the activity of scientific communication, publication, dissemination, and popularization refer to situations in which the actual contribution of the authors to the realization of research work is not considered, or material is published without permission, or data is declared unreal to obtain funding or for promotion (art.168 para.2 from Law no. 199/2023).

Compared to the legal provisions, it turns out that it represents a violation of the rules of good conduct in the activity of disseminating research results: mentioning as an author some people who did not contribute to that research activity, sometimes even without their knowledge, to increase the value of the work through the notoriety of the person (Voinea, 2018, p.28); removing an author who contributed to that work; declaration of an activity not yet carried out; presenting research that does not exist to obtain funding or to hold a senior position; receiving undue benefits or claiming rewards of any kind for the performance of research-related duties; buying a work, to be declared as research; requesting exaggerated or unjustified material resources.

Among the deviations from the norms of ethics and deontology in the exercise of the attributions related to the management functions, facts

can be identified concerning the research activity since the law sanctions, on the one hand, the abusive use of the function to personally obtain the quality of author or co-author of publications of subordinates and on the other hand, abuse of authority to obtain the quality of author or co-author or material benefits for spouses, relatives or relatives up to the 3rd degree inclusive (Tabacu, 2023, p.47).

Conclusions

The Higher Education Law prohibits intellectual fraud in any form, even if it lists only specific facts; the legislator intends to prevent and sanction, if necessary, any facts that violate ethical rules.

To talk about authentic, original, and relevant research, it is essential first to determine how it was obtained, developed, and disseminated. Compliance with the ethical and deontological rules in the field of research binds the author to declare only his actual activity, in which he actually participated and which he carried out without committing any deviations, only later being analyzed the requirement of the quality and relevance of the research by reference to its originality and usefulness.

A fraud in the research activity, by making or falsifying some results, by plagiarism, or by using some understandings, means, or technologies that reveal the lack of the author's contribution, determines the conclusion that there is no research activity, automatically the respective result cannot be considered an original contribution and even less relevant.

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ON THE TAXONOMY OF ARTIFICIAL INTELLIGENCE SYSTEMS IN THE VIEW OF THE UNIFORM UNIFICATION LEGISLATION. SPECIAL LOOK AT "HIGH RISK" IN BUSINESS-TO-CONSUMER, BUSINESS-TO-BUSINESS CONTRACTS

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Abstract: *The Union Regulation on Artificial Intelligence represents the legal framework intended to stop the abusive use of digital systems and, at the same time, to encourage technological progress while providing effective guarantees to protect fundamental rights and freedoms. The most important step of this regulation was the establishment of risk assessment criteria associated with the development and implementation of artificial intelligence technologies, as well as the careful assessment of potential associated risks. Specifically, the Union harmonization provision defines four determined levels of potential threat associated with the use of AI technologies, namely, unacceptable risk, high risk, limited risk and minimal risk.*

The present study establishes as the main topics for reflection both an analysis of these types of risks and the circumscribed fields of application as well as the specific approach regarding high-risk AL systems in the matter of business-to-consumer and business-to-business contracts. Thus, with regard to automated B2C contracts, we emphasize the need for a "recalibration" of consumer protection legislation in the context of the need to guarantee additional rights to them. With regard to B2B contracts, we believe that appropriate legislation may be needed to protect small and medium-sized enterprises from the abuse of market power by dominant players who may resort to commercial or technological blockages.

Keywords**:** *AI technology; high risk****;*** *business-to-consumer; business-to-business contracts.*

Introductory considerations

On March 21, 2024, the United Nations General Assembly unanimously approved the inaugural Global Resolution on the promotion of artificial intelligence systems suitable for sustainable development. This resolution advocates for the protection of human rights, maintaining the integrity of personal data and, last but not least, establishing monitoring mechanisms to identify risks related to AI. Therefore, it was appreciated that the global resolution adopted at the UN level successfully achieves an appropriate balance between the continuation of development and the protection of human rights.

On May 17, 2024, the Council of Europe adopted the first international treaty generating binding legal effects regarding respect for human rights, the rule of law in the context of the worldwide implementation of artificial intelligence systems.

At the level of the European Union, the president of the European Commission, Ursula von der Leyen, announced in her political guidelines entitled - "A more ambitious Union" - that the union institution she represents will present to the European Parliament and the Council draft legislative acts aimed at regulating AI. In this context, on 19 February 2020, the Commission published the White Paper on "Artificial Intelligence - A European approach focused on excellence and trust", a reference document in which we find, at first glance, a coordinated Union approach to the human and ethical implications of AI, based on the values and fundamental rights of the European Union.

In the context of an in-depth analysis of the implications of AI at the level of the European Union, during the Extraordinary Meeting of October 1-2, 2020, the European Council requested the European Commission to review the existing relevant legislation in order to adapt it to the new opportunities and challenges generated by AI. On this occasion, the European Council called for a clear determination of AI applications that should be considered as having a high degree of risk.

Also, the EU Council, in the Presidency Conclusions on the "Charter of Fundamental Rights in the context of artificial intelligence and digital changes" of October 21, 2020 reiterated in point 5 of the official document about the opportunities and benefits conferred by AI systems, recalling also about the fact that their improper design, development, implementation and use can generate risks for fundamental rights, democracy and the rule of law.

In summary, the European Commission was requested that the legislative project on artificial intelligence address issues such as opacity, complexity, the presence of the degree of unpredictability as well as the behavior generated by the degree of autonomy of certain AI systems, in order to ensure their compatibility with fundamental rights.

Therefore, what are the reference elements of the Union harmonization framework?

First of all, it is noted that the horizontal nature of the harmonization rule requires full consistency with existing Union legislation applicable to sectors where high-risk AI systems are already used or expected to be used (Popa, 2023, Sartor, 2020). We remind you in this regard that artificial intelligence systems in the European Union are subject to applicable product safety legislation, which provides a framework for consumer protection against dangerous products in general, and this legislation continues to apply. Also, this regulation does not affect the rules laid down by other legal acts of the Union on consumer protection and product safety, including Regulation (EU) 2019/1020[1] on market surveillance and product conformity, Directive 2001/95/EC[2] on general product safety and Directive 2013/11/EU[1].

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[1] Regulation (EU) 2019/1020 of the European Parliament and of the Council of 20 June 2019 on market surveillance and product conformity and amending Directive 2004/42/EC and Regulations (EC) no. 765/2008 and (EU) no. 305/2011, OJ L 169, 25.06.2019, p.1-44, consolidated version on 23.05.2024

[2] Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, OJ L 11, 15.1.2002, p. 4–17, consolidated version on 01.01.2024

In the same context, it should be emphasized that the EU legislator had in mind ensuring the coherence of the EU harmonization provision on AI with the Charter of Fundamental Rights of the European Union and with the existing secondary legislation in the European Union on data protection (the Law on AI does not affect the General Regulation on data protection - Regulation (EU) 2016/679)[2], on consumer protection (there is a large corpus of Union regulations on consumer rights including sectoral norms supplemented by transposition or application legislation), on non-discrimination (the harmonization framework complements the existing law in matter with specific requirements aimed at minimizing the risk of algorithmic discrimination, in particular with regard to the design and quality of data sets used for the development of AI systems) and gender equality.

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[1] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on the alternative resolution of consumer disputes and amending Regulation (EC) no. 2006/2004 and Directive 2009/22/EC (Directive on ADR in consumer matters), OJ L 165, 18.06.2013, p.63-79

[2] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Regulation on data protection), OJ L 119, 04.05.2016, p.1-88

I. The classification of artificial intelligence systems based on "risk", in the context of regulations at the Union level

1.1. *S High risk AI systems*[1]

The experts of the Union legislative initiator opine in the sense in which the Union regulatory framework on AI presents the particularity that "it is not excessively normative, so that it does not create a disproportionate administrative burden". In this context, in order to ensure a balance between the need for the most comprehensive regulation and "an institutional non-excess", the European Commission opines on the need for a risk-based approach, thus, the EU institution is of the opinion that a certain AI application should to be generally considered high-risk based on the stake, namely by looking at whether both the domain and the intended use involve significant risks, in particular from the point of view of safety, consumer rights and fundamental rights. More specifically, an AI application should be considered *high risk* if it meets the following two cumulative criteria:

- first, the AI application is used in a field where, given the specificity of the activities carried out, significant risks are likely to occur. This first criterion ensures that the legislator's intervention targets the areas where, in general, there is the greatest likelihood of risks (these areas are exhaustively mentioned in the new AI regulatory framework in a list that must be periodically reviewed and modified, if necessary, according to relevant developments in practice;
- secondly, the application of AI in the aforementioned fields is, moreover, used in such a way that significant risks are likely to occur. This second criterion reflects the recognition that not every

[1]AI systems can be used as a stand-alone software system, can be integrated into a physical product (embedded), can be used to serve the functionality of a physical product without being integrated into it (non-embedded), or can be used as a AI component of a larger system. If this larger system would not function without the AI component in question, then the entire larger system should be considered as a single AI system under this Regulation. See recital 6 b of the Artificial Intelligence Law for further comment.

use of AI inherently generates significant risks. The assessment of the level of risk of a particular use can be based on the impact on the affected parties: for example, the uses of AI applications that produce legal effects or equally significant effects on the rights of a consumer, present a risk of significant material or moral damages, that produce effects that cannot reasonably be avoided.

Pot exista, de asemenea, cazuri excepționale în care, din cauza riscurilor implicate, utilizarea aplicațiilor AI în anumite scopuri trebuie considerată ca prezentând în sine *un risc ridicat*, indiferent de sectorul în cauză. Cu titlu exemplificativ, se pot avea în vedere aplicații specifice care afectează drepturile consumatorilor cât și utilizarea aplicațiilor IA în scopul identificării biometrice la distanță[1] și al altor tehnologii de supraveghere intruzivă.

Specific provisions regarding AI systems that generate a high risk for the health and safety of people but also their fundamental rights and freedoms can be found in Title III of the Union legislative act.

In line with a risk-based approach, these high-risk AI systems are allowed in the European Union's single market subject to certain mandatory requirements and an *ex-ante* conformity assessment.

The classification of an AI system as high risk is based on its intended purpose, under existing product safety legislation. Therefore, classification as a high-risk system depends not only on the function performed by the AI system, but also on the specific purpose and ways in which the system is used. Under this aspect, the standardization law establishes two main categories of AI systems with a high degree of risk, namely:

[1] Remote biometric identification should be distinguished from biometric authentication (the latter is a security process that relies on a person's unique biological characteristics to verify that they are who they say they are). In the case of remote biometric identification, the identity of several people is established with the help of biometric elements (fingerprints, facial images, iris, vein patterns, etc.) remotely, in a public space and continuously or permanently, by verifying them in comparison with data stored in a database.

- AI systems intended to be used as safety components of products subject to an ex ante third-party conformity assessment. Thus, in the light of art. 48 of the AI regulation, the supplier draws up a written EU declaration of conformity[1] for each AI system stating that the high-risk system meets the requirements set out in the regulation and makes it available to the competent national authorities for a period of 10 years after the introduction on market. In this sense, the regulation provides clear instructions and requirements that must be respected, these systems will be subject to compliance tests, as described in Annex III to the regulation, consisting in principle of risk and quality management systems but also in specific compliance measures such as:
  a) performing data management;
  b) providing technical documentation to demonstrate compliance and to provide the authorities with the necessary data to evaluate this compliance;
  c) the implementation of several mandatory design features, for example, record-keeping capabilities, the ability to implement human supervision by those who implement the system, which will reach appropriate levels of precision, robustness and cyber security.
- other autonomous AI systems, with implications mainly for fundamental rights, which are explicitly listed in Annex III. The different types of high-risk artificial intelligence systems are clearly and specifically described, together with their possible uses, in Annex

[1]As the Union legislator states in art. 24 of the standardization regulation, if an AI system with a high degree of risk associated with some products is introduced to the market or put into operation together with the product manufactured in accordance with the respective legal acts and under the name of the product manufacturer, the latter assumes responsibility for the compliance of the AI system with the same obligations as those imposed on the supplier. Also, the compliance obligation rests with the distributors, based on art. 27 of the regulation, before making available on the market an AI system with a high degree of risk.

III to the AI Regulation. The Annex also presents the categories of systems that, although considered high risk, can be implemented if certain specific requirements are met. This is the case for non-prohibited biometric systems, such as remote biometric identification systems, excluding (i) biometric verification that confirms that a person is who they claim to be, (ii) biometric classification systems that infer sensitive attributes or characteristics or protected and (iii) emotion recognition systems.

1.2. About the prohibition of Al systems classified with unacceptable risk

This category includes systems that represent a critical social threat to people, their rights and any social aspect. Therefore, artificial intelligence systems that have the potential to use subliminal, manipulative or deceptive techniques to distort behavior and prevent or hinder the decision-making process, as well as systems that are capable of exploiting vulnerabilities to distort normal behavior constitute a significant risk of harm. This category includes different types and situations that can directly and even permanently affect human life.

Thus, Union provisions inserted in art. 5 prohibit uses of artificial intelligence that threaten the rights of citizens, including biometric classification systems[1] based on sensitive characteristics of individuals. The purposeless extraction of facial images from the Internet or CCTV footage to create facial recognition databases is also among the prohibited uses. Emotion recognition in the workplace and schools, social

[1] The notion of biometric data used in this regulation is consistent with the notion of biometric data as defined in Article 4 paragraph (14) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons in regarding the processing of personal data and regarding the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).- "Data based on biometric data are additional data resulting from specific technical processing relating to physical, physiological or behavioral signals of a natural person, such as facial expressions, movements, pulse rate, voice, keystrokes or gait, which may allow or not or that can confirm the unique identification of a natural person".

scoring, predictive policing systems (when they are based only on profiling a person or analyzing their characteristics) and AI that manipulate human behavior or exploit vulnerabilities will also not be allowed people.

In very specific and strict conditions, such systems can be used especially when not using such a tool can cause more harm than risk, and must still ensure the protection of people's rights and freedoms. The three situations that allow this scenario are:

- search for missing persons, victims of kidnappings and persons who have been subjected to human trafficking or sexual exploitation;
- prevention of a substantial and imminent threat to life or a foreseeable terrorist attack; or
- identification of suspects in case of serious crimes (for example, murder, rape, armed robbery, drug trafficking and illegal weapons, organized crime and crimes against the environment, etc.).

1.3. AI with limited risk. Regarding the limited risk category, the law imposes specific transparency requirements to ensure adequate awareness when AI systems are used. Also, developers must ensure that the content generated by AI, such as text, images or audio-video content, is clearly identifiable as such (the use of AI must be transparently disclosed). In addition, various other criteria must be met for AI-generated content intended for large-scale public use.

1.4. Minimal AI risk. With reference to the category of products implemented with minimal risk AI systems, according to the regulatory provisions, they are allowed without significant conditions. However, various codes of conduct regarding low-risk AI are expected to be implemented in the future. These systems include applications such as AI entertainment applications, video games and spam filters that include AI. Currently, most of the AI systems used in the European Union fall into this category.

II. The implications of EI in business-to-consumer contracts. The particular case of liability for damages caused to consumers by defective products

The existence of a clear Union regulatory framework, coherent in relation to other actions to promote innovation capacity and competitiveness, aims to strengthen consumer and business confidence in artificial intelligence systems, which implicitly generates the acceleration of technology adoption.

Developers and operators of AI systems are already subject to the rigours of EU legislation on fundamental rights (such as data protection, privacy, non-discrimination) and consumer protection, as well as product safety and product liability rules.

In this context, within business-to-consumer contracts, consumers expect to benefit from the same level of safety and respect for their rights, regardless of whether or not a product is based on the implementation of an AI system. However, some specific characteristics of AI (eg opacity) can make enforcement and enforcement of this legislation difficult. For this reason, it is necessary to examine and possibly reconsider to what extent the current legislation is prepared to address the risks of AI and if it can be ensured its effective compliance, or on the contrary adaptations of the legislation are necessary or why not, it is necessary to adopt new legislative provisions.

What is causing concern for consumers?

Consumers of the Union space know that AI can bring important benefits, including by increasing the safety of products and processes, but it can also cause damages that can be both material (safety and health of people, property damage) and moral (non-respect of privacy, limitation the right to freedom of expression, non-respect of human dignity, discrimination, etc.). In particular, AI technologies integrated into products and services may generate new security risks for users. These risks can be caused by deficiencies in the design of AI technology, issues with data availability and quality, or other issues arising from machine

learning. Specifically, under Directive 85/374/EEC[1] on liability for defective products, the manufacturer is liable for the damage caused by a defective product, or in the case of a product with an integrated AI system, it is difficult to prove the existence of a defect of the product, the damage caused and the causal link between the two. Moreover, we ask rhetorically to what extent the provisions of the aforementioned directive apply to defects resulting from deficiencies in the product's cybersecurity?

Unanswered questions... this explains why the Union legislator launched on September 28, 2022 a Proposal[2] for a directive on liability for defective products repealing Directive 85/374/EEC. Specifically, the legislative proposal responds to the reality of products in the digital age, in a technology-neutral way, by including software and digital production files in the product definition and by clarifying the situations in which a related service must be treated as a component of a product. Also, to reflect the changing nature of products in the digital age, as well as CJEU jurisprudence, factors such as interconnectedness or self-learning functions of products have been added to the non-exhaustive list of factors to be considered by courts when assessing defectiveness. To the same extent, the new Union framework will take into account the categories of economic operators that can be held liable for defective products taking into account the increasing importance of products manufactured in third countries that are introduced into the single market, ensuring that there is always in the European Union an economic operator against whom a claim for compensation can be made. The same legislative proposal clarifies the situations in which economic operators who make changes to a product, such as in the context of business

[1] Council Directive 85/374/EEC of 25 July 1985 on the approximation of laws and administrative acts of the Member States regarding liability for defective products (OJ L 210, 7.8.1985, p. 29).

[2] Proposal for a Directive of the Parliament and of the Council on liability for defective products {SEC(2022) 343 final} - {SWD(2022) 315 final} - {SWD(2022) 316 final} - {SWD(2022) 317 final} Brussels , 28.9.2022; COM(2022) 495 final

models based on the circular economy, can be held liable for existing defects.

Regarding the set of changes stipulated in the legislative proposal, we mention:

o if there are two or more responsible persons, they are jointly and severally liable.

o where a defective product causes injury, the contributory actions of third parties do not reduce the manufacturer's liability, but those of the injured person may do so.

o in order to ensure consumer protection, it is important that liability cannot be excluded or limited by contract or other legislation.

o it is not allowed to establish maximum or minimum financial ceilings for compensation.

o the three-year term provided for in the current directive for the initiation of procedures remains unchanged.

o economic operators are liable for defective products for a period of ten years after the product has been placed on the market, but claimants will benefit from an additional period of five years in cases where the symptoms of bodily injury appear at a slow rate, for example following ingestion of a defective chemical or food product.

Therefore, it is stipulated in the considerations of the legislative project that in order to ensure greater legal security, the innovative provisions explicitly target the new risks presented by emerging digital technologies and their implications, among which we mention:

(i) the opacity of algorithm-based systems carries a high degree of risk and could therefore be addressed through transparency requirements;

(ii) the autonomous behaviour of certain AI systems during the life cycle may involve essential changes to the products, which may affect safety. Moreover, a special place is given to the implications it generates - "human supervision" starting from the product design stage and throughout its life cycle. It is believed that this human supervision is actually a guarantee of product safety;

(iii) may constitute an essential element of risk reduction, the imposition of producers to comply with some obligations explicitly stipulated by the Union legislator (for example, following the collaboration of the consumer with humanoid robots, the mental safety of those former would be affected);
(iv) constitutes a separate category of safety risks generated by wrong data in the design stage, as well as in terms of maintaining data quality throughout the use of AI systems;
(v) the need for express regulation for the special case of stand-alone software that is placed on the market or downloaded into a product after it has been placed on the market, when it has an impact on safety.

Conclusions

In the synthesis of the aspects analysed in the present study, we appreciate that the legislative instrument on AI regulation takes into account the fact that whenever an AI system is likely to present a high degree of risk to fundamental rights and safety, it must be analysed through a reporting on transparency, human oversight, accuracy and robustness.

On the other hand, the intervention of the Union legislator is not limited to this regulation, on the contrary, it must be analysed in conjunction with harmonized rules, with support guidelines and instruments to ensure the major objectives regarding legal security.

We believe that the adoption of the EU regulation on AI is a necessity in the context in which the national rules in the matter lead to the fragmentation of the internal market, reducing at the same time the degree of legal security for operators who develop or use AI systems. Therefore, we are of the opinion that the Union provision has the merit of ensuring a high and consistent level of protection throughout the Union.

At the same time, the central concern of the Union rule is the establishment of uniform obligations for operators by guaranteeing the uniform protection of consumer rights at the level of the internal market, pursuant to Article 114 of the Treaty on the Functioning of the European Union (TFEU).

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QUALIFICATION OF CIVIL CONTRACTS

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Abstract*: Qualification is the intellectual operation by which a legal fact, taken in a general sense, is included in one of the legal legal categories in order to establish its applicable legal regime. The qualification operation, being necessary for the application of the law, is not specific to the matter of special civil contracts but to any other source of obligations from civil law, torts or lawful civil legal acts, etc., as well as to the relations of obligations from other branches of law, such as either to illegal criminal acts, in criminal matters, or to administrative contracts, in public law, etc.*

As a principle, any individual contract must be qualified, but those whose content and economics do not raise any difficulty in establishing their legal nature, nor is this issue raised by the parties, their inclusion in the category they belong to is done implicitly, without the judge being obliged to give an express ruling. When the object of the dispute is an unnamed individual contract, the qualification operation is mandatory, the judge being the one who gives or restores the qualification (art. 22 par. 4 C. civil.).

The qualification criterion for unnamed individual contracts is the objective one, the value of the characteristic essential obligation. Punctual civil law provides for cases where the criterion of qualification is subjective, the intention of the parties.

As a principle, the judges qualify the unnamed contracts as a unit. Exceptionally, when this is not possible, the qualification is distributive.

Keywords: *qualification; unnamed contracts; complex contracts; unit qualification; distributive qualification.*

1. The importance of the qualification of individual contracts

Unlike the qualification made in private international law, which aims to regulate the conflict of laws applicable to a fact taken in a general sense, without carrying out the actual qualification by which to choose an applicable legal regime, in domestic law, qualification is an operation necessary to apply the right to a legal fact, taken in a general sense. The legal fact, taken in the sense shown, does not by itself produce legal effects unless the legal norm is attached to it. This is the case, for example, in criminal matters, where the criminal act must be included in one of the special crimes, as well as in the matter of financial, administrative or labor law, etc.

2. Qualification, operation necessary for the application of law in civil matters

In civil law, we must apply the law of each of these legal categories to the licit and illicit legal act, the latter being a civil, tort or contractual legal liability. It is the same in the matter of civil legal documents. Requests for annulment or nullity for violation of the regime of their formation or claims for contractual civil liability must be qualified so that the fact of violation of the rules of formation or execution is applied to the specific right. For example, the annulment action for the defect of error or fraud, in the case of the cumulation of these actions with the one for hidden defects or with the one for non-compliant delivery in translational contracts on an asset (tangible or intangible) must be distinguished in order to apply the own law of each of categories. Finally, in each of these they can join and implicitly qualify the action in liability for damages, which can be compensatory or moratorium. The examples can be countless, keeping in mind the idea that any legal fact in a general sense is applicable to a right specific to the category to which it belongs and its choice and implicitly the right is done through the qualification operation.

The qualification of individual contracts, which is the subject of this study, has its own rules intended to be applied, in principle, to unnamed individual contracts. As a rule, any contractual legal situation must be qualified in order to apply the law proper to the category in which it falls. The individual contracts which, by their name and economy, fall easily into one or another type of named contracts, the qualification operation is implied to be carried out, without the need for the judge to expressly rule on it, the respective contracts are subordinate to the species in which they belong. Instead, the operation of qualification is necessary to be made and pronounced expressly for the application of the right to unnamed individual contracts.

3. Chronology of the qualification operation

The qualification is an a priori operation of the parties, the a posteriori one made by the judge being decisive. The parties make a qualification themselves when concluding the contract, a priori qualification, because they choose this or that legal operation. using a legal contract model, called contract or a social one (of contractual practice). However, when the concluded contract is atypical, the parties carrying out an unregulated or unconsecrated legal operation in contractual practice and are in conflict over the legal nature of the contract or when they are not in conflict but have chosen to give their legal operation a qualification that does not fit in the legal legal regime and their convention on the qualification violates public order, the judge is the one who gives or requalifies the contract (art. 22 par. 4 C. pr. civ). The text shown is a novelty in our private law obliging the judge to consider the qualification of the litigious situation in the hypotheses shown. In these cases, the judge is the one who gives or restores the qualification (art. 22 par. 4 Civil Code). This qualification is given by a third person, the judge, and is a posteriori, but he places himself at the date of the conclusion of the contract to determine the intention of the parties regarding the effect of the contract.

4. Definition of qualification

Qualification is the intellectual operation by which a legal fact, taken in a general sense, is included in one of the legal legal categories in order to establish its applicable legal regime. The qualification operation, being necessary for the application of the law, is not specific to civil contracts but to any legal situation that gives rise to subjective rights and obligations, both in the matter of civil law and in other branches of law, as was shown, but the qualification of civil contracts has its own technique.

5. The legal nature of the qualification in general, of the contracts in particular

However free the right to contract may be (art. 1169 Civil Code), in the last resort the legal norm is the one that applies. The judge has the mission of applying the law, not of creating it, so that in order to pronounce and argue a solution in an unnamed contract, he must be based on the law, being thus obliged to carry out the qualification operation to identify the legal category in which he is framed each of the unnamed contracts. The legal foundation of the unnamed contract is mandatory with regard to the formation of the contract because all contracts are subordinated to contract law (art. 1167 para. 1 Civil Code), including the unnamed ones (1168 thesis I, Civil Code). With regard to the effects, when the law of the contract is insufficient, the rules of special contracts apply to unnamed contracts (art. 1168 sentence II of the Civil Code).

5.1. Qualification of contracts should not be confused with the operation of contract interpretation.

This operation involves clarifying the meaning of unclear, ambiguous clauses that have at least two meanings. In the qualification operation, the obligations of the contract are clear, but in the absence of a qualification, the special legal regime applicable to the unnamed contract cannot be established.

Qualification is therefore a matter of law enforcement. Being a matter of law, (1) the qualification given by the trial courts is subject to censure in appeals, including the appeal court, in principle the High Court of Cassation and Justice.

5.2. Qualification is not to be confused with classification either

Qualification is not to be confused with classification although it is closely related to it. In order to produce legal effects, any social fact requires its translation into legal norms and for this it is necessary that the one who makes the qualification confronts the fact shown with one or another of the legal categories. In the matter of civil law, the legal fact, in the general sense, is compared with the legal fact, in the narrow sense, and with the legal act, as the former is a manifestation of will with the aim of producing legal effects or, as the case may be, it lacks this elements.

6. Qualification of individual contracts

Leaving aside the procedure of qualifying the fact without the intention to produce legal effects, the qualification technique, when the fact shown is a manifestation of will with the aim of producing legal effects, assumes that the agreement of wills is related to the category of the legal act, distinguishing by how there is a unilateral or bilateral manifestation of wills. When the manifestation is an agreement of wills with the purpose of producing legal effects, it must be reported to the category of contract. Given that in modern continental European law, the contract is a category that is multiplied in its various species, we must relate the concrete contract to the general categories of the contract, unilateral-sinalagmatic contract, onerous-free, commutative-random, etc. and in the last instance the special qualification is made by comparison with the categories of species to bring it closer to one of them, for example, the contract of sale. The role of contract qualification is all the greater the greater the number of legal categories. For example, the qualification of contracts is all the more necessary and complex as the number of special contracts increases. We remind you that, in principle,

any individual contract is qualified a priori by the parties, when they have chosen to conclude a legal operation according to a predefined model, either by law or by contractual practice, or they can even make a sui generis qualification. Therefore, a dispute related to a contract does not expressly oblige the judge to perform the qualification operation when it is done by the parties, especially if the content and economy of the concrete contract does not raise any difficulty in establishing its legal nature and this was correct and consensually established by the parties, their inclusion in the category to which it belongs being thus implied. The qualification may also result implicitly from the fact that the parties apply to an individual contract the rules of the type of contract deduced from the economy of its content, its name being only an indication of the correct qualification made by the parties themselves, the litigious aspect brought before the judge being other than this operation, for example, cancellation, resolution, contractual liability, etc.

In the qualification of the concrete contract, by its proximity to a type of contract, the difficulty arises in unnamed contracts. These, as you know, are unnamed typical or unnamed atypical. In the first case, the unnamed typical contract is the one that does not have a legal regulation, but contractual practice has created a type of legal operation chosen by the parties, thus facilitating the qualification operation. It is, for example, the contract of donation with load or exchange with sult, etc. The actual difficulty of qualification exists in the case of concrete sui generis contracts, they are, in principle, complex contracts, by definition containing essential elements of several named legal operations, requiring the application of a specific qualification technique. By applying this technique, the concrete contract is brought closer to one type or several types of contract in order to apply the legal regime to it. Within a category of contract with which the legal operation concluded by the parties is most similar, sometimes the subspecies of the category of special contract must be chosen, for example, sale with covenant of redemption, sale of inheritance, sale of real estate, etc.

7. General regulation of the qualification of unnamed individual contracts

The law of the contract establishes the rule of principle regarding the law applicable to unnamed contracts (a), being a matter of law, the qualification given by the judge is subject to verification in appeals. The law of civil procedure allows the parties under certain conditions to qualify their contract by convention, removing this understanding from the power of the judge (b).

a) Contract law organizes the law applicable to unnamed individual contracts. By definition, being devoid of a pre-established legal regime, unnamed contracts must be classified, by way of analogy (art. 1 par. 2 Civil Code), in the legal categories in order to fix their legal regime. In applying the text shown, article 1168 Civil Code, with the marginal title "Rules applicable to unnamed contracts", regulates which are the legal categories applicable to unnamed contracts: "contracts not regulated by law are subject to the provisions of this chapter [common law of contracts, n.n.] , and if these are not sufficient, the special rules regarding the contract with which they are most similar".

Unnamed individual contracts, being contracts, are by their nature subordinate to the general theory of the contract (art. 1168 thesis I Civil Code). In principle, if for the typical unnamed contracts they are by the very model created by the practice, according to the law of the contract and have by definition a pre-established regime, the unnamed sui generis contracts are the ones that must be checked if they conform to the law of the contract, and then, if they can be close or not to a legally predefined legal operation,(2) "with which they resemble the most" (art. 1168 thesis II of the Civil Code), considering that, being a genre in itself, their content could whether or not it can be close to that of some types of contracts. Through a repeated application over time, some of these end up becoming named contracts, for example, the maintenance contract, the franchise contract, or the leasing contract, the hotel contract, etc., unnamed contracts that over time became contracts defined by law.

The legal rules shown are new in our law, being necessary to remove an older dispute. The 1864 Civil Code did not regulate the qualification of unnamed contracts and the quasi-majority doctrine made brief references to the qualification operation of these contracts, summing up to enshrine the rule of subordinating special unnamed contracts only to the common law of obligations, (3) i.e. what is currently specified, as a principle, by the thesis I of art.1168 C. civil. An author completed the dominant doctrine shown, specifying that they can be subordinated to the rules of special contracts whose elements are included in the contract subject to qualification (4), this thesis being now enshrined in thesis II of art. 1168 C. civil. The dominant thesis shown was also argued by invoking the rule of principle: special rules can only be applied for specially regulated cases. By virtue of this rule, according to the judicial practice existing under the Civil Code 1864, the legal regime of a named contract could not be applied to unnamed contracts. For example, to sales contracts with a maintenance clause, the regime of the life annuity contract is not applied, nor that of the sale, but the "legal act" regime, as the doctrine or judicial practice expressed it, but the rules specific to random contracts (5).

The law of special contracts, however, is not a special law in the sense understood in the doctrine shown. The rules of special contracts are derogatory to a reduced extent and vary from contract to contract so that the principle that the special rule cannot be applied to unnamed contracts cannot be applied to them. This is how the current rule provided by art. 1168 of the Civil Code is explained, according to which contract law is applied to unnamed contracts and, in the alternative, the particular rules of the contracts with which they are most similar.

The rules of a specially named contract cannot be applied by analogy to another specially named contract except where the law expressly provides for this extension. For example, the incapacities of the seller and the buyer from the sales contract (art. 1653-1655 Civil Code) are also applicable to contracts that expressly provide for the application of the rules shown, such as the rental contract (art. 1784 par. 1-2 C. civ.).

b) The conventional qualification of the unnamed contract excludes the qualification operation. In the event of a dispute between the parties to the unnamed individual contract, the judge is the one who performs the qualification operation in order to establish the legal regime applicable to the legal operation agreed upon by them. He is not bound by a mis-qualification, intentional or unintentional, given by the parties. Before "restoring" the qualification, the judge is obliged to first question the legal nature of the contract (art. 22 para. 4 C. pr. civ.). A contract that is is called by the parties a sale, for example, but whose content reveals the elements of another type of contract called, for example the supply contract, the judge will "restore" its qualification, as stated in the above legal text. By way of exception, the judge is bound by the express qualification given by the parties of an individual contract at the time of its conclusion, as well as by the legal basis of the rights expressly provided for in the contract, unless it was made to evade the application of the rules of public order, they cannot be the subject of negotiations (art. 22 par. 5 C. pr. civ.). For example, the bank loan contract in which the clause is stipulated whereby the consumer declares that he is not a consumer, so that in this way the application of consumer rights, such as the rules sanctioning abusive clauses, is prevented. This right, being of public order, the judge is obliged, even ex officio, to ignore the stipulation shown, if there is evidence that the party is a consumer.

8. The operation of the qualification of unnamed individual contracts

As it was shown, unnamed contracts are those whose content consists of several elements that belong to different categories of special named contracts. For example, the contract by which a party undertakes to build and transfer ownership of a property, movable or immovable, consists of two legal operations: the undertaking and the transfer of ownership, sale. It is the same, for example, in the contract of donation with encumbrance, being made up of the elements of donation and sale; or in the exchange with salt, this being made up of the exchange

operation and the sale operation. These contracts are included in a single legal operation, the parties concluding a single contract.

The civil code establishes, with regard to unnamed complex contracts, which is the legal category applicable to them: the common regime of the contract and subsidiarily "the special rules regarding the contract with which they are most similar" (art. 1168 Civil Code). However, the text shown does not specify what is the criterion by which "the most similar contract" is chosen.

The qualification operation involves going through two stages: identifying the legal nature of the unnamed individual contract (A); and the inclusion in the regime of the specially named contract with which it is most similar, in the case of unitary qualification or, if necessary, to be attached to it the regimes of several contracts, in the case of distributive qualification (B)

A. Establishing the legal nature of unnamed contracts (6). The qualification of the unnamed individual contract is the operation close to the one of classification, by this it is placed in the legal categories that have the same legal nature.

According to art. 1168 Civil Code, the rules of the most similar contract are applied to the unnamed contract. The special named contract can be likened to the unnamed individual contract if they have the same legal nature. Since the legal nature of the named special contracts is known, this being provided by law, that of the unnamed contracts subject to the qualification operation must be established, this being the work of the creation of the parties. For this, the economy of the contract subject to qualification must be analysed in order to identify its essential obligations and among them the one that was decisive at its conclusion, called the characteristic essential obligation. For example, in the sales contract, called contract, there are two essential obligations: the transfer of property on an asset and the payment of the price, of which the characteristic obligation is the transfer of ownership. The transfer of property is the obligation that characterizes the economy of this contract without ignoring the one of payment of the price, because together they

make up the defining economy of the species shown, but without forgetting that the payment of the price is not the characteristic of a contract because many contracts have the obligation to pay the price.

B. Classification of the contract subject to the qualification operation in the specially named contract with which it is most similar. Knowing the essential characteristic obligations of the special contracts named (a), and establishing the characteristic obligation of the unnamed individual contract and therefore its nature (b), it follows that by comparing the latter with those of the special contracts named, the contract should be established called "which they resemble the most.", that is to qualify the unnamed contract, as a rule unitary and by exception distributive (c).

a) Reference to essential obligations characteristic of named special contracts. In order to carry out this approximation, it is necessary for the judge to refer to the synthetic picture of the legal nature of the named special contracts, given by their characteristic essential obligations: the transfer of property in exchange for the price (sale); the transfer of the use of a tangible asset, for a period of time, in exchange for a consideration mainly in money but also in another form (lease); the performance of a material service, within a certain term, in exchange for the price (enterprise); execution of a legal service, usually with representation, onerous or free (mandate with or without representation), etc.

b) Establishing the characteristic obligation of the unnamed contract subject to the qualification operation. The criteria for establishing the characteristic obligation of the unnamed individual contract are the subject of discussions in the doctrine. In principle, the authors retain the subjective criterion for establishing the characteristic obligation: the intention of the parties.

The will of the parties is, in truth, the one that determines the characteristic obligation of the contract, the agreement of wills being the one that creates the contractual obligations, one of them being decisive at the conclusion of the respective contract. The issue to be resolved, however, is what is the criterion for establishing the will of the parties,

this being a subjective element, therefore difficult to probe. We do not need to use the criteria of contract interpretation for this, because those are applicable for unclear clauses, and the establishment of the characteristic obligation is not such a hypothesis. Moreover, the determination of the legal nature according to the characteristic obligation must be based on much more certain criteria, otherwise this essential issue would be random.

Contract law has no rule regarding the criteria for establishing the characteristic obligations of unnamed individual contracts. It only provides that the agreement of the parties on the essential elements is sufficient for the conclusion of contracts (art. 1182 para. 2 Civil Code). The essential elements in the meaning of this text cover both named and unnamed contracts, which are of interest here. The law of special contracts precisely regulates, for several types of contracts, the criterion for choosing the characteristic essential obligation for the cases in which an individual contract, concluded according to the model of the respective types, would contain elements that would change its nature, making it an unnamed contract, as a border rule between the respective type of contract called and another, thus giving rise to conflicts of qualifications. The rules are as follows: art. 1766 paragraph 3 of the Civil Code, art. 1855 of the Civil Code, and art. 2105 of the Civil Code, art. 2158 al.2 Civil Code, etc.,

In practice, if there is no express clause from which the characteristic obligation of the unnamed contract subject to qualification results, the objective criterion must be the one based on which the intention of the parties in establishing the characteristic obligation is determined. (i). Exceptionally, the subjective criterion is applied in the cases expressly provided by law (ii). In addition to these, marginal criteria also apply: those of the form and subjects of the unnamed contractual relationship (iii).

(i). The objective criterion for establishing the characteristic obligation. Among the essential obligations of the unnamed individual contract, the one with the highest value is characteristic. This criterion is objective. It is natural that the intention of the parties in establishing the

characteristic obligation should be deduced by comparing the value of the essential obligations and that therefore the determining factor for the parties at the conclusion of the contract was that of the essential obligations which has the highest value, this being therefore the characteristic obligation, the others being accessories in the relationship with these, even if they were essential in a named contract.

For example, in the uncalled contract of exchange with sult, it is reasonable to conclude that the parties intended to enter into a contract of sale and not of exchange, if the amount owed by one party is, say, one hundred times the value the good that the same party gives in return, along with the sum of money. The characteristic obligation is therefore the payment of the sum of money and not the transfer of the ownership of the good to the co-sharers.

(ii) The subjective criterion provided by special rules for the qualification of unnamed contracts. The law provided for two contracts in which, in certain cases, they can give rise to unnamed contracts, more precisely, border contracts between them and other named contracts, stipulating that in those cases the criterion for establishing the characteristic obligation according to which the individual contracts are qualified unnamed is the intention of the parties.

- In the contract of enterprise. According to art. 1855 Civil Code, with the marginal name "Delimitation from the contract of sale", "The contract is for sale, and not for contracting, when, according to the intention of the parties, the execution of the work does not constitute the main purpose of the contract, considering and the value of the goods supplied. The criterion of legal qualification in this hypothesis is the intention of the parties, a subjective criterion.

The legal assumption here is that the contractor agrees that after manufacturing a good, with his material, he transfers ownership of that good to the client. In this hypothesis, the contract could be a sale of the future work or an execution of works, joint venture contracts. Through the text shown, the legislator gives priority to the intention of the parties in identifying the characteristic obligation: the sale or the provision of service, but also specifies here that to establish the intention of the parties, the criterion of value must also be used, "the value of the goods

supplied". Consequently, if the intention of the parties does not emerge from the contract, the objective criterion of value is used to determine the intention of the parties. Thus, if the materials used by the contractor, his property, have a higher value than the labor, the higher value of the first element determines the qualification of the contract as being for sale and not for contracting. For example, it is natural for the jeweler to sell gold jewelry when its value is, say, 100 times that of the workmanship. On the other hand, if the jewelry was ordered by the customer and by this or by the particularity of the project the workmanship had a higher value, say 100 times, than that of the precious metal, the contract is a joint venture, the intention of the parties being that the contractor execute the project, as a characteristic essential obligation.

Likewise, the artist who paints a picture, the value of his art is greater than that of the paint and canvas used, his property, the intention of the parties being that of a contract of undertaking when the picture was commissioned. For the establishment of the qualification criterion, it does not fall within the scope of the text of art. 1855 Civil Code, the case where the good is already executed, for example, the jewelry in the showcase or the paintings in the exhibition, these are not unnamed contracts being sales. In the same way, the hypothesis of the manufacturing contract, building of a future good, but with the client's materials, does not fall within the scope of the application of the text shown. This is a contract of undertaking and has no boundary elements with the contract of sale.

The question of the qualification of the joint venture contract is not exhausted by the text shown, it being analysed for the respective type of contract.

- In the deposit contract. In the event that the parties agree on a deposit contract of monetary funds or other such fungible and consumable goods by their nature, a conflict of qualifications arises between the contract called the deposit and the one called the loan. The Civil Code provides by art. 2105 paragraph 1 and paragraph 2 sentence I, that in this case the contract is subordinated to the consumer loan regime, but if the intention of the parties was to conclude a deposit contract, this resulting from the

essential circumstance that keeping the goods shown to be in the interest of the one who hands them over, then this regime will apply. When handing over for safekeeping in the interest of the person who handed over the asset is not expressly provided for in the contract, the text of art. 2105 para. 2nd sentence of the Civil Code also provides the criterion for interpreting the will of the parties: it is a deposit "when the parties have agreed that restitution can be requested before the expiration of the term for which the goods were received."

(iii). The criterion of the subject of the contract or its form. In addition to the essential and characteristic obligations, the quality of the parties or the form of the contract is also used as a qualification criterion (7). for example, contracts where the consumer protection regime applies have qualified subjects: consumer and professional. Contracts concluded by professionals are business contracts, and the regime of such contracts applies. For example, according to art. 2158 paragraph 2 Civil Code, "When a person grants a loan without doing so in a professional capacity, the legal provisions regarding credit institutions and non-banking financial institutions are not applicable." Similarly, for example, the contract of mandate, concluded by a professional, is qualified as having onerous character (art. 2010 paragraph 1 C. civil.)

The donation contract is a contract that takes on an authentic form, a condition of validity (art. 1011 paragraph 1 C. civil.), but some unnamed contracts that are free of charge, being partially subordinated to the donation regime, do not require this form, such as manual gift, waiver of debt payment, simulated donation (art. 1101 par. 2 Civil Code), etc.

c) Unitary and distributive qualification of unnamed contracts. As has been shown, atypical unnamed contracts are complex contracts, made up of the essential elements of several named contracts. Among these, the one that is characteristic of each unnamed individual contract must be identified, the criterion according to which the specially named contract with which it is most similar is chosen. For example, the exchange contract with sult has in the content or the essential elements of the exchange each transfer to the other the ownership of a good, but it also has the elements of the sales contract because one of the parties is also obliged to pay a sum of money, a specific element of the sales contract,

when in return he acquires the ownership of the property from his co-owners. In the same way, the donation with an obligation is an unnamed contract in its content including both the obligation to transfer an asset with the intention of gratification, but also the elements of the onerous contract, if the obligation consists in the payment of a sum of money.

In this sense, the text of art. 1168 Code civil, sentence II, provides: the unnamed contract is subject to the regime of the contract, in the singular, with which it is most similar. The legal regime of the unnamed complex contract must not be divided, applying to it as many regimes as elements of different special contracts are included in its content. The qualification must therefore be unitary, i.e. the regime of one of the named contracts whose elements make up the content of the unnamed individual contract must be fixed.

(i) The unitary qualification, given by the characteristic obligation or, by way of exception, by the quality of the parties or the form of the contract, is provided implicitly in the legal texts listed above as specific rules of qualification provided for in the law of special contracts. They all apply the unitary qualification rule, this being the reason for the regulations shown, the identification of the characteristic obligation to make a unitary qualification. The difference between them is the fact that one of them applies the rule of choosing the characteristic obligation, according to the objective criterion of the value, while the others foresee the exceptional case in which the criterion is that of the parties' intention. Especially when the other two criteria are applied (the quality of the parties and the form of the contract).

For example, by applying the rule of qualification according to the characteristic obligation, unitary qualification is implicitly regulated, the text of art. 1766 paragraph 3 C. civil. providing in this sense: "if in the same contract both the sale of goods and the supply of goods or services, then the contract will be qualified according to the characteristic and accessory obligation."

(ii) Distributive qualification. Exceptionally, the judge chooses a distributive qualification, attaching to the contract at least two legal

regimes corresponding to special contracts with which the elements that make it up are similar.

Complex contracts may have a distributive qualification when the importance of their essential obligations is close or equal. In this case, at least two legal regimes will be applied to the contract, as the case may be. For example, in the exchange contract with sult, if the value of the good and that of the sult are equal or approximately equal, the contract will be subject to the two regimes: sale and exchange.

Similarly, a rental contract in exchange for a service, or a transaction that also contains a promise to sell are complex contracts to which a double qualification will be attached, of rental and service (for example, a contract), respectively transaction and promise to sell.

9. Special cases of qualification

The qualification operation is also necessary in the case of sets of contracts, more specifically of groups of contracts(8) and chains of contracts (9). In these assumptions, it is not the nature of the contracts that raises qualification difficulties, but the existence of an indivisible link between the contracts that make up the two types of sets of contracts. The existence of this link entails legal effects for the entire set of contracts. In both cases of sets of contracts, the regime of the contracts is not unitary but divided, applying its own regime to each contract, but it is of interest if there is a situation of indivisibility between them and thus the legal situation of a contract, for example, the nullity or resolution of one entail termination of all other contracts. For example, the contract for the sale of a new movable asset (car, refrigerator, etc.) in exchange for the buyer's sale of an old movable asset of the same type, the value of which is deducted from the price of the asset of the main sale (buy-back contract). This legal situation, called a chain of contracts, is a set of contracts because the two sales are linked, the latter being concluded in consideration of the first sale. The termination of one of these has consequences for the other contract as well.

Successive contracts have a close situation, these being the contracts successively concluded by several persons having the same

object. So are legal subcontracts and the successive sale of the same good. In these contracts, the law provides for direct action for each individual case. For example, by art. 1706 Civil Code, the direct warranty action for eviction of any successive buyer against any of the chain of sellers is provided.

Unlike successive sales, subcontracts or accessory contracts have a more elaborate legal regime. These are agreements whose object is the execution of a work or service, by a person other than the one in the main contract, for example, submandate (assignment of power of attorney), sublease (10), etc. The fate of ancillary contracts depends on that of the main contract. From the content of the regulation of the types of subcontracts, their indivisible or divisible character and their conditions result, here the granting of direct action is of interest. It is like this, for example, in the sublease contract, the lessor has direct action against the sublessee but within the limits of the sublessee's obligations: for the payment of the rent up to the limit of the amount that he owed to the main lessor (art. 1807 par. 1 Civil Code), or to compel him to perform the other obligations assumed by the sublease contract (art. 1807 par. 3 Civil Code). And in other successive contracts the law provides for the granting of direct action, hence the indivisible character of those contracts. It is the situation of workers who have performed services or works under the contract concluded with the contractor and he does not pay them, the law recognizing them direct action against the beneficiary of the work (art. 1856 Civil Code) or the action of the mandate against the third party substituted for the trustee (art. .2023 Civil Code), etc.

In conclusion, the qualification of the contract is an intellectual operation necessary for the application of the law. In the matter of special contracts, the qualification of individual contracts is necessary, in principle, in unnamed individual contracts, especially in unnamed sui generis contracts. The operation of qualifying the individual unnamed contracts requires their reference to the general contract regime as well as to that of the special named contracts, in order to bring it closer. Judges,

as a rule, apply the unitary qualification to individual contracts and only by exception resort to the distributive qualification.

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TO DEFEND THE FOREST, REGARDLESS OF THE OWNER!

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Abstract: *The forest fund is often the meeting point of two very important legal concepts: public ownership and private ownership. When these rights overlap on the same property, a complex legal conflict result. According to the applicable regulations, this conflict should always have the same winner, the public property. The study proposes an analysis of the common issues encountered in practice in order to identify the requirements to be met to achieve this objective.*

Keywords: *forestry; protection; public ownership; property title; forest management.*

Introduction

Although the title of the article suggests that the focus will be on the undoubted importance of the forest for mankind, as this is a legal study, it will focus on the second part of the title.

We have chosen to do so because, if there is unanimity on the moral imperative of defending the forest, there are situations that generate acute controversy on the quality of the holder of the property right.

One of these situations is that which takes advantage of two prerequisites: on the one hand, the fact that forests belong to the national forest fund and, on the other, the fact that today's democratic society is a

relatively recent historical successor to a totalitarian regime in which state ownership was guaranteed all-powerful and, practically, exclusive rights.

In such a context, it is extremely common for the relevant state authorities (The National Forestry Regia RNP Romsilva through the County Forestry Directorates, in its own name, as holder of the right to manage the forest land, or as representative of the Romanian State as holder of the public property right), in the process of reconstituting the right of ownership of areas with forest vegetation or in the civil circuit subsequent to such reconstitution, to oppose private individuals[1] at various stages of the reconstitution procedure or, after this moment, sub-debtors of such real estate, the belonging of the land with forest vegetation to the public domain of the state, the consequences being those derived from the inalienable nature of the public property right.

The legal proceedings thus triggered also tend to be characterised by additional legal tension, because when public property is opposed, the social perception is that of a struggle between those who defend property which, because of its particular importance both for today's society and for future generations, is under the protection of the legal regime of public property, and those who tend to usurp, unjustly seeking patrimonial gain.

Since the goddess Themis is blindfolded so that the act of justice cannot be influenced by anything external to it or by social perception, and since a common denominator of the legal position expressed by the public authorities has been identified in the vast majority of concrete situations, the following question is legitimate for the purpose of this article: on what do those who argue that goods belong to the public property of the state base their arguments?

[1] The legal procedures range from opposing the handing over of the land to taking legal action to declare the invalidity of the acts issued in the procedure for reconstituting the right of ownership, to declare the invalidity of the acts transferring these assets to the sub-developers, or to take legal action based on the right of public ownership.

On what do those who argue that goods belong to the public property of the state base their arguments?

The common denominator identified in the rationale of the approaches promoted by the public authorities, the situation being explained by the fact that there is only one central authority, the National Forestry Regia Romsilva, acting, being represented at the local level, through the County Forestry Directorates, is represented by two arguments invoked with a cumulative and exhaustive effect:

a) On the one hand, the legal designation of goods as public property;

b) On the other hand, the identification of property in forestry planning. In other words, the title of ownership invoked in support of public ownership, in the situations concerned, is the Act, and the proof of its practical application is provided by the identification of assets in forestry plans.

Statement

a) the designation by law of goods as public property

The starting point is the provisions of Art 136 Para 3 of the Romanian Constitution, which stipulates that the goods listed in this text "as well as other goods established by organic law"[1] are the exclusive object of public property, i.e., they cannot form the object of private property. The justification continues in that the text of the law, which refers to the exclusive public ownership of goods listed as such in organic laws, must be read in conjunction with Art 5 of Law no 18/1991

[1] Art 136 Para 3 of the Romanian Constitution – Property: 3) The mineral resources of public interest, the air, the waters with energy potential that can be used for national interests, the beaches, the territorial sea, the natural resources of the economic zone and the continental shelf, as well as other possessions established by the organic law, shall be public property exclusively.

and Art1 and 2 of the Forestry Code. These texts expressly state that "land used for forestry purposes belongs to the public domain"[1].

The Forestry Code[2] confirms in the text of Art 1 and 2 that all forests belong to the national forest fund and that all land included in the national forest fund is land with forest vegetation, such as that referred to in Art 5 Para 1 of Law no 18/1991 which stipulates that they belong to the public domain.

The demonstration concludes by invoking the provisions of Art 286 of the Administrative Code as well as the text of Annex 2 of this normative act. The text of Art 286 Para 2[3] expressly states that the public domain of the state consists not only of the goods listed in Art 136 Para 3 of the Romanian Constitution but also of the goods listed in Annex 2 of the Administrative Code. In Annex 2 of the Administrative Code[4], forests are expressly listed as part of the public domain of the state.

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[1] Art 5 of the Law no 18/1991 on the land fund: 1) The public domain includes land on which buildings of public interest, markets, communication routes, road networks and public parks, ports and airports, land used for forestry purposes, riverbeds and riverbanks, lake basins of public interest, inland waterways and the territorial sea bed are located, the shores of the Black Sea, including beaches, land for nature reserves and national parks, archaeological and historical monuments, assemblages and sites, natural monuments, land for defense purposes or other uses which, by law, are in the public domain or which, by their nature, are of public use or interest.

[2] Art 1 of the Law no 46/2008 on the Forestry Code: 1) The totality of forests, land intended for afforestation, land used for cultivation, production or forestry administration, ponds, stream banks, other land used for forestry purposes, including non-productive land, included in forestry plans on 1 January 1990, including changes in area, according to the operations of entry-exit carried out in accordance with the law, constitute, regardless of the form of ownership, the national forest fund (...); 3) All land included in the national forestry fund is forestry land.

[3] Art 286 Para 2 of the Administrative Code adopted by G.E.O no 57/2019 states that "the public domain of the state consists of the goods referred to in Art 136 Para 3 of the Constitution, those referred to in Annex 2, and other property which, by law or by their nature, is of national public use or interest.

[4] Annex 2 of the Administrative Code – List of certain goods belonging to the public domain of the State – forests and land intended for afforestation, land used for cultivation, production or forestry administration, ponds, riverbeds and non-productive

b) the identification of assets in forestry planning

The cited normative acts also expressly refer to the forestry planning and show, through the forestry planning, how the forestry land that was in public ownership before 1 January 1990 becomes public property. It is clear that the latter land was the subject of applications for the restoration of ownership and that most of the litigation took place in relation to this land.

The category of land with forest vegetation and which, according to Art 5 of Law no 18/1991 belong to the public domain, includes, according to Art 35[1] of the same normative act, also the land that became state property before 1 January 1990, but which is registered in the forestry planning. The same condition for the identification in the forestry plans of land which came into state ownership before 1 January 1990 is laid down in Art 2 Para 2[2] of the Forestry Code.

Analysis

a) the question of the legal designation of property as public property

The question arises whether the express enumeration of an asset in an organic law, according to the provisions of Art 136 Para 3 of the Constitution, as belonging to the public domain is the only legal condition (Chelaru, 2019, p. 93) for being faced with the right of public property and to bear the effects of its legal regime?

We consider that two observations should be made:

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land included in forestry planning, which is part of the national forestry fund and is not privately owned.

[1] Art 35 of the Law no 18/1991 on land fund mentions that "state-owned land is land that came into the state's ownership in accordance with the legal provisions in force before 1 January 1990 and registered as such in the general land register and forestry planning system".

[2] Art 2 Para 2 of the Law no 46/2008 on the Forestry Code states that the term "forest" includes the "land in forestry use included in forestry plans on 1 January 1990, including changes in area, according to the operations of entry-exit carried out in accordance with the law".

First, we note an ideological segmentation between the goods referred to in Art 136 Para 3 of the Constitution. On the one hand they are goods contained in an explicit enumeration and on the other hand they are goods to which the text refers but which it does not identify in specific terms but leaves to the legislator the possibility of identifying them in organic laws. Why does the constitutional text make this distinction? We note that it can be said that the goods listed in Art 136 Para 3 of the Constitution differ from all the other goods listed in the content of the organic laws in that the goods mentioned in the constitutional text (subsoil wealth, waters, airspace, sea, continental shelf) exclude human intervention as a way of formation and therefore exclude the possibility that by this statute on belonging to the public domain any first owner – creator of these goods is wronged.

The other goods listed in the organic laws to which the constitutional text refers may be the result of human activity, and therefore likely to have been at one time the property of a creator. This situation may give rise to the idea that by including these goods in the enumerations in the organic laws as belonging to the public domain, someone could be harmed by this possible abduction of his property.

Secondly, it should be noted that the enumeration made in the constitutional text is limitative whereas the enumerations made in the organic laws are illustrative. The latter enumerations are illustrative because at any time people can create new goods of such importance as to prompt the legislator to include them in an enumeration in a new organic law. But the new legal regime acquired by the new organic law might do the creator-owner an injustice.

Starting from these two premises resulting from the analysis of the legislative enumerations, we must turn our attention to the texts of law defining and regulating public property. We shall refer to the provisions of the Civil Code and the Administrative Code.

We consider that Articles 554 Para 1 and Art 858 of the Civil Code shed light on the situation under consideration. We draw attention to two

elements in Article 554 Para 1[1]: The text begins with the wording "The property of the state and of administrative-territorial units which by their nature or … form the subject-matter of public property...". This wording imposes a prerequisite situation "the assets of the state and of the territorial administrative units", in other words we must first of all talk about assets that already belong to the state or to the territorial administrative units. The explicit expression that removes any doubt is made at the end of the paragraph: „are subject to public ownership, but only if they have been legally acquired by them".

Here is the aspect that we have anticipated and that we wish to highlight, the will of the legislator produces its legal effects and "generates" public property only under the conditions in which the state's patrimony or the territorial administrative unit's right of ownership over the goods has been legally acquired. In other words, in order to find oneself in the presence of public property, a condition must be met which is just as important as that of finding the property in an enumeration in the organic law; the condition is that of acquiring ownership of the property in question by one of the means provided for by law.

The provisions of Article 858[2] of the Civil Code are in the same sense. As in the above-mentioned text, the legislator indicates that the essence of public property is the public use or interest and the explicit requirement that the property has entered into the patrimony of the State or of the administrative-territorial unit in one of the ways provided for by law.

Thus, enumeration in an organic law is not the title (Stoica, 2017) that public authorities should display to prove public ownership. It is necessary for the public authorities to prove that the condition *sine qua*

[1] Art 554 Para 1 of the Civil Code states that assets of the state and of administrative-territorial units which, by their nature or by declaration by law, are of public use or interest are public property, but only if they have been legally acquired by them.

[2] Art 858 of the Civil Code defines the public ownership as "the right of ownership belonging to the state or to an administrative-territorial unit over property which, by its nature or by declaration of law, is of public use or interest, provided it is acquired in one of the ways provided for by law".

non expressly set out in the above-mentioned texts has been met: the legal manner in which the property was acquired.

The question could be raised whether this condition is necessary only for goods which are for public use or in the public interest and which do not belong to those listed in the organic laws as exclusively public property. Article 859[1] of the Civil Code could support this theory, that the legislator makes a distinction between the goods listed in Art 136 Para 3 of the Constitution and the goods listed in special laws as being the exclusive object of ownership, on the one hand, and goods that are for public use or public interest, on the other. We note here that there are two paragraphs. In the first paragraph the legislator does not use the wording "but only if they have been acquired in one of the ways provided for by law" whereas in the second paragraph this wording is used. Is this condition not required for goods listed in special laws?

The provisions of Art 286 Para 1[2] of the Administrative Code could also be invoked in support of the same theory.

The text specifies that the public domain is made up of the assets referred to in Art 136 Para 3 of the Constitution, the assets listed in Annexes 2 to 4, i.e., those listed in this special law, and assets that are of public use or interest and are acquired by the state or administrative-territorial units by one of the means provided for by law.

We consider that these laws, despite their appearance, do not exclude the goods listed in the organic laws from the condition of having

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[1] Art 859 of the Civil Code states the object of the public property separating it from the private domain: 1) The exclusive object of public ownership is the wealth of public interest of the subsoil, the airspace, the waters of national interest, the beaches, the territorial sea, the natural resources of the economic zone and the continental shelf, as well as other goods established by organic law. 2) Other property belonging to the state or to administrative-territorial units is part of their public or private domain, as the case may be, but only if it has been acquired in one of the ways provided for by law.

[2] Art 286 Para 1 of the Administrative Code – Public domain states that: The public domain is made up of the goods referred to in Art 136 Para 3 of the Constitution, those set out in Annexes 2 to 4 and any other assets which, by law or by their nature, are of public use or interest, and are acquired by the state or by administrative-territorial units in one of the ways provided for by law.

become the property of the State or of the administrative-territorial units in one of the ways provided for by law. These texts must, first of all, comply with the provisions of principle laid down in Art 554 and 858 of the Civil Code. These texts define public property by reference to two fundamental conditions: public use or interest and legal acquisition. Enumerations can supplement the first of these conditions, but they cannot supplement the second.

Moreover, given that the object of our study is circumscribed to a certain notion – the forest fund, we can offer arguments of special legal texts in this matter, by means of which we highlight that the legislator cannot abdicate from established principles. We have indicated above that the provisions of Art 286 of the Administrative Code include in the public domain the goods listed in Annexes 2-4. In other words, according to the theory set out above, if it were correct, it would be sufficient to find a good listed in Annexes 2-4 in order to rule that this good is public property.

In Annex no 2 of the Administrative Code we find the list of some goods belonging to the public domain of the state. Point 4 of this annex states that: "forests and land intended for afforestation, those serving the needs of culture, production or forestry administration, ponds, riverbeds, as well as non-productive land included in forestry planning, which are part of the national forest fund and are not private property".

We note that the list includes forests and all land forming part of the forest fund, provided it is not privately owned. Therefore, as the forest – *lato sensu* may also be private property, further investigation is required to establish that the forest in question is not private property. This wording highlights the fact that the enumeration in the law is not in itself proof of the right of public ownership and that in order to prove this right it is necessary that the two conditions are met cumulatively, i.e., that the property has been legally acquired.

Remaining in the topic of our study, which concerns the disputes, concerning the public-private qualification, which arose in the procedure of applications for the reconstitution of the right of ownership of forest vegetation areas wrongfully taken over by the communist state, we must

take into account that public property was also regulated through the provisions of Law no 213/1998, a normative act of which the text of Art 6[1] is still in force today. We raise this legal text in the context in which, as we pointed out in the introductory part, the public authorities prove public ownership by means of the provisions of Art 5 of Law no 18/1991 in conjunction with the provisions of Art 1 and 2 of the Forestry Code, to which are added the provisions of Art 35 of Law no 18/1991.

Art 35[2] of Law no 18/1991 stipulates that the state is also the owner of the land in its possession on 1 January 1990, which, according to the authorities, in conjunction with Art 5 of Law no 18/1991 and Art 1 and 2 of the Forestry Code, would prove public ownership of the forest areas whose restitution is sought.

What is overlooked is that, in the same spirit that we have pointed out, the text of Art 35 of Law no 18/1991 makes it a condition of state ownership of the assets existing in its patrimony at the time of 1 January 1990 if they entered the state patrimony in accordance with the legal provisions existing until 1 January 1990. To this filter (compliance with the regulations in force until 1 January 1990) Art 6 of Law no 213/1998 adds the following additional requirements: compliance with the Romanian Constitution at the time of the takeover and with the international treaties to which Romania was a party.

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[1] Art 6 of the Law no 213/1998 states that 1) Assets acquired by the State between 6 March 1945 and 22 December 1989 are also part of the public or private domain of the state or of administrative-territorial units, if they became state property on the basis of a valid title, in compliance with the Constitution, the international Treaties to which Romania was a party and the laws in force at the date of their acquisition by the state. 2) Property taken by the State without valid title, including that obtained by vitiation of consent, may be claimed by the former owners or their successors, unless it is subject to special laws of redress. 3) The courts have jurisdiction to determine the validity of the title.

[2] Art 35 of the Law no 18/1991 mentions that state-owned lands are those areas that came into its ownership in accordance with the legal provisions existing before 1 January 1990 and registered as such in the general land cadaster and forestry planning system.

Therefore, in order to speak of state property at the time of 1 January 1990, it must be enshrined in a title reflecting the requirements of Art 6 of Law no 213/1998.

This is nothing other than the principle later explicitly established by the texts of the Civil Code represented by Art 554 and 858, which impose on public property the premise of the legal entry of the property into the patrimony of the state or the administrative-territorial units.

b) The issue of forest management

Can these forest management plans represent the public property of the State?

In order to answer this question, it is necessary to identify where we find the notion of forestry planning in the legislation and what legal significance it has.

The eloquent text is represented by the provisions of Art 12^1 of Law no 46/2008 on the Forestry Code[1].

The text stipulates that the state's public ownership of forest land shall be recorded in the integrated cadaster and land register system on the basis of property deeds and cadastral documentation.

The law therefore states that proof of public ownership is provided by the title deeds. Are forestry plans title deeds? The answer is emphatically 'no', and we find this answer by reading Para 2 of the above text.

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[1] Art 12^1 states that 1) The public property right of the state or of the administrative-territorial units on the forest land is registered in the integrated cadaster and land register system at the request of the administrators of the forest land, public property of the state, respectively of the owner, in the case of public property of the administrative-territorial units, on the basis of the property deeds and cadastral documentation drawn up according to the legal provisions. 2) By way of exception to the provisions of Para 1, in the absence of ownership documents, provisional registration shall be carried out on the basis of the valid, updated forest management plan. In this case, the coordinates of the points on the boundary of the properties concerned shall be determined, using the 1970 Stereographic system, by vectorization, at the level of the administrative-territorial unit. Any dispute regarding possible overlaps shall be settled amicably or in court in accordance with the regulations laid down in the Law no 7/1996on Land Registry and Real Estate Publicity, republished, as amended.

Para 2 states that by way of exception to Para 1, in the absence of title deeds, the state's public ownership shall be registered provisionally on the basis of valid updated forestry plans.

Forest planning is also defined in point 2 of Annex 1 of the Forestry Code as the basic study in forest management, ecologically based, with technical-organizational, legal and economic content.

The following conclusions can be drawn:

- Forest management is about managing the forest estate and not about establishing ownership;
- Forest management plans are not property deeds, and therefore cannot represent title to the public property of the state;
- Forestry management may not be used for the registration but for the provisional registration of the public property right of the State in the Land Registers;
- Moreover, the question arises as to whether all forestry planning can be used to provisionally register the State's public property right in the Land Register? Answer: No, only valid and updated forestry plans after 21 July 2017 because the text of Art 12^1 was introduced by Law no 175/2017 from 21 July 2017.

In other words, forestry planning not only covers publicly owned land but also privately owned land. Therefore, the mere fact that an area of land is listed in a forestry plan does not automatically mean that it is in public ownership[1]. The text clearly states: "... included in the forestry plans constitute regardless of the form of ownership", the national forest fund.

The same current wording of Art 1 can be found in Art 3 of the Law no 46/2008 as it stood at the time of its adoption. Thus, the mention of forest land in a forestry plan does not mean that this land is part of the

[1] Art 1 Para 1 of the Law no 46/2008 on Forestry Code states that: The totality of forests, land intended for afforestation, land used for cultivation, production or forestry administration, ponds, stream banks and other land used for forestry purposes, including non-productive land, included in forestry plans on 1 January 1990, including changes in area, according to the operations of entry-exit carried out in accordance with the law, constitutes, regardless of the form of ownership, the national forest fund.

state's public property and under no circumstances can the forestry plan be the state's title to prove its public ownership.

Conclusions

If Art 554 and 858 of the Civil Code impose the condition that the property provided for in the organic laws as belonging to the state or to an administrative-territorial unit must be acquired in one of the ways provided for by law, this means that it is necessary to prove this acquisition.

It may be noted that the mentioning of goods in legal provisions which enshrine them as public property does not constitute title to property, all the more so as this mention refers to a category of goods and not to goods taken individually. If the law refers to a generic category, in this case forest land, it is natural that an additional document attesting to the legal acquisition of that property is necessary in order to be able to retain the existence of public ownership of it.

Nor the legislator could "nominate" public property in the absence of the property itself. This is another moment when the notion of "domain" proves its meaning. The terms "domain" or "domanial" express the idea of the presence of an asset in the ownership of the state or administrative-territorial units. Only a domain asset can be considered to belong to the public or private domain. So, in order to be public property, it must first of all be property. There can be no ownership without proof of a legal means of acquisition.

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COMMENT ON THE EUROPEAN SOCIAL PARTNERS FRAMEWORK AGREEMENT ON DIGITALIZATION

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Abstract: *The digital transformation brings both benefits to the labor market, but it also entails risks, as some jobs will disappear or be transformed, which implies the formation of a workforce with digital skills suitable for new technologies. Adapting to the digital age requires a reflection on how the balance between work life and family life will be ensured. The implementation of artificial intelligence in the field of work must ensure compliance with the principle of human control over machines and artificial intelligence. The implementation of artificial intelligence in the field of work must ensure compliance with the principle of human control over machines and artificial intelligence. The use of digital devices raises questions about how fundamental worker rights are affected.*

Keywords: *digitization; the right to disconnect; artificial intelligence; the right to surveillance.*

Introduction

Digital technologies have led to the current period being characterized as the "digital age" or the fourth industrial revolution. Digitization affects all segments of society and the economy, including work and employment.

Digital transformation brings benefits to both employers and workers, but also to people looking for a job, respectively: increased

productivity, increased quality of services and products, new employment opportunities, better working conditions and new ways of organizing work . At the same time, this change also entails risks for workers and businesses, as some jobs will disappear or transform, workers will have to adapt, develop new skills to be able to successfully carry out an activity in the new digital era.

Adaptation to the digital age requires a reflection on how work and working conditions will be organized, how balance between professional and family life will be ensured, how access to technology will be ensured.

In the context of digitalization, the labor market must be adapted by taking measures to ensure adequate education and training, the creation of good social protection systems for both employers and workers, but also measures that take into account the impact of digitalization on the climate and the environment. Today's skills will no longer be suitable for tomorrow's jobs as highlighted in the Global Commission on the Future of Work Report.

The digital transformation is approached differently by the EU member states depending on the concrete social and economic situation, depending on the particularities of the labor market in each country, so the European intersectoral social partners (Syndicate European Trade Union, Business Europe, CEEP, SMEUNITED) have decided concluding a framework agreement on digitization to anticipate changes, to prepare the labor market for these changes. The framework agreement on digitization was concluded in June 2020, to be implemented by each member state within three years of its conclusion.

1. Directions of action. The impact of Agreement on Romanian legislation

The general objective of concluding this Agreement was to achieve a consensual transition by successfully integrating digital technologies in the workplace by capitalizing on the opportunities created by digitization as well as by preventing and minimizing risks for both workers and employers.

Education and training play a fundamental role in the digital age, the first challenge for Member States being to prepare society as a whole for the digital age. All workers need to develop basic digital skills as well as complementary skills that cannot be replaced by any kind of artificial intelligence (such as critical thinking, creativity, management).

At the same time, Member States must focus their efforts on helping people whose jobs could undergo the greatest transformations or disappear as a result of automation, robotics and artificial intelligence, to ensure access to social protection for all citizens, including workers and self-employed persons in accordance with the European Pillar of Social Rights. The goal of the states, at the European level, is "to leave no one behind".

The idea is emphasized that a partnership between employers, workers and their representatives is necessary for the implementation of the Agreement, which will apply in all countries of the European Union, to all workers, both in the public and private sectors, including the activity provided through work platforms.

The conclusion of the Framework Agreement on digitalization was aimed at increasing awareness and understanding of the transformations, respectively the opportunities and challenges resulting from the digitalization of the labor market, establishing some directions of action for employers, workers and their representatives in order to capitalize on the opportunities created, but also to meet the challenges of the digital era taking into account existing regulations and practices, establishing a partnership between employers, workers and their representatives to meet the challenges of the new era, encouraging a human-oriented approach to the implementation of digital technology in the field of work.

The directions of action established by the Agreement aim at: digital skills training and employment assurance, ways of connecting and disconnecting in the digital age, the use of artificial intelligence and guaranteeing the principle of human control, respect for human dignity and supervision at work.

Against the backdrop of the Covid-19 pandemic, the social partners' agreement has impacted Romanian legislation. Thus, a series of normative acts were adopted that allowed people to work during the pandemic, when a state of emergency was declared at the national level, and later a state of alert.

For example, by the Decree no. 195/2020 regarding the establishment of the state of emergency on the territory of Romania, it was decided for all categories of employers (from the public and private sectors) to introduce, where possible, work at home or telework through the unilateral act of the employer, so without the need for the employee's consent. The provision was taken over the Decree no. 240/2020 regarding the extension of the state of emergency on the territory of Romania.

By the Law no. 55/2020 regarding some measures to prevent and combat the effects of the Covid-19 pandemic, it was provided that during the state of alert, employers will arrange work at home or telework, where the specifics of the activity allow, in compliance with the provisions of the Labor Code and the Law no. 81/2018 regarding the regulation of telework.

Also, by the Government Decision no. 1242/2021, it was established that during the state of alert, employers arrange work at home or telework for at least 50% of employees, where the specifics of the activity allow, under the conditions of art. 108-110 of Law no. 53/2003 - Labor Code and in compliance with the provisions of Law no. 81/2018 regarding the regulation of telework activity.

By Government Emergency Ordinance no. 132/2020 regarding support measures for employees and employers in the context of the epidemiological situation determined by the spread of the SARS-COV-2 coronavirus, as well as to stimulate the increase in employment, the state granted financial support for the purpose of purchasing packages of goods and services technological necessary to carry out the telework activity.

By Law no. 283/2022, the Labor Code was amended, in the sense that the employer can establish individualized work programs for all employees. Individualized work programs mean a flexible way of

organizing work time. The way of organizing working time is understood as the possibility for employees to adapt their work schedule, including through the use of remote work formulas, flexible work schedules, individualized work schedules or work schedules with reduced working time.

Therefore, the Agreement of the social partners on digitization contributed to the flexibility of labor relations, through the normative acts adopted at the national level, important steps have been taken towards the digitization of the labor market.

In April 2023, a national debate took place regarding the signing of the framework agreement for digitization of social partners in Romania, during which the need for cooperation between public authorities and the business environment was discussed in order to train and develop digital skills both among civil servants as well as in the private sector. It was proposed that the framework agreement be signed exactly as it is written at the European level.

2. Digital skills and securing employment

The spread of digital technologies causes the destruction of certain types of jobs, but it also leads to the creation of new jobs, so the question arises of what should be done. The first step to ensure a smooth transition to the digitization of the labor market is to prepare the workforce by training the appropriate skills to face the challenges of digital transformation.

What does this process of preparation and training of digital skills entail?

First, the social partners must facilitate access to effective and quality training for skills development within diverse and flexible training systems; there must be a common interest in the formation of a skilled workforce with skills appropriate to new technologies, which will lead to the existence of competitive enterprises and high quality services.

Employers must make positive use of digital technology to improve innovation and productivity for long-term business

development, better working conditions for workers and increased employment. Workers, for their part, must support the development of businesses and recognize the beneficial role that digital technology has, so that businesses can be competitive.

It is also necessary to identify which digital skills need to be developed and, accordingly, to take appropriate training measures, depending on the activity sector, the specifics of the enterprise.

The agreement encourages social partners to stimulate the transition of workers within enterprises, between enterprises and between sectors of activity, by investing in the development of skills and by developing the capacity for continuous professional insertion of the workforce.

A common commitment to action must be supported by social dialogue structures to identify needs related to digitization. The measures to be taken into account concern the commitment of both parties, employers and workers' representatives, to improve themselves or re-specialize to face the new digital reality, facilitating access to training programs with establishing the conditions of participation, duration, financial aspects.

It is recommended that the employer who requires an employee to participate in professional training on the digital transformation of the enterprise, bears the costs or these costs are supported according to those established in collective agreements or national practices.

It is also recommended that training programs take place according to a schedule agreed between the employer and the worker, as far as possible during working hours; if the programs are to take place outside working hours, the worker must be adequately compensated.

The training must be effective, of quality, meet the needs of the worker and the employer, so that the training program leads to the best use of digital technologies.

An important objective of digital transformation strategies is to avoid job losses as well as to create new jobs needed in the digital era, so that both workers and businesses benefit from digitalization.

The joint commitment of the social partners aims at retraining and professional development so that workers can take up new jobs or adapt to redesigned jobs within the enterprise.

The redesign of jobs within the enterprise must allow workers to remain in a position in the enterprise if their job or some of their job duties disappear, of course taking into account acquired digital skills.

It underlines the need to introduce an equal opportunities policy to ensure that digital technology benefits all workers and does not contribute to inequality between women and men.

3. Login and logoff methods

Another aspect considered by the social partners in the agreement concerned the ways of signing in and out of workers using digital work devices.

The use of digital devices in the workplace can offer many opportunities and possibilities to make work more flexible for the benefit of employers and workers, but at the same time it is a challenge regarding the definition, delimitation of working time and rest time.

The incorporation of ICT into the work sphere can lead to the permanent availability of workers for indefinite periods outside of working time which significantly blurs the line between work time and rest time.

There has even been talk of creating a new type of working time, known as "third time" or "workplace contact time", "technological connectivity time". (Carby-Hall and Mella Méndez, 2020, p. 183-184)

The European Parliament strongly rejects the shift from a culture of presence at work to a culture of permanent availability and calls on the Commission, Member States and social partners to ensure that, when developing smart work policies, they do not impose additional burdens on workers, but strengthen a healthy work-life balance and increase workers' quality of life.

In the Resolution of the European Parliament of 13 September 2016 regarding the creation of conditions on the labor market favorable

to the balance between professional and private life, "smart work" is defined as an approach to the organization of work through a combination of flexibility, autonomy and collaboration, which it does not necessarily require the worker to be present at the workplace or any pre-defined place and allows them to manage their own work schedule, while ensuring consistency with the maximum daily and weekly working hours provided by law and collective agreements.

The Agreement recognized that ensuring the health and safety of workers at work is the responsibility of the employer, who must take preventive measures to avoid negative effects on the health and safety of workers at work.

The measures to be taken refer to the creation of a culture among both employees and workers in which everyone actively participates in ensuring a safe and healthy working environment, which includes compliance with working time rules and remote working rules with the avoidance of contact outside working hours, the creation of policies regarding the use of digital tools for private purposes during working time, the existence of permanent exchanges of information between workers and employers regarding the workload.

Where the performance of the worker's duties requires an out-of-hours connection, the worker must receive an appropriate benefit for any overtime worked.

In the digital age, with telecommuting and remote work there is a danger that working time will never end. Workers are expected to stay connected, answer emails and phone calls even after hours, on days off or on vacation. And even if the employer doesn't require the worker to stay logged in, the worker may be doing so voluntarily. This will affect the health and safety of workers as well as their private lives, rest time no longer exists in this situation. Self-exploitation is a much greater danger. The eight-hour working day - the great achievement of the early 20th century labor movement - is in danger of being abolished. Even though it will be very difficult to prevent self-exploitation, it is necessary to legislate that the worker is not obliged to work beyond a certain period of time. (Gyulavári and Menegatti, 2022, p. 31-32)

In the case of performing the activity at a distance or via telework, it is necessary to take some measures to prevent isolation at the workplace.

In the context of digitization, and due to the fact that more and more employees are working remotely, the European Parliament adopted the Resolution of January 21, 2021 containing recommendations addressed to the Commission regarding the right to disconnect.

The obligations of the member states can be summarized as follows: (i) establishing a legal and institutional framework in which workers can effectively exercise their right to disconnect (including by providing them with platforms to disconnect from digital tools, used in the work process) ; (ii) the creation of an objective, reliable and accessible system that allows measuring the duration of the worker's daily working time, in accordance with the worker's right to privacy and the protection of personal data; (iii) providing workers who are excluded from the scope of the directive with adequate compensation, (iv) ensuring that any forms of discrimination, less favorable treatment, dismissals or pecuniary sanctions are prevented on the grounds that workers have exercised this right to disconnect, as well as ensuring equality between men and women; (v) ensuring compliance with the principle that the right to disconnect is done fairly, legally and transparently (Moarcăș, 2021, p. 319-323).

In the practice of the member states where telework was successfully implemented before the pandemic, policies were adopted to balance teleworkers' work and rest time by guaranteeing teleworkers' right to disconnect

France regulated in its legislation, in the Labor Code, the right to disconnect since January 2017. The aim was to insert a regulation of the use of digital devices, to promote respect for rest time and the balance between professional life and private life. The right to disconnect must be doubled by the employer's obligation to ensure occupational health and safety and to implement a general prevention obligation through collective agreements.

In Romanian legislation, the right to disconnect has not yet been expressly regulated. In the Labor Code we find clear rules regarding working time and rest time (article 111 et seq.), periodic breaks (article. 133 et seq.), the duration of annual leave and other employees' leave (article 144).

By Law no. 81/2018 telework activity was regulated. For telecommuting activities, there are no rules derogating from the above.

Telework is defined, in the sense of the law, as a form of work organization through which the employee, on a regular and voluntary basis, fulfills the duties specific to the position, occupation or job he/she holds in a place other than the workplace organized by the employer, using information and communication technology.

Teleworkers, in agreement with the employer, organize the work schedule in accordance with the provisions of the individual employment contract, the internal regulations or the collective employment contract applicable under the law.

The employer can ask the employee to perform additional work. The full-time employee, with his written consent, may perform additional work.

The employer has the obligation to keep records of the hours of work performed daily by each employee, highlighting the start and end times of the work schedule, and to submit this record to the control of labor inspectors, whenever this is requested (art. 119 of the Labor Code). This obligation also exists if the employees have a mobile activity or perform work at home.

In the case of telework, the employer has the right to check the teleworker's activity mainly through the use of information and communication technology, under the conditions established by the individual employment contract, the internal regulation and/or the applicable collective labor agreement, under the law.

Telework was considered by the social partners both as a means of modernizing the organization of work for companies, as well as a means of reconciling work and social life for employees. Thus, it was not aimed at allowing the extension or violation of working time limits or affecting the work-life balance. (Dima and Högback, 2020)

In this context, the question arises whether the right to disconnect must be regulated in Romanian legislation or whether the existing legal provisions provide sufficient guarantees for employees to observe a work schedule within the limits of working time that does not affect the balance between professional life and private life.

The opinion was expressed that until now there was no need to regulate teleworkers' right to disconnection, given that they cannot be legally obliged to stay connected or to respond to the employer's requests outside of the work schedule agreed with him; employees (including telecommuters) cannot be sanctioned for disciplinary misconduct if they refuse to respond/work outside working hours or to respond to a request communicated by the employer outside working hours. The main problem is not the lack of legislation to protect employees and their right to disconnect from work, but the implementation/respect of this legislation, because in practice employees often continue to work, outside of working hours, even if in theory they have the right to don't do that. The solution for a better protection of employees in Romania would be, not to adopt a new regulation on the matter, but to respect the existing one. At the same time, it is shown that opinions about the need to adopt a new regulation in the matter may change, because the actual situation of teleworkers who work "continuously" and cannot set limits on their working time becomes more serious and may affect them in dramatically health (effects such as stress, exhaustion) and work-life balance (affecting their private/family life) (Dima and Högback, 2020) .

It was also shown that, in the absence of the express consecration of the right to disconnect, the applicable legal provisions prohibit the provision of overtime without the employee's consent, which indirectly, but unequivocally, equates to the employer's prohibition to impose on the employee the obligation to remain connected/available outside of his work schedule (Vlăsceanu and Iordache, 2023) .

In another opinion it was shown that both the right to connect and disconnect, as well as the organization of working time in the case of remote work - must be the result of consultations and negotiations with the social partners either at the unit level or at the sector level of activity

sector to respond to all needs, but especially those of health protection at work and ensuring a fair balance between professional and family life (Moarcăș, 2021) .

Although working time and rest time is regulated restrictively by the Romanian legislator, in the case of remote work, employees encounter difficulties in keeping their regular work schedule, practically speaking they do not have the possibility to claim these legal limits outside the regulation of the law disconnection. For the implementation of the right to disconnection, the role of the social partners is essential and appropriate individual information measures must be taken to ensure the awareness of the teleworker and his awareness of the risks associated with permanent availability (Duca, 2021).

I mention the fact that through the Collective Labor Agreement at the level of the activity sector "Financial, banking and insurance activities in Romania" by art. 43 para. 2 it was established that any visit or task sent by the employer after working hours, with a deadline for execution on the same day, is considered additional working time and will be treated according to the law. In practice, the right to disconnection is regulated in an embryonic form, by qualifying the time in which an employee performs a task received after the end of the work schedule and which must be performed on the same day, as additional work, work that must be remunerated according to the law.

So until the legal regulation of the right to disconnection, it can be established by agreements between employers and employees.

The concrete way in which the right to disconnection could be regulated in Romanian legislation would be, either through the legislator's preoccupation with advancing a project of a normative act in this sense, or the transposition of a possible directive of the Union legislator guaranteeing the right to disconnection.

In any of the methods shown, in accordance with the opinion expressed in the field by reputable authors, I appreciate that it will be necessary to correlate with the norms of the Labor Code regarding the maximum duration of working time and the minimum duration of periodic rest, completing the law on telework in the sense of the involvement of social partners in finding the best solutions for

establishing the legal framework in which workers can exercise their right to disconnect.

4. Artificial intelligence and guaranteeing the principle of human control

Artificial intelligence will have a significant impact on the world of tomorrow. AI systems have valuable potential to increase enterprise productivity and worker well-being, to distribute tasks within the enterprise between humans, and even between machines and humans.

To cope with digital transformation and the implementation of AI, workers whose jobs are changing or may disappear due to automation must have all the opportunities to acquire the skills and knowledge they need to master the new technology and receive support on the duration of labor market transitions. This forward-thinking approach and focus on investing in people is the cornerstone of a people-centric and inclusive approach to AI.

Artificial intelligence (AI) involves a number of potential risks, such as opaque decision-making, gender or other discrimination, intrusion into our privacy or use for criminal purposes. Some AI applications may raise new ethical and legal questions, for example related to liability or potential influence on decision-making processes.

The EU must therefore ensure that AI is developed and applied in an appropriate framework that promotes innovation and respects the Union's values and fundamental rights, as well as ethical principles such as accountability and transparency. (White Paper, Artificial Intelligence - A European approach focused on excellence and trust).

Starting from these wishes, the Agreement emphasized the idea that it is important for the social partners to ensure that the introduction of artificial intelligence in the world of work does not endanger the workforce, but increases the involvement and capabilities of the human factor at work.

The agreement sets out certain directions and principles regarding the introduction of AI into the world of work.

A first direction aims to guarantee the principle that people are in control of machines and artificial intelligence in the workplace.

Workers should also support the use of robots and artificial intelligence applications, leading to increased productivity and much easier completion of work tasks.

The use of robots and artificial intelligence applications will have to be done in compliance with the rules of safety and security at work.

The social partners have established that artificial intelligence should be used in the field of work under the following conditions :

- to enjoy a legal, fair, transparent, safe and secure regulation, to respect all applicable laws and regulations, as well as fundamental rights and anti-discrimination rules;
- to comply with the agreed ethical standards, ensuring respect for fundamental human rights, equality and other EU principles;
- be robust and sustainable, both technically and socially, as AI systems can cause unintended harm, even when used with the best of intentions.

Therefore, the implementation of artificial intelligence systems should respect the principle of human control, be carried out under safe conditions to prevent damage to physical and mental integrity, not lead to discrimination, and ensure transparency.

It was emphasized that, if artificial intelligence is used in human resources procedures for recruitment, evaluation, promotion, dismissal, performance analysis, transparency must be ensured by providing information, through which the way of carrying out the these procedures. It is also necessary to ensure the possibility of the worker to challenge the decision and the results obtained with the help of artificial intelligence and to request the intervention of the human factor.

This is basically the application of the principle of human control over artificial intelligence systems.

Artificial intelligence systems should be designed and operated in such a way as to comply with legal regulations including the GDPR to guarantee compliance with the principle of worker dignity.

On April 21, 2021, the European Commission formulated a proposal for a regulation of the European Parliament establishing harmonization rules on artificial intelligence.

The proposal aims to address the risks associated with the use of AI. It aims to develop a legal framework for a trusted AI. The proposal is based on the EU's fundamental values and rights and aims to give people and other users the confidence to adopt AI-based solutions, while encouraging businesses to develop them. AI should be a tool for people and a force for good in society, with the ultimate goal of raising the level of people's well-being. So regulating the legal framework for the use of AI has people at its core so that they can trust that the technology is being used in a safe way and in accordance with the law, including respecting fundamental rights.

The Commission presents the proposed regulatory framework on artificial intelligence with the following specific objectives, such as ensuring that AI systems placed on the Union market and used are safe and respect existing legislation on fundamental rights and Union values, ensuring legal certainty to facilitate investment and AI innovation, creating a digital single market.

While AI clearly creates new opportunities, it also presents challenges and risks, for example in terms of safety and liability in case of misuse. The use of AI must respect fundamental rights, the right to human dignity, respect for privacy and protection of personal data, non-discrimination.

The main disadvantage of using robots, algorithms, in the work process consists in the occupation of jobs by robots and as a consequence the replacement of people, the loss of their jobs.

In specialized literature, it was analyzed whether the current legislative framework allows the dismissal of people if the jobs will be filled by robots. According to art. 65 of the Labor Code, the dismissal in question will be determined by the termination of the job held by the employee, for one or more reasons unrelated to the employee [par. (1)]. It is mainly about economic difficulties, technological transformations, reorganization of the activity. However, the termination of the job must

have a real and serious cause [par. (2)]. The Constitutional Court held: the cause is real when it presents an objective character, being imposed by an objective character, being imposed by the need to overcome some technical and economic difficulties, by the economic imperative of increasing labor productivity, of adapting to the evolution of new technologies (Decision no. 420/2013 (published in Official Gazette no. 48 of January 21, 2014).

Technological innovation, to be the cause of the dismissal, should be considered, in concrete, depending on the previous technological state of the entity and invoking the acquisition or possession of AI tools. Under these conditions, the employer can decide to restructure based on the technological change with the consequence of losing the jobs of some employees, followed by their dismissal. The renowned author concludes that the employer, in such a situation, has the obligation to organize the professional adaptation of his employees to the new technologies and only in the end can decide the dismissal caused by the use of AI tools (Ticlea, 2024).

The use of AI in the field of labor will create broader perspectives on the employment relationship, going beyond the traditional relations of employment law.

It has been argued that the structure of the employment contract will be different in the future in that the artificial machine can be considered a third element taking part in the contractual relationship involving the employer and the worker. In the near future, the labor contract will necessarily be supplemented with monitoring and regulatory actions carried out by machines - the third element of the contract. (Eduardo et al., 2021, pp. 291 -292).

In March 2024, the European Parliament's Legislative Resolution on the Artificial Intelligence Regulation was adopted. The purpose of the regulation is to improve the functioning of the internal market, promote the adoption of human-centered and reliable artificial intelligence (AI), while ensuring a high level of protection of health, safety and fundamental rights enshrined in the Charter of Fundamental Rights, including democracy, the rule of law and the environment against the

harmful effects of artificial intelligence systems (AI systems) in the Union, and to support innovation.

The Regulation establishes: (a) harmonized rules for placing on the market, commissioning and use of AI systems in the Union; (b) prohibitions on certain AI practices; (c) specific requirements for high-risk AI systems and obligations for operators of such systems; d) harmonized transparency standards for certain AI systems; (e) harmonized rules on the placing on the market of general purpose AI models; (f) rules regarding market monitoring, market surveillance, governance and ensuring compliance with this regulation; (g) measures to support innovation, with a particular focus on SMEs, including start-ups.

At the national level there is a legislative proposal on artificial intelligence B154/2024 registered at the Senate of Romania, which aims to lay the foundations for the implementation, use, development and protection of Artificial Intelligence in Romania, in the context of the development of new technologies and the implementation of increased security measures for cyber space at the national and European level.

5. Respect for human dignity and worker ’surveilliance

The worker is obliged to perform work under the guidance and supervision of the employer or the person delegated by him, the employer being able to adopt all the measures considered appropriate for supervision and control, to verify the worker's compliance with his obligations and duties with respect for the worker's dignity.

The use of digital devices considerably expands the possibilities of control over the worker's activity, raising questions about how the worker's fundamental rights are affected, such as the right to be intimidated, the right to one's own image, the secrecy of communications, the protection of personal data.

As a rule, the use of modern technologies by the employer, as well as the traditional ones, can be justified for several reasons, among them: protecting the employer's property, protecting the good reputation

of the company, preventing or detecting corporate secrets, detecting the violation of the non-compete clause , increasing production efficiency and quality, employee safety, preventing employee claims against the employer (Carby-Hall and Mella Méndez, 2020, p. 145).

Practically, there must be a proportionality between the purpose pursued by the use of digital systems and the way in which the right to privacy, the right to the protection of personal data is affected.

The Agreement noted that digital technology, the use of AI and data processing, while offering the opportunity to secure the work environment, ensure healthy and safe working conditions and improve the efficiency of businesses, at the same time they present the risk of compromising dignity to the human being, especially in cases of personal monitoring which could cause the deterioration of working conditions and workers' well-being.

In order to reduce the risk of intrusive monitoring and misuse of personal data, it is recommended to implement clear rules regarding the use and processing of personal data.

The agreement refers to the Regulation on the protection of personal data. According to Article 88 of the Regulation, by law or by collective agreements, member states may provide more detailed rules to ensure the protection of rights and freedoms regarding the processing of personal data of employees in the context of employment, likely to guarantee respecting the human dignity, legitimate interests and fundamental rights of data subjects, in particular with regard to the transparency of processing, the transfer of personal data within a group of enterprises or a group of enterprises involved in a common economic activity and workplace monitoring systems.

Essentially, it states that data collection should be done with a concrete purpose in transparent conditions, data should not be collected and stored for use at a later time and without a specific purpose.

The national legislator provided that if monitoring systems are used by means of electronic communications and/or by means of video surveillance at the workplace, the processing of personal data of employees, in order to achieve the legitimate interests pursued by the employer, is allowed only if the legitimate interests pursued by the

employer are thoroughly justified and prevail over the interests or rights and freedoms of the persons concerned, if the employer has carried out the obligatory, complete and explicit prior information of the employees, if the employer has consulted the trade union or, as the case may be, the representatives of the employees before the introduction of monitoring systems, if other less intrusive forms and ways to achieve the purpose pursued by the employer have not previously proven their effectiveness and the duration of storage of personal data is proportional to the purpose of processing, but not more than 30 days, with the exception of situations expressly regulated by law or thoroughly justified cases (article no. 5 of Law no. 190/2018).

Therefore, the monitoring by means of electronic communications and/or by means of video surveillance at the workplace and the processing of personal data of employees by the employer is justified in the situation where the employer justifies a legitimate, real interest that prevails over the particular interest of the employee.

Monitoring can only be done to the extent that the employer has informed the employee in advance, consulted the union or the representatives of the employees before the introduction of monitoring systems and no less intrusive forms have been identified to achieve the intended purpose, the duration of data storage is proportional to the purpose of the processing.

In the specialized literature, the question has been raised whether the employee can be considered to have given his consent to be monitored by the employer, by the simple fact that he concluded an employment contract? (Dimitriu, 2017)

This problem was analyzed by reference to the Romanian legislation (Law no. 677/2001, as well as Decision no. 52/2012 regarding the processing of personal data through the use of video surveillance means (issuer: National Authority for the Supervision of the Processing of Personal Data Personal - ANSPDCP) and to the solution of the European Court of Human Rights, which ruled on 5 September 2017 in the case of Bărbulescu v. Romania. In the aforementioned case, although the Romanian courts validated the dismissal decision, considering it to be

legal, point of view maintained by the Fourth Chamber of the European Court of Human Rights, which considered that, in this case, the employee's right to private life was not affected. The court held on that occasion that the employer accessed the plaintiff's email account in the belief that it contained work-related messages, since the plaintiff initially claimed that he used the messaging to give advice to clients. The domestic courts relied on the transcript only because it proved the applicant's disciplinary breach, namely that he used the company computer for personal purposes during working hours. The verification of the plaintiff's communications appeared, thus, as the only method of verifying his defense. However, on September 5, 2017, the Grand Chamber of the ECHR completely modified the approach, this time ruling in favor of the applicant (former employee), appreciating that the national courts did not ensure adequate protection of the worker's private life and the secrecy of correspondence and did not establish an appropriate balance between his and the employer's interests. As a result, the decision to dismiss Mr. Bărbulescu constitutes a violation of the provisions of art. 8 of the Convention, regarding private life and the secrecy of correspondence.

The author points out that in this case, neither the fact that the employee held private discussions during working hours, nor that they took place using the employer's electronic messaging system, nor that such conduct was sanctioned as a disciplinary offense by the internal regulation, the employer notifying employees of the possibility of monitoring private discussions held on the company's electronic equipment. The problem noted by the Court was the fact that the notification was not made prior to the monitoring, this element being decisive in the Court's decision, which assessed that the monitoring is legitimate only if there is a prior notification of the person concerned, the employee having in this case, a reasonable expectation of confidentiality of his discussions (even if he takes them online and even if he takes them from the workplace).

It is noted that monitoring is possible in the context of prior notification and compliance with the principle of proportionality. If the worker was not warned about the possibility (or degree) of monitoring by

the employer, it is generally considered that the surveillance constitutes an unacceptable interference in the private life of the person. And the fact that the employer is the owner of a device on which the worker carries out his activity does not entitle him in any way to monitor the activity carried out on that device.

Therefore, the Agreement recommends the implementation of norms that guarantee the right to human dignity, the right to protect personal data, the supervision of the worker at the workplace representing an unacceptable interference in the private life of the person.

Conclusions

The impact of the digitization of the labor market and the use of artificial intelligence is a concern of the member states to help people whose jobs could disappear or suffer the greatest transformations to have access to social protection, to have their fundamental rights respected - the right to dignity , the right to privacy, the right to one's own image, the right to private life.

The conclusion of the Framework Agreement on digitalization was aimed at increasing awareness and understanding of the transformations, respectively the opportunities and challenges resulting from the digitalization of the labor market, establishing some directions of action for employers, workers and their representatives in order to capitalize on the opportunities created, but also to meet the challenges of the digital era taking into account existing regulations and practices, establishing a partnership between employers, workers and their representatives to meet the challenges of the new era, encouraging a human-oriented approach to the implementation of digital technology in the field of work.

The social partners aimed to prepare the labor market for the changes that the digital age brings and to achieve a consensual transition, the successful integration of digital technologies in the workplace to capitalize on the opportunities created by digitization and minimize the risks for both workers and employers.

The agreement of the social partners influenced Romanian legislation, thus a series of normative acts were adopted that enabled people to work during the pandemic, when a state of emergency was declared at the national level, and later a state of alert.

The danger of being permanently connected requires the regulation of the right to disconnect, either at the Union level or at the national level.

Clear rules are needed regarding the use and processing of personal data, which guarantee the right to privacy, the right to human dignity in the field of work and which guarantee the principle of human control over systems that use artificial intelligence in the field of work.

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JOINT VENTURE. RIGHTS AND OBLIGATIONS OF ASSOCIATES

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Abstract: *Characteristic of joint venture is the lack of legal personality, but also the fact that it does not benefit from a common, autonomous patrimony, has not its own name and consequently, no may aquire rights or obligations of its own.*

From this fundamental characteristic it follows that the associates, which are subjects of law, engage in their own name towards third parties when they act on behalf of the joint venture.

The contracting parties are: the managing partner and the participating partner.

Keywords: *associates; rights; obligations; joint venture.*

Introduction

According to the definition provided by Article 1.949 of the Civil Code, a joint venture agreement is an agreement by which one person grants one or more individuals a share in the profits and losses of one or more operations that they undertake.

In order to define the concept of a joint venture agreement, it is necessary to take into account the provisions of Article 1.881 of the Civil Code regarding the simple partnership without legal personality.

From the analysis of the definition, we can deduce that joint ventures can only arise between natural and/or legal persons, and not between other partnerships or simple companies without legal status. Also, the conclusion of a joint venture agreement between associations

with legal status but with pecuniary purposes is excluded, given the purpose of the joint venture, namely the realization of benefits.

From the same legal provisions that define the joint venture, we can also deduce its characteristics, namely to be a written, onerous and consensual agreement.

As a principle, any natural person[1] or legal entity can be a partner, regardless of whether or not they are a professional, but according to the Civil Code, at least one of the partners must be a professional. The legal entity partner in the joint venture may also be a private company, as regulated by Law 31/1990 concerning Companies. Cooperative societies governed by Law no. 1/2005[2] on the organization and operation of cooperatives, non-profit legal entities organized in the form of associations and foundations, according to the Government Ordinance no. 26/2000[3], as well as any other legal entity under private law, even if it is not a professional, may also enter into the joint venture.

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[1] The specialized doctrine has raised the question of the participation of spouses in the formation of a company. It should be noted that Law No 31/1990 does not contain express rules on the participation of spouses as partners in a company. Thus, the rules of common law, namely the provisions of the Civil Code on the legal regime of the property of spouses, apply. As a matter of principle, Article 1882, paragraph (1), second sentence, provides that "a spouse may not become a partner by contribution of joint property except with the consent of the other spouse, the provisions of Article 349 of the Civil Code being applicable accordingly.

[2] The cooperative society may carry out any activities permitted by law, if they are carried out with a view to achieving the purpose for which they were established (Art. 8 of Law 1/2005).

[3] Associations, foundations and federations may carry out any other direct economic activities if they are incidental and closely related to the main purpose of the legal entity (art. 48 of the Government Ordinance no. 26/2000). Moreover, given that these non-profit organizations may participate in the establishment of companies with legal personality (regulated by Law 31/1990) and may even carry out direct economic activities (according to art. 47 of the Government Ordinance 26/2000, which stipulates as clearly as possible the sources of income of non-profit organizations), we see no impediment to their being able to participate as a partner in a joint venture. In our opinion, the list of sources of income given in the Law on Associations and Foundations is not limitative, since the article also refers to 'other income provided for by law'.

Following the conclusion of the joint venture agreement, the partners acquire certain rights which, however, cannot be analyzed as in the case of companies as fractions of the share capital.

The joint venture has no assets of its own, no share capital to be divided, and the rights acquired by the conclusion of the agreement are exercised vis-à-vis the other partner.

It is also a contract governed by the principle of consensualism[1] , in the sense that it can be concluded simply by the agreement of the parties, and no other conditions or formalities of the nature of those laid down, for example, in the case of companies, are necessary for its valid conclusion. In order to be valid, the consent of the parties must be expressed by a person of sound mind, with the intention to produce legal effects, externalized and not vitiated (Deak, 1999, p.453).

Thus, based on the principle of freedom of agreement[2] and the principle of consensualism, the associates can determine: the form of the agreement, the conditions of the association, as well as the causes of termination.

The joint venture agreement is of a sign-synallagmatic nature, as it creates interdependent and reciprocal obligations for all the partners, each party's performance being the cause of the other party's consideration (C.A. Craiova, s.com., dec. no. 237 of November 5th, 2009, www.idrept.ro.).

However, we believe that, in view of the purpose of establishing such a legal entity (which are not intended to be profit-oriented, according to Article 1(2) of Government Ordinance No 26/2000), an association or foundation cannot be a primary partner, but only a secondary partner, who may participate with goods or money in order to obtain, from the joint venture, additional income necessary for the realization of the object of the association or foundation.

[1] Joint venture as defined by Art. 1949 is a written, onerous and consensual contract.

[2] Synthetically, the *freedom of agreement principle* can be summarized in a few ideas: the basis of the binding force of agreements is the will of the parties; the parties are free to determine the content and form of the agreement; the agreement is binding on the parties and considered "the law of the parties"; the effects of the agreement of will do not extend to third parties because they did not participate in the creation of the legal relationship.

The applicable legal regulations do not use a specific name for the parties to the joint venture agreement, as is the case for other agreements. In practice, we encounter the terms "primary partner", "managing partner", "principal partner", being the partner who actually carries out the operations for which the joint venture was created, and the term "participating partner" or "hidden partner", for the party that does not participate in the practical realization of the specific activity of the joint venture. At the same time, the term managing partner (Țăndăreanu, 1995, p. 14; Chifan, 2005, p. 35) , designates the person who is responsible within the joint venture for the accounting records and reporting obligations related to the joint venture activity.

We consider it appropriate to call them managing partner and participating partner, names which fully outline the legal position of the contracting parties and summarize the obligations incumbent on each of them.

The managing partner (Chifan, 2013, p. 36; Țăndăreanu, 1995, p.13) is the participant designated to actually carry out the legal operations for which the joint venture was created, and the participating partner is the person who does not participate in the practical realization of the specific activity of the joint venture.

All partners may take part in the actual conduct of the business transactions in person or through representatives. Also, due to the intuitu personae character, the parties may not substitute another person or introduce new participants without the express consent of the other partners.

In what follows, we will set out the rights of the partners arising from the conclusion of a joint venture agreement, dividing them into two categories: political rights and financial rights.

1. Rights of associates. Political rights. Right to participate in decision-making . Public order principle

The freedom of persons is recognized to all subjects of civil law, subject to the following general limits: public order and good morals: "the sanction for breach of the rules of conduct relating to public order is

the nullity of the act concluded in breach of them". This right being respected, the joint venture agreement may freely provide for the modalities.

The freedom of legal will must be exercised only within legal limits, in order to respect public order. In the doctrine, the limits of the will are contained in the concept of "conformity of the agreement with public policy and morality" (For an in-depth analysis of the conformity of the agreement with public policy and morality, Ghestin, Loiseau and Serinet, 2013, p.378 et seq.).

Consent has an important role to play in relation to its content, forming part of the notion of *affectio societatis* (for the notion of *affectio contractus* in French doctrine, see Terré, Simler, Lequette, 2005, p. 446)[1] and covers all the determining elements of the association. It is considered that *affectio societatis* is not a single concept, but multifaceted.

The collective body of associates may take decisions at meetings of the general assembly, the convening, quorum and majority of which shall be freely agreed in the agreement. The general meeting shall be the deliberative and decision-making body of the joint venture and shall consist of all the members.

In the absence of specifications on the consultation procedures in the agreement, decisions are taken in meetings or, in the case of a civil association, solely with the consent of the participants expressed in a deed. The inter-war doctrine (Georgescu, 2002, p.306) laid down an essential principle of company law, enshrined in the form of an adage, that the general meeting is the company itself. Just as constitutional law states that the will of the citizens is emphasized, in accordance with the principle of the representative mandate, by the will expressed in

[1] These latter authors emphasize that a good number of agreements which have recently appeared in the commercial circuit (dependency agreements such as: concession agreements, franchising agreements, distribution agreements, exclusive supply agreements, technology transfer agreements - savoir-faire or know-how) are based on this *affectio contractus*. The authors also cite French case law - Cass. com. 19 décembre 1989, Bull. civ. IV, nr. 327, p. 220.

Parliament by their representatives, so the will of the associates is transformed into the social will in general assemblies.

From this perspective, as emphasized in the French doctrine (Thaller, 1910, p.370) , "the general meeting is the instrument of the superior will of the company".

The rules of law governing the right of members to participate in general meetings are of public policy, and clauses in the articles of association or statutes which restrict this right to any extent are null and void (Cass., dec. com. of April 7th, 1932 apud Mestre, Faye, 1992, p.297) . There are certain situations in which the powers of the general meeting are limited, in particular as regards certain rights of members which cannot be restricted, even by a resolution of the general meeting (Cărpenaru, David, Predoiu & Piperea, 2002, p.244) .

During the inter-war period, in Italian (De Gregorio, 1938, p. 390) and in Romanian (Georgescu, 2002, p. 302-304) doctrine, the following were qualified as intangible rights, which cannot be prejudiced by a resolution of the general assembly:

a. The right to benefits and the right to participate in the final distribution of the assets following liquidation;
b. The right to take part in the management of the company;
c. The right to challenge decisions of general meetings when they are contrary to the articles of association or the law;
d. The right to equal treatment, consisting in the impossibility for the general meeting to change the equality of shareholders.

Unanimity **-** In principle, decisions are taken unanimously unless otherwise provided in the articles of incorporation. If, however, the decision leads to an increase in the obligations of the members, decisions must be taken unanimously (Cass. III, dec. nr. 1853 of 11.07.1939, quoted in *Commercial Code*, 1994, p. 296). In the absence of express provisions in the agreement, it is the managing partner who decides on the ways and means of realizing the purpose of the joint venture, having an exclusive right in this respect, the participating partner having no right over the directives of the joint venture, and being unable to oppose the operations initiated and carried out by the managing partner.

Right to information

The right to participate in decision-making is complemented by the right of the associates (who are not administrators) to be informed, because only if they are properly informed can the associates form a picture of how the association is being carried out and managed. The realization of the right to information is a *sine qua non for* the exercise of the right of control over the association.

The common law in this matter is Article 117(3) of the Companies Act 31/1990. The development of the common law rules, which generally govern companies, whether traded on a regulated market or not, is in the direction of increasing the prerogatives of shareholders as regards their right to be informed about the company's activities.

The principles of corporate governance, applicable to any type of company, require the participation of all shareholders in the decision-making activity within a company, and the first condition for achieving this objective is to respect their right to information.

The French doctrine (Merle, 1990, p.249) emphasizes the permanent nature of the right to information, which must also be exercised between general meetings.

The right to information is considered to be an integral part of the right of control of the members (Georgescu, 2002, p. 470-471; Cărpenaru, David, Predoiu & Piperea, 2006, p.305) . The legal rules concerning the prerogatives of the members to be informed about the operations concerning the management of the association have been regarded as regulating the situations prior to the actual exercise of control.

The managing partner must constantly communicate the results of the activity to the partners. Also, Order 3512/27.11.2008 on the financial accounting documents governing the statement of income and expenditure of the joint venture stipulates that it shall be drawn up in two copies, one of which shall be communicated to the other party.

In so far as the participating member is not informed, to what extent does he or she have a right to control, verify or supervise the

commercial and accounting aspects of the association? We consider that the statutes may freely organize the information of the associates to enable them to control the management. In the absence of any other special provision, the rules will differ according to the nature of the activity carried on. Thus, if the object is civil, the members have the right to obtain, at least once, communication of the registers and corporate documents and to ask questions in writing concerning the management of the company, to which they will have to be answered in writing within one month. If the object is commercial, the same right may be exercised twice a year.

Failure to comply with the legal provisions concerning the right to information of the shareholders of the joint venture may entail, as the case may be, criminal liability or contravention of the persons to whom the obligation to inform is incumbent. Within the scope of the common law, outlined by the Companies Act No. 31/1990, there are several facts related to informing the company's shareholders, described as offenses.

Financial rights. **Right to benefits**

One of the main rights conferred by the joint venture is the right to share in the benefits resulting from the activity undertaken, which is conditional on the actual realization of benefits as a result of the joint venture.

The parties are free to determine how the benefits are to be shared, the only rule being that there must be no guaranteed minimum level for any of the partners.

Thus, if it is a single operation, the benefits are calculated and paid on the date of completion of that operation, but the parties may agree that the benefits may also be shared annually after the end of the financial year.

Indeed, the special rules on partnerships and general partnerships do not lay down any rules on this subject (only general texts on the division of profits are provided for partnerships with legal personality). Moreover, the profits received by the participants are not in the nature of dividends. The benefits may consist in the payment of money as a result

of the commercial activity, but also in movable or immovable property as a result of the activity carried out.

If the parties have not agreed otherwise, the sharing of the benefits between the partners shall be in accordance with common law, in proportion to the contribution made to the partnership[1] . To this end, it must be specified what contribution is to be taken into account and not its appearance vis-à-vis third parties. However, it is permissible to set different shares in the profits or losses, provided that such percentages are not derisory and do not conflict with the contribution made.

In the same way, it may be stipulated that the payment of benefits is related to the income received, with the stipulation that it is advisable to set in the contract the deadline by which the partner who has received the income is to make the payment to the other partner[2] .

In the doctrine (Țăndăreanu, 1995, pag.13) it has been held that the fact that each partner's share in the benefits has not been provided for does not render the contract null and void, but rather implies that the parties intend to share the resulting benefits equally.

In another opinion, this solution has no legal basis because the common law that applies in the absence of a stipulation to the contrary is that the share of each partner will be proportional to the personal

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[1] This principle is enshrined in Article 1902, paragraph (2), according to which: "The share of each shareholder in the profits and losses shall be in proportion to his contribution to the share capital, unless otherwise agreed. The share in profits and losses of the shareholder whose share consists of specific services or knowledge shall be equal to that of the shareholder who has contributed the smallest share, unless otherwise agreed".

[2] In this respect, however, judicial practice has held that, where the payment obligations of a partner in a joint venture agreement, the object of which is the construction and operation of a network of service stations located on several plots of land - which the other partner has undertaken to bring into the joint venture -, as well as the joint carrying out of income-producing activities, are determined by reference to the income obtained from the activities carried out, and not in relation to the areas of land contributed, the amount due cannot be reduced in direct proportion to the area of land contributed, unless it is proved that, as a result of the reduction in the areas of land, the income received has decreased. (Î.C.C.J. s.a IIa civ, dec. no. 1849 of April 25th, 2013, www. scj.ro).

contribution brought into the association, this solution is found in the specialized literature (Ștefan and Casandra, 1998, p.76) .

In the third opinion, it was pointed out that in the case of a joint venture, it is very difficult to quantify exactly the amount of the profit for the silent partner, because it includes not only material but also immaterial elements; if there is no contractual provision on the share of the profits that each partner is entitled to, the sanction will be absolute nullity, the reason being the non-existence of a determination of the distribution of profits and losses realized (Chifan, 2005, pag.38).

We cannot agree with the latter view, because the association gives rise to relationships of particular interest, and relative nullity may be applicable.

However, we are of the opinion that when the parties disagree on how to distribute the results of the joint venture, the courts will decide, which do not always have an easy task, especially when additional acts, joint investments or investments made by only one party and which cannot be recovered, etc., are involved between the parties.

The issue is, however, definitively settled by the new legal provisions, given that the law only expressly establishes the nullity of the leonine clause[1] , by considering *de plano*, as unwritten[2] , such a case in a joint venture agreement.

In the event of a refusal to share the profits, the other partners have a claim against the managing partner which is protected under common law like any other claim. The limitation period starts to run

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[1] As a model of a leonine clause, materialized in the guarantee of a minimum level (usually a fixed amount), we reproduce some representative details taken from the recitals of a decision: "the leader of the association (D SRL) together with the associate 1 (Z.K.-B.B.), acknowledge, accept and guarantee the payment of an amount of 100,000 + VAT to the associate 2 (S. SRL) with the title of unrealized benefit - assumption of payment of the amount of 100,000 + VAT - unrealized benefit until 31.05.2015" (Satu Mare Court, decision no. 130 of December 17th, 2020, www.roli.ro).

[2] Given that we are in the presence of an unwritten clause, this implies absolute, partial nullity, which operates by operation of law and, therefore, if the contract is upheld in part, the clause considered by law as unwritten will be replaced by the applicable legal provisions according to Art. (2) and (3) of the Civil Code.

from the date on which the distribution of profits was agreed (Săuleanu, 2009, p.55).

However, we can say that the clause whereby one of the partners is guaranteed a minimum guaranteed profit share is valid[1] .

Each partner has a personal right of recourse against the partner who has carried out profit-generating operations, and the partner who has realized a benefit for the association has a contractual obligation to share it with the others. In the case of an action against several partners, the consequences must be shared, as solidarity is only valid in relation to third parties and not between the participants.

2. Obligations of associates

In return for their rights, the members have certain obligations, but in no case may their commitments be increased without their consent. The current obligations of the associates are the obligation to contribute, the obligation to contribute to losses, the obligation of loyalty, the obligation not to compete.

The contribution obligation

The social contribution, a specific element of a civil partnership, expresses the contribution of each partner to the common fund. As a simple partnership is governed by the Civil Code, it is practically impossible for a person to become a partner without making a contribution to the company assets.

[1] By decision no. 3753/2005, the High Court of Cassation and Justice, Commercial Section, ruled that the clause in the joint venture agreement stipulating the obligation to pay the hidden partner a minimum monthly amount regardless of the profit the joint venture would realize, does not constitute a leonine clause, since it does not contravene the purpose of the agreement; on the contrary, such a clause is likely to emphasize the will of the parties expressed in the agreement.

The contribution is the obligation undertaken by each member under the joint venture agreement to contribute to the common fund by making a contribution of assets or a service[1] .

The partners' contributions may consist of money, movable or immovable assets[2] , tangible or intangible assets such as trademarks, inventions, innovations, know-how or even an entire goodwill or business. The contribution in ″specific knowledge″ may consist of the intellectual, managerial, technical or any other kind of capacity of the participating partners. Contributions in specific services or know-how shall be made by the venturer who has undertaken to carry out specific activities and by making available to the joint venture the data and information agreed upon for the realization of its object, in the manner and under the conditions laid down in the agreement.

It is the partner's duty to deliver the contribution he has pledged, and he is indebted to all the other partners for his contribution. It must be determined or determinable, possible and lawful, in accordance with public policy and morality. The content of the contribution in goods must also consist solely of goods in the civil circuit.

In this context, it should be noted that goods that are part of the public domain cannot be contributed as property, as they are inalienable. If, however, the agreement provides for the transfer of public property rights as a contribution (the same in French law, thus, the contribution may also consist solely in the use of the thing; see Malaurie, Aynès and Gautier, 2001, p. 395) , the act will be sanctioned with absolute nullity for fraud of the law (the contribution into public ownership being illegal).

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[1] The definition of contribution reflects the legal aspect of the term, since contribution has another meaning, in which the notion of contribution designates its very object, namely the assets brought into the company by the partners.

[2] The benefits may also consist of various assets, including those realized through the activity carried out within the association, and not only in money (C.A. Bucharest, 5th Civil Chamber, dec. civ. nr. 1145 of June 29th, 2015, portal.just.ro). We consider this solution to be correct, as neither the Civil Code nor the Tax Code require the distribution of benefits only in the form of money.

Article 1952 of the Civil Code lays down the regime for contributions, which may remain the property of the partners who made them available to the joint venture, become joint property by agreement of the parties, or pass in whole or in part into the property of one of the partners in order to achieve the purpose of the joint venture.

In the case of a contribution in kind, the performance of the obligation takes on an original character in a joint venture. Since, in relation to third parties, the person making the contribution is regarded as the owner of the asset contributed but owned by them, the co-partners will not be able to rely on their right if the person making the contribution has transferred the asset, the transfer being valid, only an action for damages may be brought against the person who has not made the contribution.

Also, the goods brought into the joint venture do not have to be of the same kind or value, and the sums of money do not have to be equal for all the partners. The equality of the participants is not of the essence of the joint venture (Constanța Court, civil sentence no. 8607 COM of December 10th, 2002, irrevocable by non-recruitment, portal.just.ro.) , but the extent of each partner's shareholding is a determining criterion for sharing the benefits and bearing the losses resulting from the joint venture.

By bringing goods into the joint venture, the joint venture does not become a real agreement, since the goods necessary for the conduct of the business are brought in as an effect of the joint venture agreement, and not as a requirement for its validity.

The member's right in respect of losses. Obligation to contribute to losses

Like any partner, the co-participant has an obligation to contribute to losses. Due to the lack of legal personality, the partners jointly bear the losses of the joint venture, but in a particular way (Angheni, 2014, p.125). Its non-liability vis-à-vis third parties does not remove its obligation vis-à-vis the joint partners to contribute to the

losses (according to art. 1902 Civil Code, the contrary clause will be null and void, being considered leonine) .

The distribution of losses is made according to common law, according to art.1881, para. (2), Civil Code, as well as the division of profits, in proportion to the contribution brought into the association (Săuleanu, 2009, p.51). The rule is also enshrined in the Tax Code, which, in art. 34, paragraph (1) provides that "in an association without legal personality between two or more Romanian legal persons, the income and expenses recorded shall be attributed to each partner, according to the provisions of the agreement of association", and according to art. 125, paragraph (5) of the Tax Code, "the annual income/loss/annual loss realized within the association shall be distributed to the partners, unless they have provided otherwise by agreement"[1] . By virtue of the principle of freedom of agreement, the partners have the possibility to determine the amount of profits and the extent of losses attributed to each participating partner. The contributor to the expert's expertise contributes to the same extent as the associate who contributed the least. If the joint venture has been formed only by persons contributing expertise, the distribution of profits and losses shall be carried out in accordance with the principle of equality. To the extent that the joint venture agreement does not lay down the manner in which profits and losses are to be shared, they shall be allocated in proportion to the share of each partner.

In relations between the partners, the extent of each partner's liability will be determined by the terms of the agreement of association, which usually provides that the partners will be liable from their own assets only in proportion to the contribution they have made to the association.

[1] More problematic seems to be the situation in which the parties are not concerned with determining the percentage of profits and losses relating to each partner. For such a situation, judicial practice has enshrined the principle of equality/proportionality between all partners. High Court of Cassation and Justice, s.cont. adm. et fisc., dec. no. 1068 of March 4th, 2014, www.idrept.ro.

The participating partner is the holder of rights in the company which cannot be analyzed as true shares in the company because it is not a right against the partnership, but a right against the other partners.

The shareholder's company rights are also transferable. The assignment must be recorded in writing and notified to the co-partners in order to be enforceable against them. For the assignment to be possible, the consent of all the partners is required. What is assigned are only the rights of claim, without there being any transfer of the status of the partner, since the conclusion of the joint venture agreement does not lead to the acquisition of rights similar to shares in the company (Săuleanu, 2009, p.55).

We consider that there is nothing to prevent the parties to the partnership from being declared necessary by the statutes, such a stipulation emphasizing the *intuitu personae* character of the participants. Since mutual trust plays a determining role, none of the associates may cede his rights in the association, nor may he substitute himself or associate another person without the unanimous consent of all the associates. The legal texts do, however, allow an associate to associate a third person, but only in respect of the part he holds in the association, representing for the others a *res inter alios acta*.

In practice a distinction has been made between assignment and subcontracting. Thus, it has been held that subcontracting the commercial activity does not amount to an assignment of the joint venture agreement, since it has not been proved that there is another person who has become, as a result of the accession, the holder of the rights and obligations arising from the joint venture. Accordingly, in so far as the joint venture agreement prohibits the transfer of the commercial activity which is the subject-matter of the joint venture, it must be held that the participant's subcontracting of that activity does not constitute a breach of that prohibition (Decision no.256 of 15.05.2008 of the Bucharest Court of Appeal, Commercial Section VI, unpublished) .

On the contrary, the articles of association cannot provide that the parts (shares) are freely negotiable[1] . The principle has always been accepted in doctrine and case law, a principle justified by the absence of legal personality of the joint venture.

Duty of loyalty and non-compete.

In addition to the above obligations, the shareholder also has an obligation derived from the principle of good faith (Clocotici and Gheorghiu, 1998, p.17)[2] , as well as from the existence of an *affectio societatis*[3] , namely the obligation of loyalty.

Breach of the duty of loyalty can damage the joint venture and, in the case of loss of assets, the guilty party may be liable to pay damages.

In the broader context of the duty of loyalty is also the non-competition obligation set out in art. 1903 Civil Code. Thus, the member may not compete with the association on his own account or on behalf of a third party, nor may he carry out any transaction at his own expense that could be detrimental to the association[4] .

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[1] The sanction for the issuance of negotiable instruments is provided for by law: it is limited to the nullity of the instruments issued. In the past, some courts had declared a company null and void on the grounds that the issue of negotiable instruments caused it to lose its hidden character. Such a sanction is no longer conceivable today.

[2] Good-faith, considered as an intermediary between the provision of the law and the moral norm, encompasses the moral values of honesty, i.e. loyalty, prudence, order and balance.

[3] *Affectio societatis* is the intention of the partners to collaborate in the conduct of commercial activity with a view to realizing and sharing the benefits. According to art. 1881 of the Civil Code, by the partnership contract "two or more persons undertake mutually to cooperate in carrying on an activity (...)".

[4] According to Article 1903, paragraph 3 of the Civil Code, the benefits resulting from competitive activities, prohibited by law, are due to the company, and "the partner is held liable for any damages that may result".

Conclusions

A joint venture can be defined as an agreement whereby the parties, the participating partner and the managing partner, natural and/or legal entities, agree to contribute assets and carry out an activity with the aim of obtaining a profit to be shared between the partners.

A one-person joint venture is inconceivable. In accordance with the principle of freedom of association, a joint venture may be set up by natural entities, legal entities or by natural entities together with legal entities, except in the case of joint ventures of the liberal professions.

Thus, the main obligations under the joint venture of the partners relate to the sharing of profits and the bearing of losses resulting from the exercise of activities of a commercial nature. As already mentioned, the sharing of profits and the bearing of losses will be carried out according to the agreement of the contracting parties, by virtue of the principle of freedom of agreement. The parties to the joint venture agreement are free to determine how to allocate the amount of profits and the extent of losses for each participating partner[1] .

Judicial practice has also ruled that the benefits accruing to associations are determined by reference to the income actually obtained, regardless of their contribution in assets and regardless of whether the contribution of one of the associates is less than what was agreed by agreement[2] .

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[1] In judicial practice, the prohibition of the lion's share clause in a joint venture agreement has been established. A leonine clause is considered to be a clause whereby one or more partners are exempt from losses but share in the profits, as well as an agreement between the parties whereby a partner assigns all the benefits resulting from the joint venture to himself (Article 1902 of the Civil Code)

[2]In this regard, we quote an extremely interesting solution of the Supreme Court: *"Where the payment obligations of a partner in a joint venture agreement, the object of which is the construction and operation of a network of service stations located on several plots of land - which the other partner has undertaken to bring into the joint venture - and the joint realization of revenue-producing activities , are determined by reference to the income obtained from the activities carried out, and not in relation to the areas of land contributed, the amount due cannot be reduced in direct proportion to*

It should be emphasized that the transfer of the shares of associates by reason of death may be regulated in the statutes. The contract is dissolved on the death of one of the partners, where the parties are natural persons. In the case of a civil partnership, the parties may decide to continue the activity between the remaining partners, but they may also decide to continue the partnership with the inclusion of the heir of the deceased partner[1] .

Nothing seems to prohibit the provision of a right for co-participants to withdraw from the company. Freedom of agreement goes in this direction, and the Court of Cassation has implicitly recognized it. If not, the reference to the partnership regulations must lead to allowing withdrawal with the unanimous consent of the other partners or by legal decision for good cause if the partnership activity is civil. We consider that a partner in a joint venture may also withdraw from the joint venture if such a possibility exists in the contract, or if he obtains the consent of the other partners. We also consider that it is also possible to apply to the courts for a ruling on withdrawal from the partnership (Florescu, Popa and Mrejeru, 2009, p.131) .

Irrespective of whether the partner in the joint venture is excluded or withdraws, we consider that he is entitled to restitution in kind of the assets brought into the joint venture, to the extent that the contract provides for this possibility.

This right of withdrawal naturally entitles the member to reimbursement of the value of his membership rights. The valuation shall

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the area of land contributed, unless it is proved that, as a result of the reduction in the areas of land, the income received has decreased. com, dec. no. 1849/2013, www.scj.ro.

[1] The death of a partner in a joint venture can be compared to the termination of the managing partner's status as a trader (e.g. dissolution of the company - principal partner), since he could no longer carry on the trade in question. We consider that the measures taken by the partners on the occasion of the dissolution of the partnership on death cannot change the nature of the agreement concluded with third parties in the course of a partnership, where the third parties could not have known of these measures in advance.

be carried out amicably between the co-partners or in accordance with a clause in the articles of association.

The joint venture agreement represents the law of the parties and may be modified following the agreement of the parties expressed by an additional act or for causes authorized by law (for example in the case of unforeseeable circumstances). The general principle of binding force of the agreement, established by the provisions of Article 1.270 of the Civil Code, is applicable to the joint venture agreement.

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STRATEGIC PLANNING OF HUMAN RESOURCES IN THE ROMANIAN PUBLIC ADMINISTRATION IN THE CONTEXT OF NEW TEHNOLOGY

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Abstract: *This article aims to make a brief analysis of how new technologies and especially artificial intelligence will determine new approaches in terms of strategic planning in public administration in Romania.*

The permanent changes in the frontiers of innovation have also determined a redesign of standards and practices in the sphere of human resources, including in the field of public administration.

The integration of AI in the strategic human resources planning process will be able to provide specialists with the necessary information, perspectives and recommendations almost in real time. In this context, all the activities specific to human resources planning, such as the analysis of the need for human resources or environmental factors, will be carried out in a very short time and the results obtained will be able to be used much more quickly. Assuming the global trends in the field, the Romanian public administration invests in the future, thus being able to provide public services that contribute to the development of society.

Keywords: *human resources; strategic planning; Romanian public administration; Artificial Intelligence (AI); public servant; public services.*

Introduction

Although in Romania, public administration is assimilated to the notion of bureaucracy, in reality, public administration has a particularly

important role as an expansive field that covers the services needed by communities with the role to bring about positive changes, to promote the common good and to strengthen society. The quality of public administration and the services[1] it provides to citizens and business is undoubtedly a key element in achieving progress, including economic progress.

Modern society needs the implementation of proactive and innovative public services, adapted to new social needs where citizens become "customers".

In this context, Romania's public administration needs to build the necessary capacities to enable it not only to adapt to the inherent changes, but also to become resilient and thus able to absorb shocks and turn them into opportunities for sustainable development and inclusive growth.

Investing in innovation, analytical skills and capabilities is not only a necessity, but is also about ensuring that users of public services receive high quality public services they can trust.

In this context, the need arises for the public organization to adopt those strategies that best meet the organizational objectives, including on the human resources side, by attracting and retaining in the system the best trained people capable of addressing ongoing and emerging challenges.

One of these challenges is new technologies and especially artificial intelligence, which affect organizations both structurally and operationally.

Information technology (IT) is not only a structural factor but also a tool that has transformed the architecture of organizations and is increasingly integrated into human resource management (Kamal and

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[1] The literature uses the term government efficiency, which implies "he quality of public services, the capacity of public officials and independence from political pressure". See also: Public administrations in the EU Member States, 2020 overview Luxembourg: Publications Office of the European Union, 2021

Ashish Kumar, 2013, p. 44). Advanced technology has and tends to reduce the number of jobs that require low skills and increase the number of jobs that require considerable skill, a shift and here we refer to the shift from touch work to knowledge work.

As for the concept of artificial intelligence, it was first presented at a conference at Dartmouth College in July 1956 (Reilly, 2018). The term was used by the pioneers of the field to describe the essence of intelligence, namely the ability to imagine and think, to mimic cognitive behavior (Reilly, 2018, p.3). Stuart J. Russell defines AI as an intelligent entity i.e., an agent, a system that senses its environment and acts upon it (Russell, 1997, p. 59).

Elaine Rich defined artificial intelligence in 1983 as the study of how to make computers do things that, at the time, humans were better at (Rich, 1983).

Today, the field in which artificial intelligence (AI) is applied is interdisciplinary and is used in management science and all its adjacent branches.

Paschen et al. (2019) suggest that AI today has the potential to mimic human intelligence, thus eliminating repetitive manual tasks, allowing for the best outcome, or if there is uncertainty, the best expected outcome. The authors also point out that although humans are characterized by cognitive abilities, they have limited time to make decisions, which is why it is preferable to use artificial intelligence, which by the way it was designed can solve any intellectual task.

Under these circumstances, all organizations, regardless of their type, will have to make widespread use of new technologies, which will lead to an increase in the quality of decisions taken by managers, including in the area of human resources.

Planning human resources – theoretical aspects

Regardless of the nature of the organization, public or private, there are three elements that characterize it (Koontz and Weihrich, 1988, p. 8):

– productivity – defined as outputs and inputs over a given period, taking into account the quality of services/products;

– efficiency – which implies the achievement of proposed results;

– effectiveness – achieving results with as few resources as possible.

In this context, in the public sector, achieving the three elements of public service delivery to the quality standards required by modern society depends on the competence of the people in the system who must use their knowledge, skills and personal attributes to achieve the objectives specified for their roles (M. Amstrong, 2003, p. 265).

Attracting the best people into an organization is not an easy task as organizational goals need to take into account a number of factors such as government legislation and policies, demographic changes, labor market developments and not least technological advances.

The development of organizations and their success is now based on the premise that people are the most valuable resource with great potential, but they must be understood, motivated and involved in achieving organizational goals. Today human resources are a strategic element of the dynamic changes that take place in an organization (Citeau and Barel, 2008, pp.1-2), characterized by knowledge, training and experience, and are the main vector that leads an organization into the future. Achieving objectives cannot be achieved without a strategy, regardless of the time horizon to which we refer.

The concept of strategic planning is defined in the literature as the process of forecasting an organization's activity, enabling it to establish, quantify and continuously maintain a link between resources and objectives on the one hand and market opportunities on the other (Mathis, Nica and Rusu, 1997, pp. 23-24). Strategic planning estimates the future demand for employees both qualitatively and quantitatively, compares the expected demand for existing human resources and determines the surplus or shortage of staff based on the organization's objectives.

Human resource planning is a formal activity carried out at the level of the organization which according to specialists (Rolf Buhner, 1994, pp. 55-56) has two main dimensions:

1. the functional dimension which expresses the core dimension of this staffing activity, manifesting itself as a continuous and systematic process by which the organization anticipates future staffing needs in line with its long-term objectives;
2. temporal dimension (time horizon).

Since human resource planning is closely linked to the organizational planning process, the time horizons covered by human resource plans must correspond to those covered by organizational plans (Manolescu, Lefter, Deaconu, 2007, p. 203).

Human resource planning in public administration in Romania

Romania's public administration is in a reform phase driven by a paradigm shift from a procedure-based administration to a high-performance administration capable of providing quality public services.

Challenges in finding the right people for positions in the administration are caused by a number of factors such as: the limited number of positions for junior civil servants, the ageing civil service, salary discrepancies between civil servants of the same class and grade but working in different public institutions/authorities, recruitment that focuses almost exclusively on testing candidates' ability to memorize legal texts rather than on the competencies and skills needed for certain types of positions in a modern public sector, etc.

Institutional reorganizations take place quite frequently and there is no strategic HR analysis and planning that tries to match the required skills and positions with organizational priorities.

The three main categories of human resources in the Romanian public administration are: civil servants, contractual staff and dignitaries. With the exception of dignitaries, who are a special category, as they are appointed or elected on purely political criteria, civil servants would correspond to what the OECD calls "public servants", as distinct from

"employees in the public sector as a whole, who are usually mentioned under different employment policies"[1].

In Romania's public administration, human resources policies regarding civil servants and consequently strategies in the field are the prerogative of several authorities, the most important ones being at the moment:

– Ministry of Development, Public Works and Administration (MDLPA) which is the central public authority responsible for the development of policies, strategies and draft legislation for public administration;

– The National Civil Servants Agency, subordinated to the MDLPA, which is responsible, according to the Government Emergency Ordinance no 57/2019 on the Administrative Code, as amended, for "creating and developing a professional, stable and impartial civil service" and "creating the necessary records for the management of staff paid from public funds".

The Agency is responsible for drafting legislation, policies and strategies in the field of civil service, monitoring the application of legislation in the field, the registration and management of civil service and civil servants, the development of competency frameworks.

The National Civil Servants Agency, according to Art 411 Para 2 of the Administrative Code is the authority that manages, develops and operates the national electronic system for public sector employment and keeps records of staff paid from public funds. The national electronic public sector employment registration system operates with data

[1] "Civil servants: all government employees working in the public service, who may be employed under various contractual arrangements (e.g., civil service statutes, collective agreements, labor law contracts), with permanent or fixed term employment contracts, but not normally including employees in the wider public sector who are usually covered under alternative employment frameworks (e.g., most doctors, teachers, police, military, judiciary or elected officials)". See also: https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0445 accessed on 25.04.2024

collected from the database organized at the level of the Labor Inspectorate, with data collected directly from public authorities and institutions, as well as, where appropriate, with data collected from other legal entities in which the categories of staff referred to in the framework legislation on the remuneration of staff paid from public funds work.

The information sent by the public authorities/institutions in which public administration staff work is stored by the National Agency for Civil Servants in a centralizer and the data provided is then analyzed in order to determine human resources requirements.

Until recently, the National Civil Servants Agency drew up the annual employment plan for the central civil service on the basis of reports received from public institutions. However, this plan was a list of the minimum and maximum number of positions for the following year, which did not identify or plan in advance the skills or competencies needed to achieve organizational goals.

For contractual staff, each public authority/institution determines its staffing needs and consequently develops its human resources strategies.

At present, and as far as civil servants and contractual staff are concerned, only the Ministry of Finance has a supervisory role in staff planning as it approves the annual staff expenditure of all public institutions.

In the light of this reality, it follows that the planning of human resources in the public administration and, consequently, the creation of strategies in this field is an area that requires the cooperation of the National Agency of Civil Servants, the Ministry of Finance, the General Secretariat of the Government and, last but not least, the Ministry of Labor and Social Solidarity, and public institutions/authorities for contractual staff, which makes this activity extremely difficult and inefficient.

We believe that the National Civil Servants Agency should play the central role in the strategic planning of human resources in the public administration with regard to civil servants, as it has the necessary capacity to retrieve and store all information on staff in the public administration regardless of the central or local nature of the public

institution/authority where the vacancy is located and to address this issue in an integrated way, as human potential cannot always be adapted in the short term to the strategic requirements of public organizations.

The use of new technologies in the process of strategic human resource planning in public administration in Romania

As it results from the aspects presented above, human resources planning in the public sector and especially in the public administration in Romania requires that personnel strategies are developed taking into account the most relevant organizational and environmental aspects. This involves not only the analysis of data provided by the National Electronic Public Sector Employment System, which involves the use of IT technologies (software and hardware), but also the collection and analysis of other related data covering issues such as:

- labor supply;
- demographic changes;
- level of demand for public services;
- technological developments affecting public goods/services.

Artificial intelligence can therefore be used to collect global data from the external environment, extract relevant data, interpret it, combine it with existing internal and external information and then provide the necessary information to the relevant authorities in a short time.

AI algorithms can identify in real time any changes in public service consumer choices, allowing decision-makers in the administrative system to set new performance standards that can then be used in the recruitment process.

The use of artificial intelligence in the human resource planning process in a system as large as public administration will enable the system to respond quickly to unpredictable changes in society, both by identifying problems and by reducing the time needed to implement a response, thus anticipating and planning programs to ensure that human resource needs are met.

The use of AI in the field of human resources will also support authorities in optimizing workforce planning, decreasing information access and communication times with other public institutions, thus ensuring interoperability between administrations.

In this age of information, communication and technology, public administration in Romania must adapt and use modern analytical tools, adopting what in developed societies is called Human Resource Information System (HRIS). HRIS is made up of the most sophisticated IT systems to support HR decision making (Ostermann, H., Staudinger, B. & Staudinger, 2009). By combining artificial intelligence functions with IT systems already used in the human resources sphere, the result will be more efficient management processes, including in the field of human resources.

Conclusions

AI-like information systems are systems that act rationally based on what they know. They need to be integrated into all management activities, including human resource management, because modern society is moving towards a knowledge age, where the quality and quantity of information is becoming an organization's most valuable resource.

However, the general view today is that neither robots nor computers will be able to take over the strategic and complex tasks performed by HR experts, but their activities can be improved by using the new tools available. Although the creative use of new technologies has the potential to improve the well-being of citizens, public institutions/authorities are slower to adopt new technologies for various reasons such as lack of adequate funding or slow bureaucratic procedures.

As a conclusion, in order to ensure the best quality of life for citizens in this digital age, the public sector will have to adopt a culture of innovation, especially in terms of Artificial Intelligence, and the strategic human resource planning process must be the prerogative of a

single authority, as this is a continuous process of analysis and diagnosis of all activities within public organizations.

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POLYGRAPH TESTING AND ITS UTILITY IN THE ECONOMY OF EVIDENCE

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Abstract: *The theme proposes a forensic approach, from the point of view of the tactics of hearing through the polygraph technique, as well as a criminal procedural approach, from the point of view of the admissibility of the polygraph as a means of evidence in the criminal process. The polygraph is frequently used in many international legal proceedings (Japan, USA) where state laws provide specific regulations regarding polygraph testing. Romania successfully uses polygraph testing, within all county police inspectorates there are Laboratories for the detection of simulated behavior (Polygraph), and polygraph testing is carried out by the psychological officer specialized in the detection of simulated behavior. However, polygraph testing is still not provided for in romanian national legislation as a distinct means of evidence and can be used as evidence only under certain limiting conditions in the light of art. 97 CPC (Criminal Procedure Code). Polygraph testing can only be done with the consent of the person to be interviewed by the polygraph technique and with strict compliance with certain requirements that we will develop further.*

Keywords: *polygraph; detection; simulated behavior; evidence; criminal law.*

Introduction

A procedure that has seen more and more recognition among legal proceedings is the technique of determining simulated behavior by

polygraph testing or lie detector, as it is known both in common language and in the specialized literature.

Polygraph testing can be considered a method of forensic investigation used more and more frequently in criminal investigations to evaluate the sincerity of the statement of the person being interviewed, but it is important to note that it is not a mandatory procedure either for the criminal investigation bodies or for any between the parties. Polygraph testing itself is not an exclusively judicial procedure, but is used in a wide spectrum such as domestic conflicts of any kind, screening of collaborators or employees, labor disputes, etc. The results of the polygraph test, although in principle they depict the reality of the situation, do not always faithfully reflect the truth, because the polygraph records the psycho-physiological reactions of the interrogated person by monitoring certain relevant parameters: pulse, breathing, blood pressure.

The polygraph technique has been used worldwide in legal proceedings for over 100 years. In 1878 the Italian physiologist Angelo Mosso created an instrument called the plethysmonograf to detect changes in blood pressure in response to certain stimuli. Four years later, in 1892 Sir James Mackenzie created the first polygraph used during medical consultations with the ability to simultaneously record the wavy traces of the vascular pulse (radial, venous and arterial) using a pen on a rotating drum of smoked paper. The year 1895 marks the first use of the polygraph in its primitive form, in judicial proceedings by the criminalist Cesare Lombroso who created an instrument called the hydrosphygmograph with the help of which he measured the physiological responses, namely the changes in blood pressure and pulse of the suspect during police interrogation. In 1915 the American lawyer William Moulton Marston invented a systolic blood pressure test that would become a component of the modern polygraph test. The Canadian psychologist employed by the Police in Berkeley, California, John A. Larson, improves on William Moulton's version in 1921 and creates an instrument called a polygraph that provides continuous blood pressure readings and which could be considered the original lie detector device because he had the ability to read multiple psychological responses at the same time and document these responses on a rotating drum of smoked

paper. The polygraph developed by John Larson was used extensively in criminal investigation, as he was the first person to continuously and simultaneously measure and record a person's heart rate, blood pressure, and breathing patterns during an interrogation. The father of the polygraph is considered to be Leornarde Keeler who patented in 1939 the prototype of the modern polygraph. The polygraph was later adapted to the modern technique, so in 1993 John Hopkins University developed a software called PolyScore, which, by means of mathematical algorithms, analyzed the data obtained through polygraph testing to estimate the level of probability of lying or sincerity of a subject. The US National Academy of Sciences in collaboration with the US Department of Energy commissioned in 2003 a study based on scientific evidence to evaluate the effectiveness of the polygraph, the conclusions of which were that although there may be alternative techniques to the polygraph test, none it cannot outperform the polygraph, and neither appears promising to replace the polygraph in the near future.

Every year the technique of polygraph testing improves and with the modernization of technology and the use of artificial intelligence, it will be perfected. The fact is that, as I have shown before, the polygraph or lie detector, as it is also called, has been used successfully for over 100 years in the investigation of crimes and is still the most effective way to verify the truth and detect simulated behavior .

The polygraph is a diagnostic device used in forensic psychophysiological investigation, with a complex construction, which records simultaneously, through 5 channels (distinct instruments), the physiological correlates of the emotional process. The polygraul device is composed of 2 pneumographs, 1 galvanometer, 1 tensiometer and 1 optical plethysmograph. The pneumograph is the instrument that records the variations of the respiratory rhythm (abdominal and thoracic). The galvanometer is the instrument that records the variations in electrical conductivity/resistance of the epidermis, monitoring the electrodermal reaction. The tensiometer is the instrument that records the physiology of the cardiovascular system in the area of the brachial artery. The plethysmograph is the instrument that records blood volume variations.

In order to identify manoeuvres, evading the test, some laboratories also use a tool for measuring voluntary movements and micro-movements, a tool that records all of the unintended or voluntary movements of the person under examination by means of sensors placed on the arms of the chair, on the floor under the person's feet examined or on the seat of the chair.

Polygraph testing records the physiological changes of the body during the various emotional states that accompany the simulation, not being able to establish the guilt or innocence of a person, the indicators used in the detection of insincerity being dependent on emotional manifestations, a physiological result created by emotional tension (art. 3 of internal rules no. 3632327/28.09.2023 regarding the organization of activities in the polygraph laboratories of the Romanian Police issued by the National Institute of Criminalistics - General Inspectorate of the Romanian Police). The anxiety of a false-positive result could make polygraph testing an intimidating experience for some people. The concern could arise from the fact that if a question increases the testee's nervousness, even if the answer is honest, the polygraph could give a false result. Those measured physiological characteristics, namely, breathing rate or heart rate, can be caused by several factors. Nervousness, anger, sadness, embarrassment, and fear, for example, can alter these physiological characteristics during testing. Various medical conditions, such as colds, migraines or neurological or muscular problems, can have the same effect, so we will show in the study that the polygraph testing procedure requires a normal medical state of health. Excessive fatigue, the consumption of alcohol or certain medicinal substances can also lead to uncertainties in terms of the accuracy of the test, therefore it is forbidden to polygraph test a person who is under the influence of alcoholic beverages or drugs.

As it is an emotional reaction, it may be possible that the plea of innocence until self-conviction and the excessive reasoning of the situation in which the subject is, lead over time to an affective discharge and then the feeling of guilt can diminish, which can generate at a state of emotional balance that will lead to a false result during polygraph testing. In this situation the mastery of the psychological officer can make the

difference and with the help of the appropriate questions can expose the lie.

Polygraph testing procedure in forensic investigation

An important component of the investigation and research of a crime is the activity of forensic psychology, which includes the evaluation of simulated behavior through the polygraph technique, the elaboration of the psychobehavioral profile of the unknown author and the elaboration of the personality profile. The objective of evaluating simulated behavior through the polygraph technique is to investigate the sincerity of persons suspected of having committed acts provided for by the criminal law or of those who have knowledge of any act or of any circumstance likely to serve to find out the truth in the criminal process, but also in other situations such as, for example, investigating the sincerity of the Ministry of Internal Affairs staff, in the framework of national security activities, according to the specific internal rules issued at the Ministry of Internal Affairs level (art. 36-39, section 4 of Forensic Psychology from Order no. 23/09.03.2015 regarding the psychology activity in the Ministry of Internal Affairs).

The evaluation of the behavior simulated by the polygraph technique is carried out at the disposal of the judicial bodies, by the psychologists within the criminalistic structures of the Romanian Police.

The coordination of the polygraph activity in the Romanian Police will be carried out by the National Institute of Criminalistics (art. 1 chapter I of internal rules no. 3632327/28.09.2023 regarding the organization of activities in the polygraph laboratories of the Romanian Police). The result of the evaluation of the behavior simulated by the polygraph technique is recorded in a forensic report or technical-scientific report, as the case may be. Also, the result of the evaluation of the behavior simulated by the polygraph technique is recorded in a report of the evaluation of the behavior simulated by the polygraph technique (Art. 1 point 8 of Order no. 161/03.10.2023).

The Romanian Code of Criminal Procedure does not regulate any rules regarding the polygraph test procedure. In the absence of adequate legislation in the matter and especially due to the fact that the polygraph is used in judicial investigations, the Ministry of Internal Affairs through the General Police Inspectorate has regulated by its own rules specific procedures regarding the use of the polygraph technique which also include some procedural rules that complement the fundamental rules in the matter of criminal law and criminal procedural law. There are ptocedes that concern the behavior of the forensic psychologist, the arrangement of the work room, the actual way in which the testing is carried out, as well as certain aspects that may arise during the testing.

Precisely in order to create a climate of trust and impartiality for the person to be subjected to the polygraph test, the examiner is prohibited from performing the examination in uniform or sportswear, the internal rules regarding the organization of activities in the polygraph laboratories of the Romanian Police (art. 7.2 of internal rules no. 363232/28.09.2023 regarding the organization of activities in polygraph laboratories of the Romanian Police) impose the obligation of the examiner to perform the test polygraph in sober civilian clothes and wearing a white coat.

There are certain rules that must be respected also regarding the condition of the people who are to be subjected to the polygraph test prior to the test, namely: the person who is to be tested with the polygraph must have normal food and rest conditions before testing, it must be in a normal psycho-medical state and cannot be under the influence of alcoholic beverages or drugs that influence the functions of the central nervous system and the peripheral nervous system.

Also, in order to preserve the climate corresponding to the polygraph examination, at the door of the laboratory where the polygraph test is performed there will be light signals that light up at the start of the examination and remain lit throughout the examination process, so that entry into the laboratory is prohibited during this period of any person's time, and silence will be maintained near the laboratory. No external noise may disturb a polygraph examination in progress. For this purpose, the laboratory where the polygraph test is performed must be a

soundproof room because any kind of extraneous noises can induce collateral stimulations, parasites, overstimulations or distractions that can distort the physiological recordings. Such extraneous noises can be internal or external and, for example, can consist of the sound of a telephone, the voices of people outside the laboratory, the noise given by natural phenomena (heavy rain, electric discharges) or the presence of other people during the examination.

As for the climate inside the polygraph testing laboratory, it must be conducive for the subject to be tested to be as relaxed as possible and the polygraph recording is not affected, the furniture must be sober, without paintings, ornaments or other objects that - could attract the attention of the examined person, and the optimal temperature between 18-22°C in summer and 22-25°C in winter in order not to induce thermal discomfort. Also, the lighting system must be adequate, so that the lighting must allow a perfect visualization of the facial and postural features of the person being examined.

As we have shown, the furniture in the polygraph examination laboratory should be simple and sober, with a desk and three chairs: a chair for the psychological officer who performs the examination, an examination chair and a chair on which the person will initially be seated which is to be tested with the polygraph. This is the standard type of furniture for the laboratory where the polygraph test is performed, but the furniture can be diversified according to needs: the use of an interpreter during the procedure, the provision of computing equipment that requires additional pieces of furniture. As a computing technique, the laboratory will be equipped with a computer and a printer, as well as a video camera, so that the computing technique in the endowment will allow the recording and storage of the data obtained from the polygraph examination.

Given that, in principle, the psychological officer conducting the polygraph test remains alone with the person tested, to ensure the safety and security of the examiner, the polygraph test laboratories are equipped with a panic button with both manual and pedal operation.

Procedural rules intended to obtain the highest possible degree of validity of the examination

As I have shown previously, in the absence of criminal procedural provisions (both in the Code of Criminal Procedure and special laws) specific to polygraph testing, the General Police Inspectorate through the National Institute of Forensic Science has developed some procedural rules aimed at obtaining a degree as high validity of the examination (art. 5 was corroborated with art. 7.3, art. 9 of the internal rules no. 3632327/28.09.2023 regarding the organization of activities in the polygraph laboratories of the Romanian Police).

The polygraph test procedure is done at the written request of the courts or the criminal investigation body. The polygraph examination can be requested at any stage of the research, but not before a minimum of investigative activities have been carried out to concretely establish the issue and the objectives of the examination.

The identity of the person to be subjected to the polygraph test is established by the court or the criminal investigation body that requests the polygraph test.

Any procedures from extended investigations directly involving the person tested are interrupted 3 days before the polygraph test. Ideally, the person being tested should not be subjected to prolonged interrogation for a reasonable period of time before testing.

The court or the criminal investigation body that requested the testing must provide the examiner with the file and the necessary information, so that the detailed knowledge of the events allows the establishment of the most relevant questions in relation to the issue requested for investigation. The examiner determines the questions according to the requirements of the body that requested the testing

Regarding polygraph testing of crime victims or injured parties, this is not done under all conditions, but, regardless of the crime, the examination will only be carried out in the situation where there is evidence that shows the insincerity of their statements.

Tactical rules regarding polygraph testing

It is recommended that the polygraph examination be done after a period of at least 3-5 days after the event. Therefore, polygraph testing immediately after the event that is the subject of the test is not recommended because the emotional system can still be disturbed by what happened. In the case of crimes of murder and suspicious death, first-degree relatives or people in emotional relationships with the victim, the polygraph examination is done after a reasonable interval after the death of the person, in any case after his burial (burial).

We observe a difference from the forensic tactic of interviewing the suspect or defendant, the injured person and witnesses, according to which the more quickly these people are interviewed, the more inclined they will be to tell the truth as they directly perceive it and directly, without giving time for the intervention of certain influences of human, affective, emotional, financial, etc. statements. Of course, testing with the polygraph technique has major differences compared to the forensic tactic of interviewing people involved in the commission of the crime or who have knowledge of it.

It is important that the person to be tested by the polygraph technique is not threatened, coerced or convinced by promises or exhortations, because all these factors are likely to vitiate the test result.

The examination itself with the polygraph test

As I have shown previously, the determination of the questions is done according to the requirements of the body that requested the polygraph examination and as a result of the examination of the case file by the examiner.

The polygraph testing procedure involves 3 phases: the psychological officer conducts a pre-test interview, then conducts the examination itself or the in-test interview stage and finally, in cases where he considers it necessary, the post-test discussion. After the examination has ended, the expert report or forensic report is drawn up.

The interview or the pre-test discussion consists in the fact that the examiner will present to the tested person data about the case under investigation and, if applicable, the reasons for which it is suspected, the equipment that will be tested and the way the examination will proceed, as well as the questions that will be addressed (see art. 7.2 letter (d) of internal rules no. 3632327/28.09.2023 regarding the organization of activities in the polygraph laboratories of the Romanian Police issued by the National Institute of Criminalistics - General Inspectorate of the Romanian Police).

At the end of the pre-test discussions, the tested person is presented with the Declaration of Consent to the examination and informed of the right to refuse testing. In the case of refusal, the examination is stopped and a report of refusal to the examination will be drawn up.

If during the pre-test interview, the examined person admits to committing criminal acts, this aspect is recorded in the psychological protocol of the examination or in a report. The polygraph examination will continue to take place mainly on aspects that the examined person continues not to recognize only if they represent main elements in the architecture of the file or the commission of the act and on other aspects that the psychological officer considers relevant.

The audio-video recording of the recognition of criminal facts can be done in the polygraph test procedure at any stage only after obtaining the verbal consent of the person subject to the test at the beginning of the recording. Of course, the audio video recording of the recognition of criminal acts constitutes a particularly valuable means of evidence for criminal investigation bodies, so it is necessary for the psychological officer to be prepared for such a situation with all the necessary technical means.

The examination with the polygraph test in the in-test stage consists in the examiner asking the tested person a set of clear questions, so that they are understood by the tested person and to which he can answer yes or no.

Regarding the situation in which, before the start of the polygraph examination, the person to be tested admits the commission of the facts,

the criminal prosecution body is notified about this aspect, the polygraph examination is no longer carried out and a report is drawn up signed by the psychological officer, the prosecuting attorney and the person examined.

The post-test discussion is not mandatory, it is done only if the examiner considers it necessary and only during the in-test stage were psychophysiological changes characteristic of the simulated behavior recorded.

The tested person can admit the commission of the act even during the post-test discussion, an aspect that will be mentioned in the minutes drawn up at the end of the examination in the presence of the criminal investigation body or in the forensic report.

Repeating the polygraph test procedure. The new examination

The repetition of the polygraph testing procedure is possible both at the request of the person tested and at the request of the court or the criminal investigation body, but only with the express consent of the person tested, both in the situation where the conclusions of the first examination/finding report were inconclusive, as well as if the conclusions were certain.

If the conclusions were clear after the first test, a new examination can be carried out at a minimum interval of 15 days from the date of the first examination by another examiner. If the conclusions of the first test were not conclusive, the examiner who conducts the new examination will seek, as far as possible, to change the situations, conditions and questions that generated the conclusions of the impossibility of pronouncing for the first examination.

Polygraph examination through an interpreter

In the situation where the person to be tested does not know the Romanian language or, due to some disabilities, cannot express himself, the court or the criminal investigation body will take this aspect into

account and, once the polygraph examination is ordered, appoint an interpreter authorized by law (Law no. 178/04.11.1997 (updated) for the authorization and payment of interpreters and translators used by the Superior Council of Magistracy, the Ministry of Justice, the Prosecutor's Office attached to the High Court of Cassation and Justice, the National Anti-Corruption Directorate, the criminal prosecution bodies, the courts, the offices of public notaries, lawyers and bailiffs). The person to be polygraph tested through the interpreter will have to specify in the declaration of consent that he has no objections regarding the person of the interpreter. The replacement of the designated interpreter may be requested by the psychological officer conducting the examination based on well-founded arguments (see art. 6.1.6 of internal rules no. 3632327/28.09.2023 regarding the organization of activities in the polygraph laboratories of the Romanian Police).

The polygraph examination through the interpreter is an exception and is carried out in compliance with certain rules. First of all, all questionnaires will be prepared by the examiner in Romanian and will be translated by the interpreter into the language for which he was requested. The questionnaire in the language for which the interpreter was requested is a working document to facilitate communication, but the relevant document for interpreting and providing conclusions is the questionnaire in Romanian.

During the pre-test interview or discussion, in addition to all the procedures specific to this stage, the examiner will explain to the interpreter the activities to be carried out in the laboratory and establish the way of communicating the questions during the application of the questionnaires. The test batteries will be translated by the interpreter also in this phase. In order to maintain an ambient environment that does not endanger the examination results, the positioning of the interpreter is recommended to be on the same line and next to the examiner.

During the examination itself, i.e. in the in-test stage, the examiner addresses the questions, through an interpreter, only in the language for which an interpreter was requested, at the signal and at the time determined by the examiner.

In the case of the polygraph examination through the interpreter, the post-test interview will not be conducted under any circumstances, so the examination will only include the pre-test and in-test phase.

The forensic report drawn up as a result of the polygraph examination will include the mention that the examination was done in the language for which the interpreter was requested and the data and authorization number of the interpreter. Also, annexes to this report will be all the documents drawn up by the examiner and the questionnaire with questions both in Romanian and in the language for which the interpreter is requested, will also be signed by the interpreter (see art. 5.2.6 of internal rules no. 3632238/28.09.2023 regarding the specific procedure for the examination with the polygraph test).

Admissibility of polygraph testing as evidence

In Romanian judicial practice, it was held that the polygraph test does not constitute evidence within the meaning of art. 97 para. 2 CPC, but may constitute an indication that must be corroborated with the definite evidence administered in the case, capable of establishing, beyond any reasonable doubt, a conviction solution. We are also of the opinion that in compliance with the principle of in dubio pro reo, i.e. every doubt is in favor of the suspect, the judicial bodies must form their conviction about the guilt or innocence of the suspect on the basis of certain and certain evidence, in order to avoid errors judicial. Also, the suspect has the right not to contribute to his own accusation, the burden of proof belongs to the criminal investigation bodies, and the suspect benefits from the presumption of innocence and the right to remain silent or not to defend himself, so that the right to refuse testing with the polygraph does not need to be motivated.

In this regard, the High Court of Cassation and Justice, Criminal Section, also ruled, by Decision no. 1894/2012, in file no. 5130/101/2010, claiming: "The court of appeal also showed that the testing of the defendant's sincerity, with the polygraph test, should not be overestimated given that this technique, on the one hand, is not part of

the means of evidence provided for in art. 64 – current 97 – CPC., he not being able to present a certainty regarding the guilt or innocence of the defendant, and on the other hand, most of the time, he is imperfect, dependent on a multitude of factors such as sometimes heightened emotionality, nervousness, mental deficiencies, etc. The conclusions of the polygraph test cannot be considered as providing evidence, in the procedural sense of the term, since the polygraph is not, as has been shown, a means of evidence (see Decision no. 1894/2012 pronounced by the High Court of Cassation and Justice, Penal Section in file no. 5130/101/2010). They can be exploited, in the plan of a solution, only as clues which, corroborated, with other factual elements lead to a certain conclusion".

The reservation regarding the classification of the polygraph technique, which is considered by some authors to be a technique for establishing emotion, in the category of means of evidence and its use as such is determined not so much by the fact that the law does not expressly provide for polygraph testing as a means of evidence, but, above all, the possibility of producing some errors that, even in small numbers, can seriously damage social values.

According to the criminal procedural rules, to be admitted, the evidence must be legal, relevant and useful to the case. On the other hand, any evidence is admissible in criminal proceedings unless expressly prohibited by law.

Considering these aspects, the polygraph test, although it is not expressly provided by law as a means of evidence, nor is it excluded in judicial practice, on the contrary, as I highlighted in the content of the paper, the Ministry of National Defense created through the National Institute of Criminalistics a series of procedures regarding the methodology of using the polygraph technique in criminal investigation activities, including developing forensic tactics rules that complement common law criminal procedural rules.

As far as judicial practice is concerned, at a theoretical level polygraph testing is not admissible as a means of evidence, invoking the limitation of art. 97 CPC, however, it is widely used in criminal investigations when there is the express consent of the tested person and

in compliance with all the legal requirements that we have also discussed in this paper and is at least an indication that, in conjunction with the other evidence administered in the case, can outline the magistrate's conviction regarding the factual situation.

In the specialized literature, the opinions are quite controversial. The more conservative doctrinaires exclude polygraph testing from among the means of evidence, considering it imprecise, however, being a scientific method, there are more and more doctrinal opinions according to which, as long as it respects the validity conditions of the evidence in general, the report forensic report describing the polygraph test may represent one of the evidences administered in the case.

Conclusions

Polygraph testing is a scientific method of forensic tactics that aims to find out the truth and respects the principle of the presumption of innocence and is carried out in judicial proceedings by psychological officers with respect for the honor, dignity and mental and physical integrity of the person tested.

In our opinion, the legislator could give more flexibility to art. 97 CPC by removing from para. 1 of the phrase "in fact", since some of those who oppose the recognition of the polygraph test as a means of evidence, rightly claim that the polygraph test cannot constitute an element of fact and its modification in the sense: any element constitutes evidence which serves to establish the existence or non-existence of a crime, to identify the person who committed it and to know the circumstances necessary for the fair resolution of the case and which contributes to finding out the truth in the criminal process.

We consider that para. 2 of art. 97 CPC and in its current form is sufficient to allow the polygraph test to become an admissible means of evidence since letter e includes the documents and expert reports (which also include technical-scientific reports in a broad sense), and letter f is any evidence not prohibited by law is admissible. The results of the polygraph test are materialized in a forensic investigation report which,

definitively, represents a document and can have the value of an expert report.

Therefore, we are of the opinion that the polygraph test can constitute a means of evidence, which, like any other means of evidence, will be corroborated with the other evidence administered in the case and which can be considered or eliminated from the whole of the evidence administered in the case by the court of court at the pronouncement.

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INTERNET AND ARTIFICIAL INTELLIGENCE – AS LAW CONFIGURATION FACTORS

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Abstract: *In this study we will deal with two new factors influencing law, with social and economic advantages, namely the Internet and Artificial Intelligence (A.I.).*

Both the Internet and A.I. have created a new, exciting and constantly changing world, being at the forefront of legal phenomena that shape the world's future in all aspects of social life.

We will try to define these concepts and the regulations that the legislator has managed to adopt to keep up with the evolution of these legal phenomena.

Keywords: *Internet; Artificial Intelligence; factors shaping law, the need for regulation.*

Introduction

Law is dynamic, being permanently influenced by external factors: biological, demographic, political, economic, geographical, historical, etc.

The Internet and, relatively recently, Artificial Intelligence (hereinafter AI) have become important factors that configure law, because they have brought major changes in the behaviours of participants in social life.

The physical space/territory of a state is characterized by geographical borders, which separate it from other states, as distinct, sovereign legal entities, with their own legal system.

In recent decades, we have been talking about cyberspace, a virtual/online, open, captivating world with a continuous flow of information, which brings new social and economic opportunities. However, as expected, negative, conflicting aspects also appear in social life. Therefore, it is necessary to continuously create legal norms that regulate the new social relations that take place in this "technological arena" where the Internet and AI are used.

I. Brief History

In order to achieve the desired results of our approach, it is important to have basic, elementary theoretical and technical knowledge. Therefore, first, it is necessary to answer the questions: What is the Internet? What is AI?

The term "Internet" has in its structure two words that come from the English language "interconnected" which means "interconnected" and "network" which means "network".

The Internet is an achievement of the *Defense Advanced Research Projects Agency* (DARPA), which, in 1969, created a military network of interconnected computers under the name ARPANet ("*Advanced Research Projects Agency Network*"). Its purpose was to develop a network for education (Michael Gilden, 2000, p.150). In 1977, the University of Wisconsin added a new electronic mail (*e-mail*) service to

this mother network, and two years later the *Usenet* news service, which produced a huge development of it, which would capture a huge number of users (V.V. Patriciu, I. Vasiu, Ș.G. Patriciu, 1999, p. 3).

The notion of "Artificial Intelligence" was first used by mathematician Alan Turing in the mid-1950s, who wondered whether a computer would ever be able to "think" ("Can machines think?") or would it just continue to imitate human thinking, as in an "imitation game" (R. Stancu, 2024, p. 245).

The first ideas related to Artificial Intelligence were debated at two conferences in Los Angeles in 1955 and Dartmouth in 1956 (J. Moor, 2006, pp. 87-90 apud. A.C. Pană, 2021, p. 99).

Furthermore, the European Parliament, in 2020, defined Artificial Intelligence as "*the ability of a machine to replicate behaviors associated with humans, such as reasoning, planning and creativity*", continuing that systems equipped with Artificial Intelligence have the ability to adapt their behaviors by analyzing the effects produced by their previous actions, thus acting in an autonomous manner (European Parliament, Artificial intelligence: definition and use).

II. Artificial Intelligence and the Internet and the need for regulation

The Internet is an informational “network of networks” (I. Vasiu, 1998, pp. 121-122), a global network that forms a unitary whole of computers, which has the role of uniting several networks of different ranks from all countries of the world. Local computer networks (LAN - Local Area Network) are interconnected to regional networks, which, in turn, come together to form national and international networks (M. Gilden, op.cit., p. 150).

The Internet has in its structure: *Word Wide Web* (www.), *Electronic mail* (e-mail), *File Transfer Protocol* (FTP), *Web hosting* (web hosting), *public social networks* (Facebook, Instagram, Linkedin, etc.) (Mihai Niemesch, 2019, pp. 41-46).

The explosion of information technologies has brought fundamental transformations to the global economic system, which has led to the so-called "fourth industrial revolution" or digital era, compared to the three previous waves, initiated by the introduction of steam, electricity and then computers[1], with Artificial Intelligence (AI) playing a prominent role, being practically a result of the information revolution (A.-C. Pană, 2021, pp. 98-99).

Researchers in the field of computers and information technology, starting from the idea that it is possible for a computing machine to "think", similar to a human brain, have invented and developed artificial neural network algorithms, which can find solutions to problems autonomously (A.C. Pană, 2021, p. 99-101).

The different prototypes of Artificial Intelligence, listed by the European Commission, are[2]: - *Software*: virtual assistants, image analysis software, search engines, facial and voice recognition systems; - *Artificial Intelligence "embedded" in hardware devices*: advanced robots, autonomous vehicles, drones, applications for the Internet of Things.

Virtual assistants use LLMs - Large Language Model or "extended linguistic model" (for example: ChatGPT from OpenAI, Bard from Google, Llama from Meta, GitHub Copilot, etc.) - these basically represent a model of an Artificial Intelligence program, a computer, fed with extremely many examples, information and data (thousands or millions of gigabytes - that is why it is also called "extended"), which are built on the machine learning model specialized in natural language processing (NLP), as well as other tasks such as: translation, interpretation and creation of a text, i.e. a neural network model called "a

[1] European Parliament Resolution of 3 May 2022 on artificial intelligence in the digital age (2020/2266(INI)) (2022/C 465/06), Official Journal of the European Union C 465/65, https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:52022IP0140&qid=1735311830949, accessed on the 31 st April 2024.

[2]European Parliament, *Ce este Inteligența Artificială și cum este ea utilizată?* , https://www.europarl.europa.eu/topics/ro/article/20200827STO85804/ce-este-inteligenta-artificiala-si-cum-este-utilizata

transformer model". LLMs can also be used in: analyzing product and service user sentiment, DNA investigation, Chatbots, customer service, Internet search, etc...[1] .

We believe, along with other authors, that Artificial Intelligence is a "disruptive innovation", which disrupts control and knowledge acquisition, transforming all areas of activity (Duțu. 2024, p. 18) and brings with it a "digital chaos" (A.C. Pană, 2021, p.103).

All this happens because of the gap between the legal regulation from cyberspace and the speed with which technological research brings new versions of algorithms or software.

Given the fierce global competition, there is a continuous need to create and adapt a consistent and sustainable[2] European regulatory framework. Thus, Artificial Intelligence has become a material source that must configure the law due to the risks and implications of the algorithms of computer mechanisms.

The European Commission began to regulate the field of Artificial Intelligence in April 2018 by publishing the *European Strategy on Artificial Intelligence* by creating a Coordinated Plan to promote "*AI systems made in Europe*"[3] and creating an independent High-Level Expert Group[4] on Artificial Intelligence (AI HLEG). On April 9, 2019, the European Commission published the document entitled "*Ethical*

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[1] What is a large language model (LLM)? https://www.cloudflare.com/learning/ai/what-is-large-language-model/ , *accesat în data de 15 mai 2024.*

[2] European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Artificial Intelligence for Europe {SWD(2018) 137}, Bruxelles, 25.4.2018 COM(2018) 237 final, https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:52018DC0237

[3] COM(2018) 237.

[4] European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Coordinated Plan on Artificial Intelligence, Brussels, 7.12.2018, COM(2018) 795 final, https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:52018DC0795 site accessed on 29 April 2024.

Guidelines for Trustworthy Artificial Intelligence (AI), which was drafted by this Group, the guidelines outlined being the following: "(1) *the human factor and human oversight, (2) technical soundness and safety, (3) privacy and data governance, (4) transparency, (5) diversity, non-discrimination and fairness, (6) social and environmental well-being and (7) accountability"*.

Then, in 2020, the European Commission adopted *the White Paper on AI*[1], defining Artificial Intelligence as "a set of technologies that combine data, algorithms and computing power". The Commission proposes numerous policies for future regulation in the field of AI.

The need for national[2], European and international regulations on the matter (requiring coordination in regulatory matters and through convergence with other international partners) derives from the imposition of limits on the use of computer data, which would provide legal certainty to people, as the European Parliament Resolution of 3 May 2022 on *Artificial Intelligence in the Digital Age states that "the digital transition must be designed with full respect for fundamental rights and in such a way that digital technologies serve humanity*".

Thus, these AI technologies or automated mechanisms, which incorporate artificial intelligence systems, through increasingly autonomous robots, which can influence the human factor and even replace it, which would lead to the disappearance of certain sectors of activity, a high unemployment rate and implicitly the disappearance of some jobs, which led to the statement in the European Parliament Resolution of May 3, 2022 on artificial intelligence in the digital age that Artificial Intelligence "s*hould remain a trusted technology centered on the human factor*", not to replace human autonomy and not to lead to the

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[1] White Paper, Artificial Intelligence - *A European approach based on excellence and trust*, Brussels, 19.2.2020 COM(2020) 65 final https://commission.europa.eu/document/download/d2ec4039-c5be-423a-81ef-b9e44e79825b_ro?filename=commission-white-paper-artificial-intelligence-feb2020_ro.pdf site accessed on the 29th April 2024.

[2] As of June 2021, only 20 Member States had published national AI strategies, with the remaining seven countries in the final stages of adopting them.

loss of individual freedom. A Goldman Sachs Bank Report[1] cited by T.-G. Nicolăescu, shows that Artificial Intelligence could replace 300 million full-time jobs, that is, a quarter of jobs in the US and Europe, the other two-thirds "*being exposed to a certain degree of AI automation*" (T.G. Nicolăescu, 2024, p. 117).

The one who is called the founding father of Artificial Intelligence, Professor Geoffrey Hinton, warns that, given that, at present, technology is developing at a "dangerous" speed, it is necessary to take urgent government regulatory measures to guarantee that large companies in the field of Artificial Intelligence do serious and safe research, otherwise, humanity would disappear in the next 10 years because "technology would increase productivity [...] leaving many people unemployed and poorer", writes The Telegraph[2].

Also, in the context of technological progress and the acceleration of digitalization, employers use programs to monitor and digitally supervise the activity of employees at the workplace, which brings harm to health and safety at work (D. Top, 2024, p. 7).

However, we must not ignore the real and concrete benefits brought by Artificial Intelligence, which is now part of our lives, which helps to solve the world's great challenges - from treating chronic diseases to preventing possible threats related to cybersecurity. Thus, farmers in Europe use Artificial Intelligence to be able to monitor and automatically adapt, through animal feeding devices, a balanced food consumption, as well as their temperature and movement, through digital heating devices, thus relieving farmers from certain activities. In Denmark, Artificial Intelligence, within the medical emergency services,

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[1] Goldman Sachs Report, "Generative AI could raise global GDP by 7%", 5 April 2023, see https://www.goldmansachs.com/insights/articles/generative-ai-could-raise-global-gdp-by-7-percent, accessed on the 15th April 2023.

[2] The Telegraf, "*Godfather of AI' says it could drive humans extinct in 10 years",* author Tom McArdle, https://www.telegraph.co.uk/news/2024/12/27/godfather-of-ai-says-it-could-drive-humans-extinct-10-years/?msockid=35b882f869886be400c092a068726a5c

can make a diagnosis regarding the cardio-respiratory arrest (or other medical conditions) of the caller to the emergency service, depending on the tone of their voice. In Austria, also in the medical field, it helps radiologists to identify tumors with high precision by comparing them simultaneously/instantaneously with a large database of medical data and information[1].

As the AI Act[2] states, "*the use of AI can provide essential competitive advantages to businesses and support the achievement of beneficial social and environmental outcomes in areas such as healthcare, agriculture, food safety, education and training, media, sport, culture, infrastructure management, energy, transport and logistics, public services, security, justice, energy efficiency* [...]" (paragraph 4).

However, although the big tech firms have spent tens of billions of dollars, making staggering investments in AI models to reap huge profits in the future, the trend is negative. The US Census Bureau shows that in August 2024 "only 5.1% of US companies use artificial intelligence to produce goods and services, down from a peak of 5.4% earlier this year." "[3].

On March 7, 2024, the Digital Market Act, which was adopted in 2022 by the European Commission, entered into force, which aims to

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[1] European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions Artificial Intelligence for Europe {SWD(2018) 137 final}, Brussels, 25.4.2018 COM(2018) 237 final

[2] REGULATION (EU) 2024/1689 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) (JO L, 2024/1689, 12.7.2024, ELI: http://data.europa.eu/eli/reg/2024/1689/oj

[3] The Economist, *Artificial intelligence is losing hype*, August 19th 2024, https://www.economist.com/finance-and-economics/2024/08/19/artificial-intelligence-is-losing-hype, accessed on the 30th August 2024.

ensure the confidentiality of data of economic operators and to ensure fair competition in the digital environment.

It is expected that by 2030, thanks to Artificial Intelligence, the global economy will bring an addition of over 11 trillion euros.

On June 13, 2024, the so-called AI Act was adopted, i.e. Regulation (EU) 2024/1689 of the European Parliament and of the Council *laying down harmonised rules on artificial intelligence*[1], in force since August 1, 2024, which has a number of 13 annexes with technical data, of which we list some selectively: High-risk AI systems (Annex III), Technical documentation applicable to the relevant AI system (Annex IV); Information to be submitted when registering high-risk AI systems (Annex VIII), Technical documentation for providers of general-purpose AI models (Annex XI), Criteria for the designation of general-purpose AI models with systemic risk mentioned in the text (Annex XIII).

The purpose of this regulatory act is to facilitate the functioning of the Union internal market by unifying the regulations in the field, in particular for the use and development of artificial intelligence systems in the Union, to support a "trustworthy and human-centered" Artificial Intelligence in accordance with the values of the Union: democracy, the rule of law, the protection of health, fundamental rights enshrined in the Charter of Fundamental Rights of the European Union, stimulating innovation and employment, including protection against the harmful effects of AI systems in the Union, thus ensuring its leading position in creating a trustworthy AI (points 1-3 in conjunction with art. 1 paragraph 1 of the AI Act).

It is worth noting the action of the Union legislator (AI Act, 2024) to define a number of 64 technical terms in the field of Artificial Intelligence, but the most important is the definition of the concept of "AI system" as "*a machine-based system that is designed to operate with*

[1] Regulation (EU) 2024/1689 http://data.europa.eu/eli/reg/2024/1689/oj

different levels of autonomy and that can present adaptability after implementation, and that, pursuing explicit or implicit objectives, deduces, from the input data it receives, how to generate results such as predictions, content, recommendations or decisions that can influence physical or virtual environments".

It is also worth noting that the normative text listed those practices prohibited in the activity and field of Artificial Intelligence (art. 5) as well as the classification of AI systems as presenting a high risk (art. 6), thus establishing the "red line" demarcating the space/field of activity of Artificial Intelligence producers and suppliers.

At the international level, the regulation of Artificial Intelligence systems took the form of a first global Resolution of the UN General Assembly of March 21, 2024[1] supported by over 120 Member States, which resolves to promote safe and trustworthy artificial intelligence systems to accelerate progress towards the full achievement of the 2030 Agenda for Sustainable Development, to respect, protect and promote human rights, including the protection of personal data in the design, implementation and use of Artificial Intelligence, and to identify potential risks. This act is not normative (binding), but it states that "*The design, development, implementation and misuse of artificial intelligence systems […] pose risks that could […] undermine the protection, promotion and exercise of human rights and fundamental freedoms*".

From this perspective, the right to the protection of personal data is referred to in the specialized literature as "rights of the technological society" (L. Miraut- Martín, 2021, p. 28). Artificial intelligence is of the nature of being based on the processing of "large and varied sets of data", including biometric data through facial recognition systems (M. Șandru, 2023, p. 88).

[1] https://documents.un.org/doc/undoc/ltd/n24/065/92/pdf/n2406592.pdf

Conclusions

Artificial Intelligence, in many situations, cannot function without the Internet, and, as such, the two information mechanisms have determined a new regulatory revolution in the field.

Here, the events produced as a result of the Fourth Great Scientific and Technological Revolution in the field of Artificial Intelligence have become material/real sources of law, which have determined the creation, modification and completion of domestic, European and international normative acts and later, through the AI Act, harmonized regulations, being from now on the "new legislative framework" in the matter.

We consider, together with other authors, that the new regulations for the standardization of legislation in the matter, bring extensive transformations of the law, a "fundamental revolution in the plan of the normativity of society", so that the new provisions relative to AI constitute the premises of an International Law of Artificial Intelligence (M. Duțu, 2024, p. 45).

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SOME CONSIDERATIONS ON EQUALITY PRINCIPLE

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Abstract: *Equality and diversity at all levels and in all sectors of public administration improve government function, make administration more responsive and accountable to diverse public interests, improve the quality of services provided and increase trust in public authorities.*
Keywords: *equality; principle; regulations; public; administration*.

Introduction

Social inequities both within and between states are a current concern. Public administration around the world has the task of implementing the provision of public services to all, respecting the essential values: efficiency, effectiveness and equity. Issues of equity and justice are fundamental concerns of public administrations that wish to respect the principle of equality in governance.

To be sure, all democracies are imperfect, but their basic principles provide important goals for achieving social equity. The decline in democratic practices, combined with an increase in authoritarian practices, generates a worrying net loss for social equity around the globe. Public administration scholars and practitioners can and should promote the support of basic democratic principles and practices in administration. This is a key component of good governance, which emphasizes transparency, accountability, responsiveness,

inclusiveness, equity, ethics, efficiency and effectiveness (https://www.undp.org/publications/global-report-gender-equality-public-administration).

1. The principle of equality at international level

The principle of equality represents one of the most important principles of international law, of the European Convention on Human Rights, as well as an important factor of integration into the European Union.

Both at the international and at the national level, respect for the principle of equal treatment requires that comparable situations not be treated differently and different situations not be treated in the same way unless such treatment is objectively justified.

Article 1(3) of the UN Charter of 1945 regulates the promotion and encouragement of respect for human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion.

Art. 2 of the Universal Declaration of Human Rights from 1948 provides that every person can avail himself of all the rights and freedoms proclaimed in the Declaration without any distinction such as, for example, the difference of race, color, sex, language, religion, political opinion or any other opinion, of national or social origin, wealth, birth or any other circumstances.

In 2005, Article 1 of the 12th Protocol to the ECHR Convention (https://www.echr.coe.int/documents/d/echr/convention_ron) entered into force, which contains the following provisions: 1. The exercise of any right recognized by this Convention must be ensured without any distinction based, in particular, on sex, race, color, language, religion, political or any other opinions, national or social origin, membership of a national minority, wealth, birth or any other situation. 2. No one shall be discriminated against by a public authority on the basis of any of the grounds mentioned in paragraph 1.

To date, it has been ratified by only 20 of the 47 member states of the Council of Europe.

Art. 1 of Protocol no. 12 extends the scope of protection against discrimination to "any right provided by law" and even beyond these rights as it follows from the interpretation given by the European Court of Human Rights in several cases - Savez crkava "Riječ života" and others v. Croatia, 2010, Sejdić and Finci v. Bosnia and Herzegovina (GC), 2009.

According to the Explanatory Report on Protocol no. 12, four categories of situations are included in the scope of protection offered by this article: "1. in the exercise of any right specifically granted to a person by national law; 2. in the exercise of a right which can be inferred from a clear obligation on a public authority under national law, namely where a public authority has an obligation to behave in a certain way in accordance with national law; 3.by a public authority in the exercise of its discretionary power (for example, granting certain subsidies); 4. by any other act or omission of a public authority (for example, the conduct of law enforcement officers when ensuring the maintenance of order during a riot)."

A very important aspect mentioned by the explanatory report is the fact that art. 1 obliges parties to take measures to prevent discrimination, even when discrimination manifests itself in relations between private individuals, for example, "arbitrary refusal to grant access to work, access to restaurants or services that can be made available to the public by private individuals, such as healthcare or utilities such as water and electricity supply"[1].

At the level of the Council of Europe, we can also identify the following conventions on combating discrimination: the European Social Charter from 1961, the Framework Convention for the Protection of National Minorities from 1995, the Convention on Human Rights and Biomedicine of the Council of Europe from 1997, the Council of Europe

[1] Article 1 provides a general non-discrimination clause and thus, the scope of protection it offers is wider than "the exercise of the rights and freedoms recognized in the Convention".

Convention on the Prevention and Combating of Violence against of women and domestic violence since 2011.

Also, through the Union rules, the European Union promotes equality among EU citizens. Thus, Article 19 of the Treaty on the Functioning of the European Union gives the Union the power to adopt legislative acts, including harmonizing the laws and regulations of the member states in order to combat certain forms of discrimination, generated including through the actions of the authorities of the member states (Craig & de Burca, 2017, p. 426).

Article 21 of the Charter of Fundamental Rights of the European Union prohibits discrimination of any kind, based on reasons such as sex, race, color, ethnic or social origin, genetic characteristics, language, religion or belief, political or any other opinion, membership to a national minority, wealth, birth, a disability, age or sexual orientation, and within the scope of the TCE and the TEU and without prejudice to their special provisions, prohibits any discrimination based on nationality (Hofmann & Mihaescu, 2013, p. 73).

We can also identify regulations with lower legal force than those previously mentioned, but which are important in the matter of the principle of equality: Directive 2000/43/EC [2000] OJ L180/22 (Racial Equality Directive, or RED) whose main objective is to combat discrimination on grounds of race or ethnic origin, Directive 2000/78/EC [2000], OJ L303/16 (Directive establishing a general framework for equal treatment in employment and occupation), Directive 2004/113/EC of 13 December 2004 applying the principle of equal treatment between women and men regarding access to goods and services and the supply of goods and services, Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment between men and women in employment and work.

An important EU document in this field is 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 Union of Equality: The Gender Equality Strategy 2020-2025*. This is the gender equality strategy that structures

the European Commission's work on gender equality and sets out the policy objectives and key actions for the period 2020-2025 (https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A52020DC0152). The EU wishes to have as main purpose through this strategy that women and men have equal opportunities to thrive, and can equally participate in and lead the European society.

2. The principle of equality at the national level

Just like the principle of legality, the principle of equality is regulated by the Romanian Constitution in article 16, paragraph 1, stipulating that "Citizens are equal before the law and public authorities, without privileges and without discrimination", but also in the Administrative Code in article 7 which regulates the fact that "Beneficiaries of the activity of public administration authorities and institutions have the right to be treated equally, in a non-discriminatory manner, correlative to the obligation of public administration authorities and institutions to treat all beneficiaries equally, without discrimination based on the criteria provided by law".

These provisions apply to all natural or legal persons, but also to public institutions with attributions regarding: employment conditions, recruitment, selection and promotion criteria and conditions, access to all forms and levels of guidance, training and professional development; social protection and security; public services or other services, access to goods and facilities; the educational system (Gheoculescu, 2023, pp.233-241); ensuring freedom of movement; ensuring peace and public order; other areas of social life.

To ensure compliance with these regulations, there are a number of authorities that have powers in this field: the National Council for Combating Discrimination, the People's Advocate, the National Authority for Persons with Disabilities, the National Agency for Equal Opportunities between Women and Men, the National Agency for Roma, but and courts of law.

Conclusions

The principle of equality is the basis of the state, which by regulating social rights in the Constitution makes it possible to guarantee essential equality: of the individual in society, of the individual in the legal order and of the social groups that individuals create.

Achieving equality requires the intervention of the state in the organization of several dimensions of life, through the elaboration of social, legal and economic policies.

Indeed, it is essential to define these policies that identify the principles, but much more important is the willingness of public authorities, their staff and citizens to respect them in the course of their activities.

Also, the role of the courts is highlighted when the principle of equality is violated and legality must be restored.

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DUAL UNIVERSITY EDUCATION (II)

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Abstract: *The law provides a framework for the organization, financing and evaluation of dual programs, which ensures predictability and transparency. Higher education institutions can form consortia with economic operators, which allows them to access additional resources and collaborate effectively.*

Keywords*: dual higher education; theory and practice; consortia.*

Introduction

In the first part of the material, the right to education and dual university education in some countries of the world were presented generically. This second part analyzes the new provisions of Law no. 199/2023 regarding dual university education, which represents an innovative and welcome initiative in the Romanian educational system, aiming to meet the demands of the labor market and increase the employability of graduates. It is obvious that there are positive points of this regulation, but its challenges must also be taken into account.

Among the positive aspects, the following should be mentioned:
- Integration of theory with practice: The establishment of dual university education offers students the opportunity to combine theoretical knowledge with practical experience (Ghiță, 2022, p. 110), ensured through collaboration with economic operators. This model prepares

graduates for the real demands of the workplace and helps them develop their professional skills (Popovici, 2022, p. 149).

- Partnerships between universities and the economic environment: Regulations require the conclusion of partnership contracts between universities and companies, which facilitates the involvement of the business environment in the training of future specialists. Economic operators can contribute financially and organizationally, strengthening the connection between education and the economy.
- Flexibility for all university cycles: The provisions extend this model to all levels of study: bachelor's, master's and doctoral degrees, including through the professional doctorate. This approach allows the training of specialists in various fields, including those with high demand on the labor market.
- Clear legislative support: The law provides a framework for the organization, financing and evaluation of dual programs, which ensures predictability and transparency. Higher education institutions can form consortia with economic operators, which allows them to access additional resources and collaborate effectively.

The challenges of these regulations are related to the alignment of education with market requirements and the capacity of economic operators to participate in the educational process. It is essential that dual programs are constantly adapted to economic and technological developments to avoid training in fields with no market demand. Not all companies are prepared to actively participate in the educational process, especially in sectors with limited resources, with the risk of uneven involvement between regions, which may exacerbate educational and economic disparities.

At the same time, a clear methodology is needed to evaluate work-based learning activities and to ensure a uniform quality standard (Tabacu, 2023, pp.113-120).

Although the law provides for multiple sources of funding, effective implementation depends on the allocation of the necessary resources, both from the state budget and from the private sector. The implementation of this system will require careful coordination, adequate

resources and effective monitoring mechanisms to ensure the success of the initiative.

Analysis of the provisions relating to dual university education

Article 90 of Law No. 199/2023 defines dual higher education as a form of education in which the responsibilities for carrying out learning, teaching, practical applications, research and evaluation activities are shared between accredited higher education institutions and economic operators.

According to this article, higher education institutions are responsible for organizing and carrying out learning, teaching and evaluation activities, while economic operators are responsible for organizing work-based learning activities and participate in the evaluation.

Practical and research activities can take place both within higher education institutions and at economic operators.

In order to formalize this collaboration, higher education institutions conclude partnership contracts with economic operators that establish the conditions of collaboration, the rights and obligations of the parties, as well as the costs assumed by each party. Also, students or doctoral candidates conclude an individual study and practical training contract with the higher education institution and the economic operator, which details the rights and obligations of each party.

It is important to note that local public administration authorities, chambers of commerce, industry employers' associations and other relevant partners at national or international level can contribute, including financially, to the organization of dual higher education. In addition, higher education institutions can participate in the establishment of dual education consortia, in accordance with the provisions of the pre-university education law.

The legal and procedural framework for the formation of partnerships between educational institutions and economic operators, with the aim of developing dual education programs, is established by the

Methodology for the establishment of dual education consortia, approved by Order of the Minister of Education no. 6.216/2022. According to the methodology, a dual education consortium is a partnership structure without legal personality, formed by educational institutions and economic operators, with the role of ensuring initial vocational education and training in the dual system. The consortium is mandatorily made up of at least the following four types of entities:

1. Higher education institutions: They ensure theoretical preparation and academic coordination of study programs, curricula and theoretical assessment of students.
2. Economic operators: Responsible for organizing internships and providing work-based learning opportunities for students through mentors. contribute to the assessment of students' practical skills
3. Pre-university education units: They can participate in the consortium to ensure the continuity of vocational training.
4. Other relevant entities: For example, chambers of commerce or employers' associations, which can support the consortium with resources, expertise and facilitating the integration of graduates into the labor market.

The advantages of establishing consortia are:

- Integration of theory and practice: students benefit from a complete training, combining theoretical knowledge with practical experience.
- Adaptation to the requirements of the labor market: direct collaboration with economic operators ensures the training of relevant and updated skills.
- Fiscal facilities: economic operators involved can benefit from facilities for paying taxes, fees and contributions, according to the legislation in force.

Within consortia, coordination between partners is essential, requiring efficient communication and a clear establishment of the responsibilities of each member of the consortium. At the same time, it is essential that both theoretical and practical training comply with academic and professional standards. It is also important to maintain collaboration in the long term and adapt to possible changes in the economic or educational environment.

Article 91 of Law no. 199/2023 regulates the structure of the curriculum for dual higher education, emphasizing the integration of theoretical and practical activities in student training. According to this article, the curriculum includes:

- Learning and teaching activities: These are carried out within higher education institutions, providing students with the necessary theoretical knowledge.
- Work-based learning activities: Carried out at partner economic operators, they allow students to apply theoretical knowledge in practical contexts, developing relevant professional skills.
- Assessment activities: They assess both the theoretical knowledge and the practical skills acquired by students, ensuring a complete training.
- The volume of work-based learning activities is established in accordance with national qualification standards and labor market requirements, ensuring the relevance and quality of vocational training. This integrated approach facilitates the transition of students to the labor market, providing them with the necessary practical experience and adapting to the needs of the current economy.

Article 92 of Law no. 199/2023 regulates the financing of dual higher education, establishing the modalities by which the necessary resources are ensured for the implementation of this type of education. According to this article, in the case of state higher education institutions, the financing of dual higher education activities is carried out according to the methodology approved by Government decision.

This methodology establishes the criteria and quality standards for the financing of dual higher education programs, ensuring an efficient and transparent allocation of resources. In the case of private and denominational higher education institutions, financing is carried out from their own sources, as well as from other sources, according to legal provisions. This approach allows the aforementioned institutions to manage their resources autonomously, in accordance with their own specifics and objectives. Also, economic operators' partners in dual higher education programs may contribute financially to the organization and implementation of work-based learning activities, in accordance with

the provisions of the partnership contracts concluded with higher education institutions.

This financial collaboration between higher education institutions and economic operators ensures a direct involvement of the business environment in the professional training of students, facilitating the adaptation of curricula to the requirements of the labor market and increasing the employability of graduates.

In conclusion, article 92 of Law no. 199/2023 establishes a clear financial framework for supporting dual higher education, promoting partnerships between educational institutions and the economic environment, in order to ensure relevant and quality education for students.

Article 93 of Law No. 199/2023 provides that dual higher education is organized for all cycles of university studies: short cycle, cycle I (bachelor's), cycle II (master's) and cycle III (doctorate), including through professional doctorate.

The implementation of this article extends the dual education model to all levels of university studies, allowing students to combine theoretical training with practical experience in the professional environment. This approach has the potential to improve the employability of graduates, providing them with relevant practical skills and facilitating the transition to the labor market. However, the success of the implementation depends on the development of a clear methodology, which establishes criteria and standards for the organization of dual higher education at each cycle of studies. This methodology must ensure effective collaboration between higher education institutions and economic partners, guaranteeing the quality of vocational training and adaptation to current labor market requirements.

Article 93 of Law 199/2023 extends the possibility of organizing dual higher education to all cycles of university studies, including the short cycle, bachelor's, master's and doctorate, with a special mention for the professional doctorate. This regulation reflects a significant commitment to the modernization of higher education in Romania, integrating practical training into all educational stages.

Several positive aspects emerge from these provisions:

- extension of dual education to all cycles of studies: This measure allows for better integration of students into the labor market during their training. It includes the professional doctorate, a relatively new component in the Romanian educational landscape, focused on applied research, oriented towards solving concrete problems of industry and society.
- complete and applied training: Students benefit from solid theoretical training, combined with practical applications, which ensures an easier transition to jobs in their field of specialization. The practical experience acquired during their studies allows them to develop essential skills adapted to the current demands of the labor market.
- stimulating collaboration with the economic environment: It allows economic operators to actively participate in the training of future employees, which can contribute to reducing the gap between industry requirements and educational offer.
- flexibility for diverse fields: The regulation provides the legal framework for the application of this model in all fields of study, promoting adaptability and professional diversity.

And within these provisions we find several challenges:

- complexity of implementation at the doctoral level: The professional doctorate requires effective coordination between universities and economic operators, especially in sectors where applied research is less developed. A clear methodology and significant resources are needed to ensure the success of this model at the doctoral level.
- limited resources for expansion: Especially in less developed regions, the lack of economic partners and financial resources can make it difficult to organize these programs.
- monitoring and quality assessment: It is essential to create a monitoring system to verify that the practical experience offered by economic operators complies with academic standards and contributes to the development of students' skills.
- possible regional discrepancies: Economic and structural differences between regions can lead to unequal opportunities for students, which may require additional measures to balance access.

The modernisation of the Romanian higher education system, by including dual education in all study cycles, offers real opportunities for students to better prepare for the demands of the labour market, but its success will depend on the quality of implementation, the involvement of the economic environment and the availability of the necessary resources. The adoption of supportive policies, including through funding and clear methodologies, will be essential to ensure a positive impact of this initiative in the long term.

Article 94 of Law No. 199/2023 stipulates that the provisions of the law relating to the organization, quality assurance, admission, ongoing evaluation, completion, preparation and issuance of study documents also apply to dual higher education.

This article emphasizes that dual higher education is subject to the same standards and regulations as other forms of higher education. The application of the same provisions ensures coherence and consistency in the higher education system, regardless of the form of organization. Subjecting dual education to the same quality standards guarantees that students benefit from a high-quality education, comparable to that of traditional programs. Graduates of dual programs will receive officially recognized diplomas and certificates, similar to those obtained in other forms of higher education.

Although the provisions are the same, the implementation of these regulations in the context of dual education may require specific adjustments to reflect the particularities of this form of education. It must be ensured that all institutions involved comply with these provisions, which may require additional monitoring and evaluation mechanisms.

Article 94 reaffirms the commitment to maintaining high standards in dual higher education, ensuring that it is harmoniously integrated into the national education system and that it offers equal opportunities and recognition for all students, thus ensuring that there is a balance between the aspirations of young people and their potential and the opportunities offered to them in the labour market and in society (ILO, 2012).

Article 95 of Law no. 199/2023 provides that, during the work-based learning activity, students enrolled in dual higher education

programs benefit from the recognition of their seniority in work and, where applicable, their seniority in the specialty. This provision brings significant benefits to students involved in dual education programs, offering them advantages on the labor market and in career development. Thus, students accumulate seniority in work and, where applicable, in the specialty, facilitating their integration into the labor market after graduation (Șerban-Barbu, 2014). This recognition can stimulate students' interest in dual programs, knowing that their work is officially recognized. The seniority accumulated can be an advantage in the recruitment process, demonstrating relevant practical experience.

At the same time, a clear and rigorous record of the hours worked by students is necessary for implementation to ensure correct recognition of seniority. Effective collaboration between educational institutions and employers is essential for the correct application of this provision.

Article 95 of the Higher Education Law represents an important step in integrating education with practical experience, providing students with valuable opportunities for professional development and facilitating the transition to the labor market (Crăciunean-Tatu, 2022, p. 96).

Article 96 of the same normative act regulates the tax facilities granted to economic operators involved in dual higher education programs:

1. Tax exemptions for economic operators: Economic operators that conclude partnership contracts with higher education institutions for the organization of dual education benefit from tax facilities, according to the provisions of the Fiscal Code.
2. Tax exemptions for designated personnel: Personnel designated by the economic operator for the direct guidance of work-based learning benefit from the exemption from paying tax on income from salaries and similar to salaries, according to the provisions of the Fiscal Code.

These legislative provisions have the role of stimulating the involvement of the business environment in the educational process, especially within dual higher education.

The tax facilities offered to economic operators and personnel designated for the guidance of students encourage companies to actively participate in the professional training of future specialists. Tax exemptions contribute to reducing the costs borne by companies in the process of practical training of students, making partnerships with higher education institutions more attractive. The direct involvement of economic operators in the training of students ensures the development of specific skills required on the labor market, facilitating the rapid integration of graduates into the workforce.

It is essential that tax incentives are applied uniformly and transparently, in order to avoid any discrepancies or misinterpretations of the legislation.

Authorities must monitor the effectiveness of these tax measures in stimulating partnerships and improving the quality of vocational training. These provisions introduce tax measures designed to encourage collaboration between higher education institutions and economic operators within dual education programs, facilities that have the potential to improve the quality of practical education and ensure a better adaptation of graduates to the requirements of the labor market, thus contributing to economic and social development.

Conclusions

Dual university education offers advantages for all subjects involved in its implementation, being a strategic tool for the modernization of the educational system and for the sustainable development of society. By connecting education with the real economy, this type of education supports social, economic and technological progress, creating a solid bridge between theory and practice, leading to increased competitiveness on the labor market, strengthening the relationship between academia and the economy, reducing youth unemployment, developing transversal skills, promoting entrepreneurship and innovation, reducing labor migration and increasing productivity.

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