National University of Science and Technology POLITEHNICA Bucharest,
Pitești University Centre
Faculty of Economic Sciences and Law

JOURNAL

LEGAL AND ADMINISTRATIVE STUDIES

C.H.BECK Publishing House
Bucharest 2025

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

NATIONAL UNIVERSITY OF SCIENCE AND TECHNOLOGY POLITEHNICA BUCHAREST
PITEȘTI UNIVERSITY CENTRE
FACULTY OF ECONOMIC SCIENCES AND LAW

Journal
LEGAL AND ADMINISTRATIVE STUDIES

Supplement 2025

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

Publishing House C.H. BECK
Bucharest 2025

Journal
LEGAL AND ADMINISTRATIVE STUDIES
e-ISSN: 2344-6900
ISSN-L: 1583-0772
Supplement 2025
The conference papers presented at the International Conference „European Union's History, Culture and Citizenship", 17th edition

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

The name of issuing institution
NATIONAL UNIVERSITY OF SCIENCE AND TECHNOLOGY POLITEHNICA BUCHAREST
PITESTI UNIVERSITY CENTRE
Faculty of Economic Sciences and Law
Editorial address: Targu din Vale no.1, code 110040, Argeş county
Tel/fax: +400348.453.400
E-mail: jlas@upb.ro, jlas@upit.ro
Web-site: www.jlas.upit.ro

Publishing House
C.H. BECK SRL
Address: Str. Plevnei nr. 172, Sector 6, Bucharest
Tel.:021/410.08.47
Fax:021/410.08.48
E-mail: redactie@beck.ro
Web-site: www.beck.ro

COPYRIGHT
Authors are responsible for the contents of the paper and copyrights of the illustrations/photographs.
The editor's office is not responsible for the linguistic correctness of the manuscripts.

The conference papers presented at the International Conference „European Union's History, Culture and Citizenship", 17th edition

CONFERENCE COMMITTES

- **SCIENTIFIC COMMITTEE**

Professor Ph.D. DDr.h.c., M.C.L. Heribert Franz KOECK-Universität *Johannes Kepler* Linz, AUSTRIA
Professor Ph.D. Dr.h.c. Rainer ARNOLD-Universität Regensburg, GERMANY
Professor Ph.D. Alexandru ATHANASIU – University of Bucharest, President of Association "Society of the Labor and Social Security Law", ROMANIA
Professor Ph.D. Anton- Florin BOȚA- POLITEHNICA Bucharest, Pitești University Centre, ROMANIA
Professor Ph.D. habil. Sevastian CERCEL - C.S. Nicolăescu-Plopșor Humanistic Research Institute – Romanian Academy/ University of Craiova, ROMANIA
Professor Lika CHIGHLASHVILI - Deputy Rector of Tbilisi Humanitarian Teaching University, GEORGIA
Professor Ph.D. habil. Ionel DIDEA- POLITEHNICA Bucharest, Pitești University Centre, ROMANIA
Professor Ph.D. Elena-Luminița DIMA – Faculty of Law, University of Bucharest, Vice-President of Association "Society of the Labor and Social Security Law", ROMANIA
Professor Ph.D. habil. Mircea DUȚU – Director, "Acad.Andrei Rădulescu" Institute of Legal Research of the Romanian Academy, Bucharest, ROMANIA
Professor Ph.D. Cristina HERMIDA DEL LLANO-Universidad *Rey Juan Carlos*, SPANIA
Professor Ph.D. habil. Tomasz SZANCILO - European University of Law and Administration in Warsaw, POLAND
Professor Ph.D. habil. Jakub STELINA-University of Gdańsk, POLAND
Professor Ph.D. habil. Andrzej SZMYT-University of Gdańsk, POLAND
S.R. I, Professor Ph.D. habil., Mihai ȘANDRU - Coordinator of the Center for European Law Studies - "Acad.Andrei Rădulescu" Institute of Legal Research of the Romanian Academy, ROMANIA
Professor Ph.D. habil. Mariusz ZALUCKI – AFM Kraków University, Justice at the Supreme Court of Poland, POLAND
Associate Professor Ph.D. habil. Cauia ALEXANDR, Vice-Rector International Free University of Moldova, REPUBLIC OF MOLDOVA

S.R. II, Ph.D. Tudor AVRIGEANU, M.iur.comp. (Bonn) - Coordinator of the Public Law Department, "Acad.Andrei Rădulescu" Institute of Legal Research of the Romanian Academy, ROMANIA
Associate Professor Ph.D. Andreea DRĂGHICI - POLITEHNICA Bucharest, Pitești University Centre, ROMANIA
Associate Professor Ph.D. Ilioara GENOIU-*Valahia* University of Târgoviște, ROMANIA
Associate Professor Ph.D. Constanța MĂTUȘESCU-*Valahia* University of Târgoviște, ROMANIA
Associate Professor Ph.D. Camelia MORĂREANU-DRAGNEA - POLITEHNICA Bucharest, Pitești University Centre, ROMANIA
Associate Professor Ph.D. Laura MIRAUT-MARTIN- Univesity of Las Palmas de Gran Canaria, SPAIN
Associate Professor Ph.D. Carmen Constantina NENU- POLITEHNICA Bucharest, Pitești University Centre, ROMANIA
Associate Professor Ph.D. Doina POPESCU – LJUNGHOLM - POLITEHNICA Bucharest, Pitești University Centre, ROMANIA
Associate Professor Ph.D. Ayșegül SEZGIN HUYSAL – Istanbul Medipol University, TURKEY
Associate Professor Ph.D. Beata STĘPIEŃ-ZAŁUCKA - University of Rzeszów, POLAND
Associate Professor Ph.D. Andreea TABACU- POLITEHNICA Bucharest, Pitești University Centre, ROMANIA
Associate Professor Ph.D. Miruna TUDORAȘCU - *1 decembrie 1918* University of Alba Iulia, ROMANIA
Associate Professor Ph.D. Elise VÂLCU - POLITEHNICA Bucharest, Pitești University Centre, ROMANIA
Associate Professor Ph.D. Lavinia Mihaela VLĂDILĂ - University *Valahia* of Târgoviște, ROMANIA
Associate Professor Ph.D. Ana-Maria VLĂSCEANU - Faculty of Law, University of Bucharest, ROMANIA
Lecturer Ph.D. Sorina Octavia HONȚARU – POLITEHNICA Bucharest, Pitești University Centre, ROMANIA

ORGANIZING COMMITTEE

Associate Professor Ph.D. Denisa BARBU - *Valahia* University of Târgoviște, ROMANIA
Associate Professor Ph.D. Iulia BOGHIRNEA - POLITEHNICA Bucharest, Pitești University Centre, ROMANIA

Associate Professor Ph.D. Bianca DABU - POLITEHNICA Bucharest, Piteşti University Centre, ROMANIAAssociate Professor Ph.D. Andreea DRĂGHICI - POLITEHNICA Bucharest, Piteşti University Centre, ROMANIA
Associate Professor Ph.D. Carmen Constantina NENU - POLITEHNICA Bucharest, Piteşti University Centre, ROMANIA
Associate Professor Ph.D. Andreea TABACU - POLITEHNICA Bucharest, Piteşti University Centre, ROMANIA
Associate Professor Ph.D. Carmina TOLBARU - POLITEHNICA Bucharest, Piteşti University Centre, ROMANIA
Associate Professor Ph.D. Ana-Maria VLĂSCEANU - Faculty of Law, University of Bucharest, ROMANIA
S.R. III, Ph.D. Mihaela-Gabriela BERINDEI – Department of Privat Law, "Acad.Andrei Rădulescu" Institute of Legal Research of the Romanian Academy, ROMANIA
Lecturer Ph.D. Cătălin BUCUR - POLITEHNICA Bucharest, Piteşti University Centre, ROMANIA
Lecturer Ph.D. Emilian BULEA-*Valahia* University of Târgovişte, ROMANIA
S.R. III, Ph.D. Versavia BRUTARU – Department of Public Law, "Acad.Andrei Rădulescu" Institute of Legal Research of the Romanian Academy, ROMANIA
Lecturer Ph.D. Ramona DUMINICĂ - POLITEHNICA Bucharest, Piteşti University Centre, ROMANIA
Lecturer Ph.D. Amelia-Veronica GHEOCULESCU - POLITEHNICA Bucharest, Piteşti University Centre, ROMANIA
Lecturer Ph.D. Dan GUNĂ-*Valahia* University of Târgovişte, ROMANIA
Lecturer Ph.D. Daniela IANCU- POLITEHNICA Bucharest, Piteşti University Centre, ROMANIA
Lecturer Ph.D. Sorina IONESCU - POLITEHNICA Bucharest, Piteşti University Centre, ROMANIA
Lecturer Ph.D. Florina MITROFAN - POLITEHNICA Bucharest, Piteşti University Centre, ROMANIA
Lecturer Ph.D. Lavinia OLAH - POLITEHNICA Bucharest, Piteşti University Centre, ROMANIA
Lecturer Ph.D. Adriana-Ioana PANTOIU - POLITEHNICA Bucharest, Piteşti University Centre, ROMANIA
Lecturer Ph.D. Viorica POPESCU - POLITEHNICA Bucharest, Piteşti University Centre, ROMANIA
Lecturer Ph.D. Andra PURAN - POLITEHNICA Bucharest, Piteşti University Centre, ROMANIA
Lecturer Ph.D. Andrei SOARE - POLITEHNICA Bucharest, Piteşti University Centre, ROMANIA

S.R. III, Ph.D. Radu STANCU – Department of Privat Law, "Acad.Andrei Rădulescu" Institute of Legal Research of the Romanian Academy, ROMANIA
Lecturer P.D. Dumitru VĂDUVA - POLITEHNICA Bucharest, Piteşti University Centre, ROMANIA

JLAS EXECUTIVE EDITORIAL BOARD

EDITOR-IN-CHIEF:

Professor Ph.D. hab. Eugen CHELARU

Lecturer Ph.D. Amelia-Veronica GHEOCULESCU - POLITEHNICA Bucharest, Pitești University Centre, Romania

DEPUTY EDITORS:
Associate Professor Ph.D. Andreea DRĂGHICI - POLITEHNICA Bucharest, Pitești University Centre, Romania
Associate Professor Ph.D. Carmen Constantina NENU - POLITEHNICA Bucharest, Pitești University Centre, Romania

SECRETARY GENERAL OF THE EDITORIAL:
Associate Professor Ph.D. Iulia BOGHIRNEA - POLITEHNICA Bucharest, Pitești University Centre, Romania
Associate Professor Ph.D. Andreea TABACU - POLITEHNICA Bucharest, Pitești University Centre, Romania

TEHNICAL SECRETARIAT:
Associate Professor Ph.D. Carmina TOLBARU - POLITEHNICA Bucharest, Pitești University Centre, Romania
Lecturer Ph.D. Daniela IANCU - POLITEHNICA Bucharest, Pitești University Centre, Romania
Lecturer Ph.D. Sorina IONESCU - POLITEHNICA Bucharest, Pitești University Centre, Romania
Lecturer Ph.D. Lavinia OLAH - POLITEHNICA Bucharest, Pitești University Centre, Romania
Lecturer Ph.D. Andra PURAN - POLITEHNICA Bucharest, Pitești University Centre, ROMANIA

TABLE OF CONTENTS

THE RESIDUAL ROLE OF GOOD FAITH IN INDIVIDUAL EMPLOYMENT RELATIONS **13**
Raluca DIMITRIU

FOREGOING FRUMPY FORMALISM **31**
Doug SURTEES

EUTHANASIA IN POLAND - A FEW COMMENTS ON THE IMPACT OF LEGAL REGULATIONS ON PRACTICE **56**
Beata STĘPIEŃ-ZAŁUCKA

EUROPEAN SOCIAL CHARTER STANDARDS ON THE PROTECTION OF MIGRANT WORKERS IN THE EUROPEAN UNION **66**
Tatiana PUIU

STATUTORY VERSUS CONTRACTUAL RIGHT OF WITHDRAWAL IN A CONSTRUCTION CONTRACT **87**
Tomasz SZANCIŁO

USUCAPIO AS A MEANS OF ACQUIRING REAL PROPERTY OWNERSHIP - A COMPARATIVE LEGAL OUTLINE BASED ON POLISH, ITALIAN, AND LITHUANIAN LAW **109**
Krzysztof GRZESIOWSKI

CIVIL LIABILITY FOR INJURY CAUSED TO THE VICTIM PROVOCATEUR BY THE OFFENDER UNDER THE INFLUENCE OF STRONG DISTURBANCE OR EMOTION **126**
Ion IFRIM

LEASING OF PERSONNEL - CONSEQUENCES ARISING FROM THE LACK OF IDENTITY BETWEEN THE FACTO AND THE IURE EMPLOYER **146**
Ana-Maria VLĂSCEANU, Mădălina-Ani IORDACHE

PRESIDENT AND THE CONSTITUTIONAL TRIBUNAL IN POLAND. LEGAL RELATIONSHIPS **186**
Jakub STELINA

WHY THE RULE OF LAW IS LESS ACCEPTED IN POLITICAL PRACTICES? **199**
Marius VACARELU

THE PROBLEMATIC OF LEGITIMATE INTEREST IN THE VISION OF THE PUBLIC MINISTRY AS WELL AS THE PRACTICE OF THE HIGH COURT OF CASSATION AND JUSTICE, AS ”LEGAL BASIS” FOR THE CREATION OF DISCRIMINATORY CONDITIONS ON THE ACTIVITY OF ENTERPRISES. ADDING TO THE LAW REGARDING THE APPLICATION OF ART. 339 – 340 CRIMINAL PROCEDURE CODE. THE NEED TO CEASE THE SRL TYPE BEHAVIOUR WITH SOLE ASSOCIATE FROM THE PUBLIC MINISTRY **212**
Dan-Mihail DOGARU

EUROPEAN UNION'S GREEN DIGITAL TRANSFORMATION POLICY IMPACT ON GEORGIA'S DIGITAL TRANSFORMATION PROCESS **226**
Nona GELITASHVILI, Giorgi KHARSHILADZE

EXPROPRIATION FOR PUBLIC UTILITY IN THE EUROPEAN UNION AND THE REPUBLIC OF MOLDOVA - A COMPARATIVE ANALYSIS OF THE LEGAL FRAMEWORK AND ADMINISTRATIVE PRACTICE **250**
Viorica URSU, Daniela POJAR, Iurie IVANOV

THE PRINCIPLE OF PROPORTIONALITY – AN ELEMENT OF LEGAL CONSTRAINT IN ADMINISTRATIVE PROCEDURE **280**
Oleg TĂNASE

DO YOU HAVE AN ORIGINAL RESEARCH PAPER USING AI? **287**
Andreea Elena TABACU

INSOLVENCY – POSSIBLE TRANSPOSITION INTO INTER- AND TRANSDISCIPLINARY MODELS OF ANALYSIS **302**
Ionel DIDEA, Diana Maria ILIE, Paul DIDEA

ATTRACTING JOINT LIABILITY IN INSOLVENCY PROCEEDINGS **325**
Constantin Bogdan ION

LEGAL REFLECTIONS ON THE EUROPEAN CERTIFICATE OF SUCCESION IN RELATION TO REGISTERED RIGHTS WITHIN THE INHERITED ESTATE **342**
Oana Florina ISPAS

THE RIGHT OF WORKERS TO SPECIAL PROTECTION IN CASE OF MATERNITY, FROM THE PERSPECTIVE OF THE EUROPEAN SOCIAL **354**

CHARTER AND DOMESTIC LAW
Carmen Constantina NENU, Sorina Octavia HONȚARU

LAW, RISK MANAGEMENT AND ENTREPRENEURIAL CULTURE IN THE FRAMEWORK OF PUBLIC POLICIES **369**
Nicoleta DASCĂLU

THEORETICAL AND JURISPRUDENTIAL EXAMINATION OF THE PROFESSIONAL STATUS OF WORKERS ON DIGITAL WORK PLATFORMS **388**
Livia Florentina PASCU

LEGAL REGIME APPLICABLE TO THE REMOVAL AND TRANSPLANTATION OF ORGANS, TISSUES AND CELLS OF HUMAN ORIGIN FOR THERAPEUTIC PURPOSES FROM THE LIVING DONOR **400**
Ramona DUMINICĂ, Andreea DRĂGHICI

RESTRICTION ON THE EXERCISE OF CERTAIN RIGHTS OR FREEDOMS: LEGISLATIVE AND JURISPRUDENTIAL STANDARDS **411**
Elena ANGHEL

MEDIATION IN CRIMINAL CASES. THE LEGAL FRAMEWORK, THE MEANING AND THE MULTIFACETED NATURE OF THE INSTITUTION **425**
Igor ZGOLIŃSKI

NATURAL LAW VERSUS POSITIVE LAW: A CRITICAL APPROACH **439**
Cornelia Beatrice Gabriela ENE-DINU

THE EVOLUTION OF THE CONCEPT OF CULPA IN ROMAN LAW **453**
Daniela IANCU

TAXATION IN ROMAN LAW **462**
Adriana Ioana PANȚOIU, Daniela IANCU

THE ORIGIN AND HISTORICAL EVOLUTION OF THE INSTITUTION OF USUCAPION **472**
Mariana-Alina ZISU, Rodica-Raluca ȘTEFĂNOAIA

THE UNITY OF PRIVATE LAW, PART OF THE REFORM ORGANIZED BY THE 2009 CIVIL CODE **483**
Dumitru VĂDUVA

THE IMPORTANCE OF NEW TEHNOLOGIES IN PUBLIC ADMINISTRATION **496**
Elena Emilia ȘTEFAN

DO WE STILL HAVE, OR DO WE NO LONGER HAVE LAW? **504**
Andrei SOARE

CONTINUITY OF PUBLIC SERVICES IN ROMANIA : LEGAL CHALLENGES AND INSTITUTIONAL IMPLICATIONS IN THE CONTEXT OF SYSTEMIC DYSFUNCTIONALITY **517**
Viorica POPESCU

THE LIABILITY OF THE PRESIDENTS IN CENTRAL AND EAST EUROPEAN STATES. A COMPARATIVE STUDY OF THE CONSTITUTIONAL PROVISIONS **530**
Rafał CZACHOR

THE MAIN INSTRUMENTS OF INTERNATIONAL HUMANITARIAN LAW **539**
Anastasia CATAN

CONSTITUTIONAL JUSTICE IN ROMANIA. REALITIES AND PERSPECTIVES **550**
Marius ANDREESCU, Andra Nicoleta PURAN

THE ANALYSIS OF THE THEORETICAL BACKGROUND OF THE PEOPLE'S ADVOCATE INSTITUTION **582**
Florina MITROFAN

THE REVIEW BASED ON A DECISION OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE ROMANIAN CRIMINAL TRIAL **592**
Versavia BRUTARU

THE PRINCIPLES OF INTERNATIONAL JUDICIAL COOPERATION IN CRIMINAL MATTERS **607**
Cătălin BUCUR

THE IMPACT OF THE ECHR JURISPRUDENCE ON THE ROMANIAN CRIMINAL PROCESS **628**
Andreea CORSEI

THE ROLE OF THE PRELIMINARY CHAMBER JUDGE IN REVIEWING AND APPROVING PROSECUTORIAL DECISIONS TO DISCONTINUE CRIMINAL **640**

PROCEEDINGS
Florin-Georgian CREȚU

TERRORISM – A DISRUPTIVE CULTURAL FACTOR IN CONTEMPORARY SOCIETY **652**
Bogdan Nicolae ȚONEA

THE EXERCISE AND RESOLUTION OF CIVIL ACTION IN CRIMINAL PROCEEDINGS **662**
Camelia MORĂREANU-DRAGNEA

THE CONCEPTUAL APPROACHING CONCERNING THE ACCUSATION IN THE CRIMINAL PROCESS **673**
Elena MORARU

GUARANTEEING THE INDEPENDENCE OF THE JUDGE IN CRIMINAL PROCEEDING **683**
Liliana CATAN

ENHANCING LEGAL STATUS OF THE INJURED PERSONS BY MEANS OF CRIMINAL PROCEDURE **691**
Delia MAGHERESCU

STANDARDIZATION OF SOCIAL SERVICES AND CONTROL OF RESPECT FOR BENEFICIARIES' RIGHTS **709**
Răducu Răzvan DOBRE

THE CHALLENGES OF THE EUROPEAN UNION REGARDING ASYLUM PROCEDURES **716**
Doina POPESCU LJUNHHOLM

LEGAL AND ETHICAL INTERSECTIONS IN PROJECT MANAGEMENT: A STRATEGIC PERSPECTIVE **732**
Nicoleta DASCĂLU

FIGHTING CRIMINALITY AND SUPPORTING ACTIVITIES WITHIN THE RISK-BASED SOCIAL GROUPS **744**
Daniel ASSAD MAGHERESCU

COMPARATIVE OVERVIEW BETWEEN EMPLOYEES' PATRIMONIAL **758**

LIABILITY AND ADMINISTRATIVE LIABILITY
Elena GĂMAN

INTELLIGENCE – VECTOR OF CRIME VERSUS TOOL FOR INVESTIGATION AND COMBATING **774**
Carmina Elena TOLBARU, Raimundas KALESNYKAS

THE THREAT OF CYBERATTACKS IN BUSINESS **794**
Irina BENIA, Tamara SAJAIA

EU COMMON SECURITY AND DEFENSE POLICY. PAST AND PRESENT **806**
Sorina IONESCU

TOWARDS A EUROPEAN PRIVATE SPACE LAW. CHARACTERIZING THE CIVIL LIABILITY OF PRIVATE SPACE OPERATORS **814**
Radu STANCU

DIGITALIZATION OF BANKING CONTRACTS: BETWEEN TECHNOLOGICAL INNOVATION AND LEGAL PROTECTION OF CONSUMERS **826**
Amelia-Veronica GHEOCULESCU, Marilena-Lavinia OLAH

Legal and Administrative Studies, www.jlas.upit.ro
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement – Year 2025, pp. 13-30

THE RESIDUAL ROLE OF GOOD FAITH IN INDIVIDUAL EMPLOYMENT RELATIONS

Raluca DIMITRIU
ORCID ID: https://orcid.org/0000-0002-2549-2449
E-mail: raluca.dimitriu@drept.ase.ro
Afiliation: Institute of Legal Research of the Romanian Academy, Faculty of Law, University of Economic Studies, Bucharest, Romania

Abstract: *This paper examines the principle of good faith in individual employment law, highlighting the limitations imposed by the specific regulatory framework governing this area. It will be shown that this principle has a more limited scope of application than in civil law. This is due to the fact that, in regulating employment relationships, the legislature has chosen to expressly establish, through legal provisions, certain obligations of the parties, which would otherwise have been assessed through the lens of the principle of good faith. Where a legal provision already imposes a specific obligation, reliance on good faith becomes redundant; in other words, general duties of loyalty, cooperation, or moderation (typically associated with the concept of good faith) are no longer evaluated from the perspective of the parties' moral conduct, as these duties are already directly and explicitly imposed by law.*

Keywords*: good faith; employment; case law; loyalty; labour relation.*

Introduction

Sometimes perceived as synonymous with loyalty, in pre-contractual negotiations and in the performance of a concluded contract, good faith is understood as “honest, loyal and fair conduct” (Nicolae, 2017, p. 254). Indeed, good faith constitutes a general principle of law which permeates both common law and special legislation.

There is, however, a significant limit to the possibility of invoking good faith before the courts: the conduct in question must not have been regulated by law, but must have been left to the court's assessment. It is neither necessary (nor even possible) to invoke good or bad faith when there already exists a legal rule which expressly sets out the party's conduct; just as an abuse of right will not be pleaded where there is, properly speaking, a breach of the law.

I do not manifest good faith when I merely comply with a legal provision, just as I do not manifest bad faith when I breach it. Non-compliance with a legal rule cannot be undertaken in good or bad faith. The expression "the employer has breached his legal obligations in bad faith" is not in fact accurate. The employer might have breached his obligations through ignorance, without intent, without pursuing an unlawful purpose, without seeking to deprive the worker of protection – and this would still be irrelevant, since any breach of legal obligations attracts the same sanction (for instance, the annulment of a decision), regardless of the subjective state of mind of the party bound by law.

Conversely, bad faith may be manifested in the exercise of a right. Article 14 (1) of the Civil Code provides that any natural or legal person must exercise their rights and perform their civil obligations in good faith, in accordance with public order and good morals. Where the law grants a right, but its exercise differs from the legislator's intention and pursues the detriment or harassment of the other party, we are faced with an abuse of right. This, however, presupposes that the law has not expressly determined the circumstances and conditions under which that right must be exercised. I shall provide further examples throughout this paper where, although the employer's intention in taking a decision may be questionable, nullity cannot arise because the legal rules were detailed and clear in regulating that decision, and the employer complied with them.

The way in which a party acts, subjectively speaking, becomes relevant only in the space left open by legal norms. The more detailed the legal provisions, expressly prescribing the conduct to be followed by the

parties, the fewer the situations in which good faith (or rather its absence) may be invoked.

In labour law, good faith constitutes a general principle, expressly laid down in Article 8 (1): "Labour relations are based on the principle of consensualism and of good faith." This principle forms the background against which the parties act during the often lengthy employment relationship. Its practical use, however, will be possible only where the law does not directly sanction a given act, namely where the law is silent or employs general terms whose analysis enables the judge to consider the subjective state of one party when ordering the other, for example, to pay compensation.

On this basis, we shall illustrate below situations in which good faith or bad faith cannot be invoked. Not because they do not exist (of course there is always a subjective way of relating to a given legal obligation), but because they are irrelevant before a court of law. We shall then proceed to illustrate situations where, on the contrary, their invocation is possible and produces legal effects.

1. Situations in which good faith is irrelevant

Labour law constitutes a field far less suited to the invocation of good faith than civil law. Frequently we encounter situations of manifest bad faith which nonetheless cannot be sanctioned, or of good faith which remains irrelevant within the scope of detailed and explicit labour law provisions (For further developments, Dimitriu, pp. 15–22, in Oprina, 2025). A few examples follow.

a) Probationary period. During or at the end of the probationary period, the individual employment contract may be terminated, by written notification, without notice and without reasons, at the initiative of either party. In practice, however, an employer may propose to a long-standing employee, who could hardly have been dismissed, a promotion – in other words, a modification of the employment contract – which the employee accepts. Article 32 (2) of the Labour Code provides that the employee may be subject to a new probationary

period where he or she begins a new position or occupation with the same employer. This means that in the new position, the employee becomes as vulnerable as a new recruit. His or her contract may thus be terminated in the new probationary period much more easily than it could have been terminated by dismissal from the previously held position.

Did the employer act in bad faith? Probably yes. Can the termination of the contract in the new probationary period be annulled? Probably not.

b) Dismissal. Good faith in dismissal would oblige the employer to seek certain options to avoid it. Yet the legislator tells us precisely what this entails: the proposal to transfer to other vacant posts within the undertaking, compatible with the employee's professional training or, where appropriate, with work capacity established by the occupational health physician. This is expressly provided by Article 64 (1) of the Labour Code for dismissals on grounds of physical and/or psychological incapacity, professional inadequacy, or reinstatement of the employee previously occupying the post. In the absence of this text, the courts would be called upon to analyse, considering the specific circumstances of the case, whether the employer had sought alternatives for amending the employment contract so that dismissal would be ordered as a last resort. But given that Article 64 (1) exists, any further analysis is superfluous. If the employer does not make such a proposal, this does not mean that he has committed an abuse of right; it means that he has directly infringed the legal provisions.

Moreover, it is possible that the employer does not make the proposal to transfer to another vacant post because he believes that the employee would refuse such a proposal, or considers such an offer degrading for the employee. Entirely irrelevant: there is a legal obligation whose non-fulfilment leads to the annulment of the dismissal decision, regardless of the reasons.

Dismissal for reasons unrelated to the employee may be ordered for a genuine and serious cause. In judicial practice, an assessment of the appropriateness of this measure is generally not carried out, only of legality. This constitutes an expression of the reduced scope of the

concept of good faith in labour law; the nullity of such dismissal may be triggered by the absence of a genuine and/or serious cause (i.e. illegality), or by non-compliance with the statutory procedure for dismissal (notice, content of the decision, communication of the decision), but not by the fact that the employer should have organised the undertaking differently to avoid redundancies. If the employer had available vacant posts identical to those abolished, but nevertheless dismissed the employee, the dismissal may be annulled not for failure to comply with a procedural rule (no such obligation exists, as the High Court of Cassation and Justice has held),[1] but because there was no genuine and serious cause (again, illegality, not abuse).

But the bad faith of the employee may likewise be entirely irrelevant where dismissal is prohibited by mandatory provisions.

For example, under Government Emergency Ordinance no. 111/2010 on parental leave and monthly allowance for child-raising, [2] termination of the contract of employment is prohibited during the period in which the employee is receiving the insertion incentive. Breach of this prohibition results in annulment of the dismissal, reinstatement of the employee and the employer being ordered to pay compensation. Yet this sanction applies not only where the employee returns from child-raising leave to the same employer, but also where the employee has taken employment with another employer who had no knowledge that he or she was receiving the insertion incentive.

Recently, an exception of unconstitutionality was raised regarding this provision, on the grounds that imposing an obligation on a professional without creating a mechanism to inform him that such an obligation exists infringes Article 16 (1) of the Constitution. By Decision

---

[1] High Court of Cassation and Justice, Panel competent to adjudicate appeals in the interest of the law, Decision no. 6/2011, published in the Official Gazette of Romania, Part I, no. 444 of 24 June 2011.

[2] Published in the Official Gazette of Romania, Part I, no. 830 of 10 December 2010, subsequently amended.

417/2024[1], however, the Constitutional Court rejected the exception, stating that "The challenged provisions are intended to prevent, in such situations, the abusive conduct of certain employers; the legislative solution reflects the legislator's choice concerning the social protection of persons in a particular situation, namely employees who are receiving the insertion incentive." The Court did not, however, explain how the conduct of an employer unaware of the fact that the employee was receiving the insertion incentive could be abusive.

Conversely, in common law the lack of knowledge of another person's right may underpin the invocation of good faith, as in the case of third-party purchasers acting in good faith. I do not wish to force analogies where they do not belong, but abuse can never be unintentional. Moreover, the employer does not have this information because it is not supplied by the employee. If the duty of disclosure is a component element of good faith in pre-contractual relations, then, on the contrary, the employee who fails to inform the employer that he or she is receiving the insertion incentive must be deemed to have acted in bad faith.

Similarly, where the employer orders disciplinary dismissal for unauthorised absence of an employee without knowing that the employee was unfit for work, the dismissal will be annulled even if the employee, in bad faith, failed to inform the employer.

The employee's bad faith is irrelevant. There is an express rule, admitting no exceptions, so the employer will be liable irrespective of fault.

c) Duty of loyalty. The employee's duty of loyalty during the performance of the employment contract is clearly an expression of good faith in its execution. Yet an employee who, for example, competes with his employer by taking employment with a competitor without the employer's knowledge, while the employment relationship is still in

[1] Published in the Official Gazette of Romania, Part I, no. 116 of 10 February 2025

force, does not commit an abuse of right, but directly breaches Article 39 (2)(d) of the Labour Code.

d) Duty of confidentiality. Disclosure of information given in confidence during negotiation of the employment contract or during its performance constitutes, in most cases, a breach of a specific legal obligation, which attracts administrative sanctions irrespective of the good or bad faith of the party disclosing such information.

Thus, the employer is, by law, the debtor of the duty of confidentiality with regard to certain categories of information obtained about employees. Situations include:

– the employer's duty to maintain the confidentiality of employees' personal data, enshrined in Article 40 (2)(i) of the Labour Code and, complementarily, by Regulation (EU) 2016/679 (GDPR);

– Government Decision no. 711/2025 amending and supplementing certain acts in the field of employment,[1] which provides a series of rights for undertakings employing persons unable to obtain work and who are victims of domestic violence protected by a protection order or of trafficking in human beings. Employers engaging such persons are required, inter alia, "to maintain the confidentiality of information concerning the person's status as a victim";

– Government Emergency Ordinance no. 96/2003 on maternity protection at the workplace,[2] Article 8 of which obliges the employer to maintain confidentiality regarding the employee's pregnancy and not to inform other employees except with her written consent and only in the interests of the proper conduct of the work process, if the pregnancy is not visible;

– under Law no. 361/2022 on the protection of whistle-blowers in the public interest,[3] the person designated to handle the report has a duty not

[1] Published in the Official Gazette of Romania, Part I, no. 815 of 5 September 2025.
[2] Published in the Official Gazette of Romania, Part I, no. 750 of 27 October 2003.
[3] Published in the Official Gazette of Romania, Part I, no. 1218 of 19 December 2022.

to disclose the identity of the whistle-blower or information likely to lead to identification;
– the committee for receiving and resolving cases of sexual harassment and moral harassment at the workplace has a duty of confidentiality with regard to harassment cases brought to its attention (Government Decision no. 970/2023 approving the Methodology on preventing and combating sexual harassment and moral harassment at the workplace).[1]

As regards employees, the duty of confidentiality of information obtained in the performance of the employment contract may form the subject of a confidentiality clause. At other times, the law directly provides for such a duty, for example:
– with regard to certain categories of employees, such as home-based workers (Article 110 (3) of the Labour Code) or employees' representatives in consultation or collective bargaining (Article 7 (1) of Law 467/2006 establishing the general framework for informing and consulting employees);[2]
– with regard to certain categories of information, such as salary (Article 163 (1) of the Labour Code).

Where the law expressly enshrines the duty of confidentiality regarding a category of information, that duty will no longer be analysed as a component of good faith, but as a directly applicable legal obligation, whose breach attracts sanctions (including administrative sanctions).

e) Unfavourable treatment. An employer acts in bad faith if he applies unfavourable treatment to employees as retaliation for exercising a right. But here too, there is no need to analyse the employer's subjectivity, since Article 5 (6) of the Labour Code expressly provides that any unfavourable treatment of employees or their representatives as a result of requesting or exercising one of the rights provided in Article 39 (1) is prohibited. If there is a causal link between the exercise of the right and

[1] Published in the Official Gazette of Romania, Part I, no. 939 of 17 October 2023.
[2] Published in the Official Gazette of Romania, Part I, no. 1006 of 18 December 2006.

the employer's retaliation, the bad faith with which the employer acted becomes irrelevant, because the law expressly prohibits such conduct.

f) Time limits. Where the legislator has expressly provided for a time limit, it is absolutely presumed to be reasonable; the court could not disregard the statutory provisions in question on the ground that the employer should have waited longer or, conversely, should have acted more quickly, to avoid prejudice to the employee.

g) Statement of reasons for a unilateral decision. The absence of reasons in the dismissal decision does not entail its nullity as a result of the employer's bad faith (as occurs in other legal systems), but directly as an effect of Article 78 in conjunction with Article 76(a) of the Labour Code.

In addition, the 2022[1] amendment of the Labour Code introduced the employer's duty to provide reasons for other decisions taken in relation to the employee. These include, for example, reasons for termination of the contract during the probationary period (we shall not enter into detail here on the fairness of this rule, or whether the legislator indeed intended to impose such an obligation; let us reluctantly admit that it does), reasons for dismissal (redundantly imposed by Article 62 (4) of the Labour Code), or reasons for refusal to transfer the employee to flexible working arrangements. Through this last rule, obliging the employer to provide reasons for a refusal, the scope of the concept of good faith has been further reduced: if the decision was not reasoned or the reasons do not reflect reality (for example, the employer claims that the employee's work cannot be performed remotely when in fact it can), then we are no longer dealing with abuse, but with illegality.

h) Quantum of compensation in the case of dismissal annulled for illegality. In other legal systems, such compensation is assessed by

[1] Law no. 283/2022 amending and supplementing Law no. 53/2003 – the Labour Code, as well as Government Emergency Ordinance no. 57/2019 on the Administrative Code, published in the Official Gazette of Romania, Part I, no. 1013 of 19 October 2022.

reference to the employer's subjective attitude: a procedural mistake is not the same as a discriminatory dismissal. Not so in our legal system. Here compensation is predetermined by law in Article 80 (1) of the Labour Code, being always equal to the indexed, increased and updated salaries and other entitlements the employee would have received. The employer's good or bad faith is irrelevant, as is the employee's attempt to mitigate the loss (for example, by finding another job).

2. Are we bound to good faith when confronted with the bad faith of the other party?

The duty of good faith comes to an end when it meets the bad faith of the other party.

Workers have always developed systems of self-protection, of resistance to the techniques of control implemented by the employer. They did so in the last century as well, through forms of resistance such as manipulating or damaging equipment, using resources and time for their own purposes, coordinated reduction of the pace of work, or informally arranging spaces for socialising in secluded areas, such as toilets or corridors (Kellogg, Valentine, & Christin, 2020, p. 400).

Things are no different today. Although workers are not formally informed how algorithms operate, they do not confine themselves to being passive victims: they learn from daily experience, they communicate, they compare notes on various WhatsApp groups – in order to devise ever more creative strategies to "cheat the app." When the one who controls and assesses you day after day is not a person but an application, workplace behaviour will adapt accordingly. Because workers have the ability to actively shape the outcome of algorithmic computation for their own benefit (Bonini, & Treré, 2004, p. 2).

Indeed, people adapt as well, not only machines.

This is how the notion of "algo-activism" has arisen. "Algo-activism" refers to practices whereby workers, users or activists seek to undermine, manipulate or circumvent algorithmic systems which

influence their work, visibility or access to resources. Such actions may include:

a) Manipulating algorithms. Workers may strategically accept or refuse assignments in order to influence algorithmic scores or to obtain more advantageous tasks. For example, some Uber drivers use GPS bots from the dark web to simulate the vehicle's movement, misleading the system with false data that appears to reflect real travel (Lacková, 2022, p. 88). Remote workers may use key-press software to appear to be working.
b) Forming online communities. Often, workers organise themselves in forums or groups to share information about how algorithms work and to coordinate collective actions. The solidarity once thought lost re-emerges in a form of social action having nothing in common with traditional strikes or picketing, yet born of the same sense of frustration. These are the so-called "social alliances" between workers, organised around the need to understand how best to resist the work of algorithms in order to improve their lives or working conditions (Bonini, & Trere, 2024, p. 57).

c) Developing their own tools. In some cases, workers may create or use applications giving them more control over their interaction with platforms. And the struggle against the algorithm sometimes employs other algorithms – applications specifically designed to mislead the monitoring applications initially used in the workplace. "Training" the algorithm has become one of the preoccupations of all social media users, with or without content.

These forms of resistance and sabotage reflect an attempt to regain autonomy and control in an increasingly automated and opaque working environment. But do they constitute manifestations of employees' bad faith?

In most cases, workers do not perceive their actions as disloyal or in bad faith, since they are not directed against a person but against an automated system or a machine. From a moral perspective, workers regard such subversive practices as reactive and justified in the face of algorithms being used in a non-transparent and/or dishonest manner.

Resistance forms part of the digital ecosystem[1]. Resistance to algorithmic management does not mean resistance to technology; workers develop new ways of bypassing algorithms not because they fail to understand the technology, but because they understand it too well. Without any formal information as to how the system functions or the reasons why, for example, they are penalised for certain conduct, they learn from their own and others' experience what the "bugs" of the application are, its limits and the triggers of certain reactions.

Moreover, when – through formal or informal means – workers become aware of the criteria applied, there is a risk that they will concentrate their efforts solely on meeting those criteria underlying the assessment, disregarding other aspects of the job description which cannot be assessed in that way. Employees might focus only on the behaviours or skills evaluated positively in the system, ignoring other important aspects of their role. This may lead to distortion of assessment and to the promotion of certain behaviours or skills to the detriment of others, thereby affecting the fairness and effectiveness of evaluation.

The existence of these tools of "struggle" against algorithms and of human resistance against artificial intelligence does not in any way rebalance the relationship of forces. We are faced with a profoundly unbalanced relationship in which the small "victories" of workers who succeed in outwitting the system are always marginal.

In conclusion, I would rather say that algo-activism is not a manifestation of bad faith. In the absence of legal prohibitions, employees' conduct is nothing more than a reaction; only once the use of algorithms is regulated and the employer obliged to inform workers of the use of artificial intelligence in employment relations will employees' reactive conduct be capable of attracting legal liability. Until then,

---

[1] But it should be noted that the existence of these tools of "struggle" against algorithms and of human resistance against artificial intelligence does not in any way rebalance the relationship of forces. We are faced with a profoundly unbalanced relationship in which the small "victories" of workers who succeed in outwitting the system are always purely marginal.

employees' duty of good faith cannot be assumed against the background of the employer's bad faith. The law cannot require unilateral loyalty.

3. What remains? Situations in which good faith may be invoked in individual employment relations

Good faith forms the silent backdrop against which employment relations unfold. Its enshrinement as a principle in Article 8 of the Labour Code is intended to give it value in the legislative silences, where there are no imperative prescriptions of conduct. Article 8 of the Labour Code must be read through the lens of Article 14 (1) of the Civil Code, according to which "any natural or legal person must exercise their rights and perform their civil obligations in good faith, in accordance with public order and good morals".

A few examples follow:

a) Exercise of certain discretionary rights. A number of rights are potestative; their exercise is left to the holder's discretion. This does not render them unsusceptible to abuse; on the contrary: the wider the margin of freedom in their exercise, the greater the possibility of overstepping the limits of good faith. As regards the employer, we have in mind:

– the right to recall the employee from annual leave for urgent interests requiring the employee's presence at the workplace (Article 151 (2) of the Labour Code). Even if the employer covers the expenses of the employee and the employee's family necessary for returning to work, the employer may not abuse this right, and the urgency of the interests prompting recall may be examined by the court through the principle of proportionality, by reference to the good or bad faith underlying the recall decision;

– the right to send the employee on business travel/secondment (Article 42 (1) of the Labour Code). The employee's place of work may be modified temporarily, unilaterally. However, the purpose pursued by the employer in ordering such a measure must relate solely to the undertaking and the conduct of activities within it; the employer may not pursue vexatious aims, such as removing the employee from the family

environment. Such action would constitute an abuse of right and, in certain circumstances, moral harassment;
– the right to set performance objectives, under Article 40 (1)(f) of the Labour Code. Deliberately setting unrealistic objectives so that they cannot be achieved constitutes conduct marked by bad faith;
– the right not to disclose certain sensitive information concerning the undertaking's economic situation (Article 40 (2)(d) of the Labour Code). This right is regulated against the background of the duty to communicate periodically the undertaking's economic and financial situation; the provision constitutes an exception to that duty. The sensitive nature of the information for which disclosure is refused may be challenged in court; as there are no legally established benchmarks here, the employer's good faith in determining this set of information may be taken into account;
– the right to schedule annual leave. Although, under Article 148 (1) of the Labour Code, the scheduling of annual leave is a managerial prerogative of the employer, requiring only consultation of the trade union or employees' representatives for collective schedules, and consultation of the employee for individual schedules, the employer may not abuse this right by scheduling the employee in a given period against the employee's will, for vexatious purposes unrelated to objective production interests, etc.

As regards the employee, bad faith may be manifested in the exercise of rights such as:
– the right to resign. Resignation is an expression of the constitutional right to work, in its negative dimension: the right not to work, to cease work at any time. However, if the purpose pursued by the employee in exercising this unilateral right, enshrined in Article 81, is to prejudice the employer—for example, by choosing the timing of cessation so as to produce maximal harm—one may speak of an abuse of right. The consequence could not, of course, consist in annulling the resignation and compelling the employee to continue to work, but could consist in compensation;
– the right to take annual leave. An employee who refuses to take annual

leave for the purpose of obtaining monetary compensation for untaken leave upon the future termination of the individual employment contract commits an abuse of right. Moreover, in Case C-619/16 Kreuziger, the Court of Justice of the European Union held that Article 7 of Directive 2003/88/EC must be interpreted as permitting the extinction of the right to paid annual leave and of the right to the corresponding allowance where the employee did not request leave before termination of the employment relationship, provided the employer effectively enabled the employee to exercise that right and duly informed the employee of the consequences of failing to use it.

b) Failure to provide information relevant to the conclusion of the individual employment contract (other than that for which there is a statutory duty of disclosure). Good faith requires the employer to communicate information beyond that expressly provided by law, such as informing the candidate of the employer's current or imminent insolvency, or informing the candidate about how artificial intelligence is to be used in the performance of the employment relationship.
As regards the confidentiality of these obligations, as shown above, the concept of good faith is not relevant where the duty of confidentiality is laid down by law, nor is it relevant where it stems from a confidentiality agreement between the parties. But beyond these, where there is neither an explicit statutory duty nor a contractual duty assumed, disclosure of information concerning the other contracting party constitutes a breach of the general principle of good faith.

c) Reinstatement. An employee reinstated by the court following the annulment of a dismissal decision cannot rely on the absence of an express invitation from the employer to appear at work, the absence of a reinstatement decision, the employer's failure to amend the organisational chart, the employer's failure to pay court-ordered compensation, etc., in order to justify the employee's own passivity in complying with the judgment and in performing the obligations arising under the individual employment contract reactivated by that judgment.

Moreover, under Article 435 of the Civil Procedure Code, a court judgment is binding on the parties; it cannot bind only the employer while the employee bears no obligation, despite having expressly sought reinstatement/restoration of the parties to the situation prior to the dismissal decision (Summary of the meeting of the presidents of the labour and social security law divisions, 2022).

In other words, the conduct of an employee who does not report to work despite being aware of the reinstatement judgment is marked by bad faith, and the employee's absences may be deemed unauthorised.

d) Disciplinary investigation. One example is the time-limit within which the employee must be summoned to the disciplinary investigation, which Article 251 (2) of the Labour Code does not specify. This has sometimes allowed courts to annul disciplinary sanctions on the ground that, the employee having been summoned on short notice, there was insufficient time to prepare a defence. This is an application of the principle of good faith and its converse, namely the possibility of invoking the employer's bad faith for failing to afford the employee adequate time. Had the law provided an express time-limit, such an assessment would not have been possible.

e) Collective redundancies. Article 69 (1) of the Labour Code provides that where the employer intends to effect collective redundancies, it must initiate, in good time and for the purpose of reaching an agreement, consultations with the trade union or, as the case may be, with employees' representatives, under the conditions laid down by law. The use of the expression "in good time" permits an assessment of the good faith with which the employer commenced consultations.

f) Moral damages. The employer's bad faith is particularly relevant in determining the quantum of moral damages where the employer has caused the employee non-pecuniary harm. The court will assess the amount of compensation by reference to the gravity of the employer's conduct, the intensity and duration of the adverse consequences for the

employee, the context of the employment relationship and the specific vulnerability of the person harmed. In this way, proof of bad faith may justify higher compensation, proportionate to the actual harm suffered.

Conclusions

The analysis carried out has shown that, although enshrined as a general principle of law and expressly mentioned in Article 8 of the Labour Code, good faith has a far narrower scope of application in employment relations than in common law. This is explained by the legislator's choice to regulate in detail the obligations of the parties, thereby reducing to a minimum the margin of appreciation left to the courts regarding the subjective conduct of the employer or the employee. Thus, in many situations – dismissal, probationary period, the duty of loyalty, confidentiality, unfavourable treatment or the determination of compensation – good or bad faith becomes irrelevant, since the legal effects are determined directly by statute. Breach of the rule attracts the sanction provided, irrespective of the party's intention or motivation.

There are, however, situations in which good faith retains its relevance: the exercise of potestative rights by the employer (recall from leave, secondment, setting performance objectives, scheduling leave), the exercise of rights by the employee (resignation, taking annual leave), the pre-contractual duty of disclosure, compliance with a reinstatement order, the conduct of disciplinary investigations or consultations in the case of collective redundancies. In these instances, the absence of precise statutory benchmarks requires the court to assess the parties' conduct through the prism of good faith, and the absence of such good faith may give rise to sanctions or compensation.

Special attention should be paid to situations in which the employer resorts to algorithmic control. In such a context, employees' reactions – sometimes characterised as "algo-activism" – cannot be considered manifestations of bad faith in the absence of clear regulation of the use of algorithms and of the employer's duty to inform workers. The law cannot demand unilateral loyalty, and employees' reactive conduct cannot be

legally sanctioned so long as the rules of transparency and information are not observed by the employer.

In conclusion, the role of good faith in labour law is residual: it operates only in the silences of the law, where the conduct of the parties is not expressly regulated. The more labour legislation develops and becomes detailed, the smaller the scope of the principle of good faith. Yet these "islands" of applicability remain essential, as they temper discretionary conduct and ensure balance between the parties in situations where the law is silent or couched in general terms.

References

Bonini, T., & Treré, E. (2004). *Algorithms of Resistance: The Everyday Fight against Platform Power*. The MIT Press, https://doi.org/10.7551/mitpress/14329.001.0001

Dimitriu, R. *Specificul bunei-credințe în dreptul muncii* [The Specific Nature of Good Faith in Labour Law]. (2025). In the volume "Legislative Dynamics and Legal Reality" (ed. E. Oprina). Universul Juridic Publishing, pp. 15–22.

Kellogg, K. C., Valentine, M., & Christin, A. (2020). Algorithms at work: The new contested terrain of control. *The Academy of Management Annals, 14(1).*

Lacková, E. (2022). Fragility of pre-contractual labour relations in the light of algorithmic recruitment. *Diritti Lavori Mercati*.

Nicolae, M. (2017). *Civil Law. General Theory*, vol. I. *Teoria dreptului civil [Theory of Civil Law]*. Solomon Publishing.

Legal and Administrative Studies, www.jlas.upit.ro
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement – Year 2025, pp. 31-55

FOREGOING FRUMPY FORMALISM

Doug SURTEES
ORCID [ID]: https://orcid.org/0000-0002-0898-5487
E-mail: doug.surtees@usask.ca
Afiliation: College of Law, University of Saskatchewan, Canada

Abstract*: In Saskatchewan, Canada certain contracts must be signed and evidenced by writing. Similarly, wills must be signed and be in writing. Both areas of law have their own interpretive history. Two recent cases serve as examples of judges applying interpretations determining what constitutes a signature and what constitutes writing. One is a Court of Appeal contract law case holding that text messages provided the required writing, and an emoji provided the required signature. This case has been appealed to the Supreme Court of Canada. The other case is a wills law case involving a will created and transmitted on an iPad. The court used a broad approach in using its dispensing power to find the will valid even though it was not written or signed in a traditional sense. This trial decision case will not be appealed but will be impacted by incoming legislation which may require an opposite result. The author compares the cases and suggests the emoji contract case may provide future wills courts an alternative route to a similar result.*

Keywords*: Signature; signing; writing; wills; estates; contract law; interpretation; common law; substantial compliance; dispensing power; wills formalities.*

Introduction

This is a story of two cases from my home province of Saskatchewan, Canada. One is a lawsuit alleging a breach of contract. The other is an action for probate of a deceased person's Will. Normally contract law cases do not help inform probate cases for the simple reason that a Will is not a contract. However, this contract law case *may* help

develop our understanding of when the requirements for a valid Will have been met. These two cases have something in common; in order to decide the case being heard each court had to examine what writing is and what a signature is.

Foregoing frumpy formalism

The trial for the alleged breach of contract case was held in a small community called Swift Current, in the province's south. Large farms and ranches are big business in that region. The case is called 'Achter'. It was appealed to the Saskatchewan Court of Appeal1, which affirmed the trial judge's decision. The Supreme Court of Canada has granted leave to appeal the Court of Appeal decision (Supreme Court of Canada file number 41671). It is not known when the Supreme Court will issue a decision.

South West Terminal is a grain buying company. They set out to purchase grain from a farming corporation called Achter Land & Cattle, as they had previously done on several occasions over the previous nine years. On this occasion, South West Terminal's employee contacted the father and son who ran Achter and indicated that South West Terminal was willing to purchase 86 tonnes of flax, with a November delivery date, at a price of $17.00 per bushel, which equates to $669.26 per tonne. The South West Terminal grain buyer drew up the sales contract, signed it, and texted a photo of it to Chris Achter together with the message "Please confirm flax contract". Mr. Atcher texted back a 'thumbs up' emoji. By November, the price of flax had increased to $41.00 per bushel, which equates to $1,614.09 per tonne. Achter did not deliver any flax to South West Terminal.2

The court determined that the parties' words and actions must be examined in the context of their relationship, in order to determine if the

---

[1] *Achter Land & Cattle Ltd. v South West Terminal Ltd.*['Achter'], 2024 SKCA 115 (Sask. C. A.) affirming 2023 SKKB 116.

[2] *Achter KB, supra* n 1, Agreed Statement of Facts, 2023 SKKB 116 at paragraph 15.

elements of contract formation were present. In this case, the principals had a history of concluding grain contracts via text or email. In fact, South West's grain buyers stopped visiting farms in person once the Covid pandemic reached Saskatchewan in March 2020, preferring instead to complete contracts electronically. The previous four contracts between these parties were concluded by the same grain buyer signing the contract, texting a photo of it to Mr. Achter's cell phone asking him to confirm the terms of the contract. Mr. Achter confirmed three such contracts by texting back a very informal reply. He previously accepted three grain contracts by texting a reply which said "Looks good", another reply which said "Ok", or and yet another reply which said "Yup".[1] In this context the texting of the thumbs up emoji was found to be acceptance of the offer.

While this is interesting from a contract law point of view, it simply represents a standard application of the 'objective bystander' test in contract law, albeit applied in a modern context of text messages and emojis. Since Achter's words and actions would cause an objective bystander in the position of South West Terminal to reasonably conclude that Achter accepted South West Terminal's offer, Achter will be taken to have accepted the offer. Achter's purely subjective intention to accept is not relevant. This is simply an example of contract law applying the objective meaning of parties' words and actions.[2]

In addition to determining that the parties had reached a *consensus ad idem* the court also determined that the parties had agreed on the essential terms of the contract. Putting these formation issues to rest, the court turned to examine two other issues, which may have some

---

[1] *Ibid* at paragraph 19.

[2] The rule of law is that stated in Freeman v. Cook. If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.
Smith v. Hughes (1871), L.R. 6 Q. B. 597.

resonance beyond contract law. Saskatchewan statute law provides that a contract for the sale of goods valued at $50 or more is not enforceable "unless some note or memorandum in writing of the contract is made and signed by the party to be charged…"[1] [emphasis added]. This aspect of the Saskatchewan legislation traces its history to *The Statute of Frauds*[2] passed in 1677, which became part of Saskatchewan law on July 15, 1870 when then current English statute law was automatically received in what became the Canadian provinces of Saskatchewan and Alberta (English Statutes Project, 1996).

The court treats the requirement of writing as a separate issue from the requirement of being signed. This means the court had two separate issues to consider in resolving the case. First, did the text messages fulfil the requirement that there be "some note or memorandum in writing of the contract"? Second, did the thumbs up emoji meet the requirement that the contract be "signed"?[3]

It is accepted law that the contract itself need not be in writing. If the contract is in writing, naturally this aspect of the requirement is met. However, the requirement is also met if the contract is evidenced by writing, such as where a written note or memorandum refers to the contract (Alberta Law Reform Institute, 1985, p. 31).

Like many other jurisdictions, Saskatchewan has legislation recognizing electronic documents. *The Electronic Information and Documents Act, 2000* ['c. E-7.22, SS 2002 *EIDA'*] section 8 recognizes the validity of electronic documents. It reads:

8 A requirement pursuant to any law that any information or document be in writing is satisfied if the information or document:

(a) is in an electronic form; and

(b) is accessible so as to be usable for subsequent reference.

---

[1] *The Sale of Goods Act*, c. S-1 RSS 1978, s. 6(1). The requirements are subject to some exceptions, not applicable in *Achter*.

[2] (1677) 29 Cha 2 c. 3.

[3] *Achter CA, supra* n 1 at paragraph 38.

The Court of Appeal reviewed case law which previously held that the writing requirement could be met through the exchange of text or email messages. The court agreed with the trial judge that the texts exchanged between the parties were writing in electronic form which remained accessible and therefore satisfied the 'note or memorandum in writing' aspect of *The Sale of Goods*/*The Statute of Frauds* requirement.[1]

It is important to emphasize that this aspect of the case is not directly applicable to Wills cases. The *EIDA* at subsection 4(1) expressly states that certain provisions including section 8 do not apply to Wills, trusts created by Wills, Health Care Directives, Powers of Attorney or other types of documents specifically excluded by regulation.

Having found the writing requirement to be satisfied, the court next turns to examine if the requirement that the writing be signed was met by Mr. Achter replying to the text which sent the contract, with a thumbs up emoji.

The *EIDA* states that "A requirement pursuant to any law for the signature of a person is satisfied by an electronic signature".[2]

The trial judge found that the text message including both the thumbs up emoji and the metadata accompanying the text, constituted an electronic signature. The metadata included Mr. Atcher's cell phone number and other information which identified Mr. Achter as the sender of the text. In other words, given the context in which the emoji and metadata were sent by text, they performed the functions associated with a signature.

The court adopted an explanation of the elements of an electronic signature in the *EIDA* from a case called *Embee*[3]. The court also clarified that the reference in *Embee* to email must be read as also including text messages.

The four elements of a signature under *EIDA* are:

---

[1] *Achter CA, supra* note 1 at paragraph 91.
[2] *EIDA, supra* n 11, ss. 14(1).
[3] *I.D.H. Diamonds NV v Embee Diamond Technologies Inc.*, 2017 SKQB 79, [2017] 9 WWR 172, aff'd 2017 SKCA 79.

(1) The presence of some type of "information" on the emails;

(2) Such information may be in electronic form;

(3) The information must have been "created or adopted [by the person] in order to sign a document"; and

(4) The information must be "attached to or associated with the document."[1]

In determining whether an electronic signature meets these *EIDA* requirements and therefore fulfills a statutory signature requirement, the court points out that it is necessary to examine the legislation which imposes the signature requirement. In this case the signature requirement is imposed by *The Sale of Goods Act*.[2]

The court explains that a modern approach to statutory interpretation "requires a court to focus on the 'text, context, and purpose' of the provision at issue".[3] The court points out that although a person writing their name, the so-called 'wet-ink signature', is the 'epitome'[4] of a signature, the court adds "In a digital world, I expect no serious dispute that it could include an image of the same".[5]

In determining what the verb 'to sign' means, the court turns to the *Oxford English Dictionary* and *Jowitt's Dictionary of English Law* for assistance.[6] The court says the *Oxford English Dictionary* indicates a person may 'sign' something by affixing a 'mark' to it, and *Jowitt's Dictionary of English Law* also says a person may 'sign' something by

---

[1] *Achter CA, supra* n 1 at paragraph 99.

[2] c. S-1, RSS 1978, at ss. 6(1) provides:

6(1) A contract for the sale of goods of the value of $50 or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold and actually receive the same or give something in earnest to bind the contract or in part payment or unless some note or memorandum in writing of the contract is made and signed by the party to be charged or his agent in that behalf.

[3] *Achter CA, supra* n 1, paragraph 103.

[4] *Achter CA, supra* n 1, at paragraph 104, citing Stephen Mason. *The Signature in Law: From the Thirteenth Century to the Facsimile* (University of London Press, 2022), 4.

[5] *Achter CA, supra* n 1, at paragraph 104.

[6] *Achter CA, supra* n 1, at paragraph 105.

affixing a mark to it, and adds "any mark is sufficient if it shows an intention to be bound by the document".[1]

The court cites with approval Justice Layh in *Embee* where he held as a matter of interpretation a document may be signed not only by a wet ink signature but also by affixing any of a wide variety of marks to it. Examples of marks provided by Justice Layh include crosses, initials, pseudonyms, printed names, rubber stamps and in the case of at least one Will, a thumbprint.[2]

A person may sign a document, at least as required by *The Sale of Goods Act* by attaching their "name or other mark of agreement made for that purpose and in a way that identifies its maker and signifies an intention to contract for the sale of goods".[3] The court cited with approval the statement by Chief Justice Popescul of the Court of King's Bench in a case called *Wright*, that the fundamental purpose of a signature, whether electronic or otherwise, is that the "signature links the person to the document and is evidence of the person's *intention to be bound* by the document"[4] [emphasis in Court of Appeal quotation, not in original]. Interestingly, *Wright* was a criminal law case. The *EIDA* applied to the document in question. In deciding that Certificates of Analysis which were digitally signed were therefore signed and admissible as evidence of blood alcohol levels, the Court of King's Bench quoted with approval the trial judge's holding that "even absent specific legislation allowing for acceptance of electronic signatures, courts have considered an electronic signature as a valid signature simply under longstanding principles of common law… I find, therefore, that the provisions of the *EIDA* are helpful in this application, but they do not replace a broader analysis that has always been part of the common law. In my view, the real intent of the *EIDA* is to ensure that electronic forms

---

[1] *Achter CA*, *supra* n 1, at paragraph 105

[2] *Supra*, note 1, at paragraph 107.

[3] *Achter CA*, *supra* n 1, *supra* n 1, at paragraph 110.

[4] *Achter CA*, *supra* n 1, at paragraph 109 quoting from *R. v. Wright*, 2023 SKKB 236 at paragraph 172.

of signatures may be sufficient to meet the measure of what might be a written and signed document." [emphasis in original][1]

The King's Bench related a thoughtful analogy included by the trial judge in *Wright*. In 1999, Minister of Justice and Attorney General of Canada, Anne McLellan, appeared before the Standing Committee on Industry which was then considering federal legislation which would have an effect similar to *EIDA*. She read an excerpt from the *Public Documents Act* to the committee: "No public writ, deed or other document, is required to be on parchment, but when written on paper, is as valid in all respects as if written on parchment".[2] As Minister McLellan said: "We've gone from parchment to paper and now we're going to the electronic medium".[3] The common law is not be frozen in time. Sometimes judges must be creative when interpreting outdated statutes and legal rules. Their job is to undertake a purposive approach to legislation. When the context in which rules are applied has changed because of technology, an overly formalistic or literalist approach risks frustrating the true legislative purpose.

It warrants mentioning that the Court of Appeal decision in *Achter* was not unanimous. Barrington-Foote J.A. dissented. He accepted that one *could* sign a writing electronically. He said "Typing rather than writing your name, writing only your first or last name, or placing another mark that you use to represent yourself on the note or memorandum can constitute signing it…provided they were written on or inserted in the document in order to sign it…"[4]. He points out that cursive signatures "are often a stylized and unrecognizable scrawl that can better be called a mark than an attempt to write the words that constitute your name ... Further, the case law has never limited the word

---

[1] *R. v. Wright ['Wright']*, 2023 SKKB 236 at paragraph 162.
[2] R.S.C., 1985, c. P-28 at s. 2.
[3] *Wright, supra* n 25.
[4] *Achter CA, supra n 1*, at paragraph 206.

"signature" only to a handwritten first and last name or an "X". That is a matter of settled law."[1]

However, Barrington-Foote J.A. disagreed with the majority by holding that in the circumstances present, Mr. Achter did not sign the document by texting a thumbs up emoji.[2] He held, "There is no doubt that a text message that, whether alone or together with other text messages, constitutes a s. 6(1) note or memorandum, and that contains a mark or symbol that signifies assent, *could* meet the signature requirement. Further, I agree that in order to constitute a signature, it is *necessary* that the text message identify the party to be charged and signify an intention to be bound by the terms of the contract that is the subject of that note or memorandum. However, it is not *sufficient* to meet these two requirements."[3]

In other words, the dissent believed the text message could be signed, but the texting of an emoji was insufficient to do so. He said:

"The law has evolved to adapt to electronic means of communication, including emails and text messages. It was entirely possible to do so while respecting the spirit of the legislation. However, it is not necessary or appropriate to interpret s. 6(1) of The Sale of Goods Act in a manner that would mean any text message expressing assent to a note or memorandum - whether in words or by the insertion of a symbol that means "yes" - constitutes a signature. In my opinion, that is the effect of the majority's reasons. The concept of a signature did not fall by the wayside when emails, text messages and similar forms of electronic communication or messaging came to dominate.

Put differently, the signature requirement did not become obsolete due to the widespread use of emails and texts to make agreements. I take judicial notice of the fact that from a technical perspective, there are various ways to "sign" emails and text messages, and documents forming part of or are appended to such communications. The sender can, for

---

[1] *Achter CA, supra* n 1, at paragraph 206.
[2] *Achter CA, supra* n 1, paragraph 157.
[3] *Achter CA, supra* n 1, paragraph 191.

example, type their name in the text in a location and in circumstances that support the conclusion that it is a signature. They may use an app that enables them to insert a version of their cursive signature or can sign a physical copy of the document and append it to the digital medium in the form of a PDF or digital image. It is arguable that a "signature block" that is automatically inserted in the email or text message could be found to meet the signature requirement. A party in the position of SWT can provide for the other party to sign a contract by typing their name or initials, or by clicking on a specified location in the document."[1]

With respect I would suggest that such an approach introduces an unnecessary and unhelpful distinction between old fashioned technology like email and more current technology like texting. A contract formed by email looks and acts much more like a paper based transaction than a contract formed by texting. The test suggested by the dissent is essentially grafting paper based norms onto electronic transactions. As new ways of electronic communication become mainstream, such an approach is more and more likely to result in almost never finding a signature. The true test should not be whether the electronic document was signed in the way a paper based transaction might suggest. Rather it should ask whether the technology provides clear and compelling evidence which links the individual 'signing' to the document and establishes that person's intention to be bound by the document. After all, that is what the purpose of a signature requirement is.

At the moment the decision of the majority is the law in Saskatchewan. The Supreme Court will determine whether the law remains as stated by the majority or changes in some way.

At this point I would like to switch from a contract signed by an emoji to a Will written on an iPad. Wills in the past have been found on a variety of media including a tractor fender (Ellwand, 2014, pp. 1-26),[2] an eggshell,[3] and a napkin.[1] However in each of those cases the testator still

---

[1] *Achter CA*, *supra* n 1 at paragraph 212-213.
[2] *Re Harris Estate* (13 July 1948), Kerrobert, SK 1902 (Surr. Ct.).
[3] *Hodson v. Barnes* 43 T.L.R. 71.

wrote the words of the Will in the traditional sense. It was the medium not the writing which was unexpected.

The governing legislation for Wills in Saskatchewan is *The Wills Act, 1996*[2]. In order to have the Court of Probate accept a document as a person's Will, the one putting the Will forward must establish that the document complies with the relevant statute, for example that the formalities for executing a Will contained in the legislation have been complied with. In addition to the statutory requirements, there are a number of common law requirements which also must be complied with.

As an example, capacity has two aspects: age and mental capacity. Saskatchewan legislation requires a testator to be at least 18 years of age,[3] unless the testator is living in a spousal relationship.[4] The test for mental capacity is a common law test. The modern expression of that test began with *Banks v. Goodfellow.*[5] The *Banks* test requires that the testator understand the nature of a Will, the nature and extent of their estate, the 'moral' claims of others and be free from delusions which would affect the Will.

Anything put forward as a Will must be testamentary in nature. The testator must have formed a 'fixed and final intention' with respect to property disposed of by the Will. Testators may change their mind in the future, but at the time of executing their Will, they must have determined how they wish to distribute their property.[6] This too is a common law requirement.

There are of course other important common law requirements. The testator must know and approve of the contents of the Will. Probate may be denied if evidence of undue influence or coercion is established (Oosterhoff et al., 2021, pp. 205-261). These additional common law

---

[1] *Gust v Langan*, 2020 SKQB 42.
[2] *The Wills Act, 1996 ['Wills Act']*, c. W-14.1, SS, 1996.
[3] Ibid., s. 4.
[4] Ibid., s. 5.
[5] *Banks v. Goodfellow*, [1861-73] All ER Rep 47.
[6] *Bennett v Manitoba (Official Guardian)* (*Re Gray Estate*), [1958] SCR 392.

concepts are important in many circumstances, but are not central to the iPad Will case.

The Wills Act provides a few ways to validly execute a Will in Saskatchewan. The most common type of execution is formal execution. This occurs where a Will, which must be in writing,[1] is signed by the testator and two witnesses, in each others' presence. Testators may direct someone in their presence to sign on their behalf. This may occur for example if the testator is unable to sign the document.

Saskatchewan law also recognized International Wills. International Wills are based upon the "Convention Providing a Uniform Law on the Form of an International Will" (also known as the "Convention on International Wills" or the "Washington Convention").[2] The legislation provides the format to create an International Will.[3] The purpose of the Convention is to provide a set of formalities which signatory countries will accept as creating a valid Will. Basically, in addition to the testator and two witnesses, an 'authorized person' must be present at the Will's execution. All lawyers in Saskatchewan are authorized persons under the legislation. Following the Will's execution, the lawyer must register the testator's name and description, address and date of the Will. No other form of Will needs to be registered in Saskatchewan. The international form of Will provides some certainty to individuals who want to ensure their Will is recognized by other signatory countries.

The Wills Act contains a somewhat anachronistic provision sometimes referred to as 'privileged Wills'. This vestige of the UK legislation allows sailors on a voyage, and members of the armed forces

---

[1] *Wills Act, supra* n 36, s. 6 which authorizes privileged Wills begins A member of the armed forces in actual service or a sailor in the course of a voyage, may make a will in writing…"; s. 7 authorizing formal Wills begins "Unless provided otherwise in this Act, a will is not valid unless: (a) it is in writing and signed…"; s. 8 which authorizes holograph Wills begins "A holograph will, wholly in the handwriting of the testator…".

[2] https://www.unidroit.org/instruments/international-will/.

[3] *Wills Act, supra n 36,* s. 41-51 and accompanying schedule.

in actual service to create a Will, regardless of their age, by simply signing the writing or directing someone to sign it in their presence.[1]

This brings us to the holograph Will. "A holograph will, wholly in the handwriting of the testator and signed by him or her, may be made without any further formality or any requirement as to the presence of or attestation or signature by a witness."[2]

Wills legislation must try to reconcile various goals (Alberta Law Reform Institute, 2000, p. 6.).[3] One goal is to give effect to the known intentions of the decedent. Another is to take steps to ensure that the document presented for probate is actually the Will of the testator, and that it accurately expresses the intention of a testator who had capacity at the time the Will was created. Rigid formalities can assist in providing evidence that the Will is true and proper. They can help provide safeguards against fraud. However, they can also work against the goal of giving effect to the known intentions of a testator who had capacity to create the Will.

Permitting holograph Wills as an alternative to formally executed Wills overtly provides individuals with a method to create a Will while complying with fewer formalities. The only formalities required for a holograph Will are that the Will be entirely in the testator's handwriting

---

[1] *Wills Act, supra* n 36, s. 6.

[2] *Wills Act, supra* n 36, s. 8.

[3] The Alberta Law Reform Institute stated its conclusions as follows:

Conclusion No. 1 The policy of the law is to allow persons to give directions by will as to how their property is to be disposed of on death.

Conclusion No. 2 The primary purposes of the will formalities prescribed by the Wills Act are

(a) to ensure that documents that are authentic and intended to express the testamentary intention of testators are admitted to probate, and

(b) to ensure that documents that are not authentic or are not intended to express the testamentary intentions of testators are not admitted to probate.

https://www.alri.ualberta.ca/2000/06/wills-non-compliance-with-formalities-final-report-84/.

and that it be signed by the testator.[1] I would argue that permitting holograph Wills also covertly allows judges to admit documents to probate in appropriate circumstances, even where the document is a letter written by the decedent.2 In some jurisdictions, but not in Saskatchewan, judges also found a way to admit documents which clearly were not entirely in the testator's handwriting. In the days of 'fill in the blank' Wills, where a person would buy a blank form Will and simply add in gifts and the names of beneficiaries, courts would admit the words the testator wrote, provided a dispositive intention could be discerned from those words alone. Unfortunately for many disappointed beneficiaries, the dispositive words were typically part of the pre-printed form.[3]

Fortunately, modern Canadian Wills legislation contains a provision permitting judges to overtly admit a document to probate, even though the formalities contained in the legislation have not been strictly complied with. The judge must be satisfied that the document embodies the testamentary intentions of the testator.[4] The court has no authority to admit a document which does not comply with other common law requirements such as having testamentary capacity or knowing and approving of the contents of the Will or that the Will must represent the testator's fixed and final intention. The dispensing power given to the court by legislation only applies to the legislated formalities.

---

[1] *Wills Act*, *supra* n 36, s. 8.

[2] *Re Henderson (Seekey)*, [1982] NWTJ No 46, [1982] 2 WWR 262.

[3] *Re Forest* (1981), 121 DLR (3d) 552 (Sask. C.A.).

[4] *Wills Act*, *supra* n 36, s. 37 says:

37 The court may, notwithstanding that a document or writing was not executed in compliance with all the formal requirements imposed by this Act, order that the document or writing be fully effective as though it had been properly executed as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, where a court, on application is satisfied that the document or writing embodies:

(a) the testamentary intentions of a deceased; or

(b) the intention of a deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will.

There has been some judicial disagreement over how much compliance with the formalities there must be before a judge can admit it to probate (Compare Re Mate Estate, 1999, S.J. No. 341 with Oh v Robinson, 2011, SJ No 325). Perhaps this relates to the marginal name of the section being 'substantial compliance' rather than 'dispensing power'. In Canadian law, a marginal name (called a "section heading") is not part of the legislation, and is included for convenience only.[1]

As the emoji case taught us, a requirement of writing and a requirement for a signature are separate. Under *EIDA* an electronic document can satisfy a requirement that a document be in writing if the document exists in an electronic form, and is accessible. Similarly, a requirement for a signature can be satisfied where a name or symbol is affixed to a document in circumstances which show the 'signer' intended to be bound by the document. The mark or name which was attached for this purpose links the person to the document.

EIDA expressly states that it does not apply to Wills.[2] This means that insofar as the emoji case is read only as a statutory interpretation case, it does not have any applicability to the iPad Will case. However, insofar as the emoji case is an application of the common law with respect to writing and signatures, its reasoning is available to be applied by judges determining whether or not to utilize the legislated dispensing power in Wills cases. In other words, the *EIDA* says it does not apply to Wills. It does not say that Wills *cannot* be signed electronically, just that *EIDA* is not authority for recognizing an electronic signature on a Will.

The common law never stops evolving.[3] Even where legislation has been passed so that certain issues are not litigated, the common law can

---

[1] *The Legislation Act* ['Legislation Act], c.L-10.2 SS 2019, s. 2-1

[2] *EIDA, supra* n 11, s. 4(1).

[3] "Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless, there are significant constraints on the power of the judiciary to change the law. As McLachlin J. indicated in *Watkins, supra*, in a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform; and for any changes to the

still develop to address matters covered by the legislation. In other words, although the *EIDA* itself clearly does not apply to Wills, *common law* concepts of what counts as writing and what counts as a signature can and do apply to Wills.

Changes in society often require enduring common law principles to be applied in a new context. And they *must* be applied because the common law is not frozen in time. We live in an electronic information age today. We should not be, and are not, rigidly bound by conceptions developed in a different era. The common law has previously recognized changes in what counts as a signature. At one time, Christians in England would sign a document by affixing a cross or their seal to the document. As times changed, the common law changed to recognize other marks and the writing of one's name as a signature (Mason, 2022, pp. 14-17). Times have changed again. *The Wills Act* provides that certain formalities must be observed, unless they are dispensed with by a court. These formalities include the Will being in writing (or 'handwriting' in the case of holograph Wills) and being signed. The common law must determine what counts as being signed, and what counts as writing. The definition of what counts as writing is subject to a legislative definition:

"writing" or a similar term includes words represented or reproduced by any mode of representing or reproducing words in visible form; («écrit »)[1]

There are two things to note about the legislative definition of writing. The first is that it is inclusive not exclusive. It says that writing includes the representation of words in visible form. It does not say that it excludes other representations which require assistance to be visible. The second thing to note is that it does not say the representations must

---

law which may have complex ramifications, however necessary or desirable such changes may be, they should be left to the legislature. The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.

R. v. Salituro, [1991] 3 S.C.R. 654 paragraph 37.

[1] *Legislation Act*, supra n 11, c. L-10.2, SS 2019, s. 2-29 "writing".

be in visible form at all times. Emails and electronic messages may require a machine language which is not visible to people, but once the text or email message is created it can be saved and sent and printed, and arguably exists in visible form. The same applies to any communication created on a computer. It would be an excess of formalism to maintain that when a book is closed tight, the symbols on the pages inside are not in visible form. They still exist although they may not be seen at the moment. A message sent on an iPad likewise also exists, although it cannot be read until the message is opened.

The requirement that a Will be signed may be met by the typing of one's name. As with the emoji case this should not be understood as saying the typing of one's name is always a signature. It is simply an assertion that the typing of one's name, like the affixing of a symbol could in the right circumstances be considered a signature.

The critical question then becomes 'what are the right circumstances to make such a finding?' The right circumstances are those where evidence has satisfied the court that the *functions* the requirements of writing and of a signature were intended to serve, have been served.

A signature serves several functions in the context of a Will. The primary function is evidential. Stephen Mason divides this function into a series of primary and secondary evidential functions.[1] As Chief Justice Popescul said in *Wright*, the "signature links the person to the document and is evidence of the person's *intention to be bound* by the document".[2] While each of the evidentiary functions is important, evidence other than that of a wet signature can also be presented to adequately meet these functions.

Mason also lists a cautionary function and a protective function. He says requiring a signature brings the importance of the document to the signer's mind.[3] The one receiving the document can rely on the signature as proof of the signer's identity and that the signer intends to be bound by

---

[1] *Mason, supra* n 56, pages 8-10.
[2] *Wright, supra* note 24, paragraph 172.
[3] *Mason, supra* n 56, page 9-10.

the document. I am not convinced that in this modern age, a signature necessarily serves these functions. In the context of a Will however, the requirements that the testator have a fixed and final intention to adopt the words of the Will as their own, would seem to adequately serve the same function.

Mason also lists a channelling function and a record keeping function.[1] The idea here is that adding a signature clarifies the moment the document becomes effective, focuses the mind on the binding nature of the document and provides a record of what occurred. Again, in the context of a Will, I would challenge how a signature serves these functions. The signature does not provide a record. The document does that. No Will takes effect until the testator's death, and any Will can be changed at any time prior to death provided the testator retains capacity. Therefore, the precise moment of the Will's creation is typically not the critical issue. The critical issues are whether the testator had capacity at the time of giving instructions, and whether the Will was effective at the date of death. In any event, other evidence can serve these important functions. I suggest that unless expressly forbidden by statute, it is open for judges to accept an electronic signature on a Will as effective. As Chief Justice Popescul said in *Wright*, 'even absent specific legislation allowing for acceptance of electronic signatures, courts have considered an electronic signature as a valid signature simply under longstanding principles of common law…'.[2] [emphasis in Court of Appeal quote, not in original].

The function a requirement of writing serves is also presumably evidentiary. Oral Wills, also known as nuncupative testaments, are generally not recognized. It does not have to be this way. In relatively recent times oral Wills had been recognized for sailors, fishermen and military personnel in some circumstances (Alberta Law Reform Institute,

---

[1] *Mason, supra* n 56, pages 9-10.

[2] *Wright, supra* note 24, Wright at paragraph 171.

2007, pp. 41-42).[1] In addition, although not an oral Will, the law does recognize a *donatio mortis causa*[2], which is a deathbed gift. In fact, it is a gift made in contemplation of death and dependant upon death for its effectiveness. Since it is a type of gift and not a type of Will, delivery or its equivalent, but not writing, is required. Oral Wills have been recognized at different times in history, but as a matter of policy are generally ineffective today.

Given that Wills disputes arise only at a time when the person whose property is being divided is not able to provide evidence, the law has made a policy choice to require a written record before the decedent's expressed wishes will be given effect. Because this will result in some decedent's wishes not being given effect, the law in most if not all jurisdictions imposes a plan for the distribution of intestate decedent's property. This intestate distribution scheme presumably respects common wishes, or at least embodies the state's view of what common wishes in that particular society ought to be.

Importantly, the functions that writing serves can be served equally well with electronic writing. It is true that in order to do so, additional evidence, beyond the Will itself may be required. However, extrinsic evidence is often available. If a judge has reasonable suspicions that the electronic writing is fraudulent or otherwise does not represent the actual intentions of the testator, the judge can and should require the propounder of the Will to adduce evidence to overcome those suspicious circumstances before accepting the electronic document. However, I submit that it is open for a judge in appropriate circumstances to conclude that writing in electronic form clearly comes within the common law definition of writing, unless it has been clearly and definitively excluded by statute.

---

[1] The Alberta Law Reform Institute indicated that Newfoundland and Labrador Nova Scotia, England, Australia and New Zealand allowed oral Wills in the privileged Will situation as well as for fishers at sea in the case of Newfoundland and Labrador.

[2] See generally: *Rahman v. Hassan et al.,* [2024] EWHC 1290 (Ch).

The issue before the court in the iPad Will case[1] was whether an electronic message can be recognized as a Will. I have already stated my conclusion that this could be done through a common law determination that the message is in writing and the typed name is a signature. In the iPad Will case, the judge used the court's dispensing power to arrive at this conclusion. While this seems to be an appropriate use of the dispensing power, this route may not always be available to a judge. Some jurisdictions may have restricted their dispensing power in ways which prevent its use in the circumstances before the judge. Indeed, if and when *The Wills Amendment Act, 2022* comes into force in Saskatchewan, the legislation will expressly state that a holograph Will "may not be an electronic will". [2]

Let us examine the facts of the iPad Will case. A woman named Kim was in the hospital in very precarious condition. She was weak, and had trouble breathing. Evidence established that "Kim was unable to speak because of her difficulty breathing and unable to write with a pen because she had no strength to hold a pen".[3] She could however hold the stylus to her iPad. She communicated with others by touching the stylus to the iPad thereby typing letters.

Kim, Brenda Kuffner, Wayne Kuffner and Carol Haines were siblings. Their mother was alive at the time of Kim's death, but both her and Carol passed away approximately a year later. Ryan Haines and Rheanne Haines were Carol's children.

On May 19, 2023 Kim sent a message to Brenda and Wayne. Part of that message said "This may be goodbye. I love you." which clearly indicated that Kim knew she may soon pass away. Later that day she sent Brenda and Wayne the following message:

My holographic will Rheanne Haines to be executor.

[1] *Haines v. Kuffner Estate ['Haines']*, 2024 SKKB 51.
[2] Bill 110 of 2022, *The Wills Amendment Act, 2022* s. 6 modifying s. 8 of the existing legislation.
[3] *Haines, supra* n 65, paragraph 5.

House and contents to Ryan Haines.
Balance of investments to be split 60% to Ryan Haines and 40% to Rheanne Haines. Rheanne to be pet guardian.

May 19, 2023. Kim Kuffner

Brenda and Wayne immediately went to the hospital to see Kim, but by the time they arrived Kim had lost consciousness. She passed away two days later. Kim had never married and had no children. Since her mother was alive at the time of Kim's death, she would inherit Kim's estate if Kim died without a Will.[1] Other than the message above, no document which could be a Will was found.

Rheanne and Ryan Haines were Kim's niece and nephew. They were near in age to Kim and had close a relationship. Rheanne had rented a room in Kim's house while attending university, and Ryan rented a basement apartment in Kim's house.

Rheanne, as executor brought a court application for an order declaring the message sent by Kim's iPad to be her Will. The judge now has to determine if this message typed on an iPad, and sent electronically can constitute Kim's Will. It clearly does not meet any set of formalities for executing a Will. There are no witnesses, it may not be signed and it may not be in writing. The application was granted.[2]

In order to declare the iPad Will valid, the judge must find that all the essential requirements of a Will, other than the formalities, have been met. The dispensing power only permits a court admit a document to probate, where the *formalities* required by the legislation have not been strictly complied with. Other requirements including that the document embodies the testator's testamentary intentions, and that the testator had capacity at the required time, cannot be dispensed with.

---

[1] *The Intestate Succession Act, 2019* c. I-13.2 SS, 2019 s. 8.

[2] The application was brought under *The Wills Act*, 1996, s. 37. *Haines, supra n 65*, paragraph 2,4.

The formalities are contained at s. 7 for a formal Will and s. 8 for a holograph Will. The court reproduces both sections,[1] but does not expressly specify which section the iPad Will is being considered under. Nor does it specify exactly which formalities were not complied with.

The court found that Kim had capacity and that she intended the message to be her Will.[2] It found the message was testamentary in nature and that it represented Kim's final wishes. In making this determination the court says "Although she could no longer write, and thus the formal requirements of the *Act* respecting a holographic Will were not met, I conclude that the message is testamentary in nature and that it represents Kim's deliberate and final intentions as to the disposition of her estate."[3] This implies that section 37 is being applied to the holograph Will provisions. However, if it is, it is unfortunate that the court did not tell us how it determined that the Will was in 'handwriting'. Is the court expanding the common law understanding of handwriting because the testator was unable to write in any other way but to select letters with the iPad stylus? This is not unreasonable. The meaning of 'handwriting' is not entirely clear."[4]

Alternatively, the court may be dispensing with the formality of handwriting as well as with the formality of a signature. If so, I would applaud the decision as a bold application of the dispensing power to

---

[1] *Haines, supra* n 65, paragraph18.

[2] *Haines, supra* n *65,* paragraphs 31-33.

[3] *Haines, supra* n *65,* paragraph 34.

[4] Almost 40 years ago in 1986 the Uniform Law Conference of Canada recommended holograph Wills sections use the more inclusive term 'own writing' which was defined as including "handwriting, footwriting, mouthwriting or writing of a similar kind." Saskatchewan amended its legislation in 1989, but unfortunately reverted to the undefined word 'handwriting' in *The Wills Act, 1996* s. 8 and ss. 11(3).
See: *Creation of Wills, supra* n 63., 80, 81.
Currently only Nunavut uses the more inclusive term.
"In this section, "own writing" means handwriting, footwriting, mouthwriting or writing of a similar kind."
The Wills Act, RSNWT, 1988, c. W-5, s. 5.1(1).

bring about a just decision – but a more in-depth explanation of the decision in the judgement would have been more helpful for future cases. Given that the legislation is being amended to specify that a holographic Will cannot be an electronic Will, the need for an explanation increases. The amending legislation has been passed and has received Royal Assent but is not yet in force.[1] Will section 37 remain available to judges to accept an unsigned 'handwritten' Will after the amendments come into force?

In this case, it is most likely that the court was using its dispensing power to validate the Will as a holograph Will by dispensing with the signature and the handwriting formalities. However, it may also be that the court is expanding the common law understanding of handwriting by including words tapped out with the iPad stylus, and is also expanding the common law understanding of a signature by including Kim tapping out her name on her iPad as her signature.

A signature is required under both section 7 and 8. The court refers to a 2008 case which held an electronic signature did not constitute an effective execution of a testamentary document.[2] The court says that section 37 should be broadly interpreted to validate a Will, even if there is *no compliance* with the formalities. Of course, both holograph and formal Wills require a signature. If it is appropriate to use section 37 to save an unsigned holograph Will, it would presumably also be appropriate to use section 37 to save an unsigned formal Will. The court could (and perhaps did) do this by using the dispensing power to also dispense with the requirement of witnesses. This would be an effective use of the dispensing power to recognize the Will as a formal Will under section 7. This is a critical distinction, because the upcoming limitation

---

[1] Bill 110 is now SS 2023, Chapter 45, *The Wills Amendment Act*, 2023/Loi modificative de 2023 sur les testaments (https://publications.saskatchewan.ca/#/products/121379) . It will come into force on a date determined by an Order in Council. No such Order in Council has been passed as of April 10, 2025.

[2] *Buckmeyer Estate (Re)*, 2008 SKQB 260 quoted at *Haines, supra* n 65, paragraph 22.

on Wills in electronic form only applies to holograph Wills created under section 8.[1]

Kim faced dire circumstances. Communication through an electronic device, in her case, her iPad, was the only method of communication available to her. [2] It appears that in the clear absence of suspicious circumstances, both the dispensing power and common law developments are possible avenues for future judges to give effect to a testator's wishes when the best the testator can do is imperfectly express those wishes. Thank goodness for creative, caring and compassionate judges who are willing to forego frumpy formalism.

References

Achter Land & Cattle Ltd. v South West Terminal Ltd.['Achter'] (2024). SKCA 115 (Sask. C. A.) affirming 2023 SKKB 116.

Banks v. Goodfellow, [1861-73] All ER Rep 47.

Bennett v Manitoba (Official Guardian) (Re Gray Estate), [1958] SCR 392.

Bill 110 of 2022, The Wills Amendment Act, 2022.

Buckmeyer Estate (Re), 2008 SKQB 260 quoted at Haines.

Gust v Langan, 2020 SKQB 42.

Haines v. Kuffner Estate ['Haines'], 2024 SKKB 51.

[1] Although the judge in the iPad Will case presumably based her decision on the s. 8 formalities associated with a holograph Will, my point is that she waived those formalities to reach a just and proper decision on the facts before her. The same rationale applies to waiving the s. 7 formal Will formalities, although the requirement of witnesses would also have to be waived. If a court is satisfied that the typed document should be valid as a holograph Will (which does not require witnesses) then logically it should be satisfied that it should be valid as a formal Will because the effect is identical. In order to make the document valid as a formal Will, the formality of witnesses would have to be waived. This would allow a court to save a Will, even if future legislation prevents a holograph Will from being an electronic Will.

[2] *Haines, supra* n 65, paragraphs 5, 36.

Hodson v. Barnes 43 T.L.R. 71.
https://publications.saskatchewan.ca/#/products/121379
https://www.unidroit.org/instruments/international-will
I.D.H. Diamonds NV v Embee Diamond Technologies Inc., 2017 SKQB 79, [2017] 9 WWR 172, aff'd 2017 SKCA 79.
Legislation Act, supra n 11, c. L-10.2, SS 2019, s. 2-29.
Rahman v. Hassan et al., [2024] EWHC 1290 (Ch).
Re Henderson (Seekey), [1982] NWTJ No 46, [1982] 2 WWR 262.
Re Forest (1981), 121 DLR (3d) 552 (Sask. C.A.).
R. v. Wright ['Wright'], 2023 SKKB 236.
R.S.C., 1985, c. P-28 at s. 2.
Re Harris Estate (13 July 1948), Kerrobert, SK 1902 (Surr. Ct.).
R. v. Salituro, [1991] 3 S.C.R. 654
Smith v. Hughes (1871), L.R. 6 Q. B. 597.
The Alberta Law Reform Institute, https://www.alri.ualberta.ca/2000/06/wills-non-compliance-with-formalities-final-report-84/
The Intestate Succession Act, 2019 c. I-13.2 SS, 2019 s. 8.
The Legislation Act ['Legislation Act], c.L-10.2 SS 2019, s. 2-1
The Sale of Goods Act, c. S-1 RSS 1978, s. 6(1).
The Signature in Law: From the Thirteenth Century to the Facsimile. (2022). University of London Press, 4.
The Wills Act, 1996 ['Wills Act'], c. W-14.1, SS, 1996.
The Wills Act, RSNWT, 1988, c. W-5, s. 5.1(1).

Legal and Administrative Studies, www.jlas.upit.ro
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement – Year 2025, pp. 56-65

EUTHANASIA IN POLAND. A FEW COMMENTS ON THE IMPACT OF LEGAL REGULATIONS ON PRACTICE

Beata STĘPIEŃ-ZAŁUCKA
ORCID [ID]: https://orcid.org/0000-0003-1802-680X
E-mail: beata@kpmz.pl
Afiliation: University of Rzeszow, Poland

***Abstract*:** *The protection of human life is enshrined in the most important international legal documents. These include the Universal Declaration of Human Rights of December 10, 1948, Article 3 states that "Everyone has the right to life, liberty and security of person", the subsequent Convention for the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on November 4, 1950 (Journal of Laws 1993.61.284), in which Article 2 states that "1. Every human being's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as contrary to this article when it results from the use of force which is no more than absolutely necessary:*

a) in defense of any person from unlawful violence;

b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c) in actions taken in accordance with the law to quell riots or uprisings."; or in the provisions of the International Covenant on Civil and Political Rights, opened for signature in New York on December 19, 1966. (Journal of Laws 1977.38.167), where Article 6 states that "1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. 2. In countries where the death penalty has not been abolished, a death sentence may be imposed only for the most serious crimes in accordance

with the law in force at the time of the crime and not contrary to the provisions of this Covenant and the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out on the basis of a final judgment rendered by a competent court. 3. Where deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide. 4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases. 5. Sentence of death shall not be imposed for crimes committed by persons below 18 years of age and shall not be carried out on pregnant women. 6. No provision of this article may be invoked to delay or to prevent the abolition of the death penalty by any State Party to this Covenant.

This international standard has also been adopted by the Polish Constitution, Article 38 of which states that "The Republic of Poland shall ensure the legal protection of life to every human being." The result of these contents was a criminal law article, i.e. Article 150 of the Penal Code, which defines euthanistic homicide (Journal of Laws 2024.0.17 i.e. - Act of June 6, 1997 - Penal Code) - "§ 1. Whoever kills a person at their request and out of compassion for them,shall be subject to imprisonment for a term of between 3 months and 5 years. § 2. In exceptional cases, the court may apply an extraordinary mitigation of the penalty or even waive its imposition.

As a result, it is worth considering to what extent criminal law is a deterrent to crime, and if it is considered effective, to what extent this is due to the prevention of legal regulation and possibly the determination of other factors, including non-legal ones. The key research methods will be the theoretical-legal method and the dogmatic-legal method.

Keywords: *Right to life; protection of life; euthanasia; criminal protection of life,*

.

Introduction

No one needs to be convinced that murder is inherently wrong. This belief unites people regardless of their worldview or religion. Nevertheless, there are situations in which society justifies taking another person's life, and sometimes we even hear in everyday language that someone is “praying for another person's death.” These are absolutely exceptional situations, but they do occur and are associated with long-term illness and enormous suffering on the part of the person concerned; the loved ones of the suffering person, wanting to spare them pain, often accept euthanasia and support it. However, Polish criminal law prohibits euthanasia in all its forms. Based on international regulations and the constitutional standard developed on their basis, Poland has developed legal protection of life against euthanasia, which is expressed in Article 150 of the Criminal Code, which states that "§ 1. Whoever kills a person at their request and out of compassion for tchem shall be subject to imprisonment for a term of between three months and five years. § 2. In exceptional cases, the court may apply extraordinary mitigation of the penalty or even refrain from imposing it."

As a result of the current regulation, it is worth considering to what extent the criminal law provision acts as a deterrent to the commission of euthanasia and, if it is considered effective, to what extent this is due to the preventive nature of the legal regulation and to what extent other factors, i.e., non-legal factors, also influence the existing state of affairs. The key research methods will be theoretical-legal and dogmatic-legal method.

1. Legal protection of life in international law

The protection of human life is enshrined in the most important instruments of international law. These include the Universal Declaration of Human Rights of December 10, 1948, Article 3 of which states that “Everyone has the right to life, liberty and security of his person,” and the subsequent European Convention for the Protection of Human Rights

and Fundamental Freedoms of December 4, 1950, Article 2 of which states that "No one shall be deprived of his life intentionally under any circumstances. 3 states that “Everyone has the right to life, liberty and security of his person,” and the subsequent Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome on November 4, 1950 (Journal of Laws 1993.61.284), in which Article 2 states that "1. Everyone's right to life shall be protected by law. No one shall be intentionally deprived of his life except in the exercise of the authority of law. 2. Deprivation of life shall not be regarded as contrary to this article when it is a result of the use of force which is no more than absolutely necessary:
(a) in defense of any person from unlawful violence;
(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
c) in action lawfully taken for the purpose of the suppression of a riot or insurrection."; or in the provisions of the International Covenant on Civil and Political Rights, opened for signature in New York on December 19, 1966 (OJ 1977.38.167), where Article 6 states that

"1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. 2. In countries where the death penalty has not been abolished, the death penalty may only be imposed for the most serious crimes in accordance with the law in force at the time of the commission of the crime and shall not be in contravention of the provisions of this Covenant and of the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty may only be carried out pursuant to a final judgment rendered by a competent court. 3. In cases where the deprivation of life constitutes a crime of genocide, it is clear that no provision of this article shall authorize any State Party to this Covenant to derogate in any manner from its obligations under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide. 4. Everyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the death penalty may be offered in all cases. 5. The death penalty shall not be imposed for

crimes committed by persons under 18 years of age and shall not be carried out on pregnant women. 6. No provision of this article shall be invoked to delay or prevent the abolition of the death penalty by any State Party to this Covenant".

2. Protection of human life and euthanasia regulations in Poland

This international standard has also been adopted by the Polish Constitution, whose Article 38 states that “The Republic of Poland shall ensure legal protection of life to everyone.” The Constitutional Tribunal has repeatedly ruled on the protection of human life. Interestingly, however, it also ruled on this issue on May 28, 1997, shortly after the constitutional referendum and thus before the current Constitution came into force, referring to the constitutional norms that had the highest legal force at the time. From the constitutional principle of the rule of law, it derived the obligation to guarantee “the protection of human life at every stage of its development” (see judgment K 26/96, OTK 1997, No. 2, item 19; Banaszak, 2009, p. 212).

This regulation was further developed, inter alia, in the Criminal Code, which criminalized various forms of acts against life, devoting an entire chapter (Chapter XIX, Articles 148-162) to this issue.

This content also resulted in a criminal law article, i.e. Article 150 of the Criminal Code, which defines euthanasia (Act of June 6, 1997 - Penal Code, D.2024.0.17) - "§ 1. Whoever kills a person at their request and out of compassion for them shall be subject to imprisonment for a term of between 3 months and 5 years. § 2. In exceptional cases, the court may apply extraordinary mitigation of the penalty or even refrain from imposing it."

3. The essence of euthanasia

The word euthanasia comes from Greek and means a good death, without unpleasant suffering, or a good and honorable death (Ozorowski, 2021, p. 105). John Paul II, in his encyclical Evangelium vitae, wrote

about euthanasia and gave the following definition: “Euthanasia, in its strict and proper sense, must be understood as an action or omission which, by its nature or intention, causes death in order to eliminate suffering.” (Jan Paweł II, 1995, p. 65)

Z. Sobolewski defined euthanasia as an act consisting of:

1. shortening the life of a patient in a very serious or hopeless condition by a doctor refraining from using artificial nutrition, respiration, and circulation to keep the patient alive;
2. killing a patient suffering from an incurable disease causing unbearable suffering by administering a large dose of painkillers;
3. killing and assisting in the suicide of very old people who are physically and mentally infirm, who are not needed by anyone and do not need anyone, functioning at the lowest level of possible behavior; 4. and shortening the life of severely physically and mentally disabled children, including not only newborns, but also children of several and several dozen years of age (Sobolewski, 1974, pp. 72–73.).

However, science emphasizes that “euthanasia” has become a “convenient mental shortcut” through the practice of using this term. At the same time, according to the letter of the law, the limits of euthanasia are defined by specific procedures, which are listed, among others, by Karolina Śmigacz, who writes that these procedures consist of:

1. discontinuing life-sustaining treatment when, due to the patient's condition, it is not beneficial and only prolongs suffering and agony;
2. pharmacologically inducing a terminally ill, unbearably suffering patient into an irreversible state of unconsciousness lasting until death;
3. administering to a terminally ill and unbearably suffering patient gradually increasing doses of opioid analgesics, which may accelerate death;
4. providing a suffering patient with pharmacological or technical means necessary to take their own life, providing the patient with information on how to take their own life effectively and painlessly;
5. intentionally killing an incurably ill and suffering person, at their request, by administering a lethal dose of pharmacological agents (Śmigacz, pp. 782-783). The above became the basis for distinguishing

between different forms of euthanasia. The two basic forms concern the method of implementation, i.e. active and passive:

- active euthanasia – consists in a doctor administering special drugs at the request of a seriously ill person, which cause their premature death. It is also called "mercy killing" because it aims to shorten the suffering of the patient.
- Passive euthanasia (orthothanasia, through omission**)** – involves the decision to discontinue further treatment of a sick person who is in a very serious condition (this applies only to treatment that is not aimed at curing the patient, but only at sustaining their life). (Góralski, 2008, pp. 47-65; Lipowski, & Wiliński, 2021, p. 97)

Marek Czachorowski points out that, depending on who performs euthanasia, we can talk about lethal euthanasia (killing another person) and suicidal euthanasia (killing oneself); voluntary euthanasia (with the patient's consent) and, conversely, involuntary euthanasia (performed without the patient's consent, because they cannot give their consent—cryptanazis); euthanasia against the patient's will; "assisted suicide" (the patient commits suicide, but a healthcare professional participates in the suicide by providing, for example, the appropriate substances). (Czachorowski) [1]

Conclusions

It cannot be denied that euthanasia is a controversial issue, not only legally but above all socially. In practice, it has both opponents and supporters. Proponents of euthanasia focus primarily n freedom from pain and suffering that violates the personal dignity of individuals, as well as the right to privacy in relation to an individual's self-determination regarding the length of their own life. On the other hand, opponents of euthanasia emphasize the value of human life. Religion is often invoked in these discussions, particularly in Christianity, where it is

[1] https://www.ptta.pl/pef/pdf/e/eutanazja.pdf

believed that man was created in the image and likeness of God, and therefore human life has the highest value and its violation is the gravest crime against God Himself. (Góralski, 2008, p. 47)

When assessing the situation in Poland, it should be noted that there are no current studies in this area. Previous studies indicate that the number of people who support euthanasia is equal to the number of those who oppose it.1 However, the fact is that the crime of euthanasia itself, as defined in Article 150 of the Penal Code, is not common in Poland.

Year	Number of proceedings initiated	Number of crimes detected
2023	0	0
2022	0	0
2021	1	0
2020	1	0
2019	0	0
2018	2	0
2017	0	0
2016	1	0
2015	0	0
2014	2	1
2013	4	1
2012	10	0
2011	5	0
2010	1	0
2009	8	0
2008	4	0
2007	3	0
2006	6	0
2005	7	0
2004	3	0
2003	4	1

[1]For example, CBOS research from 2009, https://www.cbos.pl/SPISKOM.POL/2009/K_142_09.PDF

2002	3	0
2001	10	0
2000	6	1
1999	2	0.1

When making a specific prediction for Poland, however, extreme caution should be exercised. This caution stems from the fact that one cannot be ignored in the face of a specific "trend" or "fashion" for euthanasia that is observable in Europe. More and more European countries are deciding to legalize it and, what is more, to "loosen" the restrictions on its practice, as confirmed by statistics in this area.2 On the one hand, this state of affairs calls for restraint. Nevertheless, on the other hand, factors distinguishing Poland from Western Europe that influence social acceptance and, consequently, possible legal changes in the area under study must also be taken into account. Here, the issue of the influence of religion on social attitudes towards euthanasia comes to the fore. In Poland, there is still a relatively high percentage of Catholics. "According to the respondents' declarations, the distribution of religious affiliation or church membership in Poland is as follows: 88.8% (Roman Catholic), 2.0% (other Christian denominations), 0.1% (other religions), 7.3% (atheism)."3 The high proportion of Catholics in the social profile, whose religion and philosophy of life include its protection from conception to natural death, combined with current statistics on euthanasia crimes, despite European trends, which are key factors in maintaining the status quo or legislative changes in the area of euthanasia, allows us to conclude that, as of today, the forecast in Poland for possible changes and the legalization of euthanasia is low.

---

[1]Data from the Police website, https://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko/63419,Zabojstwo-eutanatyczne-art-150.html

[2] P. Grata, Wzrost liczby eutanazji. Europejski kraj podał dane, https://www.rmf24.pl/fakty/swiat/news-wzrost-liczby-eutanazji-europejski-kraj-podal-dane,nId,7937039

[3] Religijność Polaków w ostatnich dziesięcioleciach, Badania CBOS, 2024, no 50, *https://www.cbos.pl/SPISKOM.POL/2024/K_050_24.PDF*

References

Banaszak, B. (2009). *Konstytucja Rzeczypospolitej Polskiej. Komentarz.* Warszawa, p. 212 and n.

CBOS research from 2009, https://www.cbos.pl/SPISKOM.POL/2009/K_142_09.PDF

Czachorowski, M. Eutanazja. https://www.ptta.pl/pef/pdf/e/eutanazja.pdf.

Data from the Police website, https://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko/63419,Zabojstwo-eutanatyczne-art-150.html

Góralski, P. (2008). Polskie prawo karne wobec problemu eutanazji. *Nowa Kodyfikacja Prawa Karnego, v. XXII*: pp. 47-65.

Grata, P. Wzrost liczby eutanazji. Europejski kraj podał dane, https://www.rmf24.pl/fakty/swiat/news-wzrost-liczby-eutanazji-europejski-kraj-podal-dane,nId,7937039

Lipowski, Paweł, & Wiliński, Oskar. (2021). Eutanazja – charakterystyka aspektów prawnych w Polsce i wybranych krajach europejskich. *Zdrowie Publiczne i Zarządzanie, no 19 (3–4*): p. 97.

Ozorowski, M. (2021). Eutanazja – zbrodnia czy cywilne prawo człowieka do wyboru śmierci? Euthanasia – a crime or a human right to choose death?. *Sympozjum, v. XXV, no 2(41)*: p. 105.

Paweł II, Jan. (1995). Encyklika Evangelium vitae. Rzym (far: EV), 65.

Penal Code - Act of June 6, 1997. D.2024.0.17

Religijność Polaków w ostatnich dziesięcioleciach. (2024). *Badania CBOS. no 50, https://www.cbos.pl/SPISKOM.POL/2024/K_050_24.PDF*

Śmigacz, K. Pojęcie i rodzaje eutanazji, https://wspia.eu/media/s5nng5qp/70-%C5%9Bmigacz-karolina.pdf, pp. 782-783.

Sobolewski, Z. (1974). Życie nie warte cierpienia. *Palestra, no 7*: pp. 72–73.

Legal and Administrative Studies, www.jlas.upit.ro
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement – Year 2025, pp. 66-86

EUROPEAN SOCIAL CHARTER STANDARDS ON THE PROTECTION OF MIGRANT WORKERS IN THE EUROPEAN UNION

Tatiana PUIU
ORCID ID: https://orcid.org/0009-0009-6519-6511
E-mail: puiutatiana@gmail.com
Affiliation: Free International University of Moldova

Abstract: *This paper examines the legal standards enshrined in the European Social Charter (ESC) concerning the protection of migrant workers' social rights in the Member States of the European Union, with a focus on normative content, personal scope, and the evolutive interpretation adopted by the European Committee of Social Rights (ECSR). The paper highlights the relevance of ESC standards in employment, social security, social assistance, family reunification, and equal treatment, as well as the positive obligations of States Parties. It also addresses the limited integration of ESC in the EU legal order and the risk of conflicting international obligations. Recommendations are made for improving normative alignment between the ESC and EU law, including initiating the EU's accession to the Charter under Article 216(1) TFEU.*

Keywords*: European Social Charter; migrant workers; social protection; EU law; legal coherence.*

Introduction

Migrant workers form a significant part of Europe's labour force, raising questions about the protection of their social rights under regional legal frameworks. Within the Council of Europe system, the European Social Charter (ESC) (1961, revised 1996) stands as a cornerstone treaty safeguarding a broad spectrum of socio-economic rights. Notably, all 27

EU Member States are States Parties to either the original or revised ESC, reflecting a pan-European commitment to social rights. The Charter's provisions cover rights ranging from employment and fair working conditions to social security, social assistance, and family welfare, many of which directly concern migrant workers and their families.

Contemporary international law faces the reality that the European Union has developed its comprehensive legal framework governing migration and social rights, creating a complex web of overlapping and sometimes conflicting obligations. The EU's approach to migrant worker protection has been characterised by what Verschueren (2016, p. 373) terms an "incomplete patchwork of legal protection," reflecting the fragmented nature of EU competences in this area and the political sensitivities surrounding migration policy. The adoption of various directives, including Directive(EU)2021/1883 (recast Blue Card), the Employers' Sanctions Directive2009/52/EC, Directive(EU)2024/1233 (recast Single Permit), the Seasonal Workers Directive2014/36/EU, and the Intra-Corporate Transferees Directive 2014/66/EU, has consolidated a sectoral EU approach to migrant worker protection that often do not ensure comprehensive coverage or consistent standards across different categories of workers.

The interaction between the ESC system and EU law has generated academic and institutional debate, particularly following Court of Justice of the European Union (CJEU) rulings such as Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet (2007) and International Transport Workers' Federation v. Viking Line ABP (2007). In these cases, the CJEU applied internal market freedoms to limit certain forms of collective action, raising concerns about the relationship between economic freedoms and social rights, especially given that the ESC is not part of the EU's primary legal order. The differing analytical frameworks employed by the CJEU and the European Committee of Social Rights (ECSR), particularly in applying proportionality tests, illustrate the potential for normative tension between the two systems.

One of the central issues in this relationship is the limited integration of ESC standards into EU law. As De Schutter explains, the current lack of coordination between the two regimes creates protection gaps and risks of conflicting obligations for Member States (De Schutter, 2016, pp. 24-26). A subsequent Council of Europe study reiterates that the EU legal order still shows major deficits in the protection of social rights and argues that stronger links to the ESC would reduce the risks of conflicts (De Schutter, 2019, pp.1-4, 46-47). Despite all EU Member States having ratified the ESC in either its 1961 or 1996 form, the absence of a comprehensive mechanism for ensuring coherence between ESC standards and EU law has resulted in what can be described as parallel systems of social rights protection that operate with limited coordination and occasional conflict.

1. The European Social Charter framework for migrant workers' protection

The European Social Charter sets out a framework for the social rights of migrant workers, with Article 19 ("The right of migrant workers and their families to protection and assistance") at its core, which imposes extensive obligations on States Parties, covering multiple aspects of employment, social protection, family reunion integration, linguistic/integration measures (Council of Europe, 2022, p.161). The main goal of Article 19 has been subject to evolutive interpretation by the European Committee of Social Rights, which has adopted an expansive approach to the definition of "migrant workers." Consistent with the Charter's Appendix, the provision applies to nationals of other States Parties who are lawfully resident or working regularly in the host State (Council of Europe, 2022, p.161). Nonetheless, the ECSR has clarified that such personal-scope limits cannot be applied in a manner that undermines human dignity (European Committee of Social Rights, 2014a, paras. 65–66; European Committee of Social Rights, 2014b, para. 185). For instance, in FIDH v. France , the Committee found a violation of Article 17 due to barriers to health care for undocumented children

(European Committee of Social Rights, 2004, paras. 27 - 32, 36). In DCI v. Belgium , it held that undocumented children must be afforded adequate shelter and assistance, finding violations of Articles 17, 7(10), and 11(1)-(3) (European Committee of Social Rights, 2012, paras. 35, 102, 122, 136).

The ECSR has interpreted Article 19 in an evolutive manner and extended the scope of Article 19 to include posted workers, a category that has become important in the context of European integration. In its interpretation of Article 19, par. 4, the Committee has held that posted workers must be considered as migrant workers for the purposes of the Charter, thereby entitling them to equal treatment with national workers, including in matters of remuneration, working conditions, and access to collective bargaining (European Committee of Social Rights, 2013).

While Article 19 is the Charter's dedicated provision on migrant workers, several other guarantees complement it. Article 18 commits States to facilitate access to employment for foreign nationals by applying existing regulations liberally, simplifying administrative formalities and charges, and liberalising the rules governing the employment of foreign workers. Article 12 secures equality of treatment in social security for nationals of other States Parties and the retention/aggregation of benefits, typically through bilateral or multilateral coordination instruments. Article 13 requires that social and medical assistance be applied on an equal footing to nationals of other Parties lawfully within the territory. These provisions aim to ensure that migrant workers do not lose access to basic social protection when moving between ESC States. For example, Article 12, par. (4) requires States to take measures, by means of social security agreements or otherwise, to ensure equality of treatment and maintenance of benefits for persons moving between States Parties (Council of Europe, 2022, p. 120). Also, Article 13, par. (4) explicitly extends the right to urgent social and medical assistance to all persons in need, "whether resident or not," which has been interpreted to cover migrants regardless of status for emergency care (Council of Europe, 2022, p. 129).

The interaction between these various provisions creates a comprehensive framework of protection that addresses the multiple dimensions of migrant workers' vulnerability. The ECSR has recalled that these provisions must be interpreted in a manner that ensures their practical effectiveness and that takes into account the particular circumstances and needs of migrant workers (Council of Europe, 2022, p.164).

The evolution of the ESC framework through the adoption of the Revised Charter in 1996 has strengthened several aspects of migrant worker protection. The Revised Charter includes enhanced provisions on non-discrimination, strengthened protection for family life, and improved mechanisms for monitoring compliance (Council of Europe, 2022, p.178). However, the fact that not all EU Member States have ratified the Revised Charter creates additional complexity in the application of these standards and highlights the need for greater harmonisation of ratification practices.

The relationship between the ESC framework and other international instruments, particularly ILO conventions on migrant workers, creates additional layers of protection that can be mutually reinforcing. The ECSR has frequently referenced ILO standards in its interpretation of Charter provisions, reflecting the complementary nature of these international frameworks (Council of Europe, 2022, p.188).

It must be acknowledged that the practical implementation of the ESC framework faces challenges, particularly in the context of increasing migration flows and evolving forms of mobility.

The Charter's normative content thus covers a broad range of social rights relevant to migrant workers and creates obligations for States to protect those rights. It is important to note, however, that the ESC's approach is not one of unconditional universality. The Charter was drafted with an "à la carte" ratification system that permits selective acceptance of provisions, subject core minimum being met. This has led to variation in commitments; for instance, not all EU States have accepted Article 19 or all its paragraphs. Furthermore, the ESC's Appendix, which forms part of the treaty text, limits the personal scope

of many rights by specifying that, as a rule, they apply only to foreigners who are nationals of other States Parties and who are lawfully resident or working regularly in the territory. Within these constraints, however, the ESC establishes a strong normative framework that champions the social rights of migrant workers. As O'Cinneide (2014) observes, the Charter's migrant-worker provisions, especially Article 19 and the active measures required by Article 18, provide a rights-based template for how migrant workers should be treated, which can be used to critique existing law and policy.

2. The European Committee of Social Rights' interpretation practice

The European Committee of Social Rights, as the Charter's supervisory body, plays a central role in interpreting and updating the meaning of ESC provisions. In the context of migrant workers' rights, the ECSR has demonstrated a distinctly evolutive and principled interpretative approach. This means that the Committee interprets the Charter as a living instrument, in light of contemporary conditions and in harmony with other international norms, rather than a static 1960s treaty. ECSR caselaw confirms that Charter protections cannot be interpreted to deprive persons in an irregular situation of essential guarantees of dignity. As Fox-Ruhs and Ruhs explain in their study, "the Charter must nonetheless be construed, in keeping with its spirit and purpose, to provide basic socio-economic rights to everyone where such rights are necessary to uphold basic entitlements such as human dignity and the right to life as protected under the European Convention on Human Rights" (Fox-Ruhs and Ruhs, 2022, p.23).

One distinctive sign of the ECSR's approach is its use of integrated interpretation, whereby it references external sources, such as UN treaties, ILO conventions, and EU law, to inform its reading of the Charter. For instance, in assessing states' compliance with Article 19 (migrant workers' rights), the Committee often considers relevant ILO Conventions. Although no EU Member State has ratified the International Convention on the Protection of the Rights of All Migrant

Workers and Members of Their Families (1990), the principles it enshrines (e.g. non-discrimination between regular and irregular migrants in fundamental human rights, per Article 7 of that Convention) resonate with the ECSR's dignity-based approach.

The ECSR's evolutive interpretation is also evident in how it fleshes out positive obligations and modernises older language. For example, Article19, par.(1) of the Charter requires to maintain adequate and free services to assist migrant workers, particularly in obtaining employment. The Committee has interpreted this in a contemporary context to require states to actively facilitate access to employment for foreign workers, which may include offering effective employment services, language training, or transparent information about job opportunities (Council of Europe, 2022, p. 161).

In Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, the ECSR found violations of Articles 6§2, 6§4, and 19§4(a)(b). The Committee interpreted the equal treatment guarantees in Article 19§4 as extending to posted workers and examined the restrictions at issue through the proportionality framework set out in Article G (European Committee of Social Rights, 2013, pp. 119 - 122).

In the same context it can be noted that the ESC addresses migrant workers' rights across several key domains, such as: (1) employment and labour rights, (2) social security, (3) social assistance, (4) family reunification, and (5) equal treatment and non-discrimination. In each area, the Charter establishes standards that States must uphold, and the ECSR's interpretations clarify the extent of these protections.

Employment and labour rights are central to the protection of migrant workers under the European Social Charter. Article 1 (right to work), while general in scope, has been interpreted by the European Committee of Social Rights (ECSR), read together with Article E (non-discrimination) and Articles 18 and 19, to require States Parties to prevent direct and indirect discrimination that would impede migrants' access to employment (European Committee of Social Rights, 2022, pp. 35–36).

Read in conjunction with Article E and subject to the Appendix's ratione personae limitation, Articles 5 and 6 of the European Social Charter secure trade-union freedoms and collective action for migrant workers. Article 18 specifically concerns nationals of other States Parties engaging in gainful employment in the host State. Under Article 18(2) and ECSR interpetation "States Parties are under an obligation to reduce or abolish chancery dues and other charges" paid by foreign workers or their employers (European Committee of Social Rights, 2022, p. 158). Under Article 18(3), "States Parties are required to liberalise periodically the regulations governing the employment of foreign workers," and conditions for access to the labour market "must not be excessively restrictive"; restrictions must be gradually lifted (European Committee of Social Rights, 2022, p. 159). Article 18(4) affirms the right to leave one's State, with the ECSR recalling that "blanket restrictions on the right of citizens to leave the national territory … are not in conformity with Article 18§4" and must be assessed under Article G (European Committee of Social Rights, 2022, p. 160).

Article 19 complements these obligations by addressing the situation of migrant workers and their families. The Charter text itself requires Parties "to maintain or to satisfy themselves that there are maintained adequate and free services to assist such workers, particularly in obtaining accurate information" (Council of Europe, 1996, Art. 19(1)). The ECSR clarifies that such free information and assistance services "must be accessible in order to be effective" and cannot rely on online tools alone (European Committee of Social Rights, 2022, p. 161).

Social security coordination under the European Social Charter rests on Article 12(4), complemented - on the assistance side - by Article 13(4); Article 19 provides distinct equality guarantees in the labour field rather than a social-security regime (Council of Europe, 1996). Article 12(4) requires both equal treatment for nationals of other States Parties and the maintenance of acquired rights and rights in course of acquisition. To secure aggregation of insurance periods and export of benefits, the ECSR accepts that States "may choose between bilateral agreements or any other means such as unilateral, legislative or

administrative measures," the point being to avoid protection gaps for migrant workers and their dependants (European Committee of Social Rights, 2022, pp. 120–124). Residence conditions may be attached to non-contributory benefits only if reasonable; the Committee underlines that "a period of five years is considered to be too long" (European Committee of Social Rights, 2022, p. 123). National schemes may not be reserved to nationals or burden eligible foreigners - within the Charter's personal scope - with more restrictive conditions (European Committee of Social Rights, 2022, pp. 120–124, 123).

Within the European Union, much coordination for intra-EU movers is supplied by Union law (for example, Regulation 883/2004), but the Charter's duties apply beyond the EU and bind any Party that has accepted Article 12(4) (European Committee of Social Rights, 2022, pp. 120–124). By contrast, Article 19(4) concerns equal treatment in employment and working conditions, trade-union membership/benefits, and accommodation, not social security; equality in social security flows from Article 12(4), and equality in social and medical assistance from Article 13(4) (European Committee of Social Rights, 2022, pp. 162–164, 123, 131).

On assistance, Article 13(1) guarantees adequate aid to "any person," but foreigners' protection is channeled through the Charter's Appendix: as a rule it covers nationals of other States Parties who are lawfully within the territory, without prejudice to Article 13(4)'s explicit equal-treatment clause. Article 13(4) then requires that paragraphs 13(1) -(3) apply "on an equal footing" to such persons, and the Committee adds that eligibility and evidentiary rules must not be harder for foreigners to satisfy (European Committee of Social Rights, 2022, pp. 128 -131; 211 - 213). The dignity-based line of case law obliging emergency provision in narrowly defined circumstances does not displace the Appendix's general ratione personae rule (European Committee of Social Rights, 2022, pp. 128 - 129).

Article 13(1) of the European Social Charter (Revised) obliges States Parties to ensure that any person without adequate resources receives adequate assistance and, in case of sickness, the care

necessitated by their condition; these guarantees apply within the Parties' territories, while the Charter's Appendix governs the personal scope for "foreigners" (Council of Europe, 1996, art. 13(1); Appendix). The ECSR reiterated that social assistance covers benefits where individual need is the main criterion and is due to "any person" in need (European Committee of Social Rights, 2022, pp. 124 -126). Article 13(4) further requires Parties to apply paragraphs 1- 3 "on an equal footing with their own nationals to nationals of other Parties lawfully within their territories," reflecting the equal-treatment regimen for such foreigners alongside the Appendix (Council of Europe, 1996, art. 13(4); European Committee of Social Rights, 2022, p. 128).

The Committee has also clarified that, when human dignity is at stake, personal-scope limits cannot be construed to deprive irregularly present migrants of basic emergency assistance. For children in an irregular situation, the ECSR required effective access to essential health care and shelter: in FIDH v. France (No. 14/2003) it found a violation of Article 17 due to barriers impeding undocumented children's access to necessary health care (European Committee of Social Rights, 2004, paras. 27-32, 36); in DCI v. Belgium it required adequate shelter and assistance for undocumented children, finding violations of Articles 17, 7(10), and 11(1)-(3) (European Committee of Social Rights, 2012, paras. 35, 102, 122, 136). For adult migrants in irregular situation, the Committee held in CEC v. the Netherlands that "when human dignity is at stake," the Appendix's personal-scope restriction must not be read so as to deprive irregularly present migrants of their most basic rights (European Committee of Social Rights, 2014a, paras. 65–66); in FEANTSA v. the Netherlands it found violations under Articles 13 and 31, emphasising that emergency assistance extends to all individuals in a precarious situation (European Committee of Social Rights, 2014b, paras. 181–188, esp. 185). The Committee recalls a right to emergency social and medical assistance for foreigners in an irregular situation "in a limited and exceptional way" under Article 13, and confirming under Article 31 that the right to shelter applies to persons present in an

irregular manner for as long as they are within the jurisdiction (European Committee of Social Rights, 2022, p. 129; p. 200).

For nationals of other States Parties lawfully within the territory, Article 13(4) secures equal treatment in social and medical assistance vis-à-vis nationals, without discrimination (Council of Europe, 1996, art. 13(4); European Committee of Social Rights, 2022, p. 128). Read together, these standards establish a coherent framework: (i) a general guarantee for any person under Article 13(1), (ii) equal treatment for lawfully present nationals of other Parties under Article 13(4), and (iii) a dignity-based floor ensuring basic emergency assistance for irregularly present persons under Articles 13 and 31 as interpreted in the case law (European Committee of Social Rights, 2022, pp. 124 -129, 200).

Family reunion is expressly protected by Article 19(6) of the ESC (Revised), which requires States Parties to "facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory," while the Appendix defines the protected "family" at least as the spouse and unmarried minor dependent children (Council of Europe, 1996, art. 19(6); Appendix). For context, the Charter (1961; revised 1996) predates the EU's Family Reunification Directive; the Charter sets a general facilitation duty ("as far as possible"), whereas Council Directive 2003/86/EC specifies detailed conditions for family reunification by third-country nationals lawfully residing in a Member State - e.g., purpose and scope, core family members, resources/housing/integration requirements - and permits more favourable national rules (Council of the European Union, 2003, arts. 1, 3(5), 4, 7–8). Applying Article 19(6), the ECSR has set concrete limits on permissible conditions: a waiting period of up to one year may be acceptable, whereas 18 months or more is not in conformity; accommodation requirements must not be so restrictive as to prevent reunion and should allow exemptions based on individual circumstances; means tests must not be set so high as to preclude reunion and social benefits may not be excluded from resource calculations; and language/integration tests (pre- or post-entry) are contrary to Article 19(6) where they risk denying entry or deprive the right of its substance

(e.g., through prohibitive fees or failure to consider age, education, or family/work commitments) (European Committee of Social Rights, 2022, pp. 165–166). The ECSR also indicates that family members already present should not be deported merely because the worker is expelled under Article 19(8); Article 19(6) is read as conferring a personal right of residence on beneficiaries, and expulsions of family members must be assessed under Article 19(6) (European Committee of Social Rights, 2022, p. 166). Accordingly, claims that Article 19(6) requires inclusion of other dependent relatives (e.g., parents) overstate the standard: the Charter guarantees coverage at least for the spouse and unmarried minor dependent children, while broader inclusion depends on national law (Council of Europe, 1996, Appendix; European Committee of Social Rights, 2022, pp. 165 - 166).

Equal treatment is a structuring principle of the ESC, given effect both through specific equality clauses and the general non-discrimination clause in Article E. For migrant workers, the central specific guarantees are Article 19(4) (equal treatment in remuneration and other employment and working conditions, in trade-union membership/benefits, and in access to accommodation), Article 12(4) (equal treatment in social security for nationals of other States Parties), and Article 13(4) (equal treatment in social and medical assistance for nationals of other Parties lawfully within the territory) (European Committee of Social Rights, 2022, pp. 162–164, 123, 131). Article E - applied in conjunction with a substantive right - covers both direct and indirect discrimination and safeguards the effective enjoyment of Charter rights (European Committee of Social Rights, 2022, p. 206). These guarantees operate within the Charter's Appendix on personal scope, and interferences are reviewed under Article G (European Committee of Social Rights, 2022, pp. 211–213, 208–209).

In practice, Article 19(4) requires States to eliminate legal and de facto discrimination and, where necessary, to pursue a "positive and continuous course of action" to secure equality in fact; the Committee confirms that posted workers also fall under Article 19(4), with any restriction justified, if at all, under Article G (European Committee of

Social Rights, 2022, p. 163). Under Article 19(4)(c), equality in accommodation must be effective in practice - no legal or de facto nationality-based barriers, provision for independent appeal, and monitoring to detect and remedy discrimination (European Committee of Social Rights, 2022, p. 164). Further equality-linked guarantees include Article 19(5) (no heavier employment-related taxes/dues for migrants than for nationals), Article 19(7) (equal treatment in legal proceedings, including access to courts and legal aid), and Article 19(9) (freedom to transfer earnings and savings without excessive restrictions) (European Committee of Social Rights, 2022, pp. 164, 166, 168).

Equal treatment also structures the social-protection titles. Under Article 12(4), States must remove discrimination, direct and indirect, from social security law affecting nationals of other States Parties; a residence period may be required for non-contributory benefits, but it must be reasonable ("five years is considered to be too long") (European Committee of Social Rights, 2022, p. 123). Under Article 13(4), paragraphs 13(1) - (3) apply "on an equal footing" to nationals of other Parties lawfully within the territory; rules of eligibility and proof must not be harder for foreigners to meet (European Committee of Social Rights, 2022, p. 131).

This ESC framework resonates with parallel EU standards. Within the EU legal order, EU citizens benefit from Treaty-based non-discrimination, whereas third-country nationals' equality rights derive from specific directives (notably Directive 2011/98/EU on the single permit—common set of rights for legally resident third-country workers and Directive 2003/109/EC on long-term residents) (European Union, 2011; EU, 2003). In this landscape, the ESC functions as an additional regional layer: for nationals of other Charter States who are lawfully resident or working, equal-treatment obligations attach to the extent the State has accepted the relevant ESC provisions (in particular, Articles 12(4), 13(4) and 19(4)) and are applied subject to the Appendix and Article G (European Committee of Social Rights, 2022, pp. 123, 131, 162–164, 208–209, 211–213).

3. Positive obligations

A recurring theme in the ESC's provisions and their interpretation is that they impose positive obligations on states. Unlike some civil and political rights instruments that mainly require non-interference, the nature of social rights protection necessitates proactive steps by governments. In the context of migrant workers, positive obligations mean that States must take deliberate action to make the rights guaranteed by the Charter effective in reality.

This goes beyond merely refraining from discrimination or abuse; it involves implementing policies, providing services, and sometimes allocating resources to fulfil these rights. For instance, Under Article 18(2), States must "simplify existing formalities" and "reduce or abolish chancery dues and other charges" for foreign workers or their employers; such charges may not be set at a level "likely to prevent or discourage" engagement in work, and States should make "concrete efforts to progressively reduce" them (European Committee of Social Rights, 2022, pp. 158–159). Under Article 18(3), States are required to "liberalise, individually or collectively," and more specifically to "liberalise periodically," the regulations governing the employment of foreign workers; conditions for labour-market access "must not be excessively restrictive," with initial restrictions to be "gradually lifted," subject to the proportionality control of Article G (European Committee of Social Rights, 2022, pp. 159–160, 208–209).

A similar logic informs Article 19(1), which obliges States to "maintain or … satisfy themselves that there are maintained adequate and free services" to assist migrant workers, "particularly in obtaining accurate information." Crucially, the ECSR insists that such services "must be accessible in order to be effective," so reliance on remote or online tools alone is insufficient (Council of Europe, 1996, art. 19(1); European Committee of Social Rights, 2022, p. 161).

In the domain of social security, Article 12(4) translates positive obligation into coordination outcomes. The Committee requires equal treatment for nationals of other States Parties and maintenance of

acquired rights and rights in the course of acquisition; to secure export and aggregation—and thereby avoid protection gaps—States "may choose between bilateral agreements or any other means such as unilateral, legislative or administrative measures" (European Committee of Social Rights, 2022, pp. 123–124).

When the focus shifts to family reunification, Article 19(6) stipulates that States must "facilitate as far as possible" reunion for a foreign worker permitted to establish himself. The ECSR has specified operational parameters: a waiting period of up to one year may be acceptable, whereas eighteen months or more is not in conformity; means conditions must not be "so restrictive as to prevent family reunion," and "social benefits shall not be excluded" from the resource calculation; language/integration tests (including associated fees) are "contrary" to Article 19(6) where they effectively deny entry or stay, impose prohibitive charges, or disregard individual circumstances (Council of Europe, 1996, art. 19(6); European Committee of Social Rights, 2022, pp. 165–166).

Finally, equality-related provisions generate programmatic duties of their own. Under Article 19(4), States must eliminate legal and de facto discrimination and, where necessary, pursue a "positive and continuous course of action" to secure equality in fact; posted workers fall within Article 19(4), and any restriction on their equal treatment "must be objectively justified … having regard to the principles of Article G" (European Committee of Social Rights, 2022, p. 163). Under Article 19(4)(c), equal treatment in accommodation must be effective in practice, which requires the absence of legal or de facto barriers, monitoring (e.g., data collection), and a right of appeal before an independent body—a safeguard the Committee deems "important for all aspects" of Article 19(4) (ECSR, 2022, p. 164). And under Article 19(7), treatment "not less favourable" than for nationals must be secured in legal proceedings, including access "to courts, to lawyers and legal aid" on the same terms; where the interests of justice so require, migrants should receive free legal assistance and, if needed, an interpreter and translations (European Committee of Social Rights, 2022, pp. 166–167).

In summary, compliance with the ESC in the realm of migrant workers is not a passive exercise. States must proactively shape their laws and policies to realise the Charter rights. This perspective aligns with the broader conception of socio-economic rights in international law (as also reflected in the UN ICESCR's obligation "to take steps" towards full realization).

4. Limited Integration

Although every EU Member State is party to either the 1961 ESC or the 1996 Revised ESC, the Charter has a modest footprint within the EU legal order. By contrast, the European Convention on Human Rights (ECHR) enjoys recognised interpretive status through Article 6(3) TEU (ECHR rights as general principles of EU law) and Article 52(3) Charter of Fundamental Rights (corresponding Charter rights share the ECHR's meaning and scope), as reflected in the Explanations to the Charter of Fundamental Rights. Because the Union is not a party to the ESC, the case law of the ECSR does not bind EU institutions as such; Member States remain bound in their capacity as Contracting Parties, which can generate tension when national authorities implement EU measures (Consolidated version of the Treaty on European Union, 2016, art. 6(3); Charter of Fundamental Rights of the European Union, 2016, art. 52(3); Explanations relating to the Charter of Fundamental Rights, 2007).

At the level of primary law, the linkage is deliberately thin. Article 151 TFEU offers a declaratory reference to fundamental social rights "such as those set out in the ESC (1961) and the 1989 Community Charter of the Fundamental Social Rights of Workers," falling short of an incorporation clause. The CFR's Explanations identify the ESC as a source for several social-rights provisions (for example, fair and just working conditions; social security and social assistance), yet neither the ESC nor ECSR interpretations are treated by the CJEU as binding authorities. Institutional and academic assessments have long warned that this loose coupling risks gaps and conflict between EU measures and ESC obligations (Consolidated version of the Treaty on the Functioning

of the European Union, 2016, art. 151; Explanations relating to the Charter of Fundamental Rights, 2007; De Schutter, 2016, pp. 24–26).

In administrative practice, Commission impact assessments and legislative drafting systematically benchmark proposals against the CFR but do not consistently test them against the ESC/ECSR acquis, a pattern documented in De Schutter's study for the European Parliament (2016, pp. 22–26, 40–47). The European Pillar of Social Rights echoes many ESC guarantees but remains programmatic unless implemented through secondary legislation and administration; De Schutter's Council of Europe report recommends explicit cross-referencing to the ESC and to ECSR interpretations in EU monitoring and policy design (De Schutter, 2019, pp. 1–3, 46–48). Recent legislative follow-up, most notably Directive (EU) 2022/2041 on adequate minimum wages and Directive (EU) 2023/970 on pay transparency - has advanced social protection but still does not systematise reliance on ECSR case law (De Schutter, 2016, pp. 41–47; De Schutter, 2019, pp. 3–6, 46–48).

Coordination failures have produced concrete frictions. After the CJEU's judgment in Laval and Sweden's implementing reforms ("Lex Laval"), the ECSR in Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden found violations of Articles 6(2), 6(4), and 19(4)(a)-(b). During the Eurozone crisis, conditionality measures triggered a series of collective complaints; in Greek General Confederation of Labour (GSEE) v. Greece the Committee held that the 32% sub-minimum wage for under-25s breached Article 4(1) on fair remuneration. These episodes show how, absent systematic bridging techniques, EU-driven measures and ESC obligations may pull in different directions.

Improved coherence does not presuppose EU accession to the ESC. Two method-level adjustments are readily available: systematic cross-referencing to relevant ESC provisions and to ECSR interpretations in EU-level policy instruments, and transposition choices by Member States that satisfy both EU secondary law and accepted ESC obligations, especially in labour and migration fields where personal-scope limits and non-discrimination standards can collide. The ECSR's emergency-

assistance line Conference of European Churches (CEC) v. the Netherlands and FEANTSA v. the Netherlands (Complaint No. 86/2012) shows how exclusionary practices concerning shelter, food and urgent care may violate Article 13 read with Article E, while not displacing the Appendix's general ratione personae rule; this underlines the value of early compatibility checks when implementing EU measures (De Schutter, 2019, pp. 3–6, 46–48).

EU law often supports ESC aims, anti-discrimination directives, free-movement guarantees for Union citizens, and the recent social-policy directives just noted all contribute to higher protection. The difficulty is one of coverage and method: EU instruments are selective and do not map onto the ESC's catalogue or the ECSR's evolving interpretations. Unless ESC benchmarks and ECSR case law are expressly integrated into EU law-making and national implementation, selective protection and avoidable conflicts will persist (De Schutter, 2016, pp. 24–26, 40–47; De Schutter, 2019, pp. 1–4, 46–48).

Conclusions

The European Social Charter offers a dense, justiciable framework for protecting migrant workers' social rights across employment, social security, social assistance, equal treatment, and family life. ECSR case law has usefully adapted Charter provisions, most notably Articles 19, 12, and 13, to contemporary mobility patterns, clarifying States' positive obligations to make rights effective in practice and to guarantee emergency assistance and basic subsistence to persons in an irregular situation where human dignity is at stake. In the EU legal order, parallel developments can be leveraged to advance Charter-consistent outcomes, even if the ESC itself has only a limited formal footprint in EU primary law. To reduce norm collisions and implementation gaps, EU policymakers should systematically reference ESC provisions and ECSR case law in legislation and policy, and Member States must implement EU directives in ways that uphold their ESC obligations. Closer alignment between the EU's legal order and the ESC - potentially

through the EU's accession to the Charter - would ensure more consistent and comprehensive protection of migrant workers' rights across Europe.

References

Charter of Fundamental Rights of the European Union. (2016). *Official Journal of the European Union*, C 202, pp. 389–405. https://eur-lex.europa.eu/eli/treaty/char_2016/oj

Conference of European Churches v. The Netherlands, Complaint No. 90/2013, Decision on the merits (10 November 2014). *European Committee of Social Rights*. HUDOC-ESC. https://hudoc.esc.coe.int/eng?i=cc-90-2013-dmerits-en

Council of Europe. (1996). European Social Charter (revised) (ETS No. 163) [Treaty text]. https://rm.coe.int/168007cf93

De Schutter, O. (2016). The European Social Charter in the context of implementation of the EU Charter of Fundamental Rights (Study for the European Parliament, Policy Department C, IPOL_STU(2016)536488). European Parliament. https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2016)536488

De Schutter, O. (2018). The European Pillar of Social Rights and the role of the European Social Charter in the EU legal order. Council of Europe. https://rm.coe.int/study-on-the-european-pillar-of-social-rights-and-the-role-of-the-esc-/1680903132

Defence for Children International (DCI) v. Belgium, Complaint No. 69/2011, Decision on the merits (23 October 2012). European Committee of Social Rights. HUDOC-ESC. https://hudoc.esc.coe.int/eng?i=cc-69-2011-dmerits-en

Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals. Official Journal of the European Union, L 168, 24–32. https://eur-lex.europa.eu/eli/dir/2009/52/oj

Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit and a common set of rights for third-country workers. Official Journal of the European Union, L 343, 1–9. https://eur-lex.europa.eu/eli/dir/2011/98/oj

Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers. Official Journal of the European Union, L 94, 375–390. https://eur-lex.europa.eu/eli/dir/2014/36/oj

Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer. Official Journal of the European Union, L 157, 1–22. https://eur-lex.europa.eu/eli/dir/2014/66/oj

Directive (EU) 2021/1883 of the European Parliament and of the Council of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (EU Blue Card). Official Journal of the European Union, L 382, 1–38. https://eur-lex.europa.eu/eli/dir/2021/1883/oj

Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union. Official Journal of the European Union, L 275, 33–47. https://eur-lex.europa.eu/eli/dir/2022/2041/oj

Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 to strengthen the application of the principle of equal pay through pay transparency and enforcement mechanisms. Official Journal of the European Union, L 132, 21–44. https://eur-lex.europa.eu/eli/dir/2023/970/oj

Directive (EU) 2024/1233 of the European Parliament and of the Council of 24 April 2024 on a single application procedure for a single permit (recast). Official Journal of the European Union, L 123, 1–33. https://eur-lex.europa.eu/eli/dir/2024/1233/oj

European Committee of Social Rights. (2022). Digest of the case law of the European Committee of Social Rights. Council of Europe. https://rm.coe.int/digest-ecsr-prems-106522-web-en/1680a95dbd

Fox-Ruhs, C., & Ruhs, M. (2022). The fundamental rights of irregular migrants in the European Union (Study for the European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, PE 702.670). European Parliament. https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2022)702670

International Federation for Human Rights (FIDH) v. France, Complaint No. 14/2003, Decision on the merits (8 September 2004). European Committee of Social Rights. HUDOC-ESC. https://hudoc.esc.coe.int/eng?i=cc-14-2003-dmerits-en

Médecins du Monde v. France, Complaint No. 67/2011, Decision on the merits (11 September 2012). European Committee of Social Rights. HUDOC-ESC. https://hudoc.esc.coe.int/eng?i=cc-67-2011-dmerits-en

O'Cinneide, C. (2014). Migrant rights under the European Social Charter. In O. De Schutter (Ed.), The European Social Charter: A social constitution for Europe (pp. 237–270). Oxford University Press. https://academic.oup.com/book/8559/chapter/154471106

Proclamation of the European Pillar of Social Rights. (2017, December 13). Official Journal of the European Union, C 428, 10–15. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2017:428:TOC

Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems. Official Journal of the European Union, L 166, 1–123. https://eur-lex.europa.eu/eli/reg/2004/883/oj

Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004. Official Journal of the European Union, L 284, 1–42. https://eur-lex.europa.eu/eli/reg/2009/987/oj

Verschueren, H. (2016). Employment and social security rights of third-country labour migrants under EU law: An incomplete patchwork of legal protection. European Journal of Migration and Law, 18(4), 373–408. https://doi.org/10.1163/15718166-12342107

Legal and Administrative Studies, www.jlas.upit.ro
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement – Year 2025, pp. 87-108

STATUTORY VERSUS CONTRACTUAL RIGHT OF WITHDRAWAL IN A CONSTRUCTION CONTRACT

Tomasz SZANCIŁO
ORCID [ID]: https://orcid.org/0000-0001-6015-6769
E-mail: tszancilo@ewspa.edu.pl
Afiliation: European University of Law and Administration in Warsaw, Poland

Abstract: *The right of withdrawal – as a unilateral right of a party to a contract – does not require the consent of the other party to have legal effect. As it is an exception to one of the most important principles of contract law, i.e. pacta sunt servanda, it must be interpreted strictly and therefore certain conditions from the law or the contract must be fulfilled. Also in the case of a construction contract, the investor and the contractor may exercise the statutory right of withdrawal as well as the contractual right of withdrawal, provided that the latter is provided for. The purpose of this article is to answer the question of how the contractual right of withdrawal relates to the statutory right of withdrawal. It is controversial whether, during the period in which a party has a contractual right of withdrawal, he may exercise his statutory right. A right of withdrawal may be introduced into a contract by way of freedom of contract and it cannot be assumed that this contractual provision excludes the right holder from invoking a right under the Act. It is also very important whether, since the specific provisions governing a construction contract provide for a right of withdrawal, the parties to that contract may withdraw from the contract under the general rules.*

Keywords: *construction contract; investor; contractor; contractual right of withdrawal; statutory right of withdrawal.*

Introduction

The right of withdrawal is one of the forms of exit from the contractual relationship (in addition to consensual termination by both parties and termination by one party). It is a declaration of intent made to

terminate the contractual relationship. It is a unilateral declaration, so the consent of the other party to the contract is not required in order to produce the indicated effect, if the prerequisites authorising the submission of the declaration occur. Irrespective of the right of withdrawal provided for in the Civil Code, as a rule, it may be reserved in all types of contracts, with the exception of those in which it is not permissible to include a condition, e.g. in a contract transferring ownership of real estate, i.e. a contract with material effect[1]. On the other hand, there is no obstacle to the right of withdrawal being included in a contract obliging to transfer ownership of the property, i.e. not having material effect. Obviously, such a reservation may be included in a construction works contract in which the contractor undertakes to deliver the object provided for in the contract, constructed in accordance with the design and principles of technical knowledge, and the investor undertakes to perform the activities required by the relevant regulations connected with the preparation of the works, in particular to hand over the site and deliver the design, and to accept the object and pay the agreed remuneration (Article 647 of the Civil Code). This also applies to subcontracts, the object of which may be a part of a construction object, including specific construction works.

Since a distinction is made between a statutory and a contractual right of withdrawal, it is crucial to determine the relationship between these rights, i.e. whether the party with this right under the contract can exercise the statutory right of withdrawal. This research question should be answered as follows: the contractual right of withdrawal does not exclude the statutory right. Similarly, the second research question must be answered positively, namely whether, since the specific provisions governing a construction contract provide for a right of withdrawal, the parties to that contract may withdraw from the contract on general principles. An analysis of the legal provisions leads to such a conclusion, while it cannot be overlooked that, in practice, the contractual right of

[1] See the judgment of the Supreme Court of the Republic of Poland of 8 December 2004, I CK 191/04.

withdrawal is exercised by the entitled party and, if the statutory right is exercised, it is usually on the basis of special provisions. This is due to the construction of the right, as it is usual for a contract to provide for a more favourable (for the right holder) solution than the one under the law, just as the right of withdrawal under the special provisions is more favourable for the right holder than the right under the general provisions. However, depriving the right holder a priori of the possibility to choose has no justification.

In view of the research problem thus outlined, the controversial issue of the divisibility of the non-monetary performance under a construction contract, among other things, was omitted, as it had no bearing on the application of the right of withdrawal in this regard.

Statutory right of withdrawal under general principles

The general rules for withdrawal from a contract are primarily provided for in Article 491 of the Civil Code. According to this article, if one of the parties is in default in the performance of an obligation under a reciprocal contract, the other party may set an appropriate additional period of time for performance with the threat that, if the set period expires ineffectively, it will be entitled to withdraw from the contract (§ 1, first sentence). If the performance of both parties is divisible and one party is in default only as regards part of the performance, the other party's right of withdrawal shall be limited, at its choice, either to that part or to the rest of the unfulfilled performance. That party may also rescind the contract in its entirety if the partial performance would not have been meaningful to it due to the nature of the obligation or due to the intended purpose of the contract known to the party in default (§ 2).
From the above, the following prerequisites for the exercise of the right holder (creditor1) (Klein, 1964, p. 145) of this right:

1/ mutuality of the contract;

[1] This refers to a creditor only in the context of unfulfilled performance, as in the case of reciprocal contracts, both parties are creditors.

2/ default of one of the parties;

3/ the setting of an appropriate additional period of time for the performance of the obligation with an appropriate threat;

4/ submission of a declaration of withdrawal from the contract (Stojek, in: Habdas, & Fras (ed.), 2018, p. 966)[1].

If either of these conditions does not occur, withdrawal from the contract is ineffective.

A contract is reciprocal when both parties undertake in such a way that the performance of one of them is to be equivalent to the performance of the other (Article 487 § 2 of the Civil Code). Such a contract is, among others, a construction contract. Contracts are usually reciprocal because – in the most general terms – such contracts consist in each party being obliged to provide a benefit (being a debtor as to that benefit) and entitled to receive the other party's benefit (as to which it is a creditor), and the benefits are exchanged (Machnikowski, in: Machnikowski (ed.), 2024, art. 487, thesis No. 1). It is about the legal coupling of benefits in such a way that the obligation of one party to perform is the legal basis for the obligation of the other party[2]. Whereby the criterion for considering the performance of one party as equivalent to the performance of the other party is, in this view, the subjective perception by the party concerned of the performance as equivalent to that of the other party (Gutowski, in: Gutowski (ed.), 2022, art. 487, side No. 2). In other words, in order for a contract to be deemed mutual, it is not necessary that the benefits of the parties are of the same economic value, determined according to objective criteria, but that the parties define them as equivalent (Radwański, & Olejniczak, 2018, p. 126), but that the content of the contract, which is objectively unfavourable to one of the parties, will merit a negative moral assessment and consequently lead to the contract being regarded as contrary to the principles of social

[1] Unless otherwise provided by the parties in the contract, this may be done in any form, including by implication.

[2] See e.g. the judgment of the Supreme Court of the Republic of Poland of 25 August 2016, V CSK 705/15.

co-existence if it has been shaped under the pressure of the de facto superiority of the other party, in which case the contract does not reflect a fully free and prudent decision[1].

It should be noted that the cited provision provides for the right of withdrawal only in the case of one 'mode' of non-performance of an obligation, namely default, i.e. failure to perform an obligation on time for which the debtor is liable (Article 476 of the Civil Code), and thus does not apply, for example, to inadequate quality of the works. In the case of a construction contract, in which contractual liability for damages is based on the principle of fault, it is therefore a matter of untimely performance through the fault of the debtor. The creditor's right to withdraw from the reciprocal contract is therefore dependent on the existence of a delay on the part of the debtor in fulfilling an essential contractual obligation, i.e. one that is necessary to realise the purpose of the contract and known to the debtor. A non-performance of a material contractual duty occurs when the non-performance of a contractual duty, due to the default of the counterparty, deprives the other party of what he or she could have expected under the contract, unless the other party, reasonably speaking, could not have foreseen such a result. A material breach of a contractual duty is determined in particular by its consequences. It is not only the non-performance of a performance which, according to the wording of the obligation, is due to the creditor, but it can also be non-performance of obligations even only functionally related to the debt. In particular, it is not only a duty of an actionable nature (performance), but also other breaches, e.g. the failure of a party to a reciprocal contract to perform other essential contractual duties, even if it is only his duty to cooperate in the performance of the obligation[2]. However, it is a legitimate view that, since Article 491 of the Civil Code is about delay in performing an obligation, it is about

[1] The judgment of the Supreme Court of the Republic of Poland of 15 September 2016, I CSK 611/15.

[2] The judgment of the Supreme Court of the Republic of Poland of 24 June 2014, I CSK 392/13.

counterperformance and not, for example, incidental performance (Zagrobelny, in: Gniewek, & Machnikowski (ed.), 2021, p. 1142; Kondek, in: Osajda, & Borysiak (ed.), 2024, art. 491, thesis No. 2.). In the case of a construction contract, the obligations referred to in this provision and to be performed within the time limit are: on the part of the contractor – the handing over of the object, on the part of the investor – the handing over of the construction site, the delivery of the design (unless this obligation has been assumed by the contractor), the acceptance of the object and the payment of the remuneration, possibly other activities related to the preparation of the works.

The last issue concerns the creditor's setting of an appropriate additional period of time for performance to the debtor with the threat that if the set period expires without success, the creditor will be entitled to withdraw from the contract. This setting of a deadline can only take place when a delay has already occurred, and not in the case of a so-called unavoidable delay, i.e. a situation where the deadline for performance of the obligation has not yet arrived, but it is indisputable from the circumstances that the debtor will not be able to perform the obligation on time (Klein, 1964, s.73). As the time limit is to be 'additional' in order to perform the obligation, it is clear that it cannot run before the contractual time limit for the performance of that obligation has expired. Furthermore, the additional time limit must be set before the creditor makes his declaration of rescission. Making such declarations separately ensures that the right holder has the necessary time for reflection, which should precede the decision to terminate the contractual relationship in principle irreversibly, and to express it firmly vis-à-vis the other party, who should be warned of the possibility of the counterparty exercising this right[1]. This is therefore a reasonable regulation that favours the performance of contracts. It is therefore not possible to combine these declarations and thus to make a so-called

[1] See e.g.: the judgment of the Supreme Court of the Republic of Poland of 5 April 2013, II CSK 62/13; the judgment of the Appeal Court in Warsaw of 4 December 2015, I ACa 1079/15.

conditional declaration of rescission, i.e. to rescind the contract on the condition that the debtor fails to perform the obligation within an additional period of time. It is only when this additional period has expired that the creditor can make a (separate) declaration of withdrawal. In order to protect the debtor from being given an unrealistic deadline within which, even by exercising due diligence, he would not be able to fulfil his obligation, the legislator stipulates that this deadline should be 'appropriate'. In determining it, the principles of good faith and fair dealing should be followed, taking into account the interests of both parties. Above all, the type and content of the debtor's obligation and the degree of preparation for its fulfilment should be taken into account. It should be such a time limit, which objectively gives the possibility to fulfil the obligation, will be adapted to the specific circumstances of the given obligatory relationship. The time limit may not be too short[1]. In other words, an 'adequate' term is one which realistically, in an objective sense, taking into account the circumstances surrounding the performance of the contract in question, enables the debtor to fulfil the performance (Doliwa, in: Załucki (ed.), 2024, p. 1105), obviously already after the time limit set in the contract. The appropriateness of an additional time limit for the performance of an obligation under a reciprocal agreement shall be assessed by the court in the light of the facts. If the time limit set by the creditor is too short, the debtor may perform after the time limit, as long as he does so within an appropriate period of time[2]. It is problematic whether, if the time limit was inadequate, but the debtor also failed to perform after the expiry of the relevant time limit, the creditor may withdraw from the contract without setting a time limit once again (the need to re-set a deadline that no longer needs to be 'appropriate' was commented on by, among others, Kondek, in: Osajda, & Borysiak (ed.), art. 491, thesis No. 2; Gutowski, in: Gutowski (ed.), art. 491, side No. 9). It is reasonable to assume that if

[1] See the judgment of the Appeal Court in Katowice of 5 January 2000, I ACa 817/99.
[2] See also the judgment of the Supreme Court of the Republic of Poland of 10 May 2007, III SK 18/06.

a reasonable period of time has elapsed, the creditor may make a declaration of rescission. There is no provision obliging him to make a further call, what is important is that the appropriate additional period has elapsed. Obviously, the submission of a declaration of withdrawal before the expiry of that period shall have no legal effect.

When setting an additional period, the creditor must at the same time threaten the debtor that, if the additional period expires unsuccessfully, he will be entitled to rescind the contract. This is because the debtor must be informed that the summons is linked to a potential rescission of the contract. This is because the creditor can 'only' summon the debtor to perform and claim damages. Withdrawal is his prerogative and not his obligation, so that he does not have to make a declaration to this effect even after the expiry of the additional time limit set for performance. If the debtor performs within this additional period, in accordance with the contract and the creditor's legitimate interest, the creditor's right to withdraw from the contract expires. If the debtor performs only partially, the other party may withdraw from the contract for the remainder of the performance without granting a further additional period of time (Dąbrowa, in: Czachórski, & Radwański (ed.), 1981, p. 821), unless the situation described in Article 491 § 2 of the Civil Code arises – then the creditor may withdraw from the contract in its entirety. Since the additional time limit applies to the entire performance, the fulfilment of a part of the performance does not release the debtor from his obligation.

A modification of the above principles is provided for in Article 492^1 of the Civil Code, according to which, if the party obliged to provide performance declares that it will not provide such performance, the other party may withdraw from the agreement without setting an additional deadline, also before the specified deadline for performance has passed. It is therefore concerned with situations in which – due to the position of the debtor himself – it would be unreasonable for the creditor to continue with the obligation relationship. The other party may either exercise this right or proceed in accordance with Article 491 of the Civil Code, i.e. set an additional time limit, but without the risk that, if it is

unsuccessful, it may withdraw from the contract and then withdraw on the basis of Article 492[1] of the Civil Code (Popiołek, in: Pietrzykowski (ed.), 2021, art. 4921, side No. 1). This provision provides a normative basis for the creditor to exit from an obligation under a reciprocal agreement with the debtor insofar as it is clear from an unambiguous and unmistakable statement of knowledge by the other party that it will not perform the performance charged to it as a whole[1]. If the debtor refuses to fulfil part of the divisible performance, Article 491 § 2 of the Civil Code applies by analogy[2].

The debtor's statement of intention not to perform need not be made directly to the creditor, it is sufficient that it reaches him/her (Lemkowski, 2015, pp. 13-14). The statement may be made in any form; what is important is that it is clear and firm. The reasons for making such a declaration are irrelevant.

A different situation is regulated in Article 493 § 1 and 2 of the Civil Code. If one of the mutual performances has become impossible as a result of circumstances for which the obliged party is responsible, the other party may, at its choice, either demand redress for the damage resulting from the non-performance of the obligation or withdraw from the agreement. This shall also apply to the partial impossibility of performance by one of the parties, if the partial performance would not be meaningful for the other party due to the characteristics of the obligation or due to the intended purpose of the contract known to the party whose performance has become partially impossible.

Therefore, what is at issue here is the subsequent (occurring after the contractual relationship has been established) impossibility of one of the mutual performances for which one of the parties is responsible, as a result of which the other party has the possibility of withdrawing from the contract. Only a state of permanent impracticability makes it possible to consider that the institution of impossibility of performance regulated by the above provision is applicable. In doing so, the impossibility of

[1] The judgment of the Appeal Court in Kraków of 5 December 2022, I AGa 146/21.
[2] The judgment of the Appeal Court in Poznań of 28 April 2022, I AGa 321/21.

performance must be of a definite nature, so that if future performance is possible, the impossibility of performance does not exist[1]. The impossibility of performance is objective in nature, meaning that such performance cannot be fulfilled not only by the debtor, but by any other person (a truly unenforceable performance) (Bujalski, & Zoll, in: Olejniczak (ed.), 2023, p. 1254)[2]. The creditor then has the choice between demanding damages or rescinding the contract, whereby he does not have to wait until the performance deadline arrives, but may also rescind the contract even if the performance that has become impossible was not yet due (Tracz, 2007, p. 249). Withdrawal from the contract does not exclude the possibility of claiming damages. However, it is clear that in the described situation the creditor cannot demand performance.

Statutory right of withdrawal based on special provisions

With regard to certain contracts, the Polish legislator has provided for special provisions regulating the right of withdrawal. One of them is a works contract, the provisions regulating which, inter alia, with regard to the consequences of a delay by the contractor with respect to commencement of works or completion of the object or performance of the works by the contractor in a defective manner or contrary to the contract, as well as with regard to the investor's right to withdraw from the contract before completion of the object, apply accordingly to a construction works contract (Article 656 § 1 of the Civil Code)[3]. In this connection, it is important to point out first of all two articles concerning the contract of work applicable to the construction contract:

1/ Article 635 of the Civil Code – if the contractor delays the commencement or completion of the work to such an extent that it is

[1] See the judgment of the Appeal Court in Białystok of 27 February 2014, I ACa 737/13.
[2] See the judgment of the Appeal Court in Warsaw of 16 January 2014, VI ACa 822/13.
[3] See also resolution of a panel of seven judges of the Supreme Court Supreme Court of the Republic of Poland of 11 January 2002, III CZP 63/01, „Orzecznictwo Sądu Najwyższego Izby Cywilnej" (OSNC) 2002, No. 9, item 106.

unlikely that he will be able to complete it in the agreed time, the investor may, without setting an additional deadline, withdraw from the contract even before the expiry of the deadline for completion of the work;

2/ Article 636 § 1 and 2 of the Civil Code – if the contractor performs the object in a defective manner or in a manner contrary to the agreement, the investor may call upon the contractor to change the manner of performance and set an appropriate time limit for this purpose, and if the set time limit expires ineffectively, the investor may withdraw from the agreement or entrust the rectification or further performance of the object to another person at the contractor's expense and risk; if the investor has supplied the material itself, the investor may, in the event of withdrawal from the agreement or entrusting the performance of the object to another person, demand that the material be returned and the commenced object be handed over.

As far as Article 635 of the Civil Code is concerned, it is *lex specialis* in relation to Article 491 of the Civil Code. It is evident that withdrawal from the contract by the investor on the basis of Article 635 of the Civil Code is possible without setting an additional deadline for the contractor, if it is objectively unlikely that the contractor will be able to complete the object (works) within the agreed deadline. In such a case, the ordering party may withdraw from the contract without setting an additional deadline, even if the deadline for the completion of the work has not yet expired, although it is permissible to withdraw from the contract also after the expiry of the deadline for the completion of the object[1]. The right to withdraw immediately from the contract may also exist in the event of failure to complete individual stages of the works on time[2]. Significantly, unlike the previously described situations in which

[1] See e.g. the judgments of the Supreme Court of the Republic of Poland: of 12 January 2012, IV CSK 182/11, OSNC 2012, No. 7-8, item 90; of 21 March 2013, III CSK 216/12; differently the judgment of the Supreme Court of the Republic of Poland of 21 January 2004, IV CK 356/02.

[2] See the judgment of the Supreme Court of the Republic of Poland of 15 November 2016, III CSK 397/15.

the investor may withdraw from the contract under the Act, the right to withdraw from the contract under Article 635 of the Civil Code does not depend on the fault of the contractor, so it may be both delay and delay for which the contractor is not responsible. On the other hand, withdrawal cannot take place if the delay was caused by the investor, who, for example, does not fulfil his duty to cooperate with the contractor[1].

Article 636 of the Civil Code, on the other hand, only applies during the execution of the object[2], because if the defects become apparent after its acceptance, the investor is entitled to claims under the ex contractu regime, in particular under the warranty for defects. Unlike the previous article, which deals with the time limit for performance, Article 636 of the Civil Code deals with the situation when irregularities arise as to the manner of performance of the object, i.e. defects or inconsistencies with the contract. The investor's rights are ordered chronologically, as he may first call upon the contractor to change – within a reasonable time – the manner of performance to the correct one, and upon the ineffective lapse of this time limit, he may choose between withdrawing from the contract or entrusting the rectification or further performance of the object to another person.

Characteristically, as long as the object has not been completed, the investor may withdraw from the contract at any time by paying the agreed remuneration, whereby the investor may deduct what the contractor has saved due to the non-performance of the object (Article 644 of the Civil Code). The necessity to pay the remuneration in such a situation is an expression of respect for the protection of the contractor's interest. Ultimately, the view emerged that withdrawal from the contract on the basis of this provision has effect from the moment it is made, and

---

[1] See the judgment of the Supreme Court of the Republic of Poland of 21 September 2006, I CSK 129/06.

[2] See e.g. the judgments of the Supreme Court of the Republic of Poland: of 4 April 1997, II CKN 65/97; of 3 November 2000, IV CKN 152/00, OSNC 2001, No. 4, item 63; of 25 June 2014, IV CSK 610/13.

simultaneous payment of remuneration is not a condition for the effectiveness of withdrawal[1]. This means that non-payment results in a claim on this account on the part of the contractor.

On the other hand, the contractor may withdraw from the construction works agreement - after setting an appropriate deadline for the investor with a threat that upon ineffective lapse of the deadline, the contractor will be entitled to withdraw from the agreement – if the cooperation of the investor is required for the performance of the object, and such cooperation is lacking (Article 640 of the Civil Code). In particular, this refers to making the construction site or the so-called frontage of works available, but also, for example, to making arrangements necessary for the continuation of the works, providing the necessary permits to conduct the works, etc. Irrelevant for the application of this provision to a construction contract is the 'difficult market for contractors and the necessity to search for investments to be carried out' (Gutowski, 2005, p. 70). This contract requires the cooperation of the investor in the vast majority of cases.

Contractual right of withdrawal

Pursuant to the first sentence of Article 395 § 1 of the Civil Code, it may be stipulated that one or both parties shall have the right to withdraw from the contract within a specified period of time. It is also permissible to reserve the right to partial rescission of the contract in favour of a party[2]. This contractual reservation is not complicated, as it requires the identification of two elements in particular: the party(ies) to whom the right of withdrawal is granted and the time limit within which the right may be exercised. In the case of a construction contract, the right of withdrawal may be reserved in favour of the contracting authority and/or

[1] See the judgments of the Supreme Court of the Republic of Poland: of 26 January 2001, II CKN 365/00, OSNC 2001, No. 10, item 154; of 22 May 2003, II CK 367/02.
[2] See the judgment of the Supreme Court of the Republic of Poland 16 November 2005, V CK 350/05, „Biuletyn SN" 2006, No. 3, item 11.

the contractor or the contractor and the subcontractor (in the case of a subcontract). It is, however, practically uniformly accepted that the aforementioned provision is peremptory in nature (*ius cogens*) insofar as it provides that the contractual provision granting the party(ies) the right to withdraw from the contract must set a deadline within which such right may be exercised. This means that if no such time limit has been specified, the provision concerning the right of withdrawal is invalid (Article 58 § 1 and 3 of the Civil Code) (Drapała, in: Osajda (ed.), 2019, p. 1248; Machnikowski, in: Gniewek, & Machnikowski (ed.), 2021, p. 861; an isolated view was expressed by Warciński, 2005, p. 36 et seq., according to which the contractual right of withdrawal may be construed as a right of unlimited duration)[1]. This is important because the contractual right of withdrawal undermines the durability of the contract in which it is incorporated and therefore constitutes a limiting element of the *pacta sunt servanda* principle[2]. The invalidity of the provision obviously results in the impossibility to invoke the contractual right of withdrawal.

The law does not indicate whether, when introducing this right into a contract, the parties must specify the prerequisites (circumstances) upon the occurrence of which a party may withdraw from the contract. As indicated, it must be borne in mind that the possibility to withdraw from a contract is an exception to the principle of permanence of contracts, as well as that it is possible to reserve the right to withdraw for the payment of a specified sum – a withdrawal fee (Article 396 of the Civil Code), when it is certainly not necessary to specify the grounds for withdrawal. Therefore, in the case of Article 395 § 1 of the Civil Code, it is necessary to specify these grounds, but there is no need to develop this thread in this study, as in practice the parties reserve a contractual right

[1] See e.g. the judgments of the Supreme Court of the Republic of Poland: of 6 May 2004, II CK 261/03; of 18 October 2012, V CSK 417/11; of 12 October 2018, V CSK 493/17.

[2] See the judgment of the Supreme Court of the Republic of Poland of 11 August 2005, V CK 86/05.

of withdrawal in strictly defined situations. It should only be emphasised that the circumstances entitling to exercise this right need not only be those for which the debtor is responsible; they may also be circumstances for which neither party is responsible. On the other hand, a provision which grants one of the parties the right to withdraw from the contract for a reason for which that party is responsible will be invalid – as being contrary to the principle of freedom of contract (Article 353[1] of the Civil Code).

Lex commissoria

A special regulation is included in Article 492 of the Civil Code, which gives the entitled party the right to withdraw from a mutual agreement without setting an additional deadline, if it was reserved for the case of non-performance of an obligation within a strictly specified deadline, or when performance of the obligation by one party after the deadline would not be significant for the other party due to the properties of the obligation or due to the intended purpose of the agreement known to the party in default. This is the so-called *lex commissoria* clause, which is one of the cassation clauses (Paśko, 2014, pp. 39 et seq). Although there is a dispute as to whether this is a modification of the statutory or contractual right of withdrawal (Lemkowski, 2012, p. 94; Lutkiewicz-Rucińska, in: Balwicka-Szczyrba, & Sylwestrzak (ed.), 2024, p. 989; Doliwa, in: Załucki (ed.), p. 1107; differently Wyżyn-Urbaniak, 1995, pp. 44-45)[1], is to be regarded as an institution that combines the features of the two rights. Although it must be reserved in the contract, it is distinguished from a statutory right by the fact that a time limit does not have to be reserved within which a party may exercise this right. However, it is impossible not to notice that the provision referred to refers to a derogation from the setting of an additional time limit, which

[1] The dominant view is the former – see e.g. the decision of the Supreme Court of the Republic of Poland 20 March 2014, I CSK 404/13; the judgment of the Appeal Court in Białystok of 10 June 2015, I ACa 97/15.

indicates a connection with Article 491 § 1 of the Civil Code. If, therefore, a right of withdrawal is reserved in the contract without specifying the period within which a party may exercise it, it must be considered whether this provision does not constitute a *lex commissoria*.

At the same time, there is no doubt that Article 492 of the Civil Code is of a peremptory nature[1] and should be interpreted strictly in accordance with the principle *exceptiones non sunt extendae*[2]. There is no justification for the view that such a provision does not have to be included explicitly in the contract, but can be interpreted from it in accordance with the rules of interpretation of declarations of intent (Wiśniewski, in: Bieniek (ed.), 2011, art. 492, thesis No. 4.). However, it has been accepted in case law that although the possibility of invoking Article 492 of the Civil Code. is obvious when there is a provision in the contract from which it follows unequivocally that in the event of one of the parties' delay in performing the service within a strictly specified period, the other party will be entitled to withdraw from the contract without the need to set an additional deadline, withdrawal from the contract on the basis of this provision is also possible when the parties have included provisions in the contract from which it can be established by way of interpretation that the deadline for performance has been strictly specified and that in the event of non-compliance with the deadline the other party may withdraw from the contract (Lackoroński, 2018, letter I)[3]. However, it cannot be overlooked that what was at issue was a situation in which the contract set a strictly defined deadline for the contractor's performance of the works, calculated from the strictly defined date of handover of the construction site, and the right to

[1] See e.g. the judgment of the Supreme Court of the Republic of Poland of 11 January 2017, IV CSK 161/16.

[2] See e.g. the judgments of the Supreme Court of the Republic of Poland: of 3 Fabruary 1997, I CKN 75/98; of 5 June 2002, II CKN 701/00, „Orzecznictwo Sądów Polskich" 2003, No. 10, item 124; the decision of the Supreme Court of the Republic of Poland of 20 March 2014, I CSK 404/13.

[3] See the judgment of the Supreme Court of the Republic of Poland of 19 June 2009, V CSK 454/08.

withdraw from the contract "in the event of performance not in accordance with the terms set out in the contract". However, the concept of a "strictly defined term" cannot be extended to include a condition[1]. At the same time, a *lex commissoria* cannot be reserved for mere delay (for which the debtor is not responsible) as well as for non-performance of a part of the obligation (e.g. a stage of the construction work).

Exercise of the statutory and contractual right of withdrawal

Two issues arise in relation to the interplay between the statutory and contractual right of withdrawal and the right of withdrawal on general principles and on the basis of special provisions.

As regards the former issue, the Polish Supreme Court has expressed the view that if a contractual right of withdrawal is reserved, as long as this right exists, the statutory right of withdrawal does not apply[2], without justifying this position. In other words, during the period in which a party is entitled to withdraw from a contract by invoking a contractual provision, it is not entitled to exercise its statutory right of withdrawal for the same reason. On the other hand, however, it has been pointed out in case law that the reservation of the contractual right of withdrawal does not affect the rights of the contracting parties to withdraw from the contract granted to them by law, and at the same time, these provisions (e.g. Articles 491 and 493 of the Civil Code) do not apply to the contractual right of withdrawal[3], although this position is also not substantiated; this would mean that the two rights, i.e. under the

[1] See e.g. the judgments of the Supreme Court of the Republic of Poland: of 17 February 2011, IV CSK 405/10; of 24 June 2010, IV CSK 67/10; differently the judgment of the Supreme Court of the Republic of Poland of 26 January 2005, V CK 401/04.

[2] See e.g. the judgments of the Supreme Court of the Republic of Poland: of 9 September 2011, I CSK 696/10; of 6 July 2016, IV CSK 687/15.

[3] See e.g. the judgment of the Appeal Court in Warsaw of 27 October 2016, VI ACa 1283/15.

law and the contract (if reserved in the contract), are independent of each other.

The right of withdrawal is introduced into the contract by the will of the parties. Usually, broader factual grounds for the right of withdrawal, more favourable than those provided for by law, are provided for in the contract. However, this is not a rule that has no exceptions in practice – on the contrary, it happens (although very rarely) that the parties provide in the contract for more far-reaching conditions that must be fulfilled in order to exercise this right. This does not mean, however, that the parties automatically exclude the mandatory provisions of the law governing the right in question. Irrespective of the fact that a provision of ius cogens cannot be contractually excluded (such a provision would be invalid), no legal or axiological considerations support the limitation of a right arising from the law by a right arising from the contract. These are two independent rights, and a party may choose which one it wishes to exercise. The following situations may be cited as examples: (i) the contract reserves the right of withdrawal (on the basis of Article 395 § 1 of the Civil Code, and not as a *lex commissoria*) without the need to give the debtor an additional period, whereas under general principles such a period would have to be given, but the creditor – for the sake of good cooperation – declares that it exercises its statutory right of withdrawal by giving the debtor an additional appropriate period for performance; (ii) the "weaker" party to the contract has been imposed a provision which entitles it to withdraw from the contract on much less favourable terms than those arising from the law - it cannot be considered that it does not have the right to exercise its statutory right of withdrawal. As regards the latter, the view has been expressed in doctrine that since Article 635 of the Civil Code is a special provision in relation to Article 491 of the Civil Code, it excludes the applicability of the latter article to situations covered by it (Kozieł, in: Kidyba (ed.), 2014, p. 338; Tanajewska, in: Ciszewski, & Nazaruk (ed.), 2019, p. 1131; Kondek, w: Osajda, & Borysiak (ed.), art. 491, thesis No. 11). It has been accepted somewhat differently in case law, namely that Article 635 of the Civil Code – as a special provision in relation to the general provisions on non-

performance of reciprocal contracts – excludes the conditions specified in Article 491 § 1 of the Civil Code for withdrawal from the contract in the form of the ordering party falling into default and setting an additional deadline for the ordering party to commence or continue and complete the work[1].

It is a fact that the exercise of the right of withdrawal on the basis of special provisions is much more favourable to the right holder, as can be seen from the preceding arguments, and in practice this problem does not usually arise. Nevertheless, we do not have here a relationship of the *lex specialis derogat legi generali* type, but with a right governed by different provisions. It should be noted that the general and special provisions discussed above do not overlap, they regulate different situations, i.e. they provide for different (at least in part) prerequisites for their application. The special provisions therefore do not exclude the applicability of the general provisions.

The prevailing view in the case law is that in determining the grounds for withdrawal (legal qualification of the declaration of will to withdraw), the court should take into account - in the light of the circumstances stated in the declaration – both whether it is effective on the basis of the contractual right of withdrawal, if the parties have reserved it in the contract, and if necessary, whether it is effective in view of the statutory provisions providing for a right of withdrawal in certain situations. The party making the declaration of will to withdraw from the contract is not obliged to indicate in its content whether it is exercising its contractual or statutory right to withdraw, and the possible indication in the content of the declaration of will of its legal basis does not determine the limits within which the court carries out its legal assessment[2]. Therefore, the mere faulty indication of the grounds for withdrawal,

[1] The judgment of the Supreme Court of the Republic of Poland of 14 November 2008, V CSK 182/08.

[2] See e.g.: the judgment of the Supreme Court of the Republic of Poland 12 September 2019, V CSK 328/18, OSNC-Zbiór Dodatkowy 2021, No. 1, item 8; the decision of the Supreme Court of the Republic of Poland of 30 September 2022, I CSK 2145/22.

where the party indicates as a ground the facts supporting the application of Article 635 of the Civil Code, does not nullify the effects of withdrawal when the provisions of the contract are merely referred to in support of the factual grounds[1].

This view should be shared, but with a caveat. The independence of the statutory and contractual right of withdrawal implies that where these rights coincide, the holder may choose whether to exercise the statutory or contractual right of withdrawal, indicating the grounds for withdrawal so that they can be verified. If he expressly indicates that he is exercising his statutory or contractual right of withdrawal, the court hearing the case shall be bound by such an unequivocal declaration of intent and there shall be no grounds for concluding that it should qualify it differently, i.e. on the basis of the contractual or statutory provisions, as the case may be, if the party has expressed its will expressly. The issue here is not the legal basis for the claim, but the manner in which the declaration of will was made, with the existence of the substantive prerequisites for making the declaration being demonstrated[2]. However, this does not imply, as a matter of principle, that in the event of the invalidity of a contractual reservation, the relevant substantive law provisions could not be applied, although this depends on the circumstances of the individual case and does not apply if the party has expressly indicated that it is exercising its contractual right of withdrawal[3]. On the other hand, it is not possible for a party to withdraw from a contract on a 'mixed basis', i.e. partly invoking the law and partly a contractual provision. If, however, when making a declaration of withdrawal, the right holder only invokes the ground for withdrawal and thus indicates the reason for the declaration (e.g. inadequate quality of the works, failure to meet the deadline), the court should consider both grounds for withdrawal – first the contractual provision, if the provision on this issue is valid, and then the statutory one.

---

[1] The judgment of the Appeal Court in Kraków of 21 January 2014, I ACa 1435/13.
[2] See the judgment of the Appeal Court in Warsaw of 24 April 2018, VII AGa 244/18.
[3] The judgment of the Appeal Court in Łódź of 31 December 2021, I ACa 639/21.

Conclusions

The purpose of this study was to consider the extremely important issue of the interrelation between the statutory and contractual right of withdrawal and the statutory right of withdrawal on the basis of specific and general provisions. The analysis of the legal norms has led to the conclusion that the reservation of the contractual right of withdrawal does not exclude the possibility of exercising the statutory right of withdrawal, and this on the basis of both general and special provisions. Even if the right of withdrawal is not reserved in the construction contract, the parties have this right under the general and special provisions. Although we are talking about the same right in all situations, the exercise of which, regardless of the basis, has the same effect of terminating the legal relationship[1], the prerequisites for the application of this right in individual situations are different. This gives broader protection to the creditor, bearing in mind that it is a power that the creditor can exercise, but is not obliged to do so.

References

Drapała, P. (2019). In: Osajda, K. (ed.). *System prawa prywatnego. Tom 5. Prawo zobowiązań – część ogólna*.

Bujalski, M., & Zoll, F. (2023). In: Olejniczak, A. (ed.). *System prawa prywatnego. Tom 6. Prawo zobowiązań – część ogólna*.

Dąbrowa, J. (1981). In: Czachórski, W., & Radwański, Z. (ed.). *System prawa cywilnego. Tom III. Cz. 1. Prawo zobowiązań. Część ogólna*.

Doliwa, A. (2024). In: Załucki, M. (ed.). *Kodeks cywilny. Komentarz*.

Gutowski, M. (2005). *Odstąpienie od umowy o roboty budowlane*. Państwo i Prawo, 9.

Gutowski, M. (2022). In: Gutowski, M. (ed.). *Kodeks cywilny. Komentarz. Tom II. Art. 353-626.*

[1] Whether there is an *ex tunc* effect or an *ex nunc* effect was not at issue.

Klein, A. (1964). *Ustawowe prawo odstąpienia od umowy wzajemnej*.
Kondek, J.M. (2024). In: Osajda, K., & Borysiak, W. (ed.). *Kodeks cywilny. Komentarz*.
Kozieł, G. (2014). In: Kidyba, A. (ed.). *Kodeks cywilny. Komentarz. Tom III. Zobowiązania – część szczególna*.
Lackoroński, B. (2018). *Skutki czynności prawnych w czasie*.
Lemkowski, M. (2015). *Zapowiedź niespełnienia świadczenia (protestatio) jako podstawa odstąpienia od umowy wzajemnej (art. 492[1] KC)*. Monitor Prawniczy, 1.
Lemkowski, M. (2012). *Wykonanie i skutki niewykonania zobowiązań z umów wzajemnych. Komentarz do art. 487–497 kodeksu cywilnego*.
Lutkiewicz-Rucińska, A. (2024). In: Balwicka-Szczyrba, M., &, Sylwestrzak, A. (ed.) *Kodeks cywilny. Komentarz*, Warszawa.
Machnikowski, P. (2021). In: Gniewek, E., & Machnikowski, P. (ed.). *Kodeks cywilny. Komentarz*.
Machnikowski, P. (2024). In: Machnikowski, P. (ed.). *Zobowiązania. Tom II. Część ogólna. Komentarz*.
Paśko, K. (2014). *Charakter prawny klauzul kasatoryjnych*. Przegląd Prawa Handlowego, 5.
Popiołek, W. (2021). In: Pietrzykowski, K. (ed.), *Kodeks cywilny. Komentarz. Tom II. Art. 450-1088.*
Radwański, Z., & Olejniczak, A. (2018). *Zobowiązania – część ogólna*.
Stojek, G. (2018). In: Habdas, M., & Fras, M. (ed.), *Kodeks cywilny. Komentarz. Tom III. Zobowiązania. Część ogólna (art. 353-534).*
Tanajewska, R. (2019). In: Ciszewski, J., & Nazaruk, P. (ed.), *Kodeks cywilny. Komentarz*.
Tracz, G. (2007). *Sposoby jednostronnej rezygnacji z zobowiązań umownych*.
Warciński, M. (2005). *Kontrowersje wokół konieczności zastrzegania terminu w klauzuli umownego prawa odstąpienia od umowy*. Przegląd Prawa Handlowego, 9.
Wiśniewski, T. (2011). In: Bieniek G. (ed.), *Komentarz do kodeksu cywilnego. Księga trzecia. Zobowiązania*, Vol. I.
Wyżyn-Urbaniak, K. (1995). *Ustawowe prawo odstąpienia od umowy wzajemnej jako środek ochrony wierzyciela w razie zwłoki dłużnika*. Przegląd Sądowy, 11-12.
Zagrobelny, K. (2021). In: Gniewek, E., & Machnikowski, P. (ed.). *Kodeks cywilny. Komentarz*.

Legal and Administrative Studies, www.jlas.upit.ro
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement – Year 2025, pp. 109-125

USUCAPIO AS A MEANS OF ACQUIRING REAL PROPERTY OWNERSHIP - A COMPARATIVE LEGAL OUTLINE BASED ON POLISH, ITALIAN, AND LITHUANIAN LAW

Krzysztof GRZESIOWSKI
ORCID[ID]: 0000-0003-3287-7790
E-mail: krzysztof.grzesiowski@usz.edu.pl
Affiliation: Faculty of Law and Administration, University of Szczecin, Poland

Abstract: *Usucapio, also known as acquisitive prescription (or adverse possession in common law system), is a legal mechanism by which ownership of property may be acquired through continuous and uninterrupted possession over a legally* prescribed *period. This article presents a comparative legal analysis of acquisitive prescription in Poland, Italy, and Lithuania, focusing on the key similarities and differences in substantive regulations. The study examines the theoretical foundations of acquisitive prescription and its role within the respective legal systems. Particular attention is given to the criteria that must be met for acquisitive prescription to be effective, including good faith, the period of possession, and the legal consequences of acquiring ownership in each jurisdiction. Despite similarities rooted in the shared Roman law tradition, the findings reveal significant differences among these legal systems, demonstrating the influence of local legal policies on the interpretation and application of acquisitive prescription. The article contributes to the broader discussion on the harmonisation of property acquisition through acquisitive prescription in the European Union.*

Keywords: *usucapion; acquisitive prescription; adverse possession; real property; Poland; Italy; Lithuania.*

Introduction

The *usucapio*[1] (acquisitive prescription in continental law system or adverse possession in common law system) as a means (method) of acquiring ownership of real estate through long-term possession is a classic civil law institution present in the legal systems of all the Member States of the European Union, with its roots in Roman law. Contemporary national regulations reflect both the continuity of this tradition and its adaptation to the historical circumstances of individual Member States. Due to the content of Article 345 TFEU[2], the acquisitive prescription as a method of acquiring property is not subject to harmonisation within the European Union. This means that the right to property remains outside the scope of EU regulation, allowing Member States to freely shape their property law systems (Jurcewicz, & Popardowski, 2011, p. 141). However, the legal doctrine (Jurcewicz, & Popardowski, 2011, p. 142) emphasises that although property matters remain under the exclusive competence of the Member States, national property law, including acquisitive prescription of real estate, are subject to EU control for their compliance with the Treaty, the Charter of Fundamental Rights of the European Union (Bandarzewski, 2022, pp. 219-237)[3] and secondary legislation. The freedom of Member States in the area of property law primarily concerns the existence of property rights themselves, whereas the means of acquiring, losing, and exercising ownership must comply with EU law (Jurcewicz & Popardowski, 2011, p. 152). As indicated by the CJEU[4], the power of individual Member

[1] In Latin the term *usucapio* comes from the words *usus* (use) and *capio* (acquisition).
[2] In accordance with Article 345 TFEU, the Treaties do not in any way prejudge the rules on property rights in the Member States.
[3] Notably from Articles 17(1) and 52(1) of the EU Charter of Fundamental Rights.
[4] Judgment of the CJEU of 1.6.1999, C-302/97 (KlausKonle v. Austria), thesis 37 and 38.

States under Article 345 TFEU do not exempt property regime from the fundamental principles of the Treaty.

The aim of this study is to provide a comparative analysis of the acquisitive prescription of real estate in Polish, Italian and Lithuanian law, with necessary references to Roman law, from which this institution originates. The following key elements of acquisitive prescription will be discussed: the type of required possession, the period of possession, the role of good or bad faith, the exclusion of certain categories of real estate from acquisitive prescription, the possibility of adding of the possession period of a predecessor, the hereditary nature of acquisitive prescription, the *ex lege* acquisition of ownership and the procedures for judicial confirmation of this acquisition. The analysis is based on primary legal sources[1], supplemented by case law of the supreme courts of the Member States[2] and key doctrinal perspectives relevant to the selected legal systems. The study not only identifies similarities and differences but also assesses how contemporary legal systems balance the stabilisation of social relations with the protection of owners. Indeed, the essence of acquisitive prescription is to regularise the legal status of the possessor by eliminating a long-standing discrepancy between de facto possession and the legal title. The article also contributes to a broader discussion on the potential harmonisation of acquisitive prescription as a means of acquiring ownership rights to real property within the European Union.

2. Roman law

In discussing the origins of the institution of acquisitive prescription, it must be emphasised that it is an original product of Roman legal doctrine, unknown to earlier legal systems such as Babylonian or ancient Greek law (Kowalczyk, 2016, p. 25). Its origins date back to the Law of the Twelve Tables of 451 BC. Ultimately, the

[1] Emperor Justinian's *Corpus Iuris Civilis* for Roman law; the 1964 Civil Code for Poland; the 1942 *Codice Civile* for Italy; the 2000 *Civilinis kodeksas* for Lithuania.

[2] Supreme Court in Poland, *Corte di Cassazione* in Italy, Supreme Court of Lithuania.

model of acquisitive prescription developed by the Romans under Justinian law continues to function today in many civil law systems as one of the methods of acquiring ownership of real estate (Rozwadowski, 2017, p. 74). The legislative activity of Emperor Justinian I the Great in the 6th century A.D. led to the unification of this institution within the Roman Empire and the introduction of two types of *usucapio*: the ordinary *usucapio* created by combining the previously existing institutions of *usucapio* and *longi temporis praescriptio* and the extraordinary *usucapio* (*longissimi temporsi praescriptio*) (Kowalczyk, 2016, pp. 53, 60). In the case of ordinary acquisitive prescription, *usucapio* henceforth applied to the acquisition of movable property, while *longi temporis praescriptio* referred to the acquisition of immovable property (Kowalczyk, 2016, p. 53).

Acquisition of property through ordinary *usucapio* in Roman law was possible when the following conditions were met: *res habilis*, *titulus*, *bona fides*, *possessio* and *tempus*. *Res habilis* referred to things (including real estate) that could be acquired throuhg *usucapio*. *Res inhabilis* (excluded from *usucapio*) were, in particular: things excluded from commerce (*res extra commercium*), stolen property (*res furtivae*), things acquired by force (*res vi possessae*), assets of state treasury (*res fiscales*), the Church, municipalities (*res municipales*) or the emperor (*res dominicae*) (Kowalczyk, 2016, p. 54; Rozwadowski, 1992, p. 130). *Titulus* referred to the legal reason for acquiring possession, such as a contract of sale (*pro emptore*), a donation (*pro donato*), the establishment of a dowry (*pro dote*), an inheritance (*pro herede*) or a testamentary legacy (*pro legato*). A valid title (the legal cause) had to be both just (*iustus titulus*) and true (*verus titulus*). *Bona fides* (good faith) meant the possessor believed that his possession did not infringe anyone's rights. Good faith had to exist at the moment possession was taken. Consequently, ordinary *usucapio* was not possible if the possessor acted (primary) in bad faith (*mala fides*). However, according to the principle *mala fides superveniens non nocet*, subsequent (secondary) bad faith did not invalidate the acquisition. It is important to note that in Roman law *titulus* was a legal issue, while *bona fides* was a moral one (Kowalczyk

2016, p. 237). Another condition for acquisitive prescription was *possessio* (possession), which required both physical control of the things (*corpus*) and the intent to retain it for oneself *(animus*). Possession must be continuous and uninterrupted throughout the entire prescriptive period. Any interruption of possession – for example, due to the loss of the thing - renders the previous period legally ineffective, and the prescriptive period must begin anew after the interruption. However, the time of possession by predecessors (*accessio possessionis*), including testators (*successio possessionis*) may be added to the required period of possession, thereby accelerating the acquisition of ownership. The final condition for ordinary *usucapio* was the passage of time. Under Justinian law, the time (*tempus*) required was 10 years for *inter praesentes* and 20 years for *inter absentes*. The first (shorter) term applied when the owner and the possessor resided in the same province. On the other hand, if they resided in different provinces, the second (longer) term applied.

Acquisition of property through extraordinary *usucapio* (*longissimi temporsi praescriptio*) required exceptional circumstances and was used when ordinary *usucapio* was impossible (Kowalczyk 2016, p. 61). In contrast to ordinary *usucapio*, the scope of *longissimi temporsi praescriptio* extended to stolen property (*res furtivae*), things acquired by force (*res vi possessae*), assets of state treasury (*res fiscales*), the Church, municipalities (*res municipales*) and the emperor (*res dominicae*). Additionally, the possessor was not required to prove a just title (*iustus titulus*); the mere lapse of 30 years was sufficient for acquisition. However, good faith (*bona fides*) at the time of entry into possession was still required, meaning a thief or a person who took possession by force could never acquire ownership.

In Roman law, acquisitive prescription resulted *ex lege* in acquisition of property as soon as all legal conditions were met, without the need for any additional formalities (Kowalczyk, 2016, p. 54; Rozwadowski, 1992, p. 129). In the case of vindication action (*rei vindicatio*), a successfully raised *usucapio* defence (*exceptio*) was of a nullifying (peremptory) nature. Thus, since Roman times, the institution of acquisitive prescription has served to resolve legal uncertainty by

aligning de facto possession with legal ownership - a principle that remains highly relevant in contemporary legal systems.

4. Polish law

The institution of acquisitive prescription (Polish term: zasiedzenie) in Polish law is regulated in the Civil Code (Articles 172 - art. 176). According to these provisions, a possessor of real estate who is not its owner acquires ownership if he has held the real estate continuously for 20 years as a possessor, unless he initially obtained possession in bad faith. However, after 30 years, even a possessor who initially obtained possession in bad faith can acquire ownership. The object of acquisitive prescription may be any real property (land, buildings or separate premises (unit), private or public property), unless otherwise provided by law (*res habilis*)[1]. The certainty of civil law transactions requires that the only way to exclude a thing from legal circulation is through a statutory provision expressly prohibiting its acquisition by prescription or restricting ownership to specific categories od persons (*res inhabilis*). Public property excluded from commerce (*res publicae extra commercium*) may only be owned by the State or local government units, which precludes the possibility of acquiring such property through acquisitive prescription. This includes public roads, which may exclusively be owned by the State or a local government unit, as well as land covered by inland flowing waters, territorial sea waters and internal sea waters, which are state property[2]. However, under the current legal framework, there are no provisions explicitly prohibiting the acquisitive prescription of specific types of real estate. It should be pointed out, however, that until 30 September 1990, Article 177 of the Civil Code was in force, which - for ideological reasons during the communist period - excluded the possibility of acquiring state property in

[1] Decision of the Polish Supreme Court of 20.12.2019, II CSK 510/18, Legalis.
[2] Decision of the Polish Supreme Court of 24.06.2010, IV CSK 40/10, Legalis; Decision of the Polish Supreme Court of 28.03.2019, III CSK 73/17, Legalis.

Poland through acquisitive prescription (Mysiak, 2024, Article 172, Nb 17; Grzesiowski, 2024, p. 31). Furthermore, in the case of real estate acquired by foreigners, a permit from the Minister of Internal Affairs is still required, although this restriction does not apply to citizens of European Union member states[1].

The Civil Code provides only two conditions for the acquisition of real property by acquisitive prescription: possession (*possessio*) and the lapse of time (*tempus*). The regulations do not require a legal reason for the possession (*titulus*) or the good faith of the possessor. Good faith (*bona fides*)[2] at the time of entry into possession affects only the length of the prescriptive period, reducing it from 30 to 20 years. A person who entered into possession arbitrarily, without any legal title - including by force, deception, or threat - may still acquire ownership. Such a person as a possessor in bad faith (*mala fides*)[3] will acquire ownership after uninterrupted possession for 30 years. Only owner-style possession, which, according to Article 336 of the Civil Code, should be understood as actual control over the property (*corpus*) with the intent to act as its owner (*animus*), can lead to acquisitive prescription, whether in good or bad faith. A dependent possessor - i.e. one who exercise control over the real estate based on another right (such a usufructuary, lessee or tenant) – cannot acquire ownership through acquisitive prescription, regardless of the period of possession. However, if the dependent possession is transformed into owner-style possession, acquisitive prescription becomes possible. Such a change requires a clear manifestation of intent (*animus*), externally demonstrating that the previous dependent possessor now possesses the real estate as an owner-style possessor. This ensures

[1] Act of 24 March 1920 on the acquisition of real estate by foreigners (Journal of Laws 2017, item 2278).

[2] In good faith is a person who, for justified reasons, is unaware that they are not the owner of the thing (decision of the Polish Supreme Court of 11.3.2009, I CSK 360/08, Legalis).

[3] In bad faith is a person who knows or ought to know that the right of ownership does not belong to them but to another person (decision of the Polish Supreme Court of 11.3.2009, I CSK 360/08, Legalis).

that the actual owner is aware of the change and can take legal action if necessary (e.g., a tenant or lessee permanently ceasing rent payments).

If possession is transferred during the course of acquisitive prescription (*accessio possessionis)*, or if the current possessor is the heir of the previous one (*successio possessionis*), the period of possession by the predecessor may be added to the period of possession of the current possessor (Article 176 of the Civil Code). This applies not only to direct predecessors but also to earlier possessors[1]. In such a case, the length of the prescriptive period (20 or 30 years) depends on whether the initial possessor acquired the property in good or bad faith, as this moment determines whether the shorter or longer period applies. Importantly, possession can only be added if it was transferred voluntarily, not if the current possessor unlawfully dispossessed the predecessor.

As a result of acquisitive prescription, the possessor acquires ownership *ex lege* once the required period of uninterrupted possession has elapsed. However, for the property to be legally transferable and for the new owner to be registered in the Land Registry Office, a court must confirm the acquisition. The court's decision is just declaratory in nature, as acquisitive prescription occurs automatically by operation of law on a specific date. It is worth emphasising that, until the prescriptive period expires, the possessor is not entitled to any right to the property (Ignatowicz, & Stefaniuk, 2022, p. 132; Grzesiowski, 2024, p. 48.). A possessor *in statu usucapiendi* is merely in a factual situation with legal significance, as it may ultimately result in acquisitive prescription and the acquisition of ownership rights (Ignatowicz, & Stefaniuk, 2022, p. 132; Grzesiowski, 2024, p. 48).

5. Italian law

The Italian legal system regulates acquisitive prescription (Italian term: usucapione) in the Civil Code (*Codice Civile*) of 1942, specifically

[1] Decision of the Polish Supreme Court of 29.4.1987, III CRN 96/87, Legalis.

in Articles 1158 to Article 1167. This institution, deeply rooted in the Roman tradition of *usucapio*, has been adapted to modern legal realities, while preserving many of the original elements (Galati, 2013, pp. 3-6). According to Article 1158, ownership of property is acquired by virtue of continuous and uninterrupted possession for 20 years. However, Article 1159 introduces an abbreviated (shorter) acquisitive prescription period of 10 years for possession acquired in good faith, if it is based on a valid legal title and has been duly transcribed (recorded) in the Land Registry Office (*trascrizione del titolo*). Additionally, a special provision of Article 1159-bis, concerning agricultural land located in mountain municipalities, reduces the standard prescriptive period to 15 years and 5 years in the case of bona fide possession based on title. This reflects a legislative policy aimed at promoting agriculture in remote areas and preventing the depopulation of such regions.

The essential conditions for ordinary acquisitive prescription in Italian law are possession (*possessio*) and time (*tempus*). The acquisition of ownership occurs automatically after 20 years of continuous and uninterrupted possession, irrespective of the possessor's good or bad faith. This possession must involve the actual control over the property (*corpus*) and the intention to act as the owner (*animus*) (Galati, 2013, pp. 14-15; Mazzon, 2022, pp. 18-19). It is important to note that *animus possidendi* does not imply that the possessor believes themselves to be the rightful owner, but rather that the possessor intends to act as the owner in relation to the property[1].

In contrast, abbreviated (shorter) acquisitive prescription requires a 10-year period of possession, but it applies only if the property was acquired from a non-owner. Additionally, the law requires that the possessor must have obtained the property in good faith (*bona fides*) based on a title (*titulus*), which would have transferred ownership had the transferor been the true owner. This title must be duly transcribed (recorded) in the Land Registry Office. In cases of abbreviated

[1] Judgment of the Italian *Corte di Cassacione* of 20.12.2011, no. 27847; judgment of the Italian *Corte di Cassacione* of 27.05.2005, no. 8422.

prescription, the legal conditions include, in addition to possession and time, two further elements: the valid title (legal cause of possession), which is an objective requirement and the good faith (*bona fides*) of the possessor at the moment of acquisition, which is a subjective requirement[1]. The title must be valid in the abstract sense — that is, in the specific case, the acquisition of ownership would have occurred if the transferor had been the owner of the real estate. In other words, the agreement to transfer ownership is ineffective solely due to the transferor's lack of authority to dispose of the property (Mazzon, 2022, p. 177).

It should be noted that possession acquired through violence or secretly does not, as a rule, lead to acquisitive prescription (Article 1163). However, once the violent state ceases or the fact of possession becomes public, the prescriptive period begins to run (Galati, 2013, pp. 207-208). Similarly, possession that corresponds to the exercise of rights other than ownership - such as usufruct or lease - does not lead to acquisitive prescription (Article 1164). However, dependent possession (e.g., that of a lessee or usufructuary) may be converted (*interversio possessionis*) into owner-style possession. From that moment on, acquisitive prescription may begin to run, provided that the change in the possessor's intent (*animus*) is manifested externally, so that the property owner can perceive the transformation from dependent possession to owner-style possession (Galati, 2013, p. 221).

The period of possession may be added under the principle of successive possession (*successio possessionis*). According to Article 1146, possession is subject to universal succession, meaning that it automatically passes to the heir upon the opening of the succession. Furthermore, possession by a predecessor may be added under the principle of accession (*accessio possessionis*). Certain categories of property are excluded from acquisitive prescription. Under Article 1145, possession of things excluded from commerce (*res extra commercium*)

[1] Judgment of the Italian *Corte di Cassacione* of 14.04.2022, no. 12207.

has no legal effect. The Italian Civil Code explicitly classifies, among such res extra commercium, property that forms part of the public domain (Article 823) and public assets that are inalienable (Article 826(3)).

Under Italian law, ownership of real estate is acquired through acquisitive prescription automatically by operation of law (*ex lege*), without requiring a court decision. However, in order to transfer ownership of real estate acquired by acquisitive prescription and to register the title in the Land Registry Office, the possessor must first obtain judicial confirmation of ownership. In such cases, the court judgment is declaratory in nature, as the acquisition of ownership occurs by the mere lapse of the statutory period of possession, independently of the court's ruling (Mazzon, 2022, p. 17).

6. Lithuanian law

The acquisitive prescription (Lithuanian term: įgyjamoji senatis) of real estate in Lithuanian law is governed by the Civil Code (Civilinis kodeksas) of 2000, specifically by the provisions from Article 4.68 to Article 4.71. This institution undoubtedly drawing inspiration from the Roman concept of *usucapio*, has been adapted to the specific features of Lithuania's post-Soviet legal order following its independence in 1990. According to Article 4.68, a person who is not the owner of the property, but who has acquired it in good faith and has possessed it in good faith, lawfully, publicly, uninterruptedly and as if it were their own property for at least 10 years, acquires ownership of that property. Thus, the conditions for the acquisition prescription in Lithuanian law include possession (*possessio*), acquisition in good faith (*bona fidea*) and time (*tempus*). Possession should be legal, public and uninterrupted. Good faith is required not only at the moment of acquisition but for the entire period of possession (Art. 4.70). Consequently, acquisitive prescription in bad faith is not permitted. It is also impermissible to acquire ownership of real estate by way of acquisitive prescription if possession was obtained secretly or by force, regardless of whether the right of

ownership is claimed by the perpetrator of such unlawful possession or by another person (Art. 4.69(2)). It should be noted that the Supreme Court of Lithuania[1] recognized the acquirer of real estate as a possessor in good faith on the basis of a contract that turned out to be invalid due to failure to comply with the mandatory form of a legal act.

Only immovable property that may be privately owned can be subject to acquisitive prescription (Article 4.69(1)). Properties excluded from acquisitive prescription (*res inhabilis*) include those owned by the state or municipalities (as local government units), as well as properties registered in the Land Registry Office under the name of a person other than the possessor. Lithuanian law allows for the aggregation of possession periods of previous possessors (*accessio possessionis*), but this is subject to strict regulation. Specifically, if possession has been successively transferred to different persons during the prescriptive period, their respective periods of possession may be aggregated only if each possessor has fulfilled the statutory requirements (Article 4.71(2)).

Pursuant to Article 4.69(2), the acquisition of ownership must be confirmed through judicial proceedings (rather by a judgment with constitutive effect), which weakens the classical *ex lege* nature of acquisitive prescription in Lithuanian law. Due to the particularly stringent requirements for acquisitive prescription, as well as the broad range of properties excluded from it, the practical application of this institution in Lithuania is minimal (Darčkutė, & Fominova, 2024, pp. 58-78; Baranauskas, Laurinavičius, Pakalniškis, & Vasarienė, 2010, pp. 102-106; Brištonas, 2020, p. 62). In light of these restrictions, Lithuanian legal doctrine (Brištonas, 2020, pp. 68-69) postulates the liberalization of acquisitive prescription rules, particularly by abolition the limitations on public property and admission for acquisitive prescription in bad faith.

[1] Judgment of the Supreme Court of Lithuania of 12.03.2013 in case no. 3K-3-85/2013.

7. Comparative legal analysis

The analysis of Polish, Italian and Lithuanian law reveals similarities rooted in Roman law, demonstrating the universal nature of acquisitive prescription as an institution stabilizing property relations over the centuries in states influenced by the common Roman legal tradition. A shared feature of the examined legal systems is the requirement of uninterrupted, public and owner-style possession. Dependent possession is excluded, which eliminates the possibility of acquisitive prescription in the case of possession of property under a lease, rental or usufruct contract. The acquisition of ownership *ex lege* is a Roman legacy present in Polish and Italian systems, although weakened in Lithuanian law requiring mandatory judicial confirmation with rather constitutive effect. Indeed, the automatic effect of acquisitive prescription by operation of law contributes to the stabilization of property relations, a feature that has remained unchanged since Roman times. Another common rule *accessio possessionis*, which allows the possessor to add the period of possession of a predecessor, is recognized in all three systems and plays a significant role, particularly in cases of family succession.

However, the analysis also highlights significant differences reflecting the historical and local conditions of the Polish, Italian, and Lithuanian legal systems. The main distinction concerns the period of possession required for acquisitive prescription and the permissibility of *usucapio* in bad faith. Under Lithuanian law, acquisitive prescription is only possible in good faith and requires 10 years of continuous possession. In contrast, both Polish and Italian law allow acquisitive prescription regardless of good or bad faith. However, Poland imposes the longest time requirements - 20 years for possession in good faith and 30 years for possession in bad faith - whereas Italy requires 10 and 20 years, respectively. Good faith acquisitive prescription in Italy and Lithuania shares similarities in the required period of possession (10 years). However, Lithuanian law is more stringent, requiring the possessor to maintain good faith both at the time of acquisition and

throughout the entire period of possession. In Italy, the requirement of good faith applies only at the moment of acquiring possession, but unlike Lithuanian and Polish law, it also requires a valid legal title and its registration (trascrizione). Notably, abbreviated acquisitive prescription in Italy applies only when the property is acquired from a non-owner. In contrast, Polish law does not require a legal title (*titulus*) for acquisitive prescription. Unlike Italian and Lithuanian law, Polish law also permits acquisitive prescription of real estate in cases of unlawful possession, including possession obtained by force.

Each of the analysed legal systems provides exceptions to acquisitive prescription for certain categories of real estate (*res inhabilis*), although the scope of these exceptions varies. Poland has the fewest restrictions, as, in principle, any real estate - including property owned by the state or local government - may be subject to acquisitive prescription. Conversely, Lithuania imposes the most stringent limitations, excluding all state and municipal property from acquisitive prescription. This restriction reflects the post-Soviet transformation and the emphasis on protecting public assets (Darčkutė, & Fominova, 2024, pp. 58-78; Baranauskas, Laurinavičius, Pakalniškis, & Vasarienė, 2010, pp. 102-106; Brištonas, 2020, p. 69). Furthermore, in Lithuania, acquisitive prescription cannot apply to real estate registered in the name of a person other than the possessor, which significantly limits the practical application of this institution.

Conclusions

The *usucapio* shaped in Roman law influenced the development of this institution in the legal systems under study. Despite the passage of nearly 2,500 years since its first codification in the Law of the Twelve Tables, the institution of acquisitive prescription remains in force, with many modern legal provisions closely resembling the Roman *usucapion* (Kowalczyk, 2016, p. 166). A comparative legal analysis confirms that acquisitive prescription remains a Roman legacy, adapted to the contemporary realities of individual legal systems. In Roman law,

acquisitive prescription was based on the fundamental premise of owner-style possession, which, after a certain period, led to the *ex lege* acquisition of ownership rights. This principle has been largely preserved in the legal systems analysed. Poland combines liberalism - by allowing acquisitive prescription in both good and bad faith - with rigorism, as it requires a long possession period before ownership can be acquired. Italy, on the other hand, is more flexible, providing for shorter periods and allowing both good and bad faith acquisitions. Lithuania, in contrast, adheres to a highly formalistic approach, permitting acquisitive prescription only when possession was acquired in good faith and maintained in good faith for the entire required period of possession. *De lege ferenda*, Poland could consider shortening the required possession periods, while Lithuania might ease its strict formalism and, following the Italian model, allow acquisitive prescription even in cases of bad faith.

In the context of the European Union, where property law remains within the exclusive competence of Member States (Article 345 TFEU), the question arises whether voluntary harmonisation of acquisitive prescription of real estate is possible (EU, 2016, pp. 68-71). Soft law initiatives, such as the Draft Common Frame of Reference (DCFR), provide a point of reference, although they explicitly regulate only the acquisitive prescription of movable property (Book VIII, Chapter 4: Acquisition of ownership by continuous possession). European legal harmonisation could use the DCFR as a foundation, as the legal doctrine has suggested (Von Bar, Clive, & Schule-Nölke, 2009, p. 4172). The fact that acquisitive prescription has been included in the DCFR highlights its significance in modern legal systems and underscores the timeless, transnational nature of Roman legal concepts (Kowalczyk, 2016, p. 219). This raises a broader question: should the European Union, through voluntary harmonisation or soft law projects, return to the common Roman roots of acquisitive prescription, or should it maintain diverse, often more formalised national regulations? The DCFR suggests a compromise, but any attempt at harmonisation would require a dialogue between national legal traditions and the demands of modern

international legal transactions aimed at ensuring legal certainty for EU citizens, who often buy property in other Member States. This complex interplay makes acquisitive prescription a fascinating subject of research - one that I deliberately leave open for further academic discussion.

References

Bandarzewski, K. (2022). Zakres ochrony prawa własności wynikający z art. 17 ust. 1 Karty praw podstawowych Unii Europejskiej a orzecznictwo polskich sadów administracyjnych. *Rocznik Administracji Publicznej, 8*, pp. 219-237, Warsaw.

Baranauskas, E., Laurinavičius, K., Pakalniškis, V., & Vasarienė, S. (2010). *Daiktinė teisė*. Vadovėlis, Vilnius.

Brištonas, R. (2020). Įgyjamosios senaties taikymo patirtis ir perspektyvos [in:] L. Didžiulis (ed.), *Daiktinė teisė. Ar privatinės teisės pamatai atlaikys XXI a. iššūkius?*, pp. 59-71, Vilnius.

Darčkutė, G., & Fominova, K. (2024). *Įgyjamosios senaties institutas Lietuvoje: keliai ir klystkeliai*. Vilnius University Open Series, pp. 58-78, [doi:10.15388/TMP.2023.3].

EU (2016). *The study: Cross Border Acquisitions of Residential Property in the EU: Problems Encountered by Citizens, the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs*.

Galati, A. (2013). *Dell'usucapione*. Art. 1158-1167, Milano.

Grzesiowski, K. (2024). O dopuszczalności zasiedzenia lokalu niewyodrębnionego, czyli nowe spojrzenie na instytucję zasiedzenia nieruchomości lokalowych. *Nieruchomości@, 1*, pp. 31-52, Warsaw.

Ignatowicz, J., & Stefaniuk, K. (2022). *Property law*. Warsaw.

Jurcewicz, A., & Popardowski P. (2011). Własność w ujęciu prawa polskiego i prawa UE. *Studia Iuridica Agraria, 9*, pp. 130-154, Warsaw.

Kowalczyk, B. (2016). *Usucapio. Rzymskie pochodzenie współczesnej instytucji zasiedzenia*. Gdansk.

Mazzon, R. (2022). *Usucapione di beni mobili e immobili e altri modi di acquisto della proprieta e dei diritti reali*. Maggioli.

Mysiak, P. (2024) [in:] Załucki M. (ed.), *Kodeks cywilny. Komentarz*. Warsaw.
Rozwadowski, W. (1992). *Prawo rzymskie. Zarys wykładu wraz z wyborem źródeł*. Poznan.
Rozwadowski, W. (2017). O nabyciu użytkowania wieczystego w drodze zasiedzenia. Uwagi krytyczne, *RPEiS, 4*, pp. 73-86, Poznan.
Von Bar, C., Clive, E., & Schule-Nölke, H. (2009). *Principles, Definitions and Model Rules of European Private Law - Draft Common Frame of Reference*. Munich.

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 126-145

CIVIL LIABILITY FOR INJURY CAUSED TO THE VICTIM PROVOCATEUR BY THE OFFENDER UNDER THE INFLUENCE OF STRONG DISTURBANCE OR EMOTION

Ion IFRIM
ORCID [ID]: https://orcid.org/0000-0001-5624-917X
E-mail: ionut_ifrim24@yahoo.com; ion.ifrim@icj.ro
Afilliation: Institute for Legal Research of the Romanian Academy
Acad. Andrei Rădulescu

Abstract: *In judicial practice and legal literature, the issue of civil liability for the damage caused to the victim provocateur by the offender's act committed under the influence of a strong disturbance or emotion caused by provocation forms the subject of discussion and various solutions. In view of the variety of solutions and their bases, in order to arrive at the conclusions that seem to us to be accurate, we consider it useful to start analyzing the problem from its primary elements.*

Keywords: *tortious civil liability; criminal law (provocation and emotional states); theory of causation and culpability; analysis of the victim's behavior in relation to the wrongful act.*

Introduction

In criminal practice (ICCJ, dec. no.12. /2016, M.Of., no.498 of July 4, 2016 and legal literature (Antoniu, & Toader, (coordonatori), Boroi, Brutaru, B. N. Bulai, C. Bulai, Dănișor, Drăghici, Duvac, Guiu, Ifrim, Ctin Mitrache, C. Mitrache, Niță, Ristea, Sima, Ștefănoaia, & Vasiu, p. 121) the issue of civil liability for the damage caused to the victim provocateur by an act committed under the control of a strong

disturbance or emotion, caused by a provocation, is the subject of discussion and various solutions. In view of the variety of solutions and their bases, to arrive at the conclusions that seem to us to be accurate, we deem it useful to start analyzing the problem from its primary elements.

We will begin by analyzing the conditions in which the act of the injured party affects the right to compensation for the damage suffered.

Some courts have adopted the view that in cases in which, from the point of view of criminal liability, there is a mitigating circumstance, pursuant to Art. 75 para. 1 lit. a, the commission of the offense under the influence of a strong disturbance, caused by a provocation on the part of the victim, consisting in an act of violence, or other serious act, committed against the offender or a person close to him, likely to cause him a strong disturbance, we are in the case of the so-called joint fault of the victim provocateur and the offender provocateur, which determines the restriction of the civil liability of the latter.

This point of view (Pușcașu, & Ghigheci, 2021, p. 356) although promoted by court judgments, is more asserted than substantiated. There is no proper analysis of the situation in the light of the requirements of common fault, but, we suspect, since, in terms of criminal liability, the victim's culpable act leads to a mitigation of liability for the crime committed by the offender, it is thought that these criteria of criminal law could also be applied to civil liability, leading to a reduction in the victim's civil liability. Rather, it would be an application by analogy of the rules governing civil liability, in the case of common fault, to the hypothesis in which, in terms of criminal liability, there is a legal mitigating circumstance, in accordance with Article 75 para. 1(a).

In another opinion, it is considered that, in this hypothesis, "the allegation that there is joint culpability, which would make it possible to compensate for the damage caused" is unfounded. In fact, in relation to the act held against the defendant, the victim had a provocative attitude which was considered by the court in the graduation of the sanction imposed, but this cannot be considered as the victim's fault in committing the crime, which constitutes an act of the defendant, which generates civil damages".

In this view, the theoretical thesis that seems to emerge is that there is no connection between the victim's provocative act and the damage caused by the victim through the provocative offender's act such as to affect the latter's civil liability, so that the damage must be made good in full by the provocative offender alone, the provocative victim not being required to bear any part of the damage. Lastly, it is also submitted that were (Oprişan,1960, pp. 906-912) in the case of criminal liability, the mitigating circumstance in Article 75 para. 1 lit. a, we are in the hypothesis in which the act causing the damage is the consequence of the victim's act, and this hypothesis includes two other sub-hypotheses. The first sub-hypothesis would be that in which "the perpetrator's culpable act disappears in the victim's unlawful act, even if not culpable, which is the sole and true cause of the damage". The second sub-hypothesis is offered by "the situation of a person who commits a wrongful act with intentional negligence (the concept is specific to civil law), or simply with intent (if the act is criminal), making the victim's culpable act an instrument of his or her culpable conception". The author argues that "this is the situation of the offender provoked by the victim's culpable wrongful acts". It rejects the theory of common fault and adopts the view that, in cases where provocation operates, there is no restriction of the civil liability of the offender for the damage caused by his act.

Civil liability for injury caused to the victim provocateur by the offender under the influence of strong disturbance or emotion

We will begin by analyzing the conditions in which the injured party's conduct has an influence on the right to compensate for the damage suffered. The act of the person sustaining the damage is of course a factor that cannot be ignored in resolving the question of the right to compensation. Where that act is the sole cause of the damage suffered, it is irrelevant whether it is culpable; it will in any event lead to the matter being resolved in such a way as to deprive the person sustaining damage of any right to compensation.

The nature of the act of the person sustaining damage begins to be relevant to the question of the right of reparation when, in addition to his own act, the act of another person has contributed to the damage and only if the act of the latter person is culpable,

a) If the act of the second person is not at fault, the fact that the act of the person sustaining damage contributes to the damage, whether at fault, removes any right to compensation. Thus, A was seriously injured by B, who was driving a motor car; B complied with all the traffic rules. In these circumstances, it is irrelevant whether A. was injured because he tried to cross the road irregularly and inopportunely or because, in hurting himself, he fell from the kerb onto the pavement just as B. was driving by. Or, another example: A. would not have gone out if B. had not suggested by telephone that they meet for a walk; on the way to the meeting place, A. falls and fractures his hand; since B.'s act was not at fault, A. will not be entitled to compensation, whether or not he himself is at fault for his fall.

b) If the act of the second person is culpable, then the nature of the act of the person who has suffered damage begins to be of importance in the question of compensation for the loss sustained. It is indisputable that, in such a case, only the fault of the person sustaining the damage can influence the way in which the question of compensation for the damage suffered by that person is resolved. No one could defend himself or herself against liability by pleading that the person sustaining the damage was not at fault. Thus, for the fault of the person who has suffered damage to affect the obligation of another person to make reparation for the damage suffered, the fault of the person who has suffered damage must be culpable, not only that of the other person. To make progress in clarifying the legal situation from the point of view of establishing civil liability, in cases in which, from the point of view of criminal liability, para. 1, letter a, of Article 75 of the Criminal Code, it is necessary to carefully examine the following question: are we, in these cases, in a genuine hypothesis of joint culpability, as some authors and practitioners claim? It seems to us that in order for fault to be common, (Dongoroz, *Tratat*, 1939, pp. 243-250) that is to say, concurrent, it is

necessary that the fault of both persons be reflected in the same event causing the damage and, thus, the damage caused must be directly linked to the culpable acts of the two persons, regardless of whether or not the damage is concentrated in the assets of only one of them. Disregarding, hypothetically and in turn, the acts of each of the two people, the acts of the other person remain sufficient to have caused the damage. The two acts are merged as the final moment in the event giving rise to the damage, which is therefore regarded as a joint act. It is only in this case that the fault is concurrent, or, as it is called, joint fault, causing one and the same damage. However, in the hypotheses in which the victim provocateur does not contribute directly, by his act, to the causing of the damage. The damage is the direct result solely of the act of the offender provocateur. A serious oral insult to another person can lead directly to one's own death; this may be the result of the offender's own acts, but not of the insult. The legal situation is therefore quite different from that of common fault, i.e. the hypothesis in which the act directly causing the damage is the consequence of the victim's own act.

Based on the above, it is also necessary to solve the problem that concerns us, to recall when an act is culpable.

Civil law links culpability to foreseeability or at least the possibility of foreseeing the harmful result of the act committed, and, in this connection, it is necessary to deal briefly with the content of the concept of culpability (Fleişiţ, 1954, p, 86). A culpable act, as a type of antisocial act, does not have this characteristic if, from an objective point of view, it is not capable of producing harmful results and, from a subjective point of view, it does not express a negative position of the perpetrator in relation to social realities; this subjective position of the perpetrator is culpa.

To be culpable, therefore, the act must subjectively express the offender's guilt. But this does not yet seem clear enough. Only by identifying the content of the subjective position that characterizes culpability will we be able to say what it consists of in. Guilt exists when the perpetrator has committed his or her act despite being aware of the negative, anti-social significance of the specific act committed. Fault, as

the subjective aspect of the act constituting a source of legal liability, is thus analyzed in terms of its specific content and in relation to the specific person of the perpetrator.

Guilt cannot be analyzed in the abstract, as a characteristic of an antisocial act "in itself", or of an act that constitutes a deviation from an abstract mode of conduct of a very prudent man or from any other predetermined standard of conduct. The requirement of awareness of the antisocial significance of the culpable act cannot be satisfied by reference to such a code of conduct, but to the concrete person of each individual offender. Going further with the analysis and going beyond notions, it is necessary to establish when the perpetrator is aware of the antisocial significance of his act, when it expresses a subjective antisocial position. This position is realized when the perpetrator is at least foreseeable of the harmful results of his act. When the perpetrator did not foresee, nor could it have foreseen such results, there is no awareness of the antisocial significance of the act, as it does not express any negative subjective position towards social realities. Therefore, guilt consists in a person's subjective position expressed by committing the act although the harmful results were foreseeable; it is a guilty subjective position, and the guilt of a concrete person can only be considered in relation to what, also in concrete terms, he foresaw or could have foreseen.

Even the slightest fault cannot be conceived without this subjective content. From the variety of results, even harmful, of an act, the perpetrator may be at fault only for some, and not for others, as he foresaw them or could have foreseen them.

The act is therefore culpable, by considering the subjective position of the suspect/defendant in relation to its harmful result, in the sense that he committed it although he foresaw or could have foreseen this result; without this subjective aspect of what was committed and caused, the act is not culpable, we are not dealing with a tort or quasi-delict as a legal fact giving rise to civil liability.

On the other hand, if it is culpable, the act must also be considered causal, because of this fact in relation to liability for the damage caused. In other words, an act with a causal value (we base this thesis on the

general principle of the theory of causation that the cause phenomenon - like the effect phenomenon - must be considered in a differentiated manner 'according to the specific features of the various fields of research, namely according to those attributes, characteristics and particularities in the light of which the given phenomena are of interest to the respective field of research'. However, civil liability, in cases in which provocation operates under criminal law, is investigated exclusively based on culpable acts in relation to the occurrence of the damage; therefore, only such culpable acts can, in the cases referred to have a causal value. Any strict liability is, in these hypotheses, excluded as regards civil liability for the damage caused can only be the culpable act and, conversely, the culpable act cannot be ineffective as regards civil liability for the damage caused.

We believe that this clarification is absolutely essential, because we have seen, in the above, that the victim's act influences civil liability for compensation for damage caused to his property by the culpable act of another person, only when that other person is also culpable and that, on the other hand, in the hypothesis of provocation, the culpable act that causes the damage is the consequence of the victim's act. Thus, in the analysis of the contributory antecedence (we refer to the set of phenomena that preceded the result and contributed to its production as the "contributory antecedence", since it is not yet certain whether all the phenomena that make up this antecedence have a causal value, some of which may remain mere conditions to produce the result. We call each component phenomenon of the antecedence a "contributory factor", because it may have the quality of a causal phenomenon or a mere condition, depending on whether, in the light of the characteristics of interest in the field of research, the factor in question has or does not have causal value in causing a harmful result, in order to select the factors with causal value and which give rise to civil liability for the damage caused, civil law requires us to focus only on those contributory factors which meet the conditions for such liability; these conditions are that the contributing factors be acts of culpable conduct, culpability meaning the foreseeability or foreseeability of the harm caused. No such

factor can be ignored; no other factor can be included in the causal antecedent.

What is the situation from the point of view of the culpability of the facts in cases where, from the point of view of criminal liability, provocation operates under art. 75, letter a, of the Criminal Code.

It is indisputable that the victim's provocative act, which resulted in the criminal act of the person provoked, forms part, together with the latter act, of the antecedent contributory cause of the damage to the victim's assets. Without the victim's act, the offender would not have committed the offense and therefore the damage would not have been caused. But, as we have seen, it is not enough for a given act to form part of the contributory antecedent to the causing of damage in order to incur civil liability for that damage; of all the contributory factors that make up that antecedent, only factors with causal value can incur such liability, and only culpable acts have such causal value. At the same time, we have seen that culpable acts are only those in the commission of which the perpetrator foresaw or could have foreseen the damage that occurred. The answer to the question as to whether both acts, which make up the contributory antecedent in the hypotheses in which provocation operates under criminal law, are culpable, will also be valid for the question as to whether both acts have causal value in relation to the result caused, thus determining the civil liability of the respective perpetrators and, in the final analysis, of the offender who has caused the damage.

It is indisputable that the act of the offender provocateur, who has directly caused damage to the assets of the victim provocateur, is, by hypothesis, a culpable act in relation to that damage. This act is an intentional or deliberate offense for which the perpetrator is subject to criminal liability, no doubt influenced by the provocation. The act is committed with direct intention - certainly under the conditions of provocation - and therefore with the foreseeability and intention of the harmful result, which includes the financial damage caused; it is therefore, also, in terms of civil liability, a culpable act.

But is the act of provocation on the part of the injured victim also a culpable act in relation to the damage caused and therefore with a causal value in relation to that damage?

As already mentioned, the Romanian Criminal Code provides as a mandatory mitigating circumstance that "the perpetrator committed the offense under the control of a strong disturbance or emotion caused by a provocation produced by violence, by a serious injury to the dignity of the person or by another serious unlawful action (Article 75 lit. a, Penal Code). An examination of the legal provision providing for this circumstance shows that for provocation to exist, three conditions must be met, namely: 1) the offense must have been committed under the influence of strong disturbance or emotion; 2) the disturbance or emotion must have been caused by provocation on the part of the injured person; 3) the provocation must have been caused by violence, by a serious violation of the dignity of the person or by another serious unlawful act.

For the circumstance to exist, it is therefore necessary to establish that at the time of the commission of the act the offender was in a state of strong mental disturbance (*perturbatio animi*) in a state of extreme nervous excitement or tension, anger or indignation affecting his whole being, or in a state of strong emotion. The existence of such a state of disturbance or strong emotion is essential, since it explains the perpetrator's action to the greatest extent and justifies the provision of this circumstance as a mitigating circumstance.

This state of strong distress or emotion must have been caused by provocation on the part of the injured person. If the disturbance or emotion had a cause other than provocation on the part of the victim, there could be no mitigating circumstance of provocation, even if the court could find that the circumstance could be regarded as a mitigating circumstance. Lastly, it is necessary that the provocation was caused by the victim by certain acts, namely violence, a serious violation of the dignity of the person or another serious wrongful act.

Violence (Ifrim, 2024, pp. 402-406) may consist of any aggressive act likely to cause distress or emotion to the person against whom it is directed. Since Article 75(a) refers to violence in general, the provocation

may be caused either by physical violence (blows or acts causing physical coercion or suffering, injury to body or health) or mental violence (threats). As criminal acts, they are certainly culpable acts, being committed with guilt. But this criminal culpability consists in a certain subjective position, in relation to certain consequences of a certain act, for a certain legally protected object, namely, this criminal culpability consists in the subjective position of the injured victim, in the context of the commission of his unjust act, considered as a crime, in relation to the socially dangerous consequences of this act, for the social-legal object protected by its criminalization. We, however, are not concerned with this subjective position, but with that of the injured victim, still in the context of the commission of his unjust act of provocation, but considered as a source of civil liability, in relation to other consequences, of a patrimonial nature, of another act, of the offender provocateur, for another protected legal object, the patrimony of the victim provocateur. Of course, the two subjective positions are not identical. The wrongful act of the victim provocateur, considered from the latter point of view, could not automatically be deemed to be culpable, solely because of its culpability as a criminal act. The elements based on which the two forms of culpability are determined are different and may give rise to different situations.

It should again be recalled that culpability in civil law means the foreseeability or the possibility of foreseeing the damage caused by the tort. A serious assault, violence or verbal abuse may give rise to a state of provocation - that is to say, that intense state of mental disturbance which for the time being alters the normal possibility of self-control, the normal self-control of the acts, the person provoked reacting, in these circumstances, by committing a crime - without the person who committed the act of assault, violence or insult having foreseen or being able to have foreseen this reaction and its harmful results.

The state of provocation is that of the provoked and the culpability is that of the provocateur. What justifies the provocation is the state of provocation of the provoked person, and this depends on his mental structure, his irritability, his power of inhibition, his conscience, and not

on the provocative act of the victim. What may, however, make the latter act culpable is linked to a different person and to entirely different determining factors, namely the foreseeability or foreseeability by the injured victim of the harmful result of the act committed by the person who has been provoked. It is not, therefore, correct to speak of a causal link between the state of provocation and the harm caused to the victim by the act of the person provoked. The criteria are therefore different and of a different nature. There is no doubt that, in very many cases, the victim's unjust act, which gives rise to the state of provocation, is also culpable; in other words, in very many cases, the injured victim, by committing the provocative act, foresees or could have foreseen, at least with some approximation, the harmful response of the person provoked. But there are situations in which the mental structure, irritability and inhibition of the person provoked are such that his reaction is so disproportionate to the act of provocation that the victim could not even have suspected such a reaction, with its corresponding prejudice. For example, violence, even intentional, but common enough, when boarding a crowded tram in a crowded streetcar, where the reaction of the victim is to shoot the perpetrator of the violence dead. On examination, it is found that the perpetrator of the murder is of such a mental structure that even simple violence leads to intense mental disturbance, accompanied by loss of self-control, and the circumstance is applicable. The violence committed by the victim provocateur remains, of course, an unjust act. But this does not make the unjust act culpable, where the condition of culpability - the foreseeability or foreseeability of the harm - does not exist. For these reasons, the wrongful act of the victim who has caused the harm is not always also a culpable act in terms of the harm caused. The scope of the two categories of wrongful acts is therefore interrelated, encompassing acts - most of them probably - which have both characteristics, but with their own distinct areas. When the victim's wrongful act is not also culpable, it will have no causal value in relation to the harm suffered.

In conclusion, in hypotheses in which the attenuated circumstance of provocation operates in terms of criminal liability, the acts that form

part of the contributory antecedent of the harm caused are presented, from the point of view of culpability, as follows: the act of the offender provocateur is not only an offense from the point of view of criminal liability, but also always a culpable act from the point of view of civil liability; the unjust, provocative act of the injured victim is not always also a culpable act; it is or is not culpable, depending on whether the offender foresaw or could have foreseen the harm that occurred.

Conclusions

In view of the above-mentioned theses, we can draw the conclusion on civil liability for the harm caused to the victim provocateur by the offender provocateur. The premises have been demonstrated above and are three in number: (a) in the hypotheses in which the mitigating circumstance operates, from the point of view of criminal liability, we are dealing with two successive acts, each with its distinct objective and subjective characteristics, one provocative, by the victim who has suffered damage, and the other, by the offender who has caused the damage directly, the second act being the consequence of the first; (b) these hypotheses are among the cases in which civil liability for the damage caused may be incurred only for culpable acts; c) between the two acts in relation to which the mitigating circumstance, Art. 175 para. 1, lit. a, in relation to the damage caused, the act of the person who caused the damage is always culpable, while the act of the victim of the damage is not always culpable.

The conclusion is easy to draw: the civil liability of the offender provocateur for the injury suffered by the victim provocateur will be limited or total, depending on whether the victim's act is culpable. Liability will often be limited, because the victim's act is often also culpable.

Therefore, we do not subscribe to any of the exclusive and formal remedies contemplated. We do not subscribe to the conclusion that the provocative act of the injured party always entails a reduction in the civil

liability of the person who has caused the damage, on the assumption that we are dealing with so-called joint fault. We have shown why this reasoning cannot be accepted and, therefore, neither can the solution. We do not subscribe to the exclusive solution of always restricted civil liability, based on an extension of the criteria of criminal law - which always attenuate criminal liability for an act committed in a state of provocation - to civil liability, even if this reasoning were to be reinforced by the argument that it is possible to apply by analogy, to the situation that concerns us, the rules governing civil liability in the case of joint fault.

These grounds and arguments are not compatible with our hypothesis. Criminal liability, in the case of the commission of an offense in the event of provocation, is always diminished, because provocation always involves an intense mental disturbance caused by the victim's wrongful act, without which the person provoked would not have committed the offense. In other words, because the act giving rise to attenuated criminal liability always has this subjective characteristic - attenuating as well. But the limited nature of the civil liability of the offender who has caused the damage does not depend on this mitigating and non-removable characteristic of the act of the person who caused the damage, but is a consequence of another act, the act of the victim who caused the damage, which does not always have the necessary characteristic to trigger civil liability.

This act is not always culpable, in terms of the damage caused, and for this reason, the civil liability of the offender cannot always be diminished. Therefore, the criteria of criminal liability, which are always attenuated in the event of the commission of an offense in a state of provocation, cannot be extended to civil liability for material damage caused by such an offense, because the consequence of attenuation of criminal liability in such cases derives from a certain characteristic of the given legal situation, and that of attenuation of civil liability from another characteristic, so that these two characteristics do not always coexist; the first is always present, the second may be absent.

For the same considerations, the further argument of the possibility of applying the rules governing civil liability in the case of common fault by analogy cannot strengthen the argument of the extension of the criteria of criminal law, as regards criminal liability always attenuated in the cases in which the attenuating circumstance under consideration operates, to civil liability, which must also always be restricted in these cases.

Joint fault, even if we disregard the fact that it is reflected in the same event which directly causes the damage, always presupposes, however, the culpable conduct of both parties to the legal relationship in respect of compensation for the damage thus caused. Now, in cases where provocation operates, from the point of view of criminal liability, the act of the offender provocation the victim is always culpable, but the act of the victim who has suffered damage is not always culpable either, from the point of view of the damage caused. For this reason, it is natural that in cases of common faults there should be compensation and therefore a reduction in civil liability, and that in cases where the mitigating circumstance under Article 75(1)(a) applies in relation to criminal liability, this reduction is not always admissible. These are the considerations for which the rules governing civil liability in the case of common fault cannot be applied even by analogy to our hypotheses.

Nor do we embrace the other exclusive solution, that the provocative act of the injured victim would never lead to the restriction of the civil liability of the offender for the damage caused, the offender always having to bear it exclusively and in full. We do not subscribe to this solution when it is based on the argument that "the victim had a provocative attitude which was taken into account by the court in the gradation of the sanction imposed, but this cannot be considered as the victim's fault in committing the crime, which constitutes an act of the defendant's own".

We have pointed out that when provocation operates, the consequence of attenuation of criminal liability derives from the state of provocation in which the offender committed his act, and the reduction of civil liability derives from the culpability of the victim's act of provocation, the act of the offender who has been provoked, as a crime,

is always culpable. So, we do not see the consistency of the above argument.

First, it is not the victim's provocative attitude or deed that justifies the attenuation of the criminal liability of the offender who has provoked the offender, but the state of provocation - of intense mental disturbance with all its characteristics - in which the offender committed the crime. The victim's unjust act, if this state is not established, has no bearing on criminal liability. Secondly, when discussing the issue of civil liability, the unjust act of the injured victim is not of interest in relation to the mental conditions in which the offender committed the crime, but in relation to the damage caused by the commission of the crime. Thirdly, we fail to see why the victim's wrongful act, which gave rise to the state of provocation, with its mitigating consequences for criminal liability, could not at the same time constitute an act which is culpable in relation to the harm caused by the act of the offender provocations the offender.

If the attenuation of criminal liability has its source in the state of provocation and the attenuation of civil liability has its source in the victim's culpable act, both these consequences are perfectly compatible, when the conditions mentioned are cumulatively met. The exclusive solution, therefore, that the victim's wrongful act of provocation would never give rise to a reduction in the civil liability of the offender who has caused the damage cannot be justified based on the arguments cited. But neither can the other arguments cited at the beginning of these lines. Starting from the precise observation that, when provocation operates in the context of criminal liability, we find ourselves in the hypothesis - which is given special consideration in the context of the criteria for establishing civil liability - in which the act causing the damage is the consequence of the act of the injured victim, two sub-distinctions are made, each of which envisages a different solution, with which we cannot agree.

First, it is pointed out that, where the act giving rise to the damage is the consequence of the act of the injured victim, the rule would be that "the perpetrator's culpable act disappears in the victim's wrongful act, even if not culpable, which is the sole and true cause of the damage".

First, we do not see how an unlawful act can be non-culpable, or conversely, how a non-culpable act can be unlawful. It is well known that the unlawfulness of an act, as a source of civil liability, is conditioned by damage, a causal link, and fault. If any of these characteristics are missing, the act is not unlawful. Moreover, we believe that the causal link itself implies fault, because in establishing civil liability for caused damage, a non-culpable act is not considered; in other words, it has no causal value. In such cases, it remains merely a condition for the occurrence of the damage.

But regardless of the meaning and scope we attribute to these notions, it is certain that civil unlawfulness must be culpable, and that civil liability can only arise from a culpable act; if detached from the possibility of establishing liability, it ceases to interest us as a legal institution. Let us, however, disregard the fact that, in the above opinion, fault was excluded from the concept of unlawfulness. Suppose the author of this opinion was referring to the non-culpable act of the injured victim as a hypothesis, alongside their culpable act—can a non-culpable act absorb the directly damage-causing culpable act, becoming the 'sole and true cause of the damage,' simply because without it, the culpable act would not have been committed? An affirmative answer would mean that even though the perpetrator of the harmful act could have foreseen—or even did foresee—the harmful result of their action, this act 'disappears' into the innocent, non-culpable act of the injured victim! Thus, they may act and cause harm without liability. Along with the culpable act disappearing into the innocent act, the entire legal conception of responsibility and causation disappears as well: liability without fault, irresponsibility despite fault, acts with no causal value regarding responsibility, despite being culpable, and acts with causal value under this aspect, but without fault. This is the most typical and, at the same time, exaggerated application of the *sine qua non* condition theory, and even legal doctrine expresses reservations about such a solution. We remain far from our legal conception of responsibility and causation when it is claimed that the directly damage-causing culpable act disappears into the culpable act of the injured victim, because the first act

is the consequence of the latter. We believe that, according to this conception, no culpable act can be excluded from the causal antecedents of causing damage—as a factor with causal value—just as no non-culpable act can be included in such antecedents.

The example chosen to illustrate the stated thesis is also interesting. The thesis is illustrated by the example of ‘a person who climbs onto a truck without the driver's will or knowledge. During the journey, due to an incorrect maneuver, an accident occurs, and the person who climbed onto the truck is injured. It seems clear that the points made above are well illustrated,’ that is, in this situation the driver would not be liable for the resulting damage. But does this example correspond to the hypothesis discussed, namely the hypothesis in which the culpable act, directly causing the damage, is the consequence of the act—culpable or non-culpable, it is indifferent to the author of the discussed opinion—of the injured victim? Firstly, the act of the driver—the incorrect maneuvers not culpable; because fault, in the well-established conception of our law, means a certain subjective position towards the specific harmful result suffered. Now, although the driver performed an incorrect maneuver, he could not have held any subjective position—of foreseeing or being able to foresee—that result, because he did not know and was not supposed to know that there was a passenger on the platform, the victim having climbed aboard, as stated in the example, ‘without the will or knowledge of the driver.’ This alone would be enough to make it clear why the driver, in this example, would not be liable for the damage caused; his act is not culpable, and this is the basis for which no right to compensation could arise in this example—not because his culpable act is the consequence of the victim's act. Nor is the latter part of the initial hypothesis confirmed. Is the driver's incorrect maneuver, that is, his action, a consequence of the passenger's boarding the truck, i.e., of the act of the injured victim? We see no such connection; on the contrary, if the driver had known there was a passenger on the platform, he might not have made the incorrect maneuver. Therefore, the given example does not match the discussed hypothesis in any way and cannot serve to illustrate the proposed theoretical solution. In any case, starting from the

proposed solution—namely that, if the damage-causing act is the consequence of the injured victim's act, the rule should be that the culpable, damage-causing act disappears into the victim's act, which becomes the 'sole and true cause of the damage'—we would reach the conclusion that even in cases of provocation, the provoked offender, whose act would disappear into the victim's provocative act, would not be liable at all for the caused damage, and the victim would have no right to compensation.

Since such a conclusion is diametrically opposed to the solution being discussed—namely, that the provoked offender must always be liable for the damage caused, exclusively and entirely—the opinion proposing the former creates a special sub-hypothesis to accommodate cases in which provocation, under criminal liability, operates according to Article 75, paragraph 1, letter a.

This would be the more general situation in which the act directly causing the damage, because of the victim's act, is intentional, the perpetrator 'making the victim's culpable act an instrument of their own plan.'

By framing cases of provocation in this sub-hypothesis, it is argued that, in these situations, the provoked offender must always be fully and solely liable for the damage caused to the victim, because 'by foreseeing and desiring, or merely accepting the socially dangerous consequences of their act, they used the victim's culpable, unlawful act as an instrument, as a means—a pretext. They directed the events knowingly, using the victim's act...' In this text, we are interested exclusively in the issue of civil liability for damage caused to the provocative victim by the act committed by the provoked offender. If we were to address other aspects of civil liability, we would also discuss the above sub-hypothesis and the proposed solution for the cases it encompasses. But the cases in which the state of provocation operates under criminal liability are far from fitting into this sub-hypothesis. We are confident that no court would recognize provocation by someone who uses the victim's wrongful act as a pretext to commit an offense. We have already seen what justifies and characterizes provocation and will not revisit it. In any case, the sub-

hypothesis created to deny any influence of the provocative act of the injured victim on the civil liability of the provoked offender does not correspond to the discussed legal situation. Therefore, the exclusive solution that the provocative act of the injured victim would never reduce the civil liability of the provoked offender cannot be justified even through the above construction.

We conclude our analysis by recalling our conclusion on the issue it addresses, as well as the essential grounds for this conclusion. The civil liability of the provoked offender for the damage caused by the offense committed against the provocative victim will be reduced or full depending on whether the victim's act was culpable or not. The essential grounds for this conclusion lie in our legal conception of causation and responsibility. According to this conception: fault is the subjective position of the perpetrator in relation to the resulting damage; only, and all, culpable acts have causal value in relation to the resulting damage; only, and all, such acts may serve as the basis for civil liability for the respective damage.

References

Antoniu, G., & Toader, T. (coordinators), Boroi, A. et al. (2025) *Explanations of the Criminal Code*, vol. II, Articles 53–187, p. 121.

Dongoroz, V. (1939). *Treatise*. pp. 243–250.

Fleisiț, E. A. (1954). *Obligations Arising from Causing Damage and from Unjust Enrichment*. State Publishing House for Scientific Literature (E.S.P.L.S.).

ICCJ, Decision no. 12/2016, Official Gazette no. 498 of July 4, 2016 (https://www.iccj.ro/2016/05/16/decizia-nr-12-din-16-mai-2016/)

Ifrim, I. (2024). *On the Meaning of the Notion of "Violence" as an Act of Provocation*. International Conference: Strengthening Social Resilience through Harnessing Human Capital in the Context of the Accession of the Republic of Moldova and Ukraine to the European Union, Chișinău, Moldova. pp. 402–406

(https://ibn.idsi.md/ro/vizualizare_articol/217291).
Oprișan, C. (1960). Does the Legal Mitigating Excuse of Provocation Influence the Civil Tort Liability of the Offender. *Justiția Nouă*, *5*, pp. 906–912.
Pușcașu, V. & Ghigheci, C. (2021). *Annotated Criminal Code*, Volume I, General Part. Universul Juridic.

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 146-182

LEASING OF PERSONNEL - CONSEQUENCES ARISING FROM THE LACK OF IDENTITY BETWEEN THE FACTO AND THE IURE EMPLOYER

Ana-Maria VLĂSCEANU [1]
ORCID ID: https://orcid.org/0000-0001-6888-0575
E-mail: ana-maria.vlasceanu@drept.unibuc.ro
Mădălina-Ani IORDACHE [2]
ORCID ID: https://orcid.org/0009-0005-8381-7992
E-mail: madalina.iordache@cim-sca.ro
Afiliation: [1] University of Bucharest, Faculty of Law, Romania
[2] University of Bucharest, Faculty of Law; Lawyer S.C.A. Ciulei, Iordache, Morozov, Co-Managing Partner, Romania

Abstract: *This study aims to analyse the erosion of legal rigour and the promotion of contractual freedom, in the name of which, in practice, numerous abuses are committed, which, by definition, test the internal limits of the law and, not infrequently, even the external ones, leading to flagrant violation of the law.*

Specifically, in what follows, we will focus on describing and criticising an increasingly widespread phenomenon - namely that of labour lending, which we define in the broadest sense as a situation in which the worker performs work under the direction and for the benefit of another person, natural or legal, other than his or her employer. In practice, all types of staff leasing are promoted as a response to the need to make employment relationships more flexible and, above all, to business development, as they relieve de facto employers of the 'burdens' associated with managing their own workforce (selection, recruitment, hiring, organising work, guaranteeing workers' social protection).

Keywords: *temporary agency work; posting; flexible working.*

Introduction

As a result of the impact of digital technology, which is turning a new page in the social and economic history of the society, work and labour relations are changing at an accelerating pace. Labour law is 'called upon' not only to keep up with this pace, but also to put forward regulations that succeed in guiding the changes themselves.

Systematic reflection on the individual employment contract is currently under pressure from three converging trends: **(i)** an increase in the variety of manifestations of contractualism in employment relationships; **(ii)** a proliferation of jurisprudential benchmarks; and **(iii)** lack of legal guidance in solving increasingly complex judicial situations

Of these manifestations, those of contractualism in labour relations are as kaleidoscopic as they are saturated with fairly compact manifestations, of which the following are worth mentioning (Athanasiu, 2019, pp. 19- 41):

- The multiplication of types of employment contracts, but also of forms labour subcontracting for different types of services;
- Difficulties for the regulatory and supervisory authorities to keep pace in terms of understanding and adapting to the dynamism, complexity and diversity of new types of work, and, consequently, to regulate or, where necessary, sanction them;
- Diversification of professions, trades, occupations that are regulated by special laws and excluded from the scope of labour legislation (e.g.: cultural workers, domestic workers, nannies);
- Work on digital platforms, with special regard to *crowdwork* and its legal qualification;
- The lease of personnel, through the implementation of legal structures which are not regulated and lead to a lack of identity between the contractual and the *de facto* employer.

Thus, the labour market today is characterised by:

- *Contractual drift whereby the level of social protection specific to standard labour contracts is reduced;*

- *The flexibilization of working conditions is transformed into a source of informalisation.* After the escape from the generalised and often forced labour of the communist period, a period of continuous flexibilization of labour relations followed. Wage labour has declined in weight and quality due to post-communist deindustrialisation, being replaced by cheap informal and fragmented work;
- *The multiplication of subcontracting intermediated by temporary labour agencies, and not only.* Post-communist de-industrialisation was quasi-concomitant with the slow domestic emergence of a small number of multinationals interested in cheap and highly skilled labour, followed by the massive migration of qualified professionals, facilitated by the opening of the European labour market after 1 January 2007, following Romania's accession to the European Union. The domestic labour market was rapidly saturated with job providers and agencies facilitating emigration on a subcontracting basis. Thus, the standard individual employment contract reached a phase of slow regulatory degradation or dilution.
- *New industrialisation and the expansion of digitised services have come with the emergence of new skills and categories of workers and new types of employers, while the individual employment contract has retained its classical structure.* The standard individual employment contract was and still is conceived as a bilateral and personal contract between an employer and a worker. However, joint-stock companies, subsidiaries of multinationals, extended franchising and other variants of corporate management or the new human resource management have opened up new avenues for (sub)contracting labour. Contractual employment has become complemented, if not replaced, by the new human resource management with techniques of recruitment, selection, hiring, professional development etc., where the standard employment contract risks becoming an isolated institution**.**

Such labour market developments have three important negative consequences:

- Destructuring of the normative integrality of labour law and especially of the processes of unitary labour contracting;

- The erosion of legal rigour in the name of 'freedom of contract' and the ongoing flexibilization of labour contracting;
- The progressive weakening and marginalisation of the content of social policies concerning the labour market, the development of human capital and balanced relations between capital and labour.

None of these consequences should be ignored unless major macro-social and legal actions are taken. Correcting and preventing them would be possible, first, by revising the regulatory structure of labour law.

In our view, the way out of this *statu quo* is to review and, implicitly, to innovate the rules applicable to the individual employment contract, which is currently undergoing a process of adaptation to the changes in the field of work and labour relations;

This study sets out to analyse one of the consequences detailed above, namely the erosion of legal rigour and the promotion of contractual freedom, in the name of which numerous abuses are committed in practice, which, by definition, test the internal limits of the law and, more often than not, even the external ones, leading to flagrant breaches of the law.

Specifically, in what follows we will focus on describing and criticising an increasingly widespread phenomenon - namely that of labour lending, which we define in the broadest sense as a situation in which the worker performs work under the direction and for the benefit of another person, natural or legal, other than his or her employer.

The loan of personnel takes various forms in practice, some of which are regulated, such as temporary agency work, secondment (transnational, or secondment based on Art. 45 C. of the Labour Code), and others that "evade" the applicable regulatory framework, such as, but not limited to (a) "virtual secondments"; (b) the employment of a worker by one entity and the *de facto* provision of work for the benefit of several entities belonging, as a rule, to the same group of undertakings as the employing entity; (c) the employment of workers by one entity of the group on the basis of open ended employment agreement and their permanent lease to the other group entities; (d) the lending of staff

disguised in the form of service agreements; (e) co-employment; and (f) employer of record.

In practice, all these types of employee lease are promoted as a response to the need to make employment relationships more flexible and, above all, to *business* development, as they relieve *de facto* employers of the "burdens" associated with managing their own workforce (selection, recruitment, hiring, organisation of work, guaranteeing social protection for workers).

In reality, in addition to these motives, which are not unlawful, companies implementing such models of work organisation are (mainly) seeking to obtain unfair financial advantages in the form of cost reductions as a result of practices such as: (a) setting up letter-box companies in countries with cheap labour or favourable tax treatment for posting allowances and posting workers to countries with a higher level of social protection; (b) granting lower remuneration to "borrowed" workers compared to the level of remuneration enjoyed by workers recruited directly by the companies receiving the labour; (c) circumvention of the limitations imposed by the legislation on the organisation of working time in the case of part-time employment contracts - for the situation of workers shared between companies belonging to the same group; (d) making the workforce more precarious and reducing the level of social protection to which workers are entitled, as a result of the lack of identity between the *de jure* and *de facto* employer.

1. A brief look at the types of labour borrowing covered by the legislation of other countries.

In addition to the legal institutions mentioned above, some countries also regulate other institutions that allow for a worker to have more than one employer.

1.1 *Professional employer organisation* (PEO*)*

By way of example, in the United States of America (USA), professional employer organisations are set up, which are in fact companies specialising in workforce management.

Concretely, these companies deal with all administrative aspects of the labour force, such as the hiring process, preparation of employment documentation, additional documents, payment of social security contributions, etc., while the employer - the beneficiary of the work - concentrates on developing its own business, free from the red tape associated with hiring the workforce.

In this case, the employment contract is concluded between the employee, on the one hand, and the employer - the labour beneficiary, together with the PEO, on the other hand.

The difference between the companies specialised in personnel administration set up in Romania (so-called *outsourcing* companies) and the PEOs is that the PEOs become a party to the employment contracts.

According to the literature (Ramsey, 2024), PEOs provide services mainly for the benefit of small and medium-sized enterprises, on the basis of service provision contracts, in which the parties' responsibilities in their relations with employees are laid down.

Initially (before the 1970s), PEOs operated as specialised staff loan companies (similar to temporary employment agencies), which were used in practice to circumvent pension tax legislation. Thus, in order to circumvent these provisions, employees were dismissed by their employer and then immediately re-hired by companies specialised in loaning personnel, which placed them at the disposal of the dismissing employer (Ramsey, 2024, p. 102)

Over time, other benefits of employee leasing have been identified, with the number of PEOs growing significantly. According to some statistics, there are currently 523 PEOs established in the US, providing services to more than 200,000 small and medium-sized businesses (17% of all employers employing between 10 and 99 people), employing a

combined 4.5 million employees (roughly equal to the number of employees employed by the top four employers in the US)[1].

Turning to PEOs comes with a number of advantages and disadvantages for clients, which can be summarised as follows:

- Advantages:
  - Expert management of labour relations, reducing the risk of violations;
  - Attraction and retention of labour due to the provision of a larger and more consistent benefits package through the PEO;
  - Reducing costs generated by work organisation;
  - Increased efficiency:
- Disadvantages:
  - Limiting autonomy over work organisation;
  - Limiting the client's ability to freely choose the categories of benefits it provides to employees;
  - Additional costs in the price of services charged by PEOs.

Even though the number of PEOs is growing, they are under-regulated, with the industry being the one that has been reluctant to enact legislation to clarify their status.

However, regulations currently vary from state to state and in principle lay down either some authorisation requirements or rules relevant to tax matters - thus not specifically aimed at the area of employment relationships.

By way of example, the *Internal Service Revenue* has adopted a number of rules in this area[2] , the most relevant of which are the following:

- As a general rule, from a tax perspective, the common law employer remains responsible for the payment of taxes and social security

---

[1] https://www.napeo.org/what-is-a-peo/about-the-peo-industry/industry-statistics (accessed on 15.03.2025).

[2] https://www.irs.gov/government-entities/third-party-payer-arrangements-professional-employer-organizations (accessed on 5 January 2025).

contributions, with a few exceptions, which require specific certification by the PEO;

- The common law employer is defined as the person for whose benefit an individual performs work as an employee, unless that person does not have control over the payment of remuneration for those services. In these cases, the person who is not the beneficiary of the labour, but has sole control over the remuneration paid to the employee, acquires the status of a legal employer (such as a PEO) - in which case he or she becomes liable for the payment of taxes and social security contributions.
- The tax code does not define the term co-employer and, as such, this concept is not covered by federal law. However, Treas. Reg. 31.3504-2 provides that a person who pays remuneration to individuals performing work under a contract for services may be designated to act as an employer with respect to the payment of remuneration. In this case, the PEO must show that it is an employer or co-employer of the employees performing work for the benefit of the client. Assumption of this capacity may also be implied if the PEO agrees to:
    - Recruit and employ the client's employees or place them at the client's disposal, either on a permanent or temporary basis, or share the specific prerogatives of the employer with the client;
    - Employ the client's employees in his own name and make them available to the client.

1.2 Employer of record (EOR)

In the context of the globalisation of the labour force and the constant attempt by companies to find a workforce to meet their business needs, wherever they may be located, a new form of staff lending has emerged, namely *employer of record.*

In essence, EORs are companies whose business is to hire labour and make it available, usually on a permanent basis, to other companies.

Employers call on the services of EORs when they wish to recruit labour from countries other than the one in which they have their main/secondary headquarters, in order to avoid the bureaucracy associated with managing the workforce - which in this case is

significantly hampered by the absence of an establishment in the employees' country of residence.

Such a practice also existed in the past, when, for the same purpose, employees were recruited in the territory of certain States by subsidiaries of companies, although the labour was performed exclusively for the benefit of the parent companies or other entities in the group.

In concrete terms, the EORs, at the request of their clients, identify the labour force in the territory of the countries where the EORs have their headquarters and, on their behalf, recruit the labour force and manage the employment relationship from start to finish (registration of employment contracts, conclusion of employment contracts, granting of benefits, conclusion of additional contracts, time sheets, suspension of employment contracts, termination of employment contracts, etc.).

EOR differs from both agency work and PEO from at least the following perspectives:

- In contrast to the situation of the temporary employment agency, as a rule, the EOR recruits employees to place them at the client's disposal on a permanent rather than temporary basis; the specific rules of agency work are not applicable;
- Unlike PEOs, in the case of the EOR, only the EOR is party to the labour contract, not the client - i.e. the *de facto* employer of the employees.

Therefore, in EOR, there is a complete separation between the contractual and the *de facto* employer, creating in reality an even more precarious situation for the employees than that of temporary employees, with the only difference that, as we have already pointed out, in EOR, as a rule, employees are recruited on the basis of employment contracts of indefinite duration, to perform work on a regular basis for the benefit of the *de facto* employer.

Among the benefits of the use of EOR by employers[1] , the following have been highlighted in practice:

- Limiting the legal risks associated with employment in jurisdictions where the employer does not have a legal presence and is not familiar with local law;
- Limiting (if not eliminating) any liability in dealing with employees - given that their contractual employer is the EOR;
- Allowing the client to focus on achieving their business and hire labour from anywhere (more efficient, cheaper);
- Attract talent from all jurisdictions, no borders.

It is interesting to note here that according to recent case law of the CJEU, Directive 2008/104/EC *"does not apply to a situation in which, on the one hand, the functions performed by a worker are permanently transferred by his employer to a third undertaking and, on the other hand, that worker, whose employment relationship with that employer is maintained as a result of that worker having exercised his right to object to the transfer of that employment relationship to that third undertaking, may, at the request of that employer, be required to perform on a permanent basis the work contractually owed to that third undertaking and, in that context, be subject, both organisationally and technically, to the management authority of the latter undertaking*[2] ."

Whilst it is true that this decision was delivered by reference to a rather specific factual context (i.e. an objection to the transfer lodged by an employee in the context of a transfer of undertaking, coupled with a clause in the applicable collective labour contract obliging the transferor in such a situation to retain the employee who objected to the transfer and to make him available to the transferee), nevertheless, in the recitals to

[1] https://unity-connect.com/our-resources/blog/legal-responsibilities-of-an-employer-of-record/ (accessed on 2 January 2025)

[2]LD v ALB FILS Kliniken GmbH, Case c-427/ https://unity-connect.com/our-resources/blog/legal-responsibilities-of-an-employer-of-record/ , EU:C:2023:505.

the above decision, the CJEU advanced a number of arguments relevant[1] to our analysis, namely:

- It follows from the definitions of the concepts of 'temporary employment agent' and 'temporary worker' that the contract of employment must be concluded with a worker for the purpose of placing the latter at the disposal of a user undertaking;
- The employment relationship with the user undertaking must be of a temporary nature;
- The term 'temporary' refers only to the manner in which a worker is made available to that undertaking and should not be interpreted to mean that the user cannot use temporary labour to fill a permanent position;
- Directive 2008/104/EC promotes objectives such as reconciling the professional and personal lives of workers, the flexibility of undertakings, the creation of new jobs or the promotion of temporary workers' access to permanent employment. However, these objectives are not relevant in cases where a worker is made available on a permanent basis.

More specifically, to summarise the above, it follows that, according to the case law of the CJEU, the essence of temporary agency work is (i) the provision of the work and (ii) the temporary nature of the assignments.

It would therefore follow that the provisions of the Directive would not apply to temporary agency workers who make workers available on a permanent basis to their clients, since the requirement that the provision of workers must be temporary is not met.

We consider that, on the one hand, this solution does not take account of the way in which the types of loan of personnel have evolved, multiplied and diversified and, on the other hand, it has the potential to affect the situation of workers employed through EORs to a greater extent than that of any other type of worker who is the subject of a loan of personnel.

[1] Idem, paras 41-47.

We highlight this because, in practice, these workers are left in a *no man's land*, with not even the possibility, according to the case law of the CJEU, for the EOR activity to be qualified as specific to temporary agency work - with the correlative obligation to respect the specific protective measures of temporary agency work for these workers (e.g.: informing the worker, equal treatment between workers employed by the temporary agency and workers recruited directly by the beneficiary of the work, applicability of the terms of collective labour contracts concluded at the level of the beneficiary, etc.).

Moreover, a similar problem exists in the case of outsourcing companies which, under the cover of service provision contracts, lend staff recruited directly by them to their clients, and if these employees are asked to work at the client's premises, the institution of delegation is used, in a manifestly illegal manner.

Despite the fact that EORs openly and constantly promote their business model, including in Romania, and they are not authorised to act as temporary employment agencies, neither at national level nor in other Member States are there any indications that the competent authorities are taking action against such practices or that they are at least endeavouring to better understand this business model and its implications for the status of workers.

Unfortunately, the authorities seem to focus more on classic cases of undeclared work, which are more familiar to them, completely ignoring the implications that new forms of work and, by extension, new forms employee leasing are generating, and which dramatically affect the level of social protection of workers.

The legislative authorities have the same lack of interest in this phenomenon, which is nothing more than a veiled, but equally serious, way of commodifying labour and subordinating the fundamental rights of workers to economic interests.

The consequences of such a business model have been detailed in the preceding paragraphs on several occasions, which is why we will not repeat them here.

In conclusion, however, we would emphasise once again that the growing phenomenon of labour borrowing, which escapes all regulation, represents a real and extremely serious threat to the workers' state and their social protection, which calls for preventive and preventive measures.

In the following, our study will focus on one of the regulated forms of labour borrowing in national law, *i.e.* temporary agency work, analysing its capacity to achieve a balance between capital and labour.

2. Temporary agency work

2.1. *The EU legal framework*

Temporary agency work is regulated at EU level by Directive 2008/104 EC[1]. The Directive was adopted because new forms of work organisation and a greater variety of contractual arrangements for workers and enterprises, which better combine flexibility with security, are needed *(recital 9)*. In addition, temporary agency work responds not only to the flexibility needs of enterprises but also to the need of workers to reconcile their professional and private lives. Temporary agency work thus contributes to job creation and to participation and integration in the labour market *(reason 11)*.

The aim of the Directive, as set out in Article 2, is to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment is applied to temporary agency workers and that temporary agency workers are recognised as employers.

Account must also be taken of the need to establish an appropriate framework for the use of temporary agency work with a view to contributing effectively to job creation and the development of flexible forms of work.

---

[1] Directive 2008/104 EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L327/05.12.2008, p. 9-14

Temporary agency labour is a relatively complex legal construct involving:

(i) Conclusion by the temporary employment agency[1] of a temporary employment contract with a temporary worker[2] , for the duration of one or more assignments ;[3]

(ii) Conclusion by the temporary agency worker of a contract with a user undertaking for the temporary worker .[4]

Even though temporary agency work is frequently encountered in practice and raises many questions of principle, the case law of the Court of Justice of the European Union on the subject is surprisingly scarce (a total of 14 recent decisions, the latest decision on the subject being delivered on 24 October 2024) and covered issues such as:

- *Limiting the number of temporary assignments to the same employer*, on which occasion the CJEU ruled as follows: "The first sentence of Article 5(5) of Directive 2008/104 of the European Parliament and of the Council of 19 November 2008 on temporary agency work must be interpreted as not precluding national legislation which does not limit the number of successive temporary work assignments which the same temporary worker may carry out with the same user undertaking and which does not make the lawfulness of

[1] According to Article 3(b) of Directive 2008/104/EC, a temporary agency is any natural or legal person who, in accordance with national law, concludes contracts of employment or employment relationships with temporary workers in order to place them at the disposal of user undertakings to work on a temporary basis under their supervision and direction.

[2] According to Article 3 lit. (c) of Directive 2008/104/EC, a temporary worker means a worker who has concluded a contract of employment or is in an employment relationship with a temporary employment agency with a view to being placed at the disposal of a user undertaking to work temporarily under its supervision and direction.

[3] According to Article 3(e) of Directive 2008/104/EC, temporary agency work means the period during which the temporary worker is placed at the disposal of the user undertaking to work temporarily under its supervision and direction.

[4] According to Article 3(d) of Directive 2008/104/EC, user undertaking means any natural or legal person for whom and under whose supervision and direction a temporary worker is temporarily working.

recourse to temporary agency work conditional on the indication of reasons of a technical nature or relating to production, organisational or replacement requirements justifying the use of temporary agency work. On the other hand, that provision must be interpreted as precluding a Member State from taking no measures to maintain the temporary nature of temporary agency work and national legislation which does not provide for any measures to prevent successive temporary work assignments of the same temporary worker to the same user undertaking for the purpose of circumventing the provisions of Directive 2008/104 as a whole" ;[1]

- *On the working conditions of temporary workers, the* CJEU ruled that *it is contrary to Directive 2008/104/EC that "the allowance which temporary workers may claim, in the event of termination of their employment relationship with a user undertaking, on the basis of days of paid annual leave not taken and the corresponding holiday allowance, is lower than the allowance which those workers could claim, in the same situation and on the same grounds, if they had been recruited directly by that user undertaking to occupy the same job for the same duration" ;*[2]

- *Applicable social security law in the case of temporary workers employed by a temporary work agency not carrying out substantial activities in the State of establishment* - The CJEU has concluded that a temporary agency worker established in a Member State, in order to be considered to "habitually carry out his activities" within the meaning of Article 12(1) of Regulation (EC) No. 883/2004 on the coordination of social security systems, as amended by Regulation (EU) No 465/2012, in that Member State, it must carry out a significant part of its activities of

[1] JH v KG, Case c-681/19, ECLI:EU:C:2020:823

[2]GD, ES v Luso Temp - Empresa de Trabalho Temporário SA Case c-426/2020, ECLI:EU:C:2022:373. See also CM v Time- Empresa de Trabalho Temporário SA, Case c-311.21, ECLI:EU:C:2022:983; XXX v Randstad Empleo ETT SAU, Serveo Servicios SAU, formerly Ferrovial Servicios SA, Axa Seguros Generales SA de Seguros y Reaseguros, Case c-649/22, ECLI:EU:C:2024:156

providing temporary workers to user undertakings established and pursuing their activities in the territory of that Member State[1] ;

- *The impact of Directive 2008/104 EC in cases where there is borrowing of workers by employers who are not authorised under the law of the Member State of establishment as temporary agency workers* - the CJEU ruling in principle as follows:
  - "The Directive applies to any natural or legal person who enters into a contract of employment or employment relationship with a worker in order to place him at the disposal of a user undertaking for temporary work under the supervision and direction of the latter and who places that worker at the disposal of that undertaking even if that person is not recognised under national law as a temporary employment agency worker since he does not have an administrative authorisation as such;
  - The concept of 'temporary agency work' covers a situation in which a worker is placed at the disposal of a user undertaking by to an undertaking whose business is to conclude contracts of employment or establish employment relationships with workers in order to place them at the disposal of a user undertaking for a given period, if that worker is under the supervision and direction of the latter undertaking and if that undertaking, on the one hand, imposes on him the work to be performed, the manner in which it is to be performed and compliance with its instructions and internal rules and, on the other hand, supervises and controls the manner in which the worker fulfils his duties;
  - A temporary worker placed at the disposal of a user undertaking within the meaning of this Directive must, during his assignment with that undertaking, receive a salary at least equal to that which he would have received if he had been recruited directly by that undertaking[2].

The relevance of these judgments lies in their practical impact in curbing abuses in this area, as they have the effect of discouraging

---

[1] Team Power Europe" Eood v Direktor na Teritorialna direktsia na Natsionalna agentsia za prihodite - Varna, Case c-784/19, EU:C:2021:427

[2] LM against Omnitel Comunicaciones SL, Microsoft Ibérica SRL, Fondo de Garantía Salarial (Fogasa),Indi Marketers SL, Leadmarket S, Case c- 441/23, EU:C:2024:916.

practices that are at the margins of legality or even illegal, consisting either in setting up letter-boxes in the territories of Member States with cheap labour or in providing *de facto* staff, simulated in the form of service contracts.

Domestically, temporary agency work is regulated by Articles 88-102 of the Labour Code[1] and H.G. No 1256/2011 on the conditions of operation and the procedure for authorising temporary employment agencies[2].

2.2 Internal legal framework - Sharing of rights and obligations arising from the temporary agency labour contract in the relationship between the temporary employment agency, the temporary employee and the user vs. the protection of temporary workers

The temporary employment contract has a number of features which distinguish it from the standard employment contract, thus giving it a legal status in its own right.

Thus, the triangular relationship, specific to temporary agency work, in which the temporary employee is subordinated to both the temporary employment agent and the user, and in which the latter has both rights and obligations in relation to the temporary employee, implies a sharing of rights and obligations between the parties to the triangular relationship.

However, the absence of precise rules on the division of responsibilities between the temporary employment agent and the user in relations with the temporary employee, coupled with the fact that, although in principle the responsibility for the working conditions of temporary employees belongs, as a rule, to the temporary employment agent, these (i.e. working conditions) are, as a rule, determined by the user (Underhill, 2010, p. 339), in many cases leads to temporary workers being deprived of their statutory rights, as it is already well known that

[1] Republished in Oficial Gazette No 345 of 18 May 2012

[2] Published in Oficial Gazette No 5 of 4 January 2012.

they benefit from less favourable working conditions in comparison to workers employed in traditional forms of employment .[1] (Gravel, 2006, pp. 145-153, Mitlacher, 2005, pp. 370-388).

In this context, it should be recalled that labour law doctrine is unanimous in upholding the negotiated nature of the employment contract (Athanasiu, 2017, pp. 89-104; Ștefănescu, p. 226; Dima, 2017; Panaite, 2017, pp. 98-99; Radu, 2019, pp. 304-331), which implies that the parties are free to negotiate its terms, subject of course to compliance with the mandatory provisions of the law and of the applicable collective agreements [2] (Brun & Galland, 1978, pp. 138-142). It should be recalled here that the relationship of legal subordination, which is specific to labour relations, arises only when the employment contract is concluded . (Athanasiu & Dima, 2003, p. 252; Volonciu, p. 35).

Therefore, at the pre-contractual stage, the parties are equal, and the future employee may negotiate any of the working conditions proposed by the employer, of course, as mentioned, subject to compliance with the rules of Article 38 of the Labour Code.

However, in the case of temporary agency work, the principle of freedom of contract is severely limited by the fact that the essential elements of the employment contract have already been negotiated between the temporary employment agency and the user. This leads to the conclusion that, in principle, the prospective temporary employee has only the possibility of agreeing to the conclusion of the employment

---

[1]International Labour Organization, The Role of Private Employment Agencies in the functioning of Labour Markets. International Labour Conference 81st Session, Report VI. Geneva: International Labour Office, 1994; International Labour Organization, Private employment agencies, temporary agency workers and their contribution to the labour market. Issues paper for discussion at the workshop to promote ratification of the Private Employment Agencies Convention 1997 (no. 181). Geneva: International Labour Office, 2009; International Labour Organization, Report III (Part 1B) General Survey concerning employment instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization. Geneva: International Labour Office, 2010.

[2] See Art. 11 and Art. 38 of the Labour Code.

contract on the terms already agreed between the temporary employment agency and the user or, conversely, of refusing the assignment.

Looked at it from this angle, the temporary agency work contract appears to be turning into a contract of adhesion, which once again emphasises the precarious nature of this form of labour.

Of course, it is possible that the view that we have expressed may not always be verified in practice. This is because, in many cases, the provision contract is in the legal nature of a framework contract, which lays down the principles governing the relationship between the parties, with the details of each assignment being determined in concrete terms on the basis of the user's request and specific needs.

In such cases, the temporary employment agency goes through the first stages of the selection process on the basis of the user's request and, subsequently, the candidates chosen by the temporary employment agency are checked by the user without any direct request from the user, in which context those selected for employment have the opportunity to enter into direct negotiations on the terms and conditions of employment with the user, even if there is no direct contractual relationship between the parties.

However, the mere fact that, in practice, situations of the kind described above may also arise is not such as to alter our conclusion that, from a regulatory point of view, the temporary employment contract is, to a large extent, a contract of adhesion.

Therefore, in order to mitigate the effects of such a conclusion, we consider that, *de lege ferenda*, it is necessary to expressly provide for the right of the temporary employee, prior to the conclusion of the temporary agency work contract, to be able to negotiate its terms, either directly or through the temporary employment agency, and, where appropriate, to have the contract of assignment or the legal acts concluded on the basis of it amended to reflect the results of the negotiation.

In this context, we will now turn to analyse the main rights and obligations of the parties to the employment contract, showing how these are concretised in the case of temporary agency work.

2.2.1 Rights of the temporary employee

The analysis of the rights and obligations of employees, as set out in Article 39 of the Labour Code, reveals that in the case of temporary employees, these are exercised/fulfilled both vis-à-vis the temporary employment agent and the user.

(i) Thus, as regards **the temporary employee's entitlement to remuneration for the work performed during the assignment**, he is entitled to receive a salary comparable to that received by an employee recruited directly by the user, who performs the same or similar work to that of the temporary employee[1] (Volonciu, p. 500; Nienhüser & Matiaske, 2006, pp. 64-77).

In addition, the Labour Code[2] stipulates that the temporary employment contract specifies the amount and the methods of remuneration of the temporary employee and enshrines the principle of equal remuneration between temporary employees and those recruited directly by the user. Also, HG no. 1256/2011[3] establishes the users' obligation to provide temporary employees with the same rights as those of employees recruited directly by the user, conferred by law, by the internal regulation or by the collective labour contract applicable at its level, as well as by any other specific regulations applicable to it.

In all cases, throughout the duration of the assignment, the temporary employee shall receive the salary paid by the temporary employment agency.

For the temporary agency to comply with its obligation to pay the temporary agency worker a salary comparable to that paid by the user to employees recruited directly by the user, the user shall inform the temporary agency of the salary rates applicable in his undertaking.

An interesting issue has been raised in the legal literature (Underhill,p. 341) in relation to the relevant provisions of Directive 2008/104/EC.

---

[1] See Art. 92 para. (2) of the Labour Code.
[2] Art. 94 para. (2) in conjunction with Art. 96 para. (1) of the Labour Code.
[3] Art. 19 lit. d)

Thus, it was argued (Underhill,p. 341) that the text of the Directive is deficient in that it does not require compliance with the principle of equal pay by taking as a benchmark the comparable worker recruited directly by the user on the basis of an open ended employment contract. In other words, in the author's view, the law is likely to favour abuses, because it allows for the remuneration of temporary workers to be determined by reference to the remuneration received by a worker recruited directly by the user, but who works under another type of atypical contract (e.g. fixed-term employment contract) and who could receive lower remuneration than workers employed on a permanent basis.

Without denying that in practice workers employed under a fixed-term employment contract often do not enjoy the same rights as other workers, however, in the light of the applicable legal provisions, we consider that the above-mentioned view is not well-founded.

In support of our point of view, we recall that Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work[1] also establishes the principle of equal treatment between fixed-term workers and comparable workers with indefinite contracts, except where the difference in treatment is justified on objective grounds (clause 4).

It follows, therefore, from a combined interpretation of the legal texts under discussion, that both temporary workers and fixed-term workers are entitled to equal treatment with workers employed under contracts of indefinite duration, unless the employer can show good reasons justifying different and, by hypothesis, less favourable treatment. Thus, a situation in which a temporary worker's remuneration is set by reference to that of a fixed-term worker, which is lower than that of a comparable fixed-term worker, would amount to impermissible discrimination, which may be relied on by both fixed-term and temporary workers.

---

[1] Published in J. Of. L 175, 10.7.1999, pp. 43-48.

In contrast to the above, as we have already pointed out, the obligation to pay wages is incumbent on the temporary employment agency, which must be informed by the user of the applicable wage levels. We consider that, in addition, the temporary employment agency must also take the necessary steps to ensure that the temporary employee enjoys equal treatment in this matter with comparable employees recruited directly by the employer (e.g. by checking in public registers to see whether there is a collective labour agreement concluded at sectoral or group of establishments level applicable to the user and imposing certain wage levels) (Volonciu p. 501).

However, if the user, in bad faith, conceals from the temporary employment agent the amount of the salary received by comparable employees recruited directly by the temporary employment agent, in order to optimise its wage costs, and thus to the detriment of the temporary employee, we consider that the liability of the temporary employment agent cannot be incurred under Article 92(2)(b) of the Staff Regulations. (3), but solely that of the user.

Lastly, as regards the right to remuneration, a final observation must be made, namely that, during the period between assignments, the obligation to pay the temporary employee is, *a fortiori,* incumbent on the temporary employment agency. However, since the temporary employee does not work between assignments, he is not entitled to a salary (i.e. consideration for the work done) but to an allowance.

(ii) As regards **the temporary employee's entitlement to daily and weekly rest and rest leave,** the relevant rules apply without conditions.

Thus, we merely recall here that, according to Article 135 of the Labour Code, "employees are entitled between two working days to a rest period of not less than 12 consecutive hours". Article 137 para. (1) of the Labour Code establishes that the weekly rest period is 48 consecutive hours, usually on Saturdays and Sundays.

The duration of rest leave cannot be less than 20 working days.

Of course, for the sake of clarity, all other legal provisions on the organisation of working and rest time are also fully applicable to temporary workers.

However, as a peculiarity deriving from the specific nature of temporary agency work, temporary employees may be subject to different rules in this area during their assignments with different users, insofar as there are special rules on the organisation of working time at their level, which are more favourable than those laid down by law [1].

As mentioned, Article 101 of the Labour Code requires that the provisions of internal regulations, as well as those of collective labour contracts applicable to employees employed with an individual employment contract of indefinite duration with the user, apply equally to temporary employees during their assignment with the user.

Therefore, during the execution of assignments, the temporary employee shall comply with the rules on the organisation of working time applicable to the user, by virtue of the prerogative of management which the user has over the temporary employee during the period of the assignment (see also Art. 11 para. (3) of HG No 1245/2011).

For the sake of clarity, we consider that the temporary employee will, during this period, also benefit from any paid days off enshrined in internal policies/collective labour agreement adopted by the user, as well as, where applicable, more favourable remuneration for overtime work, night work or work on public holidays[2].

(iii) The right to equal opportunities and equal treatment takes on specific connotations in this area, once again in view of the specific nature of temporary agency work.

---

[1] According to Article 11 of the Labour Code, "The clauses of the individual employment contract may not contain provisions to the contrary or rights below the minimum level established by normative acts or collective labour agreements." The provisions of Article 100 of Law no. 367/2022 on social dialogue, published in M. Of. no.1328 of 22.12.2022 , as amended and supplemented, should also be taken into account.

[2] See in this regard Art. 101 of the Labour Code.

The principle of equal treatment is enshrined in general terms in Article 5 of the Labour Code, which states that 'the principle of equal treatment of all employees and employers shall apply in employment relationships'. The following paragraphs of Article 5 define the concepts of direct and indirect discrimination and prohibit such behaviour.

In particular, in the field of temporary agency work, the principle of equal treatment applies both to the relationship between the temporary employee and the temporary employment agency and to that between the temporary employee and the user.

During assignments, the principle of equal treatment is to be analysed primarily by reference to comparable employees of the user. The same applies to the right to dignity at work.

(iv) With regard to the **health and safety at work,** the obligations are shared between the temporary agency worker and the user. Although in a traditional situation, the obligation to ensure health and safety at work is, in principle, incumbent exclusively on the employer, in this case, during the assignment, this obligation is primarily incumbent on the user.

It is worth recalling the provisions of Article 91 para. (1) lit. c) of the Labour Code, according to which the content of the contract of assignment must include clauses on the specific working conditions in which the temporary employee will work, as well as on the personal protective and work equipment that the temporary employee must use. At the same time, Article 98 of the Labor Code provides that during the assignment, the employer is responsible for ensuring that the working conditions of the temporary employee are provided. In addition, if the temporary employee suffers an accident at work or occupational illness, the user is obliged to immediately inform the temporary employment agent.

(v) Temporary agency workers have a number of **collective rights**, which have a number of specific features arising from the specific nature of temporary agency work, namely the right to information and consultation, the right to take part in determining and improving working conditions and the working environment, the right to collective and

individual bargaining, the right to take part in collective action, and the right to form or join a trade union.

For example, Directive 2008/104/EC provides that, with regard to the terms and conditions of employment of temporary agency workers, Member States may allow derogations from the principle applicable in this area by means of collective labour agreements provided that the rules laid down in the terms of the collective agreements are sufficiently precise and accessible to enable the sectors and undertakings concerned to identify and comply with their obligations and the Member States to take the necessary measures to prevent abuse. Furthermore, with specific reference to the information and representation of temporary agency workers, Article 7 of Directive 2008/104/EC provides that 'temporary agency workers shall be taken into account, under the conditions laid down by the Member States, in calculating the threshold above which the bodies representing workers, established by Community and national law and collective agreements, are formed at the level of the temporary agency'.

Furthermore, para. (2) allows Member States to decide that temporary agency workers are to be taken into account when calculating the threshold above which bodies representing workers are formed at the level of the user undertaking, subject to the principle of equal treatment[1](Doerflinger & Pulignano, 2014, pp. 1-10; Pedaci & Burroni, 2014, pp. 169-194).

At the national level, Article 21 of Government Decision no 1256/2011 establishes that the number of temporary workers will be taken into account when establishing the minimum threshold for which

[1] For an analysis of the role of collective bargaining in temporary agency work in the European Union, see J. Arrowsmith, James, Temporary agency work and collective bargaining in the EU, Eurofund, 2011, available at https://www.eurofound.europa.eu/publications/report/2008/industrial-relations/temporary-agency-work-and-collective-bargaining-in-the-eu (accessed 15.03.2025).

the workers' representatives are elected at the user, as if they were directly employed by the latter.

Moreover, Art. 11 para. (3) of Government Decision no 1256/2011 1259/2011 provides that all the basic terms and conditions of work and employment laid down by *inter alia*, the applicable collective labour agreement, as well as by any other specific regulations applicable to the user are directly applicable to temporary employees during the assignment.

At national level (but the same applies to the other Member States of the European Union) there has been no serious concern to regulate the collective rights of temporary workers, the legislation only providing that temporary workers are taken into account when determining the minimum threshold for the election of employee representatives at the user - although, as mentioned above, Directive 2008/104/EC establishes the rule that the trade union rights (*lato sensu)* of temporary workers are exercised primarily in relations with the temporary employment agency.

In our opinion, the main explanation for the situation described above stems from the nature of temporary agency work, which is characterised by a high degree of precariousness. Being fragmented and eminently temporary work, it discourages unionisation and collective bargaining on the status and rights of agency workers.

Thus, it was shown (Heery, & Abbott, In Heery, & Salmon (Eds.), 2000, pp. 155-180) that five types of trade union 'approaches' to temporary agency work were identified, namely:

- Exclusion - where unions disregard temporary agency workers, as they may threaten the permanent workforce and weaken their (i.e. unions') power;
- Service provision - assumes that unions provide *ad hoc* support to temporary workers, but focus on defending the rights and interests of their members;
- Partnership - reflects attempts by trade unions to reach agreements that provide guarantees of job security, but such agreements are more likely to create benefits for permanent employees;

- Dialogue - involves efforts to influence government policy to reduce the vulnerabilities associated with temporary agency work;
- Mobilisation - refers to the trade union movement as a whole and its efforts by its members to fight against injustice in the workplace.

Indeed, the particularities of temporary agency work make it difficult to exercise collective rights, since the participation of temporary agency workers in collective bargaining at the level of the temporary agency is mainly relevant for the regulation of their rights and obligations between assignments, as they are subject to the rules applicable at user level during assignments.

Moreover, taking a step back, it is also difficult to imagine the functioning of a trade union at the level of the temporary employment agency, which would protect the interests of temporary employees (and not only those of administrative staff, who, in principle, work for the temporary employment agency on an indefinite basis), except in situations where employment contracts of indefinite duration are concluded between the temporary employment agency and the temporary employees - which, however, are isolated cases, if not almost non-existent in Romanian practice. Indeed, in such a situation, although it is legally possible to set up a trade union at the level of the temporary agency worker, the fact that temporary employees usually have fixed-term employment contracts and are integrated into user enterprises for the duration of their assignments makes it extremely difficult for such a trade union to function in the medium and long term, and to fulfil its fundamental role of protecting and promoting the rights of all its members (and not only those of 'permanent' employees), particularly through collective bargaining.

Of course, our above allegations should not be interpreted as opposing the establishment of trade unions/representative bodies of temporary agency workers at the level of the temporary agency worker or ignoring the role that they can play in improving the working conditions of temporary agency workers.

On the contrary, we consider that temporary agency workers, like other categories of workers, must be recognised as having fundamental

rights, such as the right to form or join a trade union, to take part in determining and improving working conditions and to bargain collectively.

We therefore consider that, *de lege ferenda*, an appropriate legal framework must be established to guarantee the exercise of collective rights by temporary agency workers, taking account of the, in principle limited, duration of their employment relationship with the temporary agency.

Returning to the provisions in force on the matter, as we have already pointed out, Government Decision no. 1256/2011 limits itself to establishing that the number of temporary employees will be taken into account when determining the minimum threshold for which employee representatives are elected, under the conditions of the law, at the user, as if they were workers directly employed by the user for the same period.

Although we understand the rationale behind this rule, we consider that, in the absence of legislative measures guaranteeing in practice the right of temporary employees to participate in determining and improving working conditions, it (i.e. the legal rule under discussion) does not make a real contribution to the safegurding and promotion of their rights.

(vi) Finally, with regard to the rights of temporary workers to **protection in the event of dismissal,** we consider that this is an illusory right.

Firstly, their (i.e. temporary employees') stability in employment is to a large extent affected by the (in principle) fixed duration of the employment relationship.

Secondly, their position is also 'weakened' by the fact that, according to Article 95 para. (4) of the Labour Code, the temporary employment contract is terminated at the end of the assignment for which it was concluded or if the user waves the employee before the end of the assignment, under the terms of the contract of assignment. At the same time, Article 100 of the Labour Code stipulates that the temporary employment agent who dismisses the temporary employee before the term stipulated in the temporary employment contract, for reasons other

than disciplinary ones, is obliged to comply with the legal regulations on the termination of the individual employment contract for reasons not related to the employee.

The precariousness resulting from the conclusion of a fixed-term employment relationship is therefore doubled by the possibility for the user to terminate the temporary employee at any time, subject, of course, to the conditions agreed in the contract of secondment, which in most cases provides for the user to be liable to pay a penalty for premature and unjustified termination of an assignment, a point to which we shall return in a later section of this study.

2.2.2. Obligations of temporary employees

(i) Like all other employees, **the main obligation of a temporary employee is to fulfil the normal working hours and perform the duties assigned to him under his job description**.

However, although this obligation is formally assumed by the employee vis-à-vis the temporary agency, it is actually discharged in the relationship with the user. In this respect, therefore, the role of the temporary employment agency is merely to 'take over' the rules agreed in the temporary agency contract into the temporary employment contract.

In this case, the peculiarity arises from the fact that both the working hours and duties included in the job description are set by someone other than the employer, i.e. the user. In this case, such a solution is natural, since the beneficiary of the work is the user and not the temporary employment agency.

This line of reasoning is expressly enshrined in Article 91, para. (2) of the Labour Code, which regulates the content of the temporary agency contract and stipulates that it must contain, *inter alia*, clauses concerning the specific characteristics of the job, in particular the qualifications required, the place of performance of the assignment and the working hours, as well as the specific working conditions.

In practice, as a rule, the contract of assignment is concluded first, and the temporary employment contract follows.

This rule has a number of important consequences which, in our view, have not been sufficiently analysed to date, namely that the prior agreement between the temporary agency worker and the user of the temporary work on working hours, job-specific duties and working conditions significantly restricts the temporary worker's freedom of negotiation when concluding the temporary employment contract.

(ii) With regard to **the temporary worker's obligation to comply with labour discipline,** this is mainly enforced in relations with the user, since the work is carried out for the user's benefit.

This conclusion also follows from express legal provisions, such as Article 101 of the Labour Code, according to which "the legal provisions, the provisions of the internal regulations, as well as those of the collective labour contracts applicable to employees employed on an individual employment contract of indefinite duration with the user shall also apply to temporary employees during their assignment with the user[1]."

Given that the temporary employee is integrated into the user's undertaking during his assignment, it is only natural that he should be subject to the rules in force at the user's level.

It can therefore be argued that the principle of equal treatment operates in two senses in this area, i.e. the temporary employee enjoys all the rights recognised in favour of employees recruited directly by the user, but is also subject to the obligations associated with those rights.

For the sake of clarity, it should be pointed out that, as in the case of other employees, the rules on labour discipline must be brought to the temporary employee's attention.

In addition, the actual monitoring of compliance with labour discipline will be carried out by the user and not by the temporary agency, which means that the prerogative of control rests with the user, unless the parties provide otherwise.

---

[1] See also Art. 11 para. (3) of HG no 1256/2011.

Interesting issues may arise where the temporary employee commits breaches of labour discipline, given that such breaches are usually committed in relation to a person who is not the employer of the temporary employee (i.e. the temporary employee).

Firstly, the user cannot impose disciplinary sanctions on the temporary employee, since he is not the temporary employee's employer.

In the case of temporary agency work, the subordination of the temporary employee to the user is exclusively a factual situation, from a legal point of view all the rights and obligations arising from the temporary employment contract belong to the temporary employment agent.

Therefore, in the event of misconduct committed by the temporary employee during the assignment any disciplinary sanctions can be imposed only by the temporary employment agent, and, of course, on the basis of information and evidence received from the user.

Therefore, it is recommendable to include clauses in the temporary agency contract (or in any addenda thereto) which lay down specific rules on the disciplinary liability of temporary workers, particularly as regards the rules for organising disciplinary investigations, such as the appointment of a joint disciplinary committee, i.e. one on which both the user and the temporary agency worker are represented.

To conclude our considerations on this subject, it should also be pointed out that if a temporary employee commits disciplinary offences while between assignments (e.g. breach of the confidentiality clause), the temporary employment agency is the only person entitled to decide whether to impose a disciplinary penalty.

(iii) As regards the **temporary employee's obligation to comply with the provisions contained in the internal rules, the applicable collective labour agreement and the individual contract of employment,** we would simply point out that, during the period of assignments, the temporary employee is subject to the rules applicable to the user. In between assignments, of course, the rules applicable to the temporary employee are those applicable to the temporary employment agent (Ținca, 2010, pp. 33-48).

(iv) With regard to **the duty of loyalty**, we it is useful to make the following comments.

As it has been consistently held in the legal literature, the duty of fidelity encompasses the duty of non-competition and the duty of confidentiality (Ștefănescu, p. 316, Volonciu, pp. 198-199).

As far as the temporary employee is concerned, from a formal point of view, the duty of loyalty is owed to his employer, i.e. the temporary employment agency. Consequently, the temporary employee is under an obligation to refrain from committing acts which would breach that duty, such as disclosing information he has acquired access by virtue of his employment relationship with the temporary employment agency, discrediting the temporary employment agency or taking employment with a temporary employment agency - a competitor of his employer.

However, we believe that the specific nature of temporary agency work cannot be disregarded, which means that the work is performed for the benefit of a third party.

In order also to protect the user against possible acts of disloyalty on the part of the temporary employee, the contract of assignment should include clauses on the content of the temporary employee's duty of loyalty, which should further be incorporated into the temporary employment contract.

Another option is for the temporary agency worker to assume a duty of loyalty directly towards the user by signing an agreement with the latter. In this case, the user will be able to hold the temporary employee directly liable in the event of failure to fulfil the obligations under the agreement.

In addition to the above, it should also be pointed out that such obligations may also be incumbent on the temporary employee based on the internal regulations/collective labour agreement applicable to the user, which, for the duration of the assignment and subject to the temporary employee being informed of them, are fully binding.

2.2.3. Rights of the employer/user

As a matter of principle, the employer's rights, as regulated by the Labour Code, are, in the matter under consideration, shared between the temporary employment agent and the user.

For example, for the duration of the assignment, it is the user who determines the temporary employee's duties (even if initially agreed with the temporary employment agency, through the contract of assignment) and it is also the user who issues the instructions binding on the employee (subject, of course, to their legality) and exercises control over the way in which the work is performed.

For the sake of clarity, we consider that the general rules on the determination of work duties also apply in this area, in the sense that the user may not require the temporary employee to perform tasks other than those which fall within the scope of the type of work agreed in the temporary employment contract and which are closely linked to the duties set out in the job description.

As regards the individual performance objectives and the criteria for assessing them during the period of the assignment, it is for the user, as the beneficiary of the work performed by the temporary employee, to set them.

As regards the finding that disciplinary offences have been committed and the application of disciplinary sanctions, as indicated in another section of this study, we consider that this prerogative belongs to the temporary employment agency, in its capacity as the temporary employee's employer.

Consequently, in the absence of a direct legal link between the temporary employee and the user, the latter cannot impose disciplinary sanctions on the temporary employee.

2.2.4. Obligations of the temporary agency worker/user

The first of the employer's responsibilities governed by the Labour Code concerns the employer's **obligation to inform employees** about the working conditions and matters concerning the conduct of the employment relationship.

In the case of temporary agency work, this obligation is fulfilled in relations with the temporary employee by both the temporary employment agent and the user.

Thus, firstly, Article 91(1)(a) of the Labour Code provides that the temporary agency worker must be the employer of the temporary worker. (1) lit. c)- d) of the Labour Code stipulates that the contract of assignment must include clauses on the specific working conditions, the individual protective and work equipment that the temporary employee must use, as well as any other services and facilities for the temporary employee. The working conditions are therefore, in principle, fixed by the user, who then negotiates them in concrete terms with the temporary agency worker.

Article 94, para. (2) of the Labour Code stipulates that, in addition to the elements set out in Articles 17 and 18, the temporary employment contract shall specify the conditions under which the assignment is to be carried out[1] . According to Article 11 of Government Decision no. 1256/2011, if the temporary work assignment proposed by the temporary employment agent may endanger the life and physical and/or mental integrity of the temporary employee, the temporary employee is entitled to refuse the temporary work assignment. In such a case, the employee's refusal to carry out the assignment must be in writing, and the temporary agency staff member is prohibited from ordering dismissal on that ground.

In addition to the above, HG no. 1256/2011[2] also establishes a number of specific obligations for the user, namely:

- to inform temporary employees of all existing vacancies, with a view to ensuring equal opportunities with other employees with an

[1] The full text of Art. 94 para. (2) provides as follows "the temporary employment contract shall specify, in addition to the elements provided for in Art. (1), the conditions under which the assignment is to be carried out, the duration of the assignment, the identity and location of the user, as well as the amount and the arrangements for the temporary employee's remuneration.".

[2] Art. 19 of GD 1256/2011.

individual employment contract of indefinite duration with the user, for obtaining a permanent job, by posting a general notice in a place accessible to all employees working at the user in question;

- provide the temporary employee with access to the vocational training courses it organises for its employees
- make information on the use of temporary agency workers available to employees' representatives as part of the general information on employment;
- provide temporary employees with the same rights as those of employees employed under an individual contract of employment with the user, conferred by law, by the internal rules or collective labour contract applicable to the user, and by any other specific regulations applicable to the user;
- to provide and present accurate and factual information on the use of temporary employees when trade unions or, where appropriate, employees' representatives, established in accordance with the law, request the employment status of their own staff.

As regards the obligation to inform the temporary employee, in the first instance, this is carried out by the temporary labour agent, who will inform the employee of the elements concerning his/her employment relationship.

The content of the information obligation may vary according to whether the temporary agency contract is concluded for one or more assignments or for an indefinite period.

Thus, if the temporary agency contract is concluded for several assignments, it should also contain information on the conditions under which the temporary agency worker is to remain available between assignments, the amount of money to which he is entitled during this period, and any rights and obligations arising during this period.

In the following, we will focus on another type of borrowing frequently encountered in practice, namely secondment in the context of transnational service provision.

Conclusions

Labour law is not only expected to adapt to the new transformations. That would be too little. Many changes need to be anticipated, direct participation in European lawmaking needs to be intensified and changes need to be accompanied by creative and comprehensive national implementation. In addition, entrepreneurs are expected to improve their knowledge and anticipation of the social and economic implications of the new labour law.

A contrary approach creates the growing risk that labour will be seen as a commodity (O'Higgins, 1997, pp. 225-234)[1] and that pecuniary gain will take precedence over fundamental rights and individual self-realisation.

The principle that ”labour is not a commodity” is more than just a regulation contained in various international treaties; according to international law specialists (Starke, 1989, p. 77), it is a fundamental reference for public policies concerning the organisation and management of work.

In conclusion, the fundamental rights of workers cannot under any circumstances be subordinated to economic interests, let alone treating labour as any other type of good, the trading of which is governed by the

---

[1] As early as the middle of the 20th century, the General Conference of the International Labour Organisation adopted, at its 26th Session in Philadelphia on 10 May 1944, the *Declaration of Philadelphia on the aims and purposes of the International Labour Organisation (*Declaration of Philadelphia of the International Labour Organisation. Declaration concerning the aims and purposes of the International Labour Organisation, https://www.ilo.org/legacy/english/inwork/cb-policy-guide/declarationofPhiladelphia1944.pdf . Accessed: March 2025. For the full text of the Philadephia Declaration see: Constitution of the International Labour Organization, Geneva, 1992, p. 22- n4.)[1] , which reaffirms the fundamental principles of the Organisation, and in particular the one concerning the idea that ***labour is not a commodity.*** The origin of the expression "labour is not a commodity" has been presented in detail by Paul O'Higgins. According to O'Higgins, it was the Irish economist John Kells Ingram who first coined the phrase "labour is not a commodity" in a speech to the 1880 Dublin conference of the British Trades Union Congress (TUC).

principle of contractualism. This is because ”the way in which the employment relationship is structured, as well as the contribution of legal values that it includes - safe and healthy working conditions, equal treatment under the law, the right to a decent income, the right to rest, etc. - forges its legal physiognomy, illustrating, through the essential nature of the elements that make it up, the values of society and of the individual” (Athanasiu, 2019, p.41).

References

Athanasiu, Al. and Dima, L. (2003). Regimul juridic al raporturilor de muncă în reglementarea Noului Cod al muncii. *Pandectele Române*, 2

Athanasiu, Al. (2017). Reflecții pe marginea art. 38 din Codul muncii. Încă un motiv pentru a milita pentru autonomia dreptului muncii. *Revista Dreptul*, 6.

Athanasiu, Al. (2019). Manifest pentru autonomia dreptului muncii. *Revista Română de Drept Privat*, 4.

Arrowsmith, J. J.. (2011).Temporary agency work and collective bargaining in the EU, Eurofund, disponibil la https://www.eurofound.europa.eu/publications/report/2008/industrial-relations/temporary-agency-work-and-collective-bargaining-in-the-eu (accesat în 15.03.2025).

Brun, A. & Galland, H. (1978). *Droit du travail*, 2e édition, Tome 2, Les rapports collectifs du travail.

Dima, L. (2017). *Dreptul muncii*. vol. I. C.H. Beck.

Doerflinger, N. and Pulignano, V.V. (2014).Temporary Agency Work and Trade Unions in Comparative Perspective. A Mixed Blessing?. *Journal of Workplace Rights*.

Gravel, E. (2006). *ILO standards concerning employment services*. In: Kuptsch C (ed.) Merchants of Labour. International Labour Office.

Heery, E. and Abbott, B.B. (2000). *Trade unions and the insecure workforce*. in Heery, E. and Salmon, J. (Eds.) The insecure workforce. Routledge.

ILO, The Role of Private Employment Agencies in the functioning of Labour Markets. International Labour Conference 81st Session, Report VI. Geneva: International Labour Office, 1994.

ILO, Private employment agencies, temporary agency workers and their contribution to the labour market. Issues paper for discussion at the workshop to promote ratification of the Private Employment Agencies Convention 1997 (no. 181). Geneva: International Labour Office, 2009.

ILO, Report III (Part 1B) General Survey concerning employment instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization. Geneva: International Labour Office, 2010.

Mitlacher, LW. (2005). Temporary agency work, the changing employment relationship and its impact on human resource management. *Management Review*, Vol 16, 3.

Nienhüser, W. and Matiaske, W. (2006). Effects of the 'principle of nondiscrimination' on temporary agency work: compensation and working conditions of temporary agency workers in 15 European countries. *Industrial Relations Journal* Vol. 37, 1.

O'Higgins, P. (1997). Labour is not a commodity – An Irish Contribution to International Labour Law. *Industrial Law Journal*, Volume 26, 3, https://doi.org/10.1093/ilj/26.3.225.

Panaite, S. (2017). *Dreptul individual al muncii*. Hamangiu.

Pedaci, M. and Burroni, M., L. Luigi (2014). Collective bargaining, atypical employment and welfare provisions: The case of temporary agency work in Italy. *Stato e mercato*, 169-194.

Ștefănescu, I. T. *Tratat teoretic și practic de drept al muncii*. Universul Juridic.

Volonciu, M. în Athanasiu, Al. and Volonciu, M. and Dima, L. and Cazan, O. *Codul muncii. Comentariu pe articole*, Vol. I. C.H. Beck.

Radu, R.C. (2019). Drepturile şi obligaţiile părţilor: specificul efectelor contractului de muncă şi rolul specific al dreptului muncii. *Revista Română de Drept Privat*, 4, 304-331.
Ţinca, O. (2010). Comentarii referitoare la munca prin agent de muncă temporară. *Revista română de dreptul muncii*, 2, 33-48.
Starke, J. G. (1989). *Introduction to International Law*, 19th edn. Butterworth.
Ramsey, U. (2024). The Professional Employer Organization Regulatory Regime, 20 Hastings Bus. L.J. 95 https://repository.uclawsf.edu/hastings_business_law_journal/vol20/iss1/5 (consultat la data de 15.03.2025).
Underhill, E. (2010). Should host employers have greater responsibility for temporary agency workers' employment rights?. *Asia Pacific Journal of Human Resources*, 48, 3.
Labour Code, Law no. 53/2004, republished in M. Of. 345 of 18 May 2011, with subsequent amendments and completions.
Directive 2008/104 EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 327, 5.12.2008, p. 9–14.
Council Directive 1999/70/EC of 28 June 1999 on the framework agreement on fixed-term work, J. Of. L 175, 10.7.1999, pp. 43–48.
Law no. 367/2022, M. Of. no. 1238 of 22.12.2022, as subsequently amended and supplemented.
H.G. no. 1256/2011 on the operating conditions and the authorisation procedure for temporary work agents, M. Of. No. no. 5 of 4 January rie 2012.
Declaration of Philadelphia: Constitution of the International Labour Organization, Geneva, 1992, p. 22.
LD v. ALB FILS Kliniken GmbH, Case c-427/ https://unity-connect.com/our-resources/blog/legal-responsibilities-of-an-employer-of-record/, EU:C:2023:505.
JH v KG, Case c-681/19, ECLI:EU:C:2020:823.
GD, ES v Luso Temp Empresa de Trabalho Temporário SA Case C-426/2020, ECLI:EU:C:2022:373.

XXX v Randstad Empleo ETT SAU, Serveo Servicios SAU, formerly Ferrovial Servicios SA, Axa Seguros Generales SA de Seguros y Reaseguros, Case C-649/22, ECLI:EU:C:2024:156.
CM v Time Empresa de Trabalho Temporário SA, Case C-311.21, ECLI:EU:C:2022:983.
TEAM POWER EUROPE" EOOD v. Direktor na Teritorialna direktsia na Natsionalna agentsia za prihodite – Varna, case C-784/19, EU:C:2021:427.
LM against Omnitel Comunicaciones SL, Microsoft Ibérica SRL, Fondo de Garantía Salarial (Fogasa).
Indi Marketers SL, Leadmarket S, Case C- 441/23, EU:C:2024:916.
https://repository.uclawsf.edu/hastings_business_law_journal/vol20/iss1/5 (accessed at 15.03.2025).
https://www.napeo.org/what-is-a-peo/about-the-peo industry/industry-statistics (accessed at 15.03.2025).
https://www.irs.gov/government-entities/third-party-payer-arrangements-professional-employer-organizations (accessed at 5.01.2025)
https://unity-connect.com/our-resources/blog/legal-responsibilities-of-an-employer-of-record/ (accessed at 02.01.2025)
https://www.eurofound.europa.eu/publications/report/2008/industrial-relations/temporary-agency-work-and-collective-bargaining-in-the-eu (accessed at 26.11.2024).
https://doi.org/10.1093/ilj/26.3.225
https://www.ilo.org/legacy/english/inwork/cb-policy-guide/declarationofPhiladelphia1944.pdf

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 186-198

PRESIDENT AND THE CONSTITUTIONAL TRIBUNAL IN POLAND. LEGAL RELATIONSHIPS

Jakub STELINA
ORCID ID: https://orcid.org/0000-0003-2871-1413
E-mail: jakub.stelina@prawo.ug.edu.pl
Afiliation: Gdańsk University, Poland

Abstract*: In the Polish legal system, the legal relations between president and the Constitutional Tribunal cover five areas: the president's participation in making up the CT, the president's initiation of the constitutional review of the law, the Constitutional Tribunal's resolution of competence disputes, the ruling, at the president's request, on the inconsistency of the goals of political parties with the law, and the Constitutional Tribunal's ruling on the president's temporary inability to perform his function. As regards the influence exerted on the electoral process, it should be stated that the Constitutional Tribunal has no powers in that field. The election results are announced by the National Electoral Commission, while the validity of the elections is determined by the Supreme Court. When it comes to removing the president from office, it is only the State Tribunal that has such powers, a special body acting to assess the legality of the actions of the most important persons in the state. A qualified majority of 2/3 of the votes of the statutory number of members of the National Assembly (both houses of parliament) is required to impeach the president.*

Keywords*: president; Constitutional Tribunal; State Tribunal; relations between president and the Constitutional Tribunal; presidential elections; impeachment.*

Introduction

Over the last months, the attention of the world's public opinion has been drawn to certain events related to the direct activity of constitutional

courts towards persons holding or applying for the position of the head of state (president). It is obvious that the political system of each state and the way in which its bodies are formed is a constitutional matter, and therefore does not directly translate into the practice of functioning of the same or similar bodies in other countries. However, it is also true that certain events of an extraordinary nature arouse justified interest of public opinion in other countries, and sometimes even all over the world. Many people wonder how similar issues are regulated elsewhere. And this is precisely the matter addressed in this presentation, which is supposed to present the mutual legal relations between president and the Constitutional Tribunal (CT) in Poland.

1. President in the political system of the Republic of Poland

According to the Constitution of the Republic of Poland, president is the highest representative of the Republic and guarantor of the continuity of state authority, ensures observance of the Constitution, guards the sovereignty and security of the state and the inviolability and integrity of its territory. The person is elected by the nation in universal, equal, direct elections, in a secret ballot. President's term of office lasts 5 years, and the re-election, if any, can take place only once. A Polish citizen who turns 35 no later than on the day of the elections and enjoys full electoral rights to the *Sejm* (the country's lower parliamentary chamber) may be elected President of the Republic of Poland. The candidate that has received more than half of the valid votes cast is elected president, and if none of the candidates has polled the required majority, a second round is held after two weeks, in which the two candidates who received the highest number of votes in the first ballot take part. The validity of the election of President of the Republic of Poland is confirmed by the Supreme Court.

Despite very strong electoral legitimacy, the powers of president as a public authority are not wide. Although the Constitution grants the person numerous rights, they are mostly of representative, formal and ceremonial nature. The actual executive power is exercised by the

government. While the body is established by president, in fact the role of the head of state is limited to appointing the representative of the party with the largest representation in parliament to the position of prime minister and appointing ministers at the request of the latter.

2. The Constitutional Tribunal in the political system of the Republic of Poland

As for the Constitutional Tribunal, it is a judicial authority that is separate and independent from other authorities. The Tribunal was established during the communist period, in 1982, when the then leadership of the state, in an attempt to ease the extremely tense political situation in the country, decided to create a kind of a substitute to the rule of law, by introducing into the Constitution two new state agencies - the State Tribunal, as a court to judge the highest state officials, and the Constitutional Tribunal, as the guardian of the legality of the law. While the State Tribunal has actually never functioned (to date, only two people have been convicted). the Constitutional Tribunal, established later, in 1986, has been operating to this day. It consists of 15 judges elected by the *Sejm* for a single 9-year term. The operation of the Tribunal is directed by its president, who is appointed by the head of the state from among the candidates presented to him by the assembly of judges of the Tribunal.

According to the Constitution, the Constitutional Tribunal adjudicates on matters of the so-called hierarchical control of legal norms. This involves examining the conformity of legal norms lower in rank with those placed higher in the hierarchical order, i.e. the conformity of laws and international agreements with the Constitution, the laws with ratified international agreements, as well as ordinances and regulations enacted by executive authorities with the Constitution, international agreements and laws. In addition to the hierarchical control of legal norms, the Constitutional Tribunal adjudicates on the conformity of the purposes or activities of political parties with the Constitution, resolves competence disputes between central constitutional state bodies,

and has also the right to declare the president temporarily unable to hold office.

The Constitutional Tribunal's rulings have universally binding force and are final. A ruling on the inconsistency of a given act or its part with an act higher in rank removes the challenged act (or its part) from the legal order. For this reason, the Constitutional Tribunal is often referred to as the “negative legislator”. If a court ruling or another individual act was issued under the removed legal norm, the Tribunal's ruling constitutes the basis for reopening the proceedings or repealing that act.

3. President and the Constitutional Tribunal

When it comes to the relations between president and the Constitutional Tribunal, it should be pointed out that the Constitution of the Republic of Poland entrusts both the authorities with the role of its guardian. However, each of them performs the role in a different way, which results primarily from the different legitimacy of each of the agencies to act and their different empowerment in the system of state bodies. Without going into a detailed analysis of the issue, the problem discussed here can be reduced to the nature of the function performed as the above said "guardian of the Constitution". The aim of the CT is to restore constitutionality, i.e. to remove defective norms from the legal system because they violate higher-order norms, while the president does not have powers that directly lead to a similar effect, his role consisting in initiation of the mechanisms that can cause such an effect. This means initiating procedures before other state bodies (e.g. the Supreme Audit Chamber or the Constitutional Tribunal) (Brzozowski, 2010, p. 15). Such distribution of powers is a consequence of the location of the president and the CT in different segments of the state power – the president being part of the executive power, the Tribunal – of the judicial power. In accordance with the principle of the separation of powers, which is one of the fundamental principles of the political system of the Republic of Poland, all segments of power are independent and autonomous, and

therefore exercise competences that by their nature belong to a given type of power. The above does not mean complete separation and lack of connections between the different types of state bodies the individual segments of power are composed of. Such connections are more than natural. When it comes to the relations between the president and the CT, the Polish Constitution allows to distinguish five fields in which they are implemented: the president's participation in shaping the composition of the CT, the president's initiation of the review of the constitutionality of the law, the Constitutional Tribunal's resolution of competence disputes, ruling at the president's request on the conflict of political parties' goals with the law, and the Constitutional Tribunal's ruling on the president's temporary inability to perform his function.

4. The president's participation in shaping the composition of the Constitutional Tribunal

The Constitutional Tribunal judges are elected by the *Sejm*, the first house of the Polish parliament, from among people distinguished by their legal knowledge. Candidates for the position of the CT judges are nominated by the Presidium of the *Sejm* or at least 50 members of parliament. After being elected, the Constitutional Tribunal judge takes an oath before the President and begins a 9-year term of office. It is thus a strictly political mechanism that is set in motion at the time, but after taking office, a CT judge is autonomous and independent, being subject only to the Constitution, and any political activity is prohibited from him. In particular, the CT judges must not belong to a political party, a trade union or conduct public activities that are incompatible with the principles of the autonomy of courts and the independence of judges during their term of office.

As can be seen from the above, the President's role in shaping the makeup of the Constitutional Tribunal is not a prominent one; it is actually limited to administering the oath to the new judge of the Tribunal. In the past, it would happen that President delayed accepting the oath from a person elected as a judge of the CT, therefore in one of its

rulings the Tribunal stated that the president should meet this obligation immediately (CT judgment of 3 December, 2015., K 34/15).

The Constitution entrusts President with a more prominent role in the deciding on the composition of the management bodies within the Constitutional Tribunal. It states that the president and vice-president of the CT are appointed by President of the Republic from among candidates presented by the General Assembly of Judges of the Constitutional Tribunal. It is worth noting at that occasion that appointing the president and vice-president of the CT is one of the so-called prerogatives of the president, i.e. the acts that do not require the countersignature of the prime minister.

5. Initiation of the control of constitutionality of laws by the president

Ruling on the hierarchical conformity of legal norms is one of the most important competences of the Constitutional Tribunal. The CT does not act *ex officio*, and the proceedings before it may be initiated only by authorized entities. Polish law provides for two types of such review - abstract and specific. In cases of so-called abstract review, i.e. the review of a provision unrelated to an individual case, the eligible entities are limited to the most important bodies of various branches of the state machinery, as well as other entities performing specific social tasks (e.g. trade unions or churches and religious associations). On the other hand, in cases of so-called specific review, i.e. review of a provision that was or may be the basis for an individual decision, the entities authorized to initiate proceedings before the Tribunal include only two groups of those:
- courts, which may ask a so-called legal question regarding the legality of a provision that is to be applied in a specific case. After asking a question, the court suspends the proceedings pending before it and waits for the Tribunal's decision;
- citizens or private legal persons that may file a constitutional complaint with the Tribunal against a legal provision that was the basis for the decision in their case, if they believe that the provision is inconsistent

with the Constitution and their rights or freedoms specified in the Constitution have been violated as a result.

In the scope of our interest, the president does not have the authority to initiate specific control, but plays an important role in relation to abstract control. He can initiate such control in relation to the applicable law or a law before it enters into force. As for the first case, according to the Constitution, the president is the entity authorized to submit applications to the Constitutional Tribunal to initiate proceedings on the abstract review of the constitutionality of any applicable legal act or part thereof. The president often uses this authority, and in the event of submitting the application in question, he is a participant in the proceedings before the CT. However, the Constitution also provides for the possibility of the president applying to the Constitutional Tribunal during the legislative process, i.e. before the act enters into force. The legislative process in Poland includes three stages - first, the *Sejm* (the first chamber of parliament) passes the act, then it is sent to the Senate (the second chamber). The Senate may make amendments to the adopted act. If such is the case, the act with amendments is returned to the *Sejm*, which may accept or reject them. If the Senate has not tabled any amendments or if the *Sejm* has considered the Senate's amendments (positively or negatively), the bill goes to the president, who then has 21 days to sign it and the president's signature is a condition for the law to come into force. After the bill is signed, it is published in the Journal of Laws of the Republic of Poland.

If the president’s doubts about the bill submitted to him are so serious that he does not want to sign it, then he has two options. First, he can file a motion with the Constitutional Tribunal regarding the conformity of this bill with the Constitution. In such a case, the so-called preventive control is talked of, the one before the entry into force of a given bill. If the CT has found the bill to be in conformity with the Constitution, the president cannot refuse signing it. On the other hand, if the Constitutional Tribunal has found the bill to be inconsistent with the Constitution, the president refuses to sign it. However, if the inconsistency with the Constitution concerns individual provisions of the

bill, and the CT does not rule that they are inextricably linked to the entire bill, the president, after seeking the opinion of the Marshal of the *Sejm*, signs the bill leaving out the provisions found to be inconsistent with the Constitution or returns the bill to the *Sejm* to remove the inconsistency. It is worth noting here that only the president can initiate preventive control as part of the described legislative process (Naleziński, 2006, p. 93). No other state body may request the Constitutional Tribunal to review the legality of an act or part thereof before this process is completed.

Secondly, instead of referring the act for preventive control the president may veto it. The president's veto of the act consists in submitting a reasoned motion to the *Sejm* to reconsider it. The rejection of the president's veto occurs if the *Sejm* passes the act again by a qualified majority of 3/5 votes in the presence of at least half of the statutory number of the deputies. In such a case, the president signs the act and orders its publication in the Journal of Laws of the Republic of Poland. If the veto is rejected, the president does not have the right to apply to the Constitutional Tribunal for preventive control. If the *Sejm* does not reject the president's veto, the act does not enter into force. The president decides quite freely which of the above moves (preventive control before the CT or veto) to choose. From the praxiological point of view, the veto has one fundamental flaw - unlike preventive control, it is not selective and is directed against the entire act. The president's motion to the Constitutional Tribunal may cover only certain parts of a given legal act (Dudek, 2023, p. 71).

Slightly different rules apply to the procedure for adopting the state budget. Firstly, the president has only 7 days to sign the budget act, and secondly, he cannot veto it. However, he may refer it to the Constitutional Tribunal for preventive control. The Tribunal shall rule on the matter no later than within 2 months from the date of filing the application with the CT.

It should be added that after signing the act, the president may refer it to the Constitutional Tribunal following the general principles. If this happens immediately after signing the act, a so-called subsequent control

is talked of. In such a case, the Constitutional Tribunal examines the act (or part of it) as part of the ordinary procedure for abstract control of applicable law. The practice of the legislative process reveals quite often instances of the president using this possibility. The president does not always decide to veto or conduct preventive control for political reasons. Referring the act to the Constitutional Tribunal immediately after signing it is therefore a "soft" form of the president distancing himself from the act submitted to him for signature.

Finally, it should be mentioned that the President may, before ratifying an international agreement, submit to the Constitutional Tribunal an application regarding verification of its conformity with the Constitution.

6. The Constitutional Tribunal resolving competence disputes at the request of or with the participation of the president

The president is one of the entities that may apply to the Constitutional Tribunal to resolve a competence dispute. Apart from him, only the Marshal of the *Sejm*, Marshal of the Senate, Prime Minister, First President of the Supreme Court, President of the Supreme Administrative Court and President of the Supreme Audit Chamber may exercise such authority.

The Constitutional Tribunal resolves competence disputes in the event that at least two central constitutional state bodies consider themselves competent to resolve the same case or have issued decisions in it (positive dispute) or at least two central constitutional state bodies consider themselves incompetent to resolve a specific case (negative dispute).

7. Ruling on the inconsistency of the goals of political parties with the law, at the request of the President

The President – like other key state authorities – has the right to submit to the Constitutional Tribunal a motion to examine the conformity

of the goals of a political party, specified in the statute or program or the activities of a political party with the Constitution.

8. The Constitutional Tribunal adjudicating on the temporary inability of the president to perform his duties

As a rule, the Constitutional Tribunal is a court of law, and therefore its adjudicative powers are limited to the hierarchical control of legal acts or parts thereof. The only competence of the CT that goes beyond examining the legality of law is adjudicating on the temporary inability of the president to perform the person's duties.

The Constitution of the Republic of Poland provides that if the president is temporarily unable to perform his duties, he shall notify the Speaker of the *Sejm* about the same, which Speaker shall then temporarily take over his duties. The Constitution does not limit possible reasons for the inability to perform President's duties to health issues, and they may be issues of a different nature (e.g. family situation, inability to return to the country due to a natural disaster, warfare or an act of terrorism) (Radajewski, 2016, p. 14). Where the president is unable to notify the Speaker of the *Sejm* of the inability to perform his duties, the Constitutional Tribunal rules on the existence of an obstacle to the performance of the office by the President of the Republic of Poland at the request of the Marshal of the *Sejm*. In the event that the President is temporarily unable to perform his duties, the Constitutional Tribunal shall entrust the Marshal of the *Sejm* with the temporary performance of the duties of the President of the Republic. Should the Marshal of the *Sejm* prove unable to perform the duties of the President of the Republic, the duties shall be assumed by the Marshal of the Senate.

The Constitutional Tribunal shall consider the application of the Marshal of the *Sejm* to confirm an obstacle to the performance of the office by the President of the Republic of Poland and to entrust the Marshal of the *Sejm* with the temporary performance of the duties of the President of the Republic of Poland immediately, but no later than within 24 hours of its submission. If, during the consideration of the case,

doubts arise regarding the circumstances justifying the determination of the inability to perform the functions by the President, the Tribunal may order the Prosecutor General to perform specific activities within a specified period and adjourn the hearing. The adjournment of the hearing may not last longer than 24 hours.

The Tribunal shall issue a decision to confirm an obstacle to the performance of the office by the President of the Republic of Poland and to entrust the Marshal of the *Sejm*, for no longer than 3 months, with the temporary performance of the duties of the President of the Republic of Poland. In the event that after the expiry of the period for which the Tribunal entrusted the Marshal of the *Sejm* with the temporary performance of the duties of the President of the Republic of Poland, the circumstances that temporarily prevent the President of the Republic of Poland from exercising his office have not ceased, the Marshal of the *Sejm* may once again submit a motion to the Tribunal to establish an obstacle to the performance of the office by the President of the Republic of Poland and to entrust the Marshal of the *Sejm* with the temporary performance of the duties of the President of the Republic of Poland.

So far, the Constitutional Tribunal has never addressed the issue of determining the temporary inability of the president to perform his duties.

Conclusions

As it results from the above, the Constitutional Tribunal of Poland does not wield any powers related to the assessment of the course of any elections. Tasks in this scope are performed primarily by the National Electoral Commission, which is the permanent highest electoral body competent in matters of conducting elections and referenda. It consists of one judge of the Constitutional Tribunal, appointed by the president of this Tribunal, one judge of the Supreme Administrative Court, appointed by the president of this court, and 7 persons qualified to hold the position of judge, appointed by the *Sejm*.

When it comes to presidential elections, their results are determined, based on the results established in the voting protocol, by the

National Electoral Commission. Electoral protests against the election of the president may be filed with the Supreme Court. It decides on the validity of the elections basing on the report of the National Electoral Commission and after considering the protests within 30 days from the date of the announcement of the election results by the National Electoral Commission. If the Supreme Court adopts a resolution declaring the election of the President of the Republic of Poland invalid, new elections are held. Until a new president is elected, his duties are performed by the Speaker of the *Sejm*.

As can be seen, there exists in Polish law a possibility to invalidate the presidential elections. However, this can only happen after they have been fully conducted, i.e. after the second round of those (if it was held). The decision is made by the Supreme Court, not the Constitutional Tribunal.

In relation to the issue of removing the president from office, the Constitutional Tribunal has no authority in this matter. The President may be deprived of his function by the State Tribunal. This is a special judicial body before which persons holding the most important state functions are held accountable for violating the Constitution or the law in connection with the position they hold or within the scope of their office.

Of course, the President of the Republic of Poland is among the people who may be held accountable before the State Tribunal. The right to impeach the President is vested exclusively in the National Assembly, i.e. both parliamentary chambers combined – the *Sejm* and the Senate. The National Assembly has a total of 560 members (460 members of the *Sejm* and 100 senators). An initial motion to impeach the President may be submitted to the Speaker of the *Sejm* by at least 140 members of the National Assembly. Impeachment of the President may occur by a resolution of the National Assembly, adopted by a majority of at least 2/3 of the votes of the statutory number of members of the National Assembly. If the State Tribunal finds that there has been even an unintentional violation of the Constitution, the Tribunal rules that the President be removed from office. However, due to the insignificant degree of social harm caused by the act or if there exist special

circumstances of the case, the State Tribunal may limit itself to finding the accused guilty (without imposing a penalty). For acts constituting a crime, the State Tribunal imposes penalties or penal measures provided for in the provisions of criminal law.

References

Brzozowski, W. (2010). *Prawne relacje Prezydenta RP z Trybunałem Konstytucyjnym* (w:) *Instytucja prezydenta. Zagadnienia teorii i praktyki na tle doświadczeń polskich oraz wybranych państw obcych* [Legal relations of President of the Republic of Poland with the Constitutional Tribunal [in:] *The Institution of the Presidency. Issues of Theory and Practice against the Background of Polish and Selected Foreign Countries' Experiences*], collective work, T. Mołdowa and J. Szymanek (eds.), Warszawa.

Dudek, D. (2023). Prewencyjna kontrola konstytucyjności ustaw – efektywność instrumentu w świetle założeń ustrojowych i praktyki [Preventive Control of the Constitutionality of Laws – the Effectiveness of the Legal Arrangement in the Light of Systemic Assumptions and Practice], *Przegląd Prawa Konstytucyjnego 2*.

Naleziński, B. (2006). Realizacja konstytucyjnych kompetencji Prezydenta RP wobec Trybunału Konstytucyjnego i Trybunału Stanu, (w:) *System rządów Rzeczpospolitej Polskiej. Założenia konstytucyjne a praktyka ustrojowa* [The Implementation of the Constitutional Powers of the President of the Republic of Poland towards the Constitutional Tribunal and the State Tribunal (in:) *The System of Government of the Republic of Poland. Constitutional Assumptions and Systemic Practice*], collective work, M. Grzybowski (ed.), Warszawa 2006.

Radajewski, M. (2016). Przejściowa niemożność sprawowania urzędu przez prezydenta RP w świetle Konstytucji i nowej ustawy o Trybunale Konstytucyjnym [Temporary Inability of the President of the Republic of Poland to Hold Office in the Light of the Constitution and the New Act on the Constitutional Tribunal], *Przegląd Prawa Konstytucyjnego 2*.

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 199-211

WHY THE RULE OF LAW IS LESS ACCEPTED IN POLITICAL PRACTICES?

Marius VACARELU
ORCID [ID]: 0000-0002-8146-0871
E-mail: marius333vacarelu@gmail.com
Afiliation: SNSPA Bucharest

Abstract: *In recent years, a question has arisen regarding the behavior of politicians, specifically how they relate to the supremacy of the law. Each year, there are examples of these individuals violating the fundamental norms of law, leading to an increase in public discontent. This discontent can manifest either in violent outbursts, apathy, or the tolerance of low-quality behaviors that have negative effects on governance. Therefore, a periodic discussion of this relationship – politics and law – is necessary to remind and once again warn of the dangers that arise when legal norms are seen as unnecessary or adversarial to political power.*

Keywords: *Rule of law; politicians; interest; practices; limitations of power.*

Introduction

Very often, there is discussion about an issue that irritates the normal persons, someone without extensive political connections and without an easy way to escape administrative actions, namely the borderline criminal and/or immoral behavior of politicians. This issue is by no means unimportant, and in a society where every citizen has a constitutionally enshrined right to vote, it is necessary to understand the limits of political action and where there might be a certain tolerance for exceeding the boundaries prescribed by lawmakers.

A strong society is based on the genuine trust of citizens not only in their own social institutions but especially in the national public administration and the country's politicians (Winsvold et al, 2023). Obviously, even though there will never be equality between the three major types of socio-psychological actors (because the institution of marriage, for example, will always be more popular than the political class, etc.), there still must not be major discrepancies between them. When one part of this "three-armed balance" becomes too weak, meaning trust in it weakens significantly, society will seek rebalancing, and this will lead to electoral tendencies that are not necessarily positive. However, there is also a corollary: if the political environment becomes unpopular, it will also drag down the public administration (Schedler and Eicher, 2013), since the latter follows and implements decisions adopted by bodies of a political – or predominantly political – nature.

This relationship of trust is not a hidden thing, accessible only to the highest intelligences of a nation. In reality, the entire human community is aware of this necessity for social balance, regardless of the country we might wish to analyze in a specialized article. However, although these realities are well-known, the major problem remains that the political environment continues to violate the basic requirements of minimal social harmony. In fact, data from several institutions reveal that in recent years the level of respect for society and the foundations of its proper functioning are increasingly violated by the political environment, and then we must ask ourselves why we have reached this point.

1. From the moment a child becomes aware of their own existence, they will learn the meaning of the word "I", and especially the power of their own will. From that moment on, they will begin to represent their life and relationships with other people in different terms, which can be of weakness / strength, and which will shape their attitude towards the environment they live in. They will learn what is right and what is wrong, they will encounter examples of good practices and abuses, but they will always have their personal well-being in mind. During their

development, they will also come into contact with literature – first for children, then for adults – and will largely complete their personality.

Throughout this journey to becoming an adult, a citizen with the right to vote, they will understand the division between the leadership of a local or national community and positions of low political involvement, which in time will also give them their own ideas that may mean more intense participation in the competitions necessary for taking and exercising political power. Not by chance, these political behaviors will offer them only two options for life: either they will be little involved politically, and then they will almost always have to respect the decisions adopted by political institutions and established in laws and administrative acts, or they will participate with some success in the political competition, and then they will be able to decide on the content of some of the normative acts, with the subsequent obligation for them to also respect them.

The political individual, however, when beginning their career, will observe that they have more power over the community, and from here there is a major danger, namely that of no longer respecting legal norms with the same conscientiousness as when they were not participating in this public activity sphere. Obviously, this "sliding" towards a behavior not beneficial to a country/community does not always occur, and does not appear from the beginning of the career. Nevertheless, the danger of deviation from the basic norms of the political medium-citizen (and communities) relationship is a real one and equally recognized by any person with mature thinking. We are primarily in what is called political psychology, but it is necessary to understand a few things about it, so that we can have a minimal explanation of the non-compliance of some politicians with the functioning principles of society, which are configured in a synthetic expression, namely the supremacy of law over any citizen, or the rule of law.

2. This lack of respect for the legal framework has several causes, some of which are specific to the political environment, and some are common to all human life. Without discussing philosophy and the terrible

analyses of man and the essence of humanity, we must nevertheless highlight that the legal environment is concerned with these violations of legality by politicians, because – ultimately – the normative framework of any country is established by politicians, in a political-legal body (National Representation, or Parliament).

The first problem that can affect the moral lifestyle in politics is given by electoral competition, which often allows even immoral conduct. In fact, you will find a decision by the US Supreme Court that acknowledges that politicians have the right to lie in election campaigns. The case is No. 77769-1, Marilou Rickert vs. state of Washington and PDC. This decision – is important to note that voting was 5 to 4 – it brings up the fact that there is a certain tolerance for how much a candidate can know about other political competitors during elections, but from here it can lead to a less acceptable issue, namely that anything can be said, invoking ignorance of certain facts. The danger here lies in the fact that politicians' false statements can be picked up by voters – who may rely on political loyalty when spreading those lies – and the repetition of untruths will remain in the press, on the internet, and a person's image can be knowingly damaged for a long time.

In any case, we are facing a violation of moral and legal norms, because we all have the obligation to make public facts according to reality, not altered by personal interests.

A continuation of the idea of false or misleading statements is electoral promises. In a society that benefits from long-term education systems for most citizens, an electoral promise can be something possible to achieve, or conversely – but this second type of action (negative) is not always easily intelligible. People have different levels of legal, economic, geopolitical, educational knowledge, etc., which makes certain electoral promises seem plausible and even achievable for some, while for others the perception is negative.

It is therefore a real discussion that we should have in a more extensive study on the legal consequences of electoral promises (Bytzek et al, 2024). We say this because today's intellectual landscape is very different, and legality also suffers. Specifically, the fact that today you

can address targeted messages to voters, in relation to your own ideas – see the Cambridge Analytica scandal (Le Jeune, 2021), which is not at all singular – is a political advantage, but this does not mean that you will govern exactly according to the messages you gave to voters, which ultimately weakens their trust in the entire political environment. But these personalized messages are actually different from voter to voter, so where is the respect for one's own political program, on the basis of which the status of one's own party was defined? Could a political formation be dissolved based on these electoral message "inconsistencies"?

The doctrine reveals that parties are less able to keep their campaign promises when they enter government in countries and they also become less responsive to public opinion. When forming coalition governments, parties must reach compromises with their coalition partners, which sometimes means breaking the promises they made during the campaign. Sharp downturns in economic conditions also impede governing parties' ability to deliver on their promises, as policies that seemed possible at the time of the campaign appear infeasible in the midst of tighter fiscal constraints (Vestergaard, 2025).

There is a major difference, however, between promises made and broken in the context of forming a government coalition and promises broken when a party can govern alone (true, this way of exercising power as the sole governing party is increasingly rare in democratic countries). But it should not be forgotten that the realism of political struggle is not always equal to the realism of the voters of one's own party, and even less so to that of the entire electorate, which does not have the same tolerance for changes made during the term, and a party that wins the elections can find itself after governance in which it has disappointed its voters in a significantly worse position in the next election round, having lost many percentage points.

Thus, we can appreciate that citizens see the electoral campaign as a real "contractual negotiation" between them and the political parties, and the will agreement is "signed" by casting their vote (Parker and Gallagher, 2007). Now, since a contract is law for its parties, it follows

that breaking promises is a true breach of the contract, and the action of termination (being obviously a contract with ongoing execution) must be resolved at the next elections. From here, we will consider that electoral promises are regarded as law for the party making them, and breaking them is a true violation of a legal norm, which must be punished unequivocally and as quickly as possible, including through public protests that lead to early elections.

3. The absence of any form of legal sanction for breaking electoral promises also results in no punishment for political actions that were not promised but still take place. Obviously, no party – and no politician – will say that during their time in power they will grant public contracts mostly to people from their own political group, or that they will appoint only people from their own party to public dignitary or administrative leadership positions, etc.

Nevertheless, they can do this perfectly legally, because they have a constitutionally established advantage on their side, namely the privilege of issuing normative acts and appointments to leadership positions. Participation in political competition also results in a leading role in the process of public policy development, as well as in the appointment of those who will have to implement them.

And so, it is precisely this right – transformed into a privilege – that forms the basis of any abuse, first in a psychological, intentional form, and later, if the legal mechanisms of the state are weakened, in a factual way as well. It is true that once someone reaches the supreme – or at least a superior – position in the state, they will have to solve both everyday matters and extraordinary ones. In fact, it is in this duality that one of the reasons lies for politicians developing a great sense of self-esteem, which they seek to validate themselves by removing various legal restrictions on the exercise of their mandates.

The fact that they exercise a leadership position in the state appears as a full assumption of the obligations attached to the position, but especially of the corresponding rights. But we should ask ourselves something else: how many people would still want to exercise political

leadership positions if their status was not only restrictive, but also constraining? What if there were an official, mandatory residence of small size (2 or 3 rooms at most), and children were subject to major restrictions in their careers or studies during the mandate? This question is not rhetorical, for two reasons:

First, because history shows us many cases in which certain positions were offered precisely with such a condition (typically, constraints were applied to the children of the person), so that the freedom of action of the one receiving the position was reduced out of fear of possible reprisals. Even if we are no longer in this official typology, it still applies in various cynical political calculations, usually in the form of blackmail (you or your children did something illegal or immoral, so you get the position if you do whatever is asked of you, and criminal investigation or public disgrace won't find out about your behavior);

The second possibility, however, is much more commonly encountered today and in the past, namely the career and/or wealth that the children and various relatives of someone appointed to important positions develop during their mandates. Examples of this type are revealed in almost every country in the world, and various public scandals – Panama Papers, for example, without being the only one (Aristodemou, 2024) – compromise not just the respective politicians and their families, but also destroy the credibility of national political and legal institutions.

This problem is actually the most important one in the entire relationship between governance and citizens. No citizen in a truly free society will elect a person they are convinced will steal, because their free will shall not tolerate being robbed through taxes or permit costs. At the same time, the fact that today there are many leadership positions that can be filled by people with different levels of education, wealth, and morality actually means nothing more than there are more opportunities for enrichment at the expense of public funds.

Obviously, this raises a certain question: is it necessary to appoint to leadership positions only the wealthy, who – according to a theory

common among naive people – have no reason to steal / embezzle / abuse public funds? The answer is self-evident, as we have so many examples where wealthy people who reached important positions sought to become even wealthier – from Crassus onwards, history provides us with examples every year. Ethics and morality are what can bring success to a government, and this contradicts human nature, which has a certain dose of greed, as well as the legal framework of politics, in which politicians write their own rules, including those for absolving themselves of responsibility (or for making it harder to establish criminal liability).

In the most objective analysis, we must admit that when someone creates their own rules for operation and sanctioning, it will be very difficult to achieve a generally positive result, because egoism and subjectivism – matters impossible to eradicate, being biological – will make the most draconian restrictions very hard to impose through legal provisions. In politics, only the legal norm is what can truly ensure a restriction, not ethical and deontological norms. Essentially, each of us has had moments when we broke the promises we made only to ourselves, because we created the promise, and we also had the full freedom to break it, usually by finding or inventing excuses.

Therefore, in the absence of a very strict legal framework for conducting political activities – which must be created by politicians – we will be left to rely on ethical and moral norms, as well as on their awareness and observance by politicians. Evidently, public pressure will help maintain a moral foundation in society, but unfortunately there are politicians who defy any norm, crossing the Rubicon of common sense and legality. From that moment on, we will have precedents that can be used by other politicians to not conform to moral norms, but also a new line of conduct for them, which can push the limits of public morality and ethics in politics even lower.

4. One of the effects of mandatory education is the fairly good knowledge of national and international history. Obviously, examples regarding wars and struggles for freedom are very interesting, but equally interesting are – and life obliges you to know them – those of good

governance, as well as those of revolts that emerged as an effect of poor governance and the low quality of politicians' activities and public administration. If we pay attention, we will understand that education in schools and high schools actually insists on a reasonable definition of the relationship between politicians and governance, considering practical examples of applying good or bad practices of this relationship, including their consequences.

What does a responsible political class mean to a person with an average education in good governance? In three points: it is a group that does not grant itself legal privileges regarding accountability before the law for its own actions; a group that does not favor a social, economic, or ethnic group; a group that at the end of its term will not be substantially richer than at the beginning, neither in its own name nor through that of relatives or close friends. In a word, ethics and complete neutrality towards all political and economic actors in a country.

In order for this to be fulfilled, the existing legal framework will be analyzed as well as any that will emerge during the exercise of the respective mandates, along with the manner of appointment to leadership positions in public administration, as well as the allocation of administrative contracts – which by their very nature are the least exposed to terminations due to breaches imputable to agents of public authority.

About the legal framework we must underline that a legislative proposal that is to be functional for at least a decade must fulfill a fundamental objective: namely, to be at the same time logical, predictable, and sufficiently flexible to allow development or business plans based on it in the long term. Such a planning horizon only emerges if the normative act is one whose logic offers opportunities for utilization by as broad a range of people as possible, even if for various reasons – financial, personnel-related, technical competencies, etc. – not everyone will act based on it. Therefore, the normative act must be as neutral as possible so that any interested person can use it without major problems, with predictable financial, logistical, and time costs (Celano, 2013).

The neutrality of normative acts is therefore an indispensable goal for anyone wishing to operate in various fields of interest. The neutrality of a normative act is understood as the absence of favoritism, the elimination of the arbitrariness of political (public) power, and the equal anticipation of potential issues with various public authorities acting without political influence (Smith, 2011).

However, neutrality is a dual-natured element, both technical-legal and psychological.

Within the technical-legal nature, matters concerning the neutrality of a normative act are rather objective and depend on the structure of the text in relation to the principles of law as well as the principles of legislation. Thus, a legal specialist will identify issues where the norm offers equal treatment to any interested person, as well as the logical sequence of ideas that provide consistency to the legal norm. In this way, a clear analysis can be conducted, identifying those items that allow specialized conclusions about the normative act, which can also be the subject of scientific publications, for example.

On the psychological side, the issue of the neutrality of normative acts is more difficult to approach because it refers to the perception ordinary people have of lawmakers, the public institutions of a country, as well as the way political will is expressed across various sectors of society. For this reason, it is more difficult to present a normative act as being neutral, since the level of legal education is not equal within a society, and on the other hand, a legal provision is not always in favor of everyone. From this perspective, the legislator must keep in mind that they will always face criticism from someone, and the most important thing is that the number of dissatisfied individuals does not reach a significant proportion of society (or of the professionals for whom the normative act is intended).

Neutrality – being difficult to achieve at an objective level – appears almost impossible for politicians to uphold, since they come from particular political formations that have an electoral base, and consequently a type of representational expectation from those who enter parliament with the votes of these groups of citizens. In reality, political

parties must constantly confirm their appeal to as wide a range of voters as possible, or at least to groups large enough to be able to send representatives to parliament through voting, which means that once elected, the human communities (convinced to vote) and the normative acts proposed by those political formations will predominantly favor their voters. Thus, in this way, the neutrality of normative acts is objectively violated, and the subjective aspect no longer needs to be discussed.

However, citizens notice these things, and since they also have discernment and understand the realities of their own society, they will react either by decreasing voter turnout, or by favoring new political competitors with new programs – not necessarily better – or through emigration (where possible) or revolts. In any case, however, the blame does not lie with those who are forced to endure, but with those who decide, and who must understand once and for all that politics attracts more attention than any human activity, and the consequences of illegal and/or immoral behavior can completely destroy not only the politician who breaks the rules, but especially their entire family, which can be stigmatized for decades, no matter how wealthy they are.

Conclusions

Political activity is difficult in any century, and these recent years have shown that significant transformations are occurring in the relationships parties have with citizens, implicitly subjecting the status of politicians to changes.

However, there is one thing that the new world of artificial intelligence will not be able to change, and that is the legal capacity that politicians have to regulate all social activities in a country, including their own. From this, there will always be a temptation to violate general moral norms, which will be carried out under the protection of legal norms – which politicians also create.

No matter how much we insist on the necessity of applying moral norms in society, it is the obligation of every citizen to be as politically

active as possible, restricting the freedom of politicians to do as they wish, in order to compel them to the supreme gesture: the self-limitation of their own freedom to create the most favorable legal framework for themselves.

References

Aristodemou, M. (2024). Are beneficial ownership laws important? Exploring the impact of Panama, FinCEN, and Pandora Papers on beneficial ownership laws in the UK and the US, *Journal of Economic Criminology*, 5, 100082, https://doi.org/10.1016/j.jeconc.2024.100082.

Bytzek, E., Dupont, J.C., Steffens, M.C. *et al.* (2024). Do Election Pledges Matter? The Effects of Broken and Kept Election Pledges on Citizens' Trust in Government. *Polit Vierteljahresschr* https://doi.org/10.1007/s11615-024-00567-6.

Celano, B. (2013). Normative Legal Positivism, Neutrality, and the Rule of Law. In: Ferrer Beltrán, J., Moreso, J., Papayannis, D. (eds) *Neutrality and Theory of Law. Law and Philosophy Library*, vol 106. Springer, Dordrecht. https://doi.org/10.1007/978-94-007-6067-7_9.

Le Jeune, M. (2021). *Facebook and the Cambridge Analytica Scandal: Privacy and Personal Data Protections in Canada*. https://carleton.scholaris.ca/server/api/core/bitstreams/9a1161d7-336e-47ad-8b6e-a9f9310e5746/content.

Parker, S. and Gallagher, N. (2007). *The Collaborative State. How working together can transform public services*, https://lx.iriss.org.uk/sites/default/files/resources/The%20collaborative%20state.pdf.

Schedler, K. and Eicher, A., (2013). *Relations between administration and politics*, https://www.alexandria.unisg.ch/server/api/core/bitstreams/ba78c88b-2faf-4028-9858-8725179f7739/content.

Smith, T. (2011). Neutrality Isn't Neutral: On the Value-Neutrality of the

Rule of Law, 4, *Washington University Jurisprudence Review, 49*. https://openscholarship.wustl.edu/law_jurisprudence/vol4/iss1/3.

Supreme Court of Justice, USA, case Marilou RICKERT, Respondent, v. STATE of Washington, Public Disclosure Commission; and Susan Brady, Lois Clement, Earl Tilly, Francis Meartin and Mike Connelly, members of the Public Disclosure Commission, Petitioners. No. 77769-1. https://law.justia.com/cases/washington/supreme-court/2007/77769-1-1.html.

Vestergaard, M.B. (2025), Why all these promises? How parties strategically use commitments to gain credibility in an increasingly competitive political landscape. *European Journal of Political Research*. https://doi.org/10.1111/1475-6765.70011.

Winsvold, M., Haugsgjerd, A., Saglie, J., & Segaard, S. B. (2023). What makes people trust or distrust politicians? Insights from open-ended survey questions. *West European Politics*, *47*(4), 759–783. https://doi.org/10.1080/01402382.2023.2268459.

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 212-226

THE PROBLEMATIC OF LEGITIMATE INTEREST IN THE VISION OF THE PUBLIC MINISTRY AS WELL AS THE PRACTICE OF THE HIGH COURT OF CASSATION AND JUSTICE, AS ”LEGAL BASIS” FOR THE CREATION OF DISCRIMINATORY CONDITIONS ON THE ACTIVITY OF ENTERPRISES. ADDING TO THE LAW REGARDING THE APPLICATION OF ART. 339 – 340 CRIMINAL PROCEDURE CODE. THE NEED TO CEASE THE SRL TYPE BEHAVIOUR WITH SOLE ASSOCIATE FROM THE PUBLIC MINISTRY

Dan-Mihail DOGARU
ORCID [ID]: https://orcid.org/0009-0002-1154-2000
E-mail: dogarum@rdsmail.ro
Afiliation: Faculty of Law, University of Craiova, Romania

Abstract: *This Article concerns the restriction of access to justice for persons who refer criminal investigation bodies to offences against property or service.*

If these whistle-blowers cannot justify a legitimate interest of their own, concrete and current, they do not have the right to subject the acts and measures of the prosecutor to censure the court, in case the beginning of the criminal investigation or the prosecution was not ordered.

Although these issues formed the subject of Decision no. 13/2011 of the High Court of Cassation and Justice (recourse for the interest of the law), the effects of this decision lead to the encouragement of the lack of the criminal investigation, with the consequence of creating discriminatory effects on the activity of enterprises.

In addition to these aspects, there is a prejudice to the state budget regarding the amounts of money not recovered due to the lack of criminal

investigation, as well as an activity favoring the perpetrator according to art. 269 of the Criminal Code.

Keywords: *legitimate interest; lack of access to justice; discriminatory conditions regarding the activity of enterprises.*

The legal regulation of the notion of interest in civil procedural law

Interest is one of the conditions for the exercise of civil action according to Article 32 (1) letter d) of the New Code of civil procedure.

Provisions art. 32 The NCPC describes the 4 conditions for the exercise of civil action, as follows:

- the procedural capacity;
- the procedural quality;
- -formulating a claim;
- -justification of interest.

These requirements must be met cumulatively both in case of formulation and support of legal claims, as well as in case of invocation and support of substantive or procedural defenses (Gabriel & co, 2016).

The person bringing the civil action must justify a determined, legitimate, personal, born and actual interest according to art. 33 Civil procedure code.

The definition of the notion of interest refers to the practical, material or moral benefit pursued by the subject of law that introduced civil action, regardless of the concrete form of its manifestation (application for justice or defence of procedural funds).

The judge of a civil case must appreciate; foreshadow the actual benefit that the author of the civil action could obtain in the situation of admitting this action.

Interest must exist both at the time of filing the application for a summons and during the course of the dispute until the final settlement of the case.

In the national judicial practice there was no unitary point of view regarding the application of the provisions of Article 2781 of the Old Code of criminal procedure, a norm that has as its correspondent under

the provisions of art. 339 (Plea against the acts of the prosecutor) and art. 340 (Plea against non-removal or non-sending solutions).

Contradictory interpretations, the unitary practice referred to the fact that the legal subject who filed a denouncement has or does not have the procedural quality of the person whose legitimate interests are injured, with the consequence of the existence of the possibility, of the right to attack the solutions of non-sending to trial.

The contradictory interpretations, the unitary practice referred to the fact that the legal subject who filed a denouncement has or does not have the procedural quality of the person whose legitimate interests are injured, with the consequence of the existence of the possibility, of the right to attack the non-sending solutions.

As a result of this situation, at the referral of the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice, Decision no. 13/2011 – Appeal in the interest of the Law in the file no. 15/2011 of the ICCJ, a decision that established the following:

"In order to establish whether the whistle-blower may be a „person whose legitimate interests are harmed", the notion of „legitimate interests" must be delimited, by reference to the conduct of the whistle-blower, who is acting, either because the law obliges him to such an action (for example, in the case of offences whose failure to notify or not the judicial bodies constitutes itself a crime), either because the ethical or civic spirit leads him to such an action.

In these cases, one cannot speak of a legitimate self-interest, concrete and current, which the whistle-blower would have to overcome the initial process of informing the prosecution bodies about the alleged commission of a crime, regardless of the cause that led him to act (a legal obligation or his own conscience).

If the law recognizes any person the right to refer the matter to the criminal investigation bodies, when it considers that an offence has been committed, the same cannot be said regarding the possibility of challenging the act by which the prosecutor has assessed, with reference to the matters raised, that it is not necessary to start the

criminal investigation or, as the case may be, to initiate the prosecution order the suing of the person (s) being investigated.
This is because the procedure established in Article 2781 of the Criminal Procedure Code is essentially private, inferred from the requirement of an injury suffered by the person who is addressing the court, in his legitimate rights or interests.
By informing the judicial bodies of an alleged crime, the whistle-blower acts by virtue of a public interest as a representative of the company, thus helping these bodies to investigate facts provided for by the criminal law of which they were not otherwise aware (complaint or referral ex officio).
However, this public interest is limited to referral to the criminal investigation bodies and does not give the whistle-blower the right to subject the case to censorship to the court, when it was not ordered to start the criminal investigation or to sue."

As is clear from this reasoning, the ICCJ stipulates the necessity of the existence of its own legitimate interest for the whistle-blower, as a condition of the possibility to challenge in court the acts or ordinances of the prosecutor for failure to sue.

In this respect, it is recognized for the whistle-blower the existence of a legitimate interest that has, however, an abstract – character that gives him the right/obligation to notify the criminal investigation bodies, especially in the case of crimes whose non-denunciation or non-obsession would constitute a violation of the criminal law. This general and abstract interest is, in reality, assimilated to the ethical or civic spirit, being practically confused with them.

The lack of regulation of the notion of interest in criminal procedural law

The notion of interest does not have a legal correspondent within the criminal procedural law, the only approach being within the provisions of art. 32-33 Code of civil procedure.

In this context, the so-called ”transplant” of the notion of interest in criminal procedural law presents aspects of non-meaning and illegality, aspects that we will develop in the following.

As we have previously shown, within the definition of the notion of interest in doctrine, it can also look at the moral benefit that the whistle-blower might obtain from a solution for the referral from the Public Ministry (corroborated with the application of the appropriate sanctions or penalties by the criminal court).

It is noted that the RIL decision of the above-mentioned ICCJ abusively establishes that the interest regulated by art. 32-33. The Civil procedure code produces legal effects on the right to censure in court the solutions of non-sending by the whistle-blower.

Basically, the ICCJ even overlaps the notion of interest on the condition of injury caused by a crime, excluding that such injury could be moral.

As regards the complaint against non-delivery or non-sending solutions, according to Article 340 pct. (4) Cpp, find their impact on these issues including the provisions of Article 289 (3)-(5) of the same code.

These paragraphs regulate the situations in which the complaint is made, in writing, personally or through the trustee, as well as the situation in which it is made in electronic form under the conditions of certification by e-mail with electronic signature.

In fact, the legislator had to provide that the provisions of par. (1) art are applicable. 289 Cpp (complaint), a rule that states that **”***The complaint is the acknowledgement made by a natural or legal person of an injury caused to him by the crime***.”.**

In this context, it should be noted that Art. 289 corroborated with art.339 and art. 340 Cpp do not provide anywhere the condition of interest that the plaintiff must justify in order to challenge in court the solutions of non-removal or non-sending in court.

The requirement of injury, as regulated by Article 289 pct. (1) Cpp, refers to both forms of material and moral injury.

ICCJ RIL Decision no. 13/2011, as well as the related practice of the Public Ministry adds to the law, in the sense that they imply the need for interest in the perspective of the person who made the complaint so that the latter can appeal in court the solutions of non-delivery or non-sending.

In this context, if the plaintiff invokes a moral injury, a moral prejudice, this matter is not qualified in practice as sufficient to justify the interest.

This interest – in the opinion of the ICCJ and the Public Ministry - should be strictly material, financial, aspect totally erroneous.

In the case of a complaint aimed at prejudicing public money, the state budget, according to the ICCJ Decision 13/2011 and the practice in the field of parquet, there may be only 2 situations:

1. The situation in which the Public Ministry, by all forms of organization, wants to complete the criminal investigation initiated on the basis of the complaint, to ascertain the guilt of the perpetrators of the damage, with the consequence of issuing an indictment in which the defendants – on the civil side should fully pay the damage caused by the crime, damage composed of the main debit and accessories.

With regard to this situation, the criminal investigation bodies have an active role, and no criticism is made in this regard.

2. In the second situation, the Public Ministry does not want to carry out the investigation, does not administer evidence, proceeding to administer solutions of non-removal or non-sending to court that can no longer be challenged by to the author of the complaint, because this person – as we have shown – does not justify an interest (a requirement that is not required in criminal procedural law).

The author of the complaint may justify the moral injury according to Article 289. (1) Criminal procedure code, but this issue is not considered to be sufficient for the admissibility of a complaint against non-delivery or non-sending solutions.

Basically, it is worth noting that the prosecutor has a much higher power than that of the judge, because he can decide on his own whether or not he completes the criminal investigation, whether he leaves -

wilfully or not – as in question the rules governing the prescription of criminal liability.

It should also be noted that a ranking order motivated on the intervention of the prescription of criminal liability can also lead to the limitation of civil liability, according to the provisions of art. 1394 Civil code[1].

Including the issue of the intervention in question of the civil prescription is – as we showed – only at the discretion of the prosecutor.

These aspects, mentioned above, are specific to a behaviour manifested within a SRL with a sole associate, in which the sole associate/administrator does what he wants in terms of business decisions, without being censored in any way or another.

This behaviour must cease in the practice of the Public Ministry, behaviour which is practically encouraged by the emergence of the RIL Decision of ICCJ no. 13/2011.

In this situation, the intention of the prosecutor not to complete a file or to leave – even with good conscience – that the criminal liability to be prescribed, can no longer be censored by anyone, since the author of the complaint can no longer have access to justice precisely because by the RIL decision above-mentioned ICCJ added to the law, rather, to the provisions of art. 339-340 Cpp, by inventing this condition of interest.

[1] Art. 1394 Civil code:" In all cases where compensation derives from a fact subject to criminal law longer than civil prescriptions, the limitation period of criminal liability also applies to the right to action in civil liability.

The consequence of the false problem of interest in competition law. Ensuring discriminatory conditions regarding the activity of enterprises

If the perpetrator of a criminal complaint against economic agents alleged to have committed economic crimes (tax evasion in particular, money laundering, etc.) cannot justify this false condition of interest, the Public Ministry may investigate some of these economic agents with the consequence of the referral, and towards others – as I have specified - can register a phenomenon of ”oblivion”, abusive lack of investigation cannot be censored.

In this context, there is a risk of creating discriminatory conditions for the activity of enterprises, consisting in the fact that un-invested economic agents (for which the entire damage - debt and accessories are not collected to the budget) accumulate, under illicit conditions, capital related to the exact amounts of money they should have paid to ANAF.

This type of illicit “capitalization” can create, for economic operators against which the Public Ministry has registered the phenomenon of oblivion, obtaining economic advantages that could not be acquired under normal market conditions, including the emergence of monopolistic practices.

This matter is subject to Article 8 (1) letter a) and b) of Law no. 21/1996, republished: ”*Any actions or inactions of central or local public administration authorities and institutions and entities to which they delegate their powers, restricting, preventing or distorting competition, such as:*

a).;

b) the establishment of discriminatory conditions for the activity of enterprises.”

Between the provisions of Article 8 (1) and the provisions of Article 2 (1) there is an essential difference. If the provisions of Article 2 (1) apply to acts and acts which, as actions, hinder or distort competition, the provisions of Article 8 (1) sanction both the action in this respect of

the authorities and the institution of public administration and the inaction.

Practically, most of the times, the acts restricting or distorting the competition are carried out by these institutions as a result of inaction, when fiscal control or criminal age are completely missing (Journal Curierul Judiciar, 2018, p. 398).

In other news, the failure of the criminal investigation by the prosecutor produces effects including in the field of public procurement, apart from the anticompetitive and discriminatory consequences specified above: the economic operator against whom the Public Ministry does not wish to carry out the investigation cannot be excluded from the award procedure by the contracting authority, according to the provisions of 167 item (1) letter c) of Law no. 98/2016.

According to this rule of law, the economic operator who has committed a serious professional misconduct evoked by the contracting authority may be excluded from the award procedure, including with a conviction decision from a criminal court.

Another issue to be debated in question relates to the fact that Competition Law No 21/1996 regulates in Article 2, in a totally flawed, insufficient way, what kind of entities may hinder or distort competition: enterprises or associations of enterprises, as well as central or local public administration authorities and institutions, to the extent that they, by decisions issued or by the regulations adopted directly or indirectly influence competition.

The Public Ministry does not represent an authority or institution of central or local public administration and, at first glance, the provisions of Article 2 of Law no. 21/1996 of competition are not applicable to it.

In this context, the public prosecutor's office may exhibit the unique associated SRL behaviour of which I have spoken, omit from the investigation the preferred economic operators (usually the multinationals operating in Romania) and create discriminatory conditions regarding the activity of enterprises, including the RIL Decision of ICCJ no. 13/2011.

In reality, not only the author of a criminal complaint cannot defend himself, does not have access to justice, precisely because of the invocation of this false and abusive condition of interest, as well as disadvantaged economic operators in a competitive market, precisely because of the lack of criminal investigation against competitors.

The legislator should have included in Article 2 of Law no. 21/1996 all public institutions of the Romanian state, without proceeding to a ”discrimination against them in relation to the institutions of the central or local public administration, which ” as I have shown – through the decisions taken, may prevent or distort competition.

The action of the Public Ministry, with the consequence of the intervention of the prescription of criminal liability, has already been the subject of actions for claims to civil courts, as a result of incurring tort liability and proving the existence of moral damage.

By Decision no. 744/A/2016, the Mehedinti Tribunal admitted in part the claims of a claimant - a natural person at odds with the Ministry of Public Finance as a result of the damage caused by the inaction of the Public Ministry - The Prosecutor's Office attached to ICCJ, an institution which – through the absence of the – investigation led to the prescription of criminal liability in a case having as its object of culpable murder.

Although in the field of tort liability corroborated with the provisions of art. 3 ECHR the inaction of the prosecutor's office may be the basis for the delivery of court decisions to oblige the Romanian state (through the Ministry of Finance) to pay damages, this aspect is impossible in the field of repairing the damages in the field of competition law, because the Public Ministry – on the one hand is not regulated as the author of the violation of Law no. 21/1996 art. 2 and on the other hand, this latter institution can invoke at any time against the author of the complaint the RIL decision of the above-mentioned ICCJ, motivated on the false problem of interest.

In other news, the illegal capitalization of unplanned economic operators, bleached by the Public Ministry precisely as a result of the RIL decision of the ICCJ, takes the form of illegal state aid granting, according to the provisions of OUG no. 77/2014.

This normative act also regulates both the legal state aid and the state aid granted under illegal conditions[1].
The Court of Justice of the European Commission and the European Commission define more broadly the notion of state aid than the domestic legislator in Romania.

European institutions shall make the provisions of Article 107 para. 1 TFEU which regulates "*aid granted by States or through state resources in any form which distorts or threatens to distort competition by favouring certain undertakings or the procedure of certain goods, in so far as they affect trade between Member States*".

Thus, illegal State aid is not limited to positive benefits (subsidies or subsidies), but also includes all forms of aid that lead to a reduction in burdens or obligations incumbent on an undertaking, such as taxes and duties (Maican; Ungureanu).

By invoking the false problem of interest and RIL Decision no. 13/2011 "as legal basis" for the inadmissibility of complaints made by persons who do not justify this interest, the Public Ministry can investigate only who it wants, with the consequence of illegal granting of state aid to economic operators against whom the criminal investigation does not take place.

The recent practice of the Public Ministry and the criminal courts, synonymous with illegal state aid provision and inaccessibility to justice, following the emergence of RIL Decision no. 13/2011 of ICCJ

Within the Ordinance no. 309/II-2/2024 of 26 September 2024, a criminal complaint filed by C.D. against the perpetrators T.C.C. – general manager of the Agency for Payments and Intervention in Agriculture, as well as of R.N.S. – executive director within APIA Dolj, for the crime of abuse of office according to Article 132 of Law no. 78/2000, because

[1] According to art. 2 letter f) of GEO no. 77/2014," the aid granted without respecting the national and European Union procedures in the field of state aid."

they, as they, the on the basis of their functions, they unduly prevented enforcement of an enforceable title –Payment decision No 15096114/19.11.2021 issued against B.L. PFA, having as object the obligation to pay of this economic operator over 500,000 euros main debit, as well as accessories in the amount of 100,000 euros.

During the B.L. PFA paid only the main debit, but not the accessories.

The ranking ordinance presented a profound non-meaning and illegality both on the grounds of the non-existence of the criminal act (because the debt would have been paid) and on the intentional omission of the Public Ministry – DNA, to recover the accessories, penalties amounting to 100,000 euros.

The Public Ministry had to ascertain the existence of the act with the consequence of partial recovery of the damage, in the context in which the perpetrators refused to submit the enforceable title – Payment decision no. 15096114/19.11.2021 of APIA to ANAF for the initiation of enforcement proceedings and not to classify the case with the motivation of the non-existence of the act.

As regards the accessories in the amount of 100,000 euros, the prosecutor's office takes the decision of RIL no. 13/2011 of ICCJ, motivating the classification of the case on the so-called lack of interest of the complainant.

In this situation we are dealing with the crime of favouring the perpetrator according to art. 269 Criminal Code from the criminal investigation bodies, favoured by the RIL decision of the ICCJ.

On the other hand, the Public Ministry illegally grants state aid 100,000 euros to B.L. PFA, with the consequence of ensuring discriminatory conditions regarding the activity of enterprises towards other economic operators with the same activity in the field of agriculture.

The decision of the court in case no. 7404/63/2024 was the reconfirmation of this ranking order, confirming practically the same discriminatory effects, of denial of access to justice and anticompetitive, as the ranking order no. 309/II-2/2024.

The need to remove from application the non-compliance with RIL Decision no. 13/2011 of ICCJ

Although the theoretical possibility of questioning the mandatory application of an ICCJ RIL decision has not been considered so far, we consider that – in the context of the – expositions there may be situations where a RIL decision has a profound non-grounded and illegal character.

By lege ferenda, we consider necessary in a future regulation the possibility that the internal judge not to take into account, to remove from the application a decision of appeal in the interests of the law that violates the right of defence of a litigant, context in which the applicability of the provisions of art. ECHR 6.

Moreover, if the ECHR has established the principle of removing from the application of the internal law in force in numerous cases against Romania (the Sandor case c. Romania, Dumitru Popescu c. Romania, Tacea c. Romania, SC PROD COMEXIM no. 1 and no. 2 c. Romania, Abramiuc c. Romania, Negulescu c. Romania and others), we do not see why it would not be possible to remove a decision from enforcement - appeal in the interest of the law, such as ICCJ Decision no. 13/2011.

A RIL decision does not impose binding rules and is not a law in the true meaning of the word.

Although RIL decisions are binding, aimed at unifying the non-unitary practice in national law, the question must be asked, what should be done if the possible non-unitary practice must be uniformed in the wrong direction?

RIL decisions are final and cannot be abolished by another decision given by a court of judicial review.

In this context, we consider – de lege ferenda – including the need to legally regulate an appeal against ICCJ RIL decisions that violate the rights of the defence, are discriminatory or cause strong anti-competitive consequences in the sense of Law no. 21/1996 and TFEU.

If, so far, – cannot be denied – the fact that the European rule of law applies as a priority over the domestic rule of law when the latter

contains provisions contrary to European law, the same cannot be said about the occurrence of situations in which the RIL decisions of the ICCJ are contradictory to European Union law, in the sense of those set out in this article.

Conclusions

RIL Decision no. 13/2011 of ICCJ which presupposes the condition of the interest of the author of a criminal complaint in order to be able to censure at the court the solutions of non-disclosure or non-sending on the part of the Public Ministry produces effects of restricting access to justice[1], discriminatory and anti-competitive.

By adding to the law (art. 339-340 Cpp) of the condition of interest creates the possibility for the Public Ministry, the case prosecutor to decide at will whether or not to carry out the criminal investigation in the file.

This issue represents a behaviour of type SRL with sole associate, favouring the perpetrator from the Public Ministry, behaviour that cannot cease only by removing from the application of RIL Decision 13/2011 of ICCJ.

In this context, there is a need to regulate – de lege ferenda – both of legal remedies against RIL decisions that are inconsistent with European law and the possibility that the magistrate invested with the resolution of criminal cases in which the Public Ministry invokes the applicability of the RIL decision mentioned above, may proceed to the removal from application, to the non-compliance with these decisions – appeal in the interest of the law.

At the same time, there is the need – de lege ferenda – that within the provisions of Law no. 21/1996 of competition to be regulated the

[1] ECHR, Airey vs. Irlanda (1979); Golder vs. Regatul Unit al Marii Britanii și Irlandei de Nord (1975); Vasilescu vs. România (1998); etc.

situation in which all public institutions (including the Public Ministry) to refrain from issuing anti-competitive acts or decisions.

References

Boroi, G. et al. (2016). *Civil procedure code commented*. Hamangiu, of the program Syntact Wolters Kluwer.

Journal. (2018). *Curierul Judiciar, no. 7*, p. 398.

Maican, O. *Legislația comunitară în domeniul ajutoarelor de stat (Community legislation in the field of state aid*).

Ungureanu, D. *Noțiunea de ajutor de stat în jurisprudența națională și europeană* (*The notion of state aid in national and European case law). (*sintact.ro).

ECHR. (1979). Airey vs. Irlanda.

ECHR. (1975). Golder vs. United Kingdom of Great Britain and Northern Ireland.

ECHR. (1988). Vasilescu vs. Romania.

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 226-249

EUROPEAN UNION'S GREEN DIGITAL TRANSFORMATION POLICY IMPACT ON GEORGIA'S DIGITAL TRANSFORMATION PROCESS

Nona GELITASHVILI[1]
ORCID ID: 0000-0003-4592-2976
E-mail: ngelitashvili@thu.edu.ge
Giorgi KHARSHILADZE[2]
ORCID ID: 0000-0002-8357-5525
*E-mail:*gkharshiladze@thu.edu.ge
Affiliation: [1,2] Tbilisi Humanitarian Teaching University, Tbilisi, Georgia

Abstract: *In modern era, people's lives are being altered to digital technologies. The EU's main role in this process is introducing those industrial and digital initiatives that should be beneficial for both individuals and companies. Green Digital Transformation (GDT), the initiative which is underscored by the European Green Deal and Digital Strategy, is one of the tools for integrating digital technologies for achieving environmental sustainability, addressing climate change, resource depletion and pollution. As the world faces pressing environmental challenges like climate change, resource depletion, and pollution, technology has emerged as a vital tool for addressing these issues. However, the digital sector itself has a significant environmental impact, contributing to e-waste generation, data center energy consumption, and a growing carbon footprint. GDT offers a potential pathway to sustainability but requires mindful implementation for avoiding unintended consequences and ensure a positive impact on the environment.*

Georgia, as the part of Eastern Partnership and the candidate country, is striving for achieving its digital transformation and sustainable growth. The role of European Union in this process is helping Georgia aligning its environmental laws with EU standards, supporting the development of natural parks, improving air quality, promoting greener growth and helping with waste management and water

infrastructure. The EU funds various projects in water supply, sanitation, waste management, and eco-friendly transport, which also help reduce greenhouse gas emissions and combat climate change. One of the most important directions, where Georgia can play an important role is the European Union's Global Gateway Strategy, which aims creating reliable and sustainable connections around the world by focusing on infrastructure, digital growth and energy security. Due to its location, Georgia plays a key role in energy supply to Europe, making its involvement in the Global Gateway essential for regional stability and economic growth as well as for stronger ties between Europe and Asia.

Keywords: *Digital transformation; Green Deal; Green Digital Transformation; European Union; Digital Single Market.*

Introduction

In an era where digital technologies are rapidly reshaping economies and societies worldwide, the European Union recognizes the urgent need for digital transformation. This transformation is not merely about adopting new technologies but fundamentally rethinking how businesses, governments, and citizens interact. The EU aims creating a digital society that is human-centric, sustainable, and prosperous, ensuring that digital technologies serve the interests of all Europeans. The EU's vision involves addressing these challenges and leveraging its strengths for achieving digital sovereignty and technological leadership on the global stage. Achieving this vision requires overcoming significant obstacles, such as fragmented markets that hinder the scalability of digital businesses. The EU must also address the skills gap, which prevents many Europeans from fully participating in the digital economy. Furthermore, it is essential to mitigate cybersecurity threats that undermine trust in digital technologies and navigate complex regulatory environments that can stifle innovation. By confronting these challenges head-on, the EU can unlock the full potential of digital transformation and secure its place as a global digital leader.

On the other hand, European Union's ambitious goals for achieving environmental sustainability, reducing gas emissions and achieving climate-neutral Europe are intertwined with digital strategy,

which can be served as an enabler for achieving environmental goals with a held digital technologies. The last one plays a crucial role in optimizing resource usage, reducing emissions and promoting sustainable practices. The European Union's policy framework includes regulations, directives and funding mechanisms designed for supporting this transformation, creating a cohesive approach for achieving both digital and environmental objectives.

The interrelation between the European Green Deal and the Digital Strategy is evident in several key areas. Digital technologies are being leveraged for monitoring and managing environmental impacts, improving energy efficiency, and promoting circular economy practices. For instance, smart grids and intelligent transport systems rely on digital infrastructure for optimizing resource allocation and reduce waste. The convergence of these two frameworks is driving innovation and creating new opportunities for sustainable development across various sectors.

Economic and institutional aspects of European Union's Global Gateway Strategy

In 2021 European Union have launched the Global Gateway Initiative as a strategic response to the evolving geopolitical landscape, primarily as an alternative to China's Belt and Road Initiative (BRI). The BRI, launched in 2013, had rapidly expanded China's influence through large-scale infrastructure projects across Asia, Africa, and Latin America. Recognizing the need to provide a competing model, the EU conceived the Global Gateway as a values-driven and sustainable approach to infrastructure development. Furthermore, the Global Gateway aligns with the broader G7 infrastructure investment counterproposal, which seeks to address the global infrastructure gap with high-standard and transparent projects. This initiative is not solely an economic endeavor but also a geopolitical strategy aimed at enhancing the EU's global influence and strengthening its relationships with partner countries. The EU aims to offer a more sustainable and equitable model, emphasizing democratic values, good governance, and environmental

protection, which sets it apart from other infrastructure initiatives. The strategy underscores the EU's commitment to fostering resilience and strategic autonomy for its partner countries by diversifying their economic and political relationships.

The Global Gateway Strategy is anchored in several core objectives and principles designed to ensure its effectiveness and sustainability. Foremost among these is the commitment to sustainable infrastructure development, which focuses on projects that are environmentally sound, socially responsible, and economically viable over the long term. This approach contrasts with infrastructure projects that may offer short-term gains but lead to environmental degradation or unsustainable debt burdens.

The strategy prioritizes investments in the digital, energy, and transport sectors, recognizing their critical role in fostering economic growth and connectivity. In this case we make accents on European Unions digital transformation and on green energy transformation, that uses digital technologies. Digital connectivity infrastructure aims to bridge the digital divide, providing access to information and communication technologies that can drive innovation and development. Investments in green energy and climate transition are geared towards reducing carbon emissions and promoting renewable energy sources, aligning with the EU's climate goals. Transport network development focuses on creating efficient and sustainable transportation systems that facilitate trade and mobility. The Global Gateway seeks to promote EU values and standards globally, emphasizing democratic governance, human rights, and the rule of law. This values-driven approach is integral to ensuring that investments contribute to inclusive and equitable development outcomes. The strategy focuses on quality over quantity of investments, ensuring that projects are well-planned, effectively implemented, and deliver lasting benefits to partner countries.

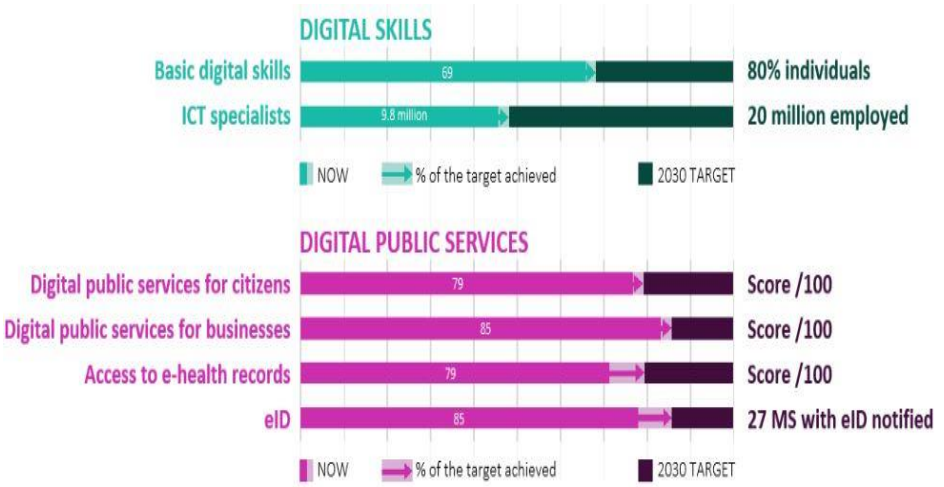
The Global Gateway Strategy prioritizes investments across several key sectors, each is critical to fostering sustainable and inclusive development. Digital connectivity infrastructure is a central focus, aiming to bridge the digital divide and promote access to high-speed

internet and digital services. This includes investments in fiber optic networks, satellite communications, and other technologies that can connect remote and underserved areas. Digital connectivity infrastructure is supported and interrelated to the European Unions Digital Decade visions. Launched in 2021, the Digital Decade Policy Programme sets out a clear vision for a human-centered and sustainable digital transition across the European Union. This initiative addresses the critical need for enhancing Europe's global technological competitiveness while safeguarding its digital sovereignty. The Digital Decade aims to ensure that technological advancements benefit all citizens and businesses, promoting a fair and inclusive digital society. At its core, the vision emphasizes the ethical using of technology and the protection of fundamental rights in the digital space. By fostering innovation and building robust digital infrastructure, the EU seeks creating a resilient and competitive digital economy that drives economic growth and improves the quality of life for all Europeans. This involves not only deploying advanced technologies but also ensuring that the workforce is equipped with the necessary skills to thrive in the digital age.

Moreover, the digital decade seeks establishing the EU as a global leader in digital technologies, setting standards and promoting its values on the international stage. This includes collaborating with partner countries for advancing shared digital goals and address global challenges through technology. The program's holistic approach ensures that digital transformation is aligned with the EU's broader sustainability and social inclusion objectives.

A central pillar within the Digital Decade is the enhancement of digital skills and education among EU citizens. The initiative sets an ambitious target to ensure that at least 80% of adults possess basic digital competencies by 2030 [The European Pillar of Social Rights Action Plan; adopted in 2021]. Recent surveys show, that in 2024, the digital competences of adults are about 69%.

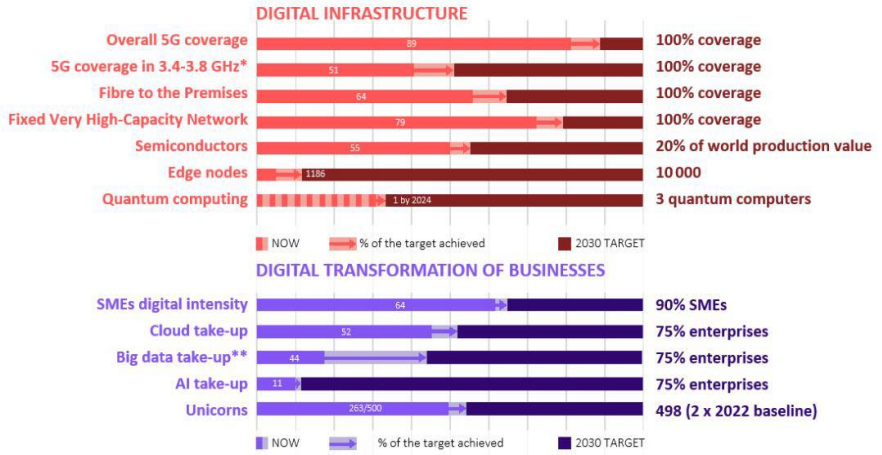
Figure 1: A digital policy for people and society: Digital skills and public services [State of the Digital Decade 2024 report: https://digital-strategy.ec.europa.eu/en/node/12810/printable/pdf]



The digital decade emphasizes the critical importance of robust digital infrastructure and connectivity for achieving its broader goals. One of the key targets is to ensure gigabit connectivity for all EU citizens, enabling high-speed internet access across the Union. This involves deploying advanced network technologies and upgrading existing infrastructure for meeting the growing demands of the digital economy. The initiative also prioritizes the rollout of 5G and future network technologies, recognizing their potential to transform industries and enable new applications such as smart cities, autonomous vehicles, and connected healthcare. Investments in these technologies are essential for fostering innovation and driving economic growth. Furthermore, the Digital Decade aims to establish 10,000 climate-neutral, secure edge nodes across the EU, providing distributed computing resources and enhancing data processing capabilities. The submarine cables play an important role in this process, because it allows transferring data over

long distances, keeping internet traffic stable even in those situations when data usage is increased.

Figure 2: A competitive, sovereign, and resilient EU: Digital infrastructure and businesses [State of the Digital Decade 2024 report: https://digital-strategy.ec.europa.eu/en/node/12810/printable/pdf]



The digital decade places a strong emphasis on accelerating the digital transformation of EU businesses, particularly small and medium-sized enterprises (SMEs). The initiative aims to have 75% of EU companies using Cloud computing, Artificial Intelligence (AI), or Big Data technologies by 2030. This target recognizes the potential of these technologies to enhance productivity, improve decision-making, and drive innovation across various sectors. To support this transformation, the EU is implementing programs to promote the adoption of digital technologies among SMEs, providing them with access to funding, training, and expert advice. These programs are designed to help businesses overcome barriers to digital adoption, such as lack of awareness, skills gaps, and financial constraints. The Digital Decade also aims to double the number of EU tech unicorns, fostering a vibrant ecosystem of high-growth companies that are at the forefront of digital innovation. The SME digital intensity improvement program is a key component of this effort, focusing on helping SMEs integrate digital

technologies into their business processes and operations. This includes promoting the use of e-commerce, digital marketing, and other tools to expand their reach and improve their competitiveness. By supporting the digital transformation of businesses, the Digital Decade aims to create a more dynamic and resilient European economy.

The Digital Decade aims to revolutionize public services by making them fully accessible online. A key objective is to ensure that 100% of key public services are available online by 2030, providing citizens with convenient and efficient access to government services. This includes services such as applying for permits, accessing educational resources, and managing healthcare information. To facilitate this digital transformation, the initiative promotes the development of a universal digital identity for EU citizens. This digital identity would enable secure and seamless access to public services across member states, simplifying administrative processes and reducing bureaucracy. The Digital Decade also prioritizes the digitalization of healthcare, with a goal of 100% access to medical records for citizens. This would empower patients to manage their health information and improve the coordination of care among healthcare providers.

Streamlining digital government services is another key focus, with efforts to simplify processes, reduce paperwork, and improve the user experience. This involves redesigning public services around the needs of citizens and businesses, making them more intuitive and user-friendly. By digitalizing public services, the Digital Decade aims to improve efficiency, reduce costs, and enhance the quality of life for all Europeans. Ensuring cybersecurity and protecting digital rights are fundamental to the Digital Decade's vision. The initiative emphasizes the importance of robust data protection frameworks to safeguard citizens' personal information and ensure compliance with privacy regulations. This includes strengthening enforcement mechanisms and promoting best practices for data security among businesses and public sector organizations.

The Digital Decade also addresses the emerging challenges posed by quantum computing, with initiatives focused on developing quantum-

resistant security solutions. These initiatives aim to protect critical infrastructure and sensitive data from potential cyber threats in the quantum era. Protecting citizen privacy in digital spaces is a core principle, with efforts to promote transparency and empower individuals to control their personal data. Furthermore, the Digital Decade promotes the development of ethical AI guidelines, ensuring that AI technologies are developed and used in a responsible and trustworthy manner. These guidelines aim to address potential biases, prevent discrimination, and promote fairness in AI systems. By prioritizing cybersecurity and digital rights, the Digital Decade seeks to create a safe and inclusive digital environment for all Europeans.

Developing the European technology ecosystem is another important objective, with efforts to support startups, scale-ups, and venture capital investments. This includes creating a more favorable regulatory environment, providing access to talent and expertise, and fostering collaboration between industry, academia, and government. By promoting innovation and technology leadership, the Digital Decade aims to position the EU as a global hub for digital technologies.

How European Union can use digital technologies for creating resilient, resource-efficient and competitive economy? We must seek the answer to this question in a green digital transformation strategy, integrating digital innovation with climate neutrality goals. With an €8.1 billion investment from the Digital Europe Programme, the EU is targeting net-zero greenhouse gas emissions by 2050. This initiative aims to revolutionize various sectors through digital technologies, fostering a sustainable and competitive economy.

The EU's Green Digital Vision is built upon a dual transition strategy, intertwining digital and environmental sustainability. This "twin transition" approach connects technology and climate action, recognizing that digital advancements can significantly contribute for achieving environmental objectives. The EU aims to lead the global green digital transformation by fostering innovative solutions and setting ambitious targets for sustainable development. This involves integrating digital technologies into various sectors to reduce carbon emissions, promote

resource efficiency, and drive circular economy practices. By aligning digital policies with environmental goals, the EU seeks to create a resilient and environmentally responsible economy.

Digital technologies play a crucial role in enabling the EU to achieve its Green Deal objectives. The Internet of Things (IoT) can optimize resource management in agriculture, industry, and energy production. Artificial intelligence (AI) can analyze vast datasets to improve energy efficiency, predict environmental risks, and develop sustainable solutions. Cloud computing provides the infrastructure for processing and storing data, enabling real-time monitoring and decision-making. Blockchain technology can enhance transparency and traceability in supply chains, promoting sustainable consumption and combating illegal logging. Digital platforms facilitate the sharing of knowledge, best practices, and innovative solutions, accelerating the green transition across various sectors. These technologies are not merely tools but integral components of a new, sustainable economic model.

The EU's Green Digital Transformation strategy targets numerous key sectors, recognizing the interconnectedness of the economy and the need for a holistic approach. Energy is a primary focus, with smart grids, renewable energy management systems, and energy-efficient buildings. Under energy sector, the European Union is trying to reach climate neutrality target. One goal of reaching this is to decarbonize their energy system by aiming achieving net-zero greenhouse gas emissions by 2050. Their relevant energy directive is intended to be looked over and adjusted if problem areas arise. In 2023 member states updated their climate and national energy plans for adhering European Union 2030 climate goals. From these point of view, the main key principles include: Priority of the Energy Efficiency; Developing a power sector which are based on renewable resources; Securing energy supply; And having a “fully integrating, interconnected digitalized EU energy market” [European Commission: Clean Energy: December 11, 2020].

In 2020, the European Commission unveiled its strategy for greener, cleaner energy future. The EU strategy for Energy System Integration was one of the frameworks for energy transition, which

comprises measures for reaching a more circular system and measures implementing direct electrification as well as developing clean fuels, including hydrogen. By 2023, Greentech was one of the few sectors in the European Union where venture capital investments matched those in the United States, highlighting the impact of the European Union's ambitious climate goals and government subsidies. The European Green Deal and accompanying government policies have driven substantial investment in Greentech particularly in areas like energy storage, circular economy initiative s and agricultural technology. This focus enabled the European Union closing existing investment gap with the United States in these strategic sectors [European Investment Bank, 2024 p 28].

Transport is being transformed through electric vehicles, smart mobility solutions, and optimized logistics. Agriculture benefits from precision farming, smart irrigation, and optimized crop management. Manufacturing is becoming more sustainable through circular economy practices, resource-efficient production processes, and waste reduction technologies. Cities are evolving into smart, sustainable urban centers with optimized resource consumption, smart infrastructure, and citizen engagement platforms. Each sector presents unique opportunities for leveraging digital technologies to achieve specific green goals.

The EU employs a range of policies and regulations to drive the Green Digital Transformation. The European Green Deal Investment Plan mobilizes public and private funding to support green projects. The Digital Europe Programme invests in digital infrastructure, skills, and technologies. The Innovation Fund supports innovative clean technologies. The Emissions Trading System (ETS) incentivizes emission reductions. The Energy Efficiency Directive sets targets for energy savings. The Renewable Energy Directive promotes the deployment of renewable energy sources. The Circular Economy Action Plan promotes waste reduction, reuse, and recycling. These policies and regulations create a clear framework for businesses and individuals to adopt sustainable practices and invest in green technologies.

The EU offers a variety of funding mechanisms to support Green Digital projects. The Horizon Europe programme provides funding for

research and innovation in sustainable technologies. The European Regional Development Fund (ERDF) supports regional projects that promote green growth and digital transformation. The Cohesion Fund invests in infrastructure projects that contribute to environmental protection and climate action. The Just Transition Fund supports regions that are heavily reliant on fossil fuels. The Recovery and Resilience Facility (RRF) provides funding for investments that promote economic recovery and green transformation. These funding mechanisms provide critical financial support for businesses, research institutions, and public authorities to implement innovative green digital projects. Despite the numerous opportunities, the EU's Green Digital Transformation faces several challenges and barriers to implementation. Data privacy and security concerns can hinder the adoption of digital technologies in sensitive sectors. The digital skills gap can limit the ability of businesses and individuals to effectively use and implement green digital solutions. Lack of interoperability between different digital systems can impede the integration of various sectors. Resistance to change from established industries can slow down the transition to a green digital economy. Insufficient investment in digital infrastructure and green technologies can limit the scale and scope of the transformation. Addressing these challenges requires a multi-faceted approach involving policy interventions, skills development initiatives, and public-private partnerships.

The future of the EU's Green Digital landscape is characterized by emerging trends and innovations. The increasing adoption of edge computing enables real-time data processing and analysis closer to the source, improving efficiency and reducing latency. The rise of digital twins allows for virtual simulations of physical assets and systems, facilitating optimized design and operation. The development of advanced materials enables the creation of more sustainable and resource-efficient products. The integration of blockchain technology into supply chains enhances transparency and traceability, promoting sustainable consumption. The growing use of artificial intelligence in environmental monitoring and prediction improves the ability to

anticipate and mitigate environmental risks. These trends and innovations promise to further accelerate the green digital transition and create a more sustainable and resilient Europe.

Georgia's Perspective under European Union Green Digital Transformation Process

Climate change and environmental degradation represent significant global risks, with profound economic implications. The European Union (EU) promotes the European Green Deal, aiming for a transition to sustainable, resource-efficient, and climate-neutral economies, which could generate new economic opportunities through green technologies and job creation. As a leader in climate policy, the EU's goal of climate neutrality by 2050 could stimulate investment in low-carbon sectors, fostering innovation and driving economic growth.

In Georgia, the EU supports climate mitigation and adaptation efforts, such as EU4Climate, which finances infrastructure projects that not only reduce greenhouse gas emissions but also create employment opportunities and stimulate economic development in green industries. The EU's support for energy efficiency and renewable energy in Georgia contributes to the long-term reduction in energy costs, enhancing energy security and fostering a competitive green economy. The rehabilitation of public buildings is expected to generate substantial economic returns through increased energy savings and the creation of jobs in the construction and energy sectors.

The EU's promotion of natural resource management and the circular economy in Georgia drives efficiencies in waste management and resource use, leading to reduced operational costs for businesses. Policies like Extended Producer Responsibility incentivize sustainable production practices, which can enhance the competitiveness of Georgian industries in global markets. The development of sustainable packaging industries further contributes to economic growth by fostering innovation and creating new business opportunities.

Finally, the EU's support for sustainable food systems through the ENPARD programme in Georgia promotes agricultural innovation, improves food security, and enhances rural economic development. By supporting environmentally sustainable agricultural practices, the EU contributes to long-term economic stability in the region, ensuring both economic growth and environmental resilience.

As an Eastern Partnership country and an EU candidate state, Georgia is aligning its national development strategy with the European Union's Green Digital Transformation (GDT) framework, which integrates environmental sustainability with digital innovation. The EU's GDT process, underpinned by initiatives like the European Green Deal and the Digital Decade, drives the dual transitions towards a climate-neutral, digitally empowered society. Georgia's commitment to aligning with EU standards in digital infrastructure, green energy, and e-governance is expected to generate long-term economic benefits, including enhanced productivity, sustainable growth, and the creation of green jobs.

Strategic investments facilitated through EU4Digital, the Global Gateway, and other bilateral programs are enhancing Georgia's broadband connectivity and promoting the adoption of digital technologies in rural areas. This digital expansion is expected to reduce the economic divide between urban and rural regions, fostering innovation, improving access to markets, and enhancing the competitiveness of small and medium-sized enterprises (SMEs). Additionally, digital upskilling initiatives are expected to boost human capital and productivity, which are critical for economic resilience in the long run.

In the energy sector, the EU's support under initiatives like EU4Energy and the Global Gateway Strategy has enabled Georgia to improve energy efficiency, deploy smart grid technologies, and expand the use of renewable energy sources. These advancements are anticipated to lower energy costs, reduce dependence on imported energy, and support the creation of a competitive, low-carbon economy. Digital tools introduced for monitoring and managing energy consumption will further

enhance efficiency, contributing to decarbonization targets and improving overall economic performance through energy savings and cost reductions.

The transportation sector is undergoing gradual digital modernization, with the implementation of smart mobility solutions, electronic logistics systems, and the digitalization of customs and border procedures. These advancements will reduce operational costs, increase infrastructure efficiency, and enhance Georgia's position as a regional transit hub. This transition could also open new opportunities for regional trade and cross-border cooperation, contributing to economic integration and growth.

In education, the EU-funded digital transformation includes the expansion of e-learning platforms, digital literacy programs, and the integration of green digital content into curricula. Investments in digital infrastructure, particularly in rural areas, aim to bridge existing educational inequalities and enhance the employability of the workforce. By improving access to quality education and digital skills, Georgia is positioning itself for long-term economic development through a more knowledgeable and skilled labor force.

However, challenges persist, particularly regarding the digital divide, the need for institutional capacity building, and the securement of funding for large-scale digital transitions. Despite these obstacles, Georgia's engagement in the EU GDT process is crucial for achieving a low-carbon, digitally inclusive society, which will be vital for long-term socio-economic resilience and sustainable development.

In conclusion, Georgia's alignment with the EU's Green Digital Transformation strategy is expected to generate substantial economic benefits by fostering green innovation, improving productivity, and enhancing access to digital technologies across sectors. While challenges remain, the integration of digital and green technologies offers significant opportunities for Georgia's economic transformation and its integration into the EU's low-carbon, digitally advanced economy.

According to the National Statistics Office of Georgia (Geostat), there has been a consistent increase in ICT adoption across the country.

In 2024, 91.5% of Georgian households had internet access, marking a 2.6 percentage point rise from the previous year. Urban areas saw 94.5% connectivity, while rural regions had 87.5%, indicating ongoing urban-rural digital divides. Regions like Adjara A.R. and Tbilisi reported the highest access rates at 97.8% and 95.8%, respectively.

Among Georgians aged 6 and older, 82.7% used the internet within the last three months in 2023, with higher usage in urban centers compared to rural areas. The primary internet activities include information search, communication, and social networking, with a growing trend in online shopping. Smartphone ownership is prevalent, with 93.5% of individuals aged 6 and above owning one, facilitating mobile internet access. Computer ownership stands at 69.8% of households, and 65.2% of individuals aged 6 and older have used a computer in the past three months. Digital skills are widespread, with 80.1% of individuals aged 16-74 possessing at least basic digital skills, though disparities exist among older adults and rural populations. These statistics underscore the importance of targeted digital literacy programs to bridge existing gaps.

The data reflects Georgia's significant progress in ICT adoption, highlighting the need for policies that address regional disparities and promote digital literacy to ensure equitable access to digital opportunities.

The National Statistics Office of Georgia provides comprehensive data on the adoption and utilization of Information and Communication Technologies (ICT) among Georgian enterprises. This analysis synthesizes the available information to offer insights into the current state of ICT usage within the country's business sector.

*Internet Access and Usage; Prevalence of Internet Access***:** A significant majority of Georgian enterprises have integrated internet connectivity into their operations. The widespread adoption of internet services facilitates efficient communication, access to global markets, and the implementation of various digital business solutions.

*E-commerce Engagement***:** The engagement of Georgian enterprises in e-commerce activities reflects the sector's adaptability to digital

commercial platforms. Participation in e-commerce enables businesses to expand their reach, optimize sales processes, and enhance customer engagement through online channels.

Software Utilization and Technological Integration; *Software Adoption:* The deployment of specialized software solutions across various business functions indicates a strategic approach towards operational efficiency and data management. Utilization of such software supports activities ranging from resource planning to customer relationship management.

Emerging Technologies: The exploration and integration of advanced technologies, including the Internet of Things (IoT) and Artificial Intelligence (AI), suggest a forward-looking stance among Georgian enterprises. Incorporating IoT and AI can lead to enhanced data analytics capabilities, automation of processes, and the development of innovative products and services.

In Georgia, digital transformation is increasingly recognized as a strategic priority within national public policy frameworks, particularly in relation to the development and competitiveness of small and medium-sized enterprises (SMEs). Given that SMEs account for over 99% of all registered businesses and represent a significant share of employment and GDP, their successful digitalization is critical to the country's overall economic modernization. However, structural challenges—such as limited access to financing, inadequate digital infrastructure in rural regions, and insufficient digital literacy—have slowed the integration of advanced technologies into SME operations. In response, Georgian public policy has gradually shifted toward supporting digital innovation, with initiatives aimed at strengthening digital infrastructure, enhancing ICT education, and promoting e-governance and e-commerce. Programs co-funded by international partners, such as the EU's EU4Digital Initiative, have played a pivotal role in aligning Georgia's digital policies with European standards. Nonetheless, a coordinated policy approach is needed that combines regulatory reform, targeted financial incentives, and digital upskilling initiatives to ensure that SMEs are not left behind in the digital transition. Such efforts will not only enhance SME

resilience and productivity but also contribute to more balanced and inclusive economic growth.

In the context of accelerating digitalization, the capacity for effective digital transformation constitutes a pivotal determinant of competitive advantage in contemporary economies. Digital transformation extends beyond the mere adoption of new technologies; it involves the comprehensive integration of digital tools into core business processes, organizational structures, and strategic decision-making. Enterprises that successfully implement such transformation are better positioned to enhance operational efficiency, streamline resource allocation, and improve productivity. Moreover, digital transformation facilitates access to new markets, fosters innovation, and enables data-driven decision-making, thereby generating significant value creation potential. In highly dynamic and competitive environments, this capacity can serve as a key differentiator, strengthening an enterprise's resilience and long-term sustainability. As such, digital transformation should be regarded as a strategic imperative rather than a technological option, particularly in the context of global economic shifts and evolving consumer expectations.

The process of digitalization has emerged as a critical driver of economic modernization in Georgia. Its relevance grew significantly during the COVID-19 pandemic, as businesses were compelled to adapt to social distancing requirements by integrating digital tools into their everyday operations. These adaptations were primarily focused on customer-facing activities, including digital marketing and online sales. However, there is a gradual shift toward incorporating digital technologies into internal operational processes, aiming to enhance overall business efficiency and productivity.

Georgia, as an Eastern Partnership country and an EU candidate state, is aligning its national development agenda with the European Union's Green Digital Transformation (GDT) strategy, which integrates environmental sustainability with digital innovation. The EU's GDT process, supported by initiatives such as the European Green Deal and the Digital Decade, emphasizes the twin transitions toward a climate-

neutral and digitally empowered society. In this context, Georgia has embarked on comprehensive reforms to harmonize its policies with EU standards, particularly in digital infrastructure, green energy, and e-governance. Strategic investments—facilitated through EU4Digital, the Global Gateway, and other bilateral programs—are enhancing Georgia's broadband connectivity, supporting the adoption of digital technologies in rural areas, and fostering innovation among SMEs. Furthermore, Georgia's active participation in green technology adoption and digital upskilling initiatives demonstrates its commitment to advancing a sustainable digital economy. However, challenges remain, especially in addressing the digital divide, improving institutional capacity, and ensuring inclusive access to green-digital tools across sectors. As Georgia progresses on its EU integration path, its ability to effectively integrate green digital principles will be instrumental in achieving long-term socio-economic resilience and environmental sustainability.

Within the framework of the European Union's Green Digital Transformation (GDT) strategy, Georgia is increasingly integrating digital innovation with environmental sustainability in key sectors such as energy, transport, and education. In the energy sector, the EU's support under initiatives like the EU4Energy and the Global Gateway Strategy has enabled Georgia to improve energy efficiency, promote smart grid technologies, and expand the use of renewable energy sources. Digital tools are being introduced to enhance the monitoring and management of energy consumption, contributing to decarbonization goals. The transport sector is undergoing gradual digital modernization, with emphasis on smart mobility solutions, electronic logistics systems, and the digitalization of customs and border procedures. These developments aim to reduce emissions, improve infrastructure efficiency, and strengthen Georgia's role as a regional transit hub. In education, the digital transformation is reflected in the expansion of e-learning platforms, digital literacy programs, and the integration of green digital content into curricula. EU-funded projects support teacher training and digital infrastructure upgrades, especially in rural areas, to bridge existing educational inequalities. However, challenges persist in aligning

institutional capacities with the pace of technological change, securing funding for large-scale digital transitions, and ensuring equitable access to digital tools. Despite these constraints, Georgia's engagement in the EU GDT process demonstrates its strategic intent to build a future-oriented, low-carbon, and digitally inclusive society.

Digital Technology Adoption in Georgian Enterprises: ERP and AI Trends (2020–2024)â

An analysis of digital technology adoption trends in Georgian enterprises from 2020 to 2024 reveals a modest but fluctuating uptake of Enterprise Resource Planning (ERP) systems, alongside consistently low implementation of artificial intelligence (AI). The chart (Figure 1) below illustrates three dimensions: the use of ERP systems, the actual use of AI in enterprises, and the stated purposes and origins of AI application.

ERP System Usage**:** Between 2020 and 2024, the use of ERP packages in enterprises remained relatively stable, ranging from 6.8% to 10.5%. The peak occurred in 2023, suggesting a temporary increase in digital systems integration, possibly driven by post-pandemic restructuring or donor-driven modernization initiatives. Nevertheless, the trend lacks a consistent upward trajectory, indicating a cautious and slow approach to enterprise-level digital transformation.

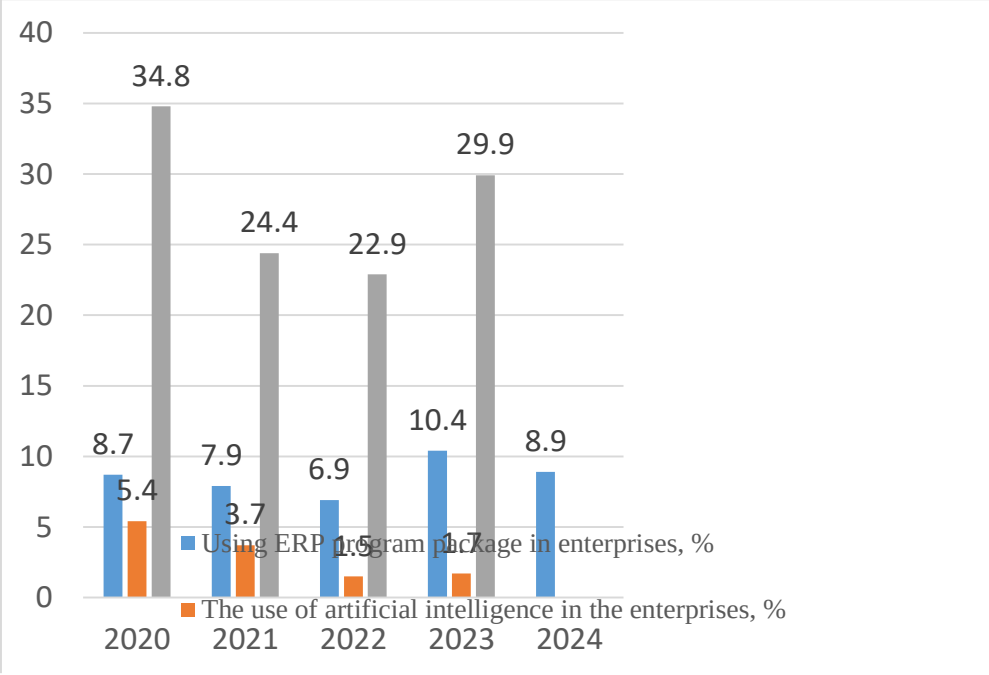
AI Usage in Enterprises**:** The actual implementation of AI within Georgian enterprises has remained strikingly low, with a high of 5.1% in 2020 and a dip to 1.6% in 2022. Although there was a slight rebound in 2023 (2.0%), the levels remain insufficient to suggest mainstream integration. Data for 2024 AI use is unavailable or yet to be reported, leaving the recent trend unclear.

Purposes and Origins of AI Use: Contrasting with actual usage, the percentage of enterprises reporting awareness or planning regarding AI—labeled as "purposes and origins of AI use"—is significantly higher. This indicator peaked at 35.3% in 2020 and remained relatively strong throughout the observed period, with another notable high (29.8%) in 2023. This gap between intention and implementation reflects a

disconnect often observed in emerging markets: while awareness of innovative technologies may grow, practical application lags due to constraints in infrastructure, expertise, or funding.

Implications for Policy and Practice**:** These trends indicate that while Georgian enterprises are increasingly informed about the potential of AI, actual implementation remains limited. The discrepancy between knowledge and action, particularly in the case of AI, suggests the need for strategic interventions—such as capacity-building programs, pilot projects, financial incentives, and public-private partnerships—to bridge the gap between awareness and adoption. Similarly, although ERP systems are more widely used, their adoption has not gained significant momentum, implying that broader digital transformation efforts are still in the early stages.

Figure 3. Information and Communication Technologies Usage in enterprises in Georgia [Geostat: https://www.geostat.ge/en/modules/categories/105/information-and-communication-technologies-usage-in-enterprises**]**



Conclusions

Nowadays the European Union's Global Gateway Initiative and the Digital Decade Policy Programme represent a strategic and values-driven response to the evolving geopolitical landscape, emphasizing sustainable infrastructure development and digital transformation. By prioritizing democratic values, environmental protection, and equitable growth, these initiatives not only aim to enhance the EU's global influence but also foster resilience and innovation among partner countries and within the EU itself. In the case European Union's Green Digital Transformation strategy represents a pivotal initiative that intertwines digital innovation with environmental sustainability, aiming for a resilient and competitive economy by 2050. By leveraging advanced technologies across various sectors, the EU not only seeks to achieve its climate neutrality goals but also to position itself as a global leader in the green digital revolution, fostering sustainable practices and driving significant investment in Greentech.

For Georgia, as the part of Eastern Partnership and as for the candidate country, alignment with the European Union's Green Digital Transformation strategy presents a significant opportunity for economic growth and sustainability by integrating digital innovation with environmental practices across various sectors. While challenges such as the digital divide and institutional capacity remain, the potential for enhanced productivity, job creation, and long-term socio-economic resilience underscores the importance of this strategic partnership. The analysis of digital technology adoption in Georgian enterprises from 2020 to 2024 highlights a cautious approach to digital transformation, characterized by stable but limited use of ERP systems and persistently low implementation of AI. This disconnect between awareness and practical application underscores the necessity for strategic interventions to enhance both the integration of these technologies and the overall digital landscape in the region.

References

The European Pillar of Social Rights Action Plan. (adopted in 2021). https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021DC0102

World Economic Forum: Digital solutions can reduce global emissions by up to 20%. https://www.weforum.org/stories/2022/05/how-digital-solutions-can-reduce-global-emissions/#:~:text=If%20brought%20to%20scale%2C%20digital,the%20adoption%20of%20digital%20technologies

European Commission: State of the Digital Decade 2024 report: https://digital-strategy.ec.europa.eu/en/node/12810/printable/pdf

Haines, A. & Scheelbeek, P. (2020). European Green Deal: a major opportunity for health improvements (pdf). „*The Lancet*. 395 (10233): 1327–1329; https://researchonline.lshtm.ac.uk/id/eprint/4655684/1/Haines_Scheelbeek_2020_European-Green-New-Deal.pdf

European Commission: Clean Energy. (December 11, 2020). https://ec.europa.eu/commission/presscorner/api/files/attachment/860072/Clean_energy_en.pdf

European Investment Bank“ The scale-up gap Financial market constraints holding back innovative firms in the European Union. https://www.eib.org/attachments/lucalli/20240130_the_scale_up_gap_en.pdf

European Union. (2020). Financing the green transition: The European Green Deal Investment Plan and Just Transition Mechanism https://ec.europa.eu/commission/presscorner/detail/en/ip_20_17

European Commission: State of the Digital Decade 2024 report: https://digital-strategy.ec.europa.eu/en/node/12810/printable/pdf

European External Action Service (EEAS). (2024). *The European Union and Georgia*. Retrieved from https://www.eeas.europa.eu/georgia/european-union-and-georgia_en

National Statistics Office of Georgia (Geostat) https://www.geostat.ge/en/modules/categories/105/information-and-communication-technologies-usage-in-enterprises

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 250-279

EXPROPRIATION FOR PUBLIC UTILITY IN THE EUROPEAN UNION AND THE REPUBLIC OF MOLDOVA - A COMPARATIVE ANALYSIS OF THE LEGAL FRAMEWORK AND ADMINISTRATIVE PRACTICE

Viorica URSU [1]
ORCID ID: 0000-0003-4194-4799
*E-mail:*viorica.ursu@dp.utm.md
Daniela POJAR [2]
ORCID ID: 0000-0001-8894-9445
E-mail: daniela.pojar@adm.utm.md
Iurie IVANOV [3]
ORCID ID: 0000-0002-1083-9657
E-mail: iurie.ivanov@dp.utm.md
Afiliation: [1,2,3] Faculty of Constructions, Geodesy and Cadastre, Tehnical University of Moldova

Abstract: *The concept of expropriation for public utility plays a pivotal role within the legal systems of democratic societies, serving as a legitimate tool through which public authorities can intervene in private property rights to fulfill public interest goals. This mechanism inherently involves a careful balancing act between the collective welfare and the safeguarding of individual rights, a process governed by nuanced legal frameworks at both the national and European levels.*

This study examines how the European Union addresses the issue of expropriation by analyzing relevant provisions from both foundational treaties and derived legislation, complemented by the interpretative role of the Court of Justice of the European Union. It delves into fundamental legal concepts—including the requirement of legality, the necessity of proportionality, the justification of public interest, and the obligation of fair reparation—while drawing illustrative examples from national

practices in countries such as France, Germany, and the United Kingdom.

Additionally, the article evaluates the Republic of Moldova's domestic legislation on expropriation, assessing its degree of convergence with European legal standards and identifying areas where further legislative alignment is needed. By adopting a comparative perspective, the study underlines the importance of harmonizing Moldovan regulations with EU principles in order to strengthen legal certainty and promote the effective protection of property rights within the context of Moldova's European integration efforts.

Keywords: *Expropriation; EU legal framework; institutional competence; normative alignment; fair compensation; legal proportionality.*

Introduction

Expropriation in the public interest is an essential legal institution involving a collision between the public interest and the fundamental right to private property. In all modern legal systems, property is guaranteed, but not absolute - it can be limited or forcibly transferred to the state when a public necessity so requires, but only under strictly regulated conditions. At the European level, the protection of property rights is enshrined both in international instruments (such as the "*European Convention on Human Rights, Protocol 1, Art.* 1"[1]) and in European Union law - the *"EU Charter of Fundamental Rights*[2] *"* provides in Article 17 that no one may be deprived of his or her property except for a purpose of public utility, under the conditions provided by law and with fair compensation. These general standards have profoundly influenced the national laws of European states.

This paper seeks to place the expropriation framework within the broader context of European Union law, while also offering a

[1] European Convention On Human Rights https://www.echr.coe.int/european-convention-on-human-rights

[2] Charter of Fundamental Rights of the European Union (2012/c 326/02) https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:C2012/326/02

comparative perspective on how this legal institution is addressed in several key jurisdictions—namely France, Germany, and the United Kingdom (whose legal model remains influential in European legal thought despite its exit from the EU). The analysis contrasts these approaches with the current legal situation in the Republic of Moldova, aiming to identify both shared foundations and national divergences. Based on this comparison, the study proposes pathways for legal harmonization, taking into account Moldova's EU integration trajectory and the imperative of aligning its domestic legal system with European legal benchmarks.

The research methodology is predominantly legal-comparative. Primary normative sources (constitutions, special laws on expropriation) have been examined and case law analysis, including judgments of the Court of Justice of the EU and, additionally, of the European Court of Human Rights, has been used to identify converging interpretations on the limits of expropriation. The aim is to provide an integrated picture of the general EU framework and national variations, highlighting the fundamental principles applicable (legality, public necessity, proportionality, compensation) and how they are implemented. Finally, the conclusions will summarize the results and formulate suggestions for improving the Moldovan regulatory framework in line with European best practices.

1. Research results

1.1. General framework of EU law on expropriation. In the legal order of the European Union, the right to property is acknowledged as a core fundamental principle. However, the detailed regulation of expropriation is primarily left to the discretion of individual Member States (Benedetti, 2022, p. 124). Although the EU Treaties do not include specific provisions on expropriation, the Charter of Fundamental Rights of the European Union—which holds the same legal value as the Treaties—explicitly provides in Article 17 that private property shall be

respected. It further states that any deprivation of property is only permissible for reasons of public interest, under conditions laid down by law, and with fair compensation. Before the Charter's adoption, the Court of Justice of the European Union had already recognized the protection of property rights as a general principle of EU law. This recognition was grounded in the shared constitutional traditions of the Member States and aligned with the values set out in the European Convention on Human Rights[1].

Therefore, while Member States retain competence over expropriation procedures, they are nonetheless bound by minimum EU standards: any expropriation measure must serve a legitimate public interest and must not result in a disproportionate or intolerable infringement that undermines the very essence of the right to property. [2]

In other words, although the European Union does not have a single expropriation law, the EU's influence manifests itself through two main channels: *1. Harmonization of principles* - the EU ensures that the principles of legality, public interest and proportionality in expropriation are recognized throughout the European area, both through the EU Charter and the case law of the CJEU; *2. European conditionality* - in the broader context of European integration and enlargement, candidate countries such as the Republic of Moldova are required to harmonize their legal frameworks concerning property rights with those established within the European Union. This alignment reflects one of the key conditionalities imposed by the EU, which places strong emphasis on the rule of law and the safeguarding of fundamental rights, including the right to property. The European Parliament has repeatedly underscored

---

[1] Judgment of the Court of December 13, 1979. Liselotte Hauer v Land Rheinland-Pfalz. Reference for a preliminary ruling: Verwaltungsgericht Neustadt an der Weinstraße - Germany. Prohibition on new planting of vines. Case 44/79. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:61979CJ0044#:~:text=4%20,PROTECTION%20OF%20HUMAN%20RIGHTS

[2] Ibid

that adherence to these values is essential for both current Member States and prospective partners[1].

It is equally important to consider the role of the European Convention on Human Rights (ECHR), which, although it operates under the Council of Europe and not directly under EU law, holds significant influence. All EU Member States and the Republic of Moldova are signatories to the ECHR, and Article 1 of Protocol No. 1 outlines core principles regarding expropriation—specifically, the necessity of a legal basis, the pursuit of a legitimate public interest, and the requirement of fair compensation to maintain a "just balance[2]."

Together, EU law and the legal standards of the Council of Europe form a cohesive normative framework that guides property rights protection. A key distinction lies in the enforcement mechanism within the EU: the Court of Justice of the European Union has the authority to ensure consistency across Member States. Where an expropriation measure touches upon EU competences—such as projects funded by the Union, transnational infrastructure developments, or the application of the EU Charter of Fundamental Rights—the CJEU may intervene to invalidate national measures that contravene the principles of legality, proportionality, or equitable compensation.

1.2. Fundamental principles of expropriation: legality, public utility, proportionality, compensation

An analysis of the European framework and the traditions of the Member States reveals four fundamental principles which condition any expropriation measure:

1. **Principle of legality** - expropriation must have its basis in a previously adopted law, which explicitly lays down the conditions and procedure to be followed. This principle provides protection against administrative arbitrariness. Already the "*French Declaration of the*

[1]Ibid

[2] Right To Property In The Context Of Article 1 Protocol 1 To The European Convention On Human Rights And Freedoms rm.coe.inteur-lex.europa.eu.

Rights of Man and of the Citizen of 1789"[1] stipulates that no one may be deprived of his property except "*in cases where public necessity, legally established, clearly requires it*". Therefore, the existence of a law (in the formal sense) or of a legal decision by the competent authorities (under the conditions laid down by law) is an absolute prerequisite. In all the countries analyzed, the legal framework is set at a high level: national constitutions contain provisions on expropriation, and special laws detail the procedure. For example, the Constitution of the Republic of Moldova[2] explicitly states that no one can be expropriated except under the conditions of the law and for a specific cause of public utility. Similarly, in the United Kingdom, although there is no written constitution, the exercise of the power of compulsory purchase requires an Act of Parliament or specific statutory authorization, which means that any expropriation is based on dedicated legislation (such as the Town and Country Planning Act 1990 etc.) enacted by the relevant legislature .[3]

2. Public-interest purpose - an expropriation cannot be ordered for the benefit of a private interest or in the absence of a public-interest justification. This principle is closely linked to legality, as the law must define the cases of public necessity which may justify expropriation. In France, the concept of "*utilité publique*" underpins the whole procedure: expropriation is possible only after a formal declaration of public utility, issued by the competent administrative authority following a public inquiry. Germany uses the term "*public good*" (öffentliche Wohl) in the Basic Law, which stipulates that expropriation is only permissible for the

---

[1] https://www.conseil-constitutionnel.fr/le-bloc-de-constitutionnalite/declaration-des-droits-de-l-homme-et-du-citoyen-de-1789).%E2%80%9D

[2] Constitution of the Republic of Moldova No 1 of 29-07-1994, Published : 29-03-2016 in Official Gazette No 78 art. 140 https://www.legis.md/cautare/getResults?doc_id=111918&lang=ro

[3]Compulsory purchase in England and Wales https://en.wikipedia.org/wiki/Compulsory_purchase_in_England_and_Wales#:~:text=Compulsory%20purchase%20is%20the%20power,overriding%20or%20compelling%20public%20interest

public good[1] . Even in the case law of the CJEU we find this requirement: in the *Hauer* case (1979), the Court stated that restrictions on the right to property must actually correspond to objectives of general interest pursued by the Community[2] . Concrete examples of public interest include: the construction of infrastructure (roads, railways, utility networks), national defense works, urban and regional development projects, preservation of cultural heritage or environmental protection. The list remains open, as the definition of legitimate public interest evolves with the needs of society. The important thing is that in each individual case the authority must demonstrate that there is a real and present public purpose, not merely hypothetical or disguised, otherwise the expropriation becomes illegal.

3.Proportionality principle - even if there is a legitimate public purpose, the measure of expropriation must be proportionate to that purpose. Proportionality involves two major aspects: necessity and balance. On the one hand, expropriation must be necessary - i.e. the desired end could not be achieved by a less intrusive measure on property rights (e.g. a voluntary purchase, a land swap or the establishment of an easement right could be alternatives, where possible). On the other hand, a fair balance must be struck between the public interest and the rights of the owner, so that the burden imposed on the latter is not excessive or disproportionate to the public benefit. ECtHR case law has developed this fair balance test, for example in the case "*James and others v. United*

[1] Basic Law of the Federal Republic of Germany constitutions.wordpress.com

[2] Document 61979CJ0044. Judgment of the Court of December 13, 1979. Liselotte Hauer v Land Rheinland-Pfalz. Reference for a preliminary ruling: Verwaltungsgericht Neustadt an der Weinstraße - Germany. Prohibition on new planting of vines. Case 44/79. European Court Reports 1979 -03727 ECLI identifier: ECLI:ECLI:EU:C:1979:290 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:61979CJ0044#:~:text=4%20,PROTECTION%20OF%20HUMAN%20RIGHTS https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:61979CJ0044#:~:text=4%20,PROTECTION%20OF%20HUMAN%20RIGHTS

Kingdom (1986)"[1] emphasizing that a deprivation of property without reasonable compensation or procedural safeguards may upset the balance and violate Article 1 of Protocol 1 (right to property)[2] . The CJEU, in the same vein, has pointed out that the interference must not affect "*the very substance of the* **property** *right*"[3] , i.e. must not become an intolerable burden for the owner. (Sluysmans, & Waring, 2016, pp.276-300).

In practice, the principle of proportionality translates into a requirement that the expropriation be limited to what is necessary (e.g. expropriate only the area of land indispensable for the public project, no more) and that the procedure should provide the affected person with the possibility to challenge the measure or to obtain a (judicial) reassessment of its necessity. (Jourdan, Czapracka., Killick, Komninos, & Citron, 2023).

4. The right to just compensation (compensation) - any lawful expropriation entails an obligation on the expropriating authority to pay adequate compensation to the expropriated owner. This principle is vital to morally and legally validate the forced transfer of property: the loss suffered by the individual must be materially compensated. The principle is expressly enshrined in most European constitutions. For example, Art. 17 of the "*French Declaration of 1789*" requires "*just and prior*

---

[1] Case Of James And Others V. The United Kingdom (Application no. 8793/79) https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57507%22]}

[2] Right To Property In The Context Of Article 1 Protocol 1 To The European Convention On Human Rights And Freedoms rm.coe.int

[3]Document 61979CJ0044. Judgment of the Court of December 13, 1979. Liselotte Hauer v Land Rheinland-Pfalz. Reference for a preliminary ruling: Verwaltungsgericht Neustadt an der Weinstraße - Germany. Prohibition on new planting of vines. Case 44/79. European Court Reports 1979 -03727, ECLI identifier: ECLI:EU:C:1979:290 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:61979CJ0044#:~:text=OBSERVANCE%20OF%20THE%20RIGHT%20TO,INTERFERENCE%20WITH%20THE%20RIGHTS%20OF
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:61979CJ0044#:~:text=OBSERVANCE%20OF%20THE%20RIGHT%20TO,INTERFERENCE%20WITH%20THE%20RIGHTS%20OF

compensation"[1] , and the Constitution of the Republic of Moldova takes this phrase almost literally, requiring "*just and prior* compensation"[2]. The German Basic Law (Grundgesetz) provides that the nature and extent of the compensation shall be determined by law, that the compensation shall reflect a fair balance between the public interest and the interests of those affected, and that in case of disagreement on the amount, it shall be open to challenge before the courts[3] . In practice, "fair compensation" is usually interpreted as the equivalent of the *market value of* the expropriated asset (value determined at the time of expropriation, taking into account its economic utility). The legal systems provide for valuation mechanisms - technical expertise, committees of valuers or specialized courts. But there are also variations: in the UK, the Land Compensation Act 1961 and other acts provide that the owner is entitled to the market value of the property and to additional compensation for removal or loss of benefit (e.g. a "*home loss payment*" as an additional lump sum for disturbance of the home)[4] . It is also important to note the prior nature of compensation, which is explicitly required in some systems (France, Moldova): ideally, compensation should be paid before or at the latest at the time of transfer of the property, so as not to leave the owner in an uncertain situation. Other countries accept payment within a reasonable period thereafter, possibly with compensatory interest, especially if there are disputes requiring judicial settlement.

These four principles constitute the basic pillars of any expropriation regime compatible with European standards. They are

---

[1] https://www.conseil-constitutionnel.fr/le-bloc-de-constitutionnalite/declaration-des-droits-de-l-homme-et-du-citoyen-de-1789).%E2%80%9D

[2] Constitution of the Republic of Moldova No 1 of 29-07-1994, Published : 29-03-2016 in Official Gazette No 78 art. 140 https://www.legis.md/cautare/getResults?doc_id=111918&lang=ro

[3] Basic Law of the Federal Republic of Germany constitutions.wordpress.com

[4] Compulsory purchase in England and Wales https://en.wikipedia.org/wiki/Compulsory_purchase_in_England_and_Wales#:~:text=Today%2C%20the%20Land%20Compensation%20Act,Compensation%20is%20often%20also

interrelated and are designed to ensure that expropriation remains an exceptional measure, used responsibly and with respect for fundamental rights.

1.3. The role of the CJEU in standardizing the interpretation of property rights and the conditions of expropriation.

Although the responsibility for regulating expropriation primarily falls under the jurisdiction of individual Member States, the Court of Justice of the European Union (CJEU) plays a decisive role in promoting consistency across the EU with regard to the protection of property rights and the permissible boundaries of expropriation (Golden, Szabó, & Erne, 2025).This harmonizing function is particularly important in the context of fundamental rights.

One of the most influential rulings in this domain was delivered in the "Hauer v. Land Rheinland-Pfalz case (1979)", where the CJEU affirmed that the right to property forms an integral part of the EU's legal order, grounded in the shared constitutional traditions of Member States and further reinforced by the European Convention on Human Rights[1]. In that judgment, the Court laid down essential safeguards: any restriction of property rights, whether through expropriation or other limitations such as usage prohibitions, must be justified by a legitimate objective serving the common interest of the Community and must not represent a disproportionate interference relative to the pursued aim.

Through such jurisprudence, the CJEU has, since the 1970s, embedded the principles of legality, public interest, and proportionality

[1] Judgment of the Court of December 13, 1979. Liselotte Hauer v Land Rheinland-Pfalz. Reference for a preliminary ruling: Verwaltungsgericht Neustadt an der Weinstraße - Germany. Prohibition on new planting of vines. Case 44/79. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:61979CJ0044#:~:text=4%20,PROTECTION%20OF%20HUMAN%20RIGHTS

into the EU's interpretation of property rights, contributing to a coherent and rights-based framework across the Union[1].

Thus, since the 1970s, the Court has integrated the principles of legality, public interest and proportionality into the notion of property protection at EU level.

Second, with the entry into force of the "*Lisbon Treaty of* 2009"[2] and the "*Charter of* Fundamental *Rights*"[3] becoming binding, the CJEU has started to directly apply the provisions of the Charter, including Art. 17 on property rights, in cases under EU law. For example, if a Member State implements an EU-funded policy or project involving expropriation, affected persons can invoke the EU Charter and the Court can verify whether the conditions of legality and compensation are met. The CJEU ensures that the application of secondary EU law (regulations, directives) does not contravene the right to property; in conflicting situations, the Court has been willing to interpret secondary legislation in the light of the Charter to avoid unjustified interference with property.

Another aspect of the role of the CJEU is to provide judicial guidance to national courts through the preliminary questions procedure. National courts confronted with expropriation disputes that raise questions of interpretation of EU law (e.g. the compatibility of a national expropriation law with the fundamental principles recognized by the EU) can ask questions to the Court of Justice. By providing answers, the CJEU contributes to uniform interpretation. Even if there is not an

---

[1] Judgment of the Court of December 13, 1979. Liselotte Hauer v Land Rheinland-Pfalz. Reference for a preliminary ruling: Verwaltungsgericht Neustadt an der Weinstraße - Germany. Prohibition on new planting of vines. Case 44/79. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:61979CJ0044#:~:text=4%20,PROTECTION%20OF%20HUMAN%20RIGHTS

[2] Treaty Of Lisbon **https://Www.Europarl.Europa.Eu/Factsheets/Ro/Sheet/5/Tratatul-De-La-Lisabona**

[3] Charter of Fundamental Rights of the European Union (2012/c 326/02) https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:C2012/326/02

abundance of direct expropriation cases before the CJEU (given that, repetitively, the matter is a matter of national autonomy), the Court has indirectly influenced standards: for example, referring to compensation, the CJEU has confirmed in various contexts that, where EU law provides for compensation (e.g: expropriations in the context of trans-European transport networks or environmental restrictions equivalent to expropriation), compensation must be "*real and actual*", not illusory, taking into account the real value of the asset lost - in line with ECHR case law and the practices of most states.

Last but not least, the CJEU acts as a factor of positive pressure: its judgments serve as benchmarks for national legislators. Member States, knowing that possible deviations from the principles of property protection could be sanctioned in Luxembourg, have an incentive to keep their legislation in line with European requirements. For example, in the area of proportionality, CJEU decisions have reinforced the need for States to provide effective legal remedies. Thus, all comparative jurisdictions allow access to justice for those expropriated (challenging the public benefit or the amount of compensation), which also reflects the influence of the CJEU's interpretations of the right to an effective remedy (Art. 47 of the EU Charter[1] , in conjunction with Art. 17).

The CJEU does not unify the expropriation regime in law (there is no "European code on expropriation"), but it does provide a conformity filter: any national expropriation practice must fall within the limits of respect for property rights as they are uniformly understood in the European area. Through its consistent case law, the Court has helped to define a common European jurisprudence in this field, alongside the national courts and the ECHR, all converging towards similar solutions on public necessity, proportionality and fair compensation.

[1] Charter of Fundamental Rights of the European Union (2012/c 326/02) https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:C2012/326/02

1.4. Comparative legislative analysis: France, Germany, United Kingdom vs. the Republic of Moldova.

The national expropriation regulations present, in substance, similar principles imposed by the European legal tradition, but differ in terms of implementation, procedures and institutions involved. (Hernández-Alemán, Cruz-Pérez, & Santamarta, 2022). We will analyze in turn the situation in *France, Germany and the United Kingdom* and compare it with the framework in the *Republic of Moldova*, highlighting the common points and particularities of each.

1. France. France has one of the oldest and most well-structured expropriation legislations, influencing the systems in continental Europe (including Romania and, indirectly, Moldova). (Jourdan, Czapracka, Killick, Komninos, & Citron, 2023). The basic principles are constitutionally anchored in the constitutional bloc: "*Article 17 of the Declaration of the Rights of Man and of the Citizen of 1789*", integrated into the current Constitution by the preamble, establishes the inviolability of property and the strict conditions of expropriation - public necessity, legally established, and prior and fair compensation . [1]

The legislative development started with the *1810 law on expropriation in the public interest (adopted under Napoleon*), which created a procedural framework designed to stop abuses by the administration and introduce judicial review. Today, the expropriation regime is codified in the "*Code of Expropriation for Cause of Public Utility"* (code promulgated in its updated form in 2015), which details the procedure in two stages: 1. *The declarative phase*, in which an administrative decision is issued declaring the project to be of public utility - this involves a public inquiry, consultation of interested parties and analysis of alternatives; if the DUP is issued, it constitutes the legal basis for expropriation; 2. *The enforcement phase*, during which expropriation is actually carried out either amicably (through the purchase of the asset by the authority at a negotiated price) or, in the

[1] https://www.conseil-constitutionnel.fr/le-bloc-de-constitutionnalite/declaration-des-droits-de-l-homme-et-du-citoyen-de-1789).%E2%80%9D

absence of agreement, by a decision of the expropriation judge (a specialized court, usually within the high court), who pronounces the transfer of ownership and sets the amount of compensation. Characteristic of France is therefore the predominant role of the administrative authority in establishing public utility and the strong role of the judiciary in determining compensation and finalizing the transfer. The compensation must *in principle* be paid *before the actual repossession of the property* (before or at the same time), in the form determined by the judge (as a rule, a sum of money equivalent to the market value; in certain cases compensation in kind may be offered - other land in exchange). The owner is also entitled to compensation for collateral losses (e.g. loss of use, removal). French legislation also provides for post-expropriation mechanisms, such as the obligation that the expropriated property must be used in accordance with its declared purpose, otherwise the owner has the theoretical possibility of retrocession (if the public utility has not been realized). Thus, the French system is highly formalized, emphasizing prior control of the public interest and prompt compensation, fully reflecting the fundamental principles of expropriation.

2. Germany. In Germany, the legal framework for expropriation is mainly established by the "*Federal Constitution - Basic Law (Grundgesetz)"*. Article 14 of the Grundgesetz enshrines the right of ownership and inheritance, stating that *"expropriation is permitted only in the public interest"*, must be ordered by law or on the basis of a law, which will also determine the manner and amount of compensation, which must reflect a fair balance between the general and private interest[1] . If the compensation awarded does not satisfy the owner, he has the right to apply to the ordinary courts for a judgment on the amount[2] .

This constitutional provision provides a uniform general framework at federal level. However, the practical implementation of

[1] World Constitutions https://constitutii.wordpress.com/

[2] Verfassung der Deutschen Demokratischen Republik, 7. Oktober 1949 https://constitutii.wordpress.com/wp-content/uploads/2024/01/constitutia-ddr-1949.pdf

expropriation also depends on federal and Land legislation: there are sector-specific federal laws allowing expropriation (e.g. in the field of construction - the *Baugesetzbuch* contains sections on expropriation for urban development plans, in the field of transport - special laws for highways, railways, etc.) as well as Land laws on expropriation procedure in general. The typical German procedure involves an *administrative decision on expropriation* issued by a competent authority (usually at Land level, there are *expropriation commissions* or regional authorities managing the process). Before issuing this decision, the authority must try to obtain the property amicably (by purchase at market price). If this fails, the forced procedure is initiated, where the authority issues an expropriation order, while fixing the amount of compensation in accordance with the law. The dissatisfied owner can challenge both the merits of the expropriation (lack of public interest, lack of proportionality) and the amount of compensation before administrative (for the legality of the decision) and civil (for the assessment of the compensation) courts. The German system is characterized by a particular concern for the fairness of compensation - the principle of equitable balance is expressly enshrined in the Constitution[1] , and practice shows that compensation tends to be awarded at market value, sometimes also including compensation for possible economic losses caused by expropriation. Unlike in France, prior payment is not necessarily required, but property generally does not pass to the state until the compensation awarded is made available (or recorded) - this follows from the rule of law and effective judicial review.

Another distinctive feature in Germany is the concept of "*Aufopferungsentschädigung*" (compensation for special sacrifice), which applies in situations where a legal measure of the state, without being formally an expropriation, seriously affects property (a restriction of use, for example); in such cases, the courts may award compensation under the principle of equality before public burdens. This concept shows

[1] Ibid

the openness of German law to protect property not only in the case of forcible transfer, but also to interference equivalent in effect. On the whole, German expropriation law faithfully reflects the principles of legality-public interest-compensation, with an emphasis on rigorous procedures and an effective right of action for the affected owners. (Jourdan, Czapracka, Killick, Komninos, & Citron, 2023).

3. United Kingdom. The United Kingdom (particularly England and Wales) has a system of expropriation known as *compulsory purchase*. Unlike in France and Germany, the UK framework does not start from a constitutional text (the UK not having a codified written constitution and not having a classical bill of rights including property rights; also the EU Charter is no longer applicable after Brexit). However, equivalent principles have been formed through common law and parliamentary legislation over more than two centuries. Any expropriation in the UK requires *statutory authority* - in other words, only if an Act of Parliament has conferred on a public body the power to expropriate can it take place[1] . Parliament has passed numerous Acts over the years granting such powers to local authorities, government agencies or other entities for various public purposes (town planning, transportation, utilities, etc.). A reference framework act is the *Compulsory Purchase Act 1965*[2] , supplemented by the *Acquisition of Land Act 1981*[3] and subsequent legislation as well as specific regulations (e.g. *Town and Country Planning Act 1990*[4] for expropriations for planning purposes). The UK procedure usually starts with the making of a *Compulsory Purchase Order* by the authority requiring the land (e.g. a

[1] Compulsory purchase in England and Wales https://constitutii.wordpress.com/wp-content/uploads/2024/01/constitutia-ddr-1949.pdf

[2] Compulsory purchase act 1965 https://www.legislation.gov.uk/ukpga/1965/56/contents

[3] Acquisition of land act 1981 https://www.legislation.gov.uk/ukpga/1981/67/contents

[4] Town and country planning act 1990 https://www.legislation.gov.uk/ukpga/1990/8/contents

local council). This order must be approved or confirmed by a central government minister (e.g. the Secretary of State) to ensure that there is a "*compelling case in the public interest*" - a compelling public interest justifying expropriation[1] . The affected owner has the opportunity to object, in which case a public inquiry may be held, led by an independent inspector, who reports to the Minister. Once the order is confirmed, the transfer of the property to the expropriating authority can be effected through various legal mechanisms (e.g. the issuing of a *General Vesting Declaration*, which heralds the passing of title). As regards compensation, UK law provides for comprehensive compensation: the owner receives the market value of the property (valued according to the principles of the *Land Compensation Act 1961*, section 5, which states that the value is to be calculated as in the case of a voluntary sale on the open market[2]). In addition to this price, there are other heads of compensation: e.g. *disturbance compensation* (for the inconvenience of moving, loss of income during the relocation of the business, etc.), *home loss payment* for owner-occupiers (an additional statutory sum, currently about 10% of the value of the property, with a cap)researchbriefings.files.parliament.ukresearchbriefings.files.parliament.uk, compensation for transaction costs (legal fees, stamp duty) etc. If the owner considers that the offer of compensation is not satisfactory, he is entitled to apply to the Lands Chamber of the Upper Tribunal (formerly the Lands Tribunal) for judicial determination of the amount[3] .

---

[1] David Elvin QC, CPO: compelling case, human rights and alternatives https://www.landmarkchambers.co.uk/wp-content/uploads/2020/07/CPO-compelling-case-human-rights-and-alternatives.pdf

[2] Compulsory purchase in England and Wales https://en.wikipedia.org/wiki/Compulsory_purchase_in_England_and_Wales#:~:text=Today%2C%20the%20Land%20Compensation%20Act,Compensation%20is%20often%20also

[3] Compulsory purchase in England and Wales https://en.wikipedia.org/wiki/Compulsory_purchase_in_England_and_Wales#:~:text=must%20pay%20the%20compensation%20figure,to%20the%20Court

A specific feature of the English system is that, technically, the authority can take possession of the property before the final determination of compensation, provided it makes an offer and pays an initial sum, with any differences being settled by the court. However, failure to pay compensation within a reasonable time would violate the obligations imposed by law and by the *Human Rights Act 1998,*[1] which has incorporated into domestic law the provisions of the ECHR, including the right to property implicit in Art.1, Protocol 1[2] . In the light of the ECHR, the UK courts oversee that expropriations respect "*fair balance*" - for example, an expropriation without any compensation would be considered unlawful and contrary to human rights. Therefore, although the procedures are different, in principle the UK adheres to the same requirements: *genuine public purpose, clear legal authority and adequate compensation.*

4. The Republic of Moldova. The Republic of Moldova, with a legal system influenced by the continental European tradition and in particular by the Romanian one, has integrated the fundamental principles of expropriation into its post-independence legislation from an early stage. At constitutional level, Article 46 para. (2) of the Constitution states: *"No one may be expropriated except for a cause of public utility, established according to law, with just and prior compensation*"[3] . This text, adopted in 1994, brings Moldova into line with French-Romanian standards and in fact corresponds to the model laid down in the "*Declaration of 1789"* and the "*Constitution of Romania (Art. 44 para. 3)*". In order to implement these principles, Moldova has adopted " *Law No. 488-XIV of 08.07.1999 on expropriation for reasons*

[1] Human Rights Act 1998 https://www.legislation.gov.uk/ukpga/1998/42/contents

[2] h ttps://researchbriefings.parliament.uk/

[3] Constitution of the Republic of Moldova No 1 of 29-07-1994, Published : 29-03-2016 in Official Gazette No 78 art. **140** https://www.legis.md/cautare/getResults?doc_id=111918&lang=ro

of public utility "[1] . This law (similar to a large extent to the Romanian Law no. 33/1994 at that time) defines expropriation as *"the forced transfer of property and patrimonial rights from private to public ownership, for the realization of public utility works of national or local interest, under the conditions of the law, with just and prior compensation".*[2] The law expressly lists what can be the object of expropriation in the national or local interest - mainly immovable property (land, buildings) and certain special categories of property (e.g. inventions of importance for national security, natural resources in danger of extinction, etc.), reflecting both European influence and local particularities. The procedure foreseen by Moldovan law consists of several steps: 1. *Declaration of public utility* - this is done by Government decision for works of national interest or by decision of the local public authority for works of local interest, which identifies the real estate to be expropriated; *2. Notification and possible negotiation* - the owners are informed about the intention of expropriation, a voluntary transaction may ***be*** proposed; ***3****. Application for expropriation in court* - if no amicable agreement is reached, the expropriator (the state, represented by the authorized body) applies to the court for expropriation. The court will verify the fulfillment of the legal conditions (including the existence of a public utility declared under the law) and, if it deems them to be met, will issue an expropriation judgment, ordering the transfer of the property to state ownership and ordering the payment of the compensation established. The law requires that compensation must be "just and prior", which means that the court must set a fair amount (usually based on the market value, as determined by expert appraisal) and that it must be offered to the owner before or at the latest

[1] Law No. 488-XIV of 08.07.1999 on expropriation for public utility reasons Published : 20-04-2000 in the State Gazette No. 42-44 art. 311 amended LP59 of 20.03.25, MO154-156/27.03.25 art.173; in force 01.04.25 https://www.legis.md/cautare/getResults?doc_id=147849&lang=ro#

[2] Ibid

at the time of transfer of ownership (Hernández-Alemán, Cruz-Pérez, & Santamarta, 2022).

If immediate possession is necessary (e.g. in cases of emergency or national security), the law provides for the possibility of temporary possession or requisition, but subject to compensation. A detail worth mentioning: recently, in order to facilitate major infrastructure projects , the aim has been to *speed up expropriation procedures* - legislative amendments have been initiated to shorten time limits and simplify formalities[1] . For example, the updated Moldovan legislation exempts expropriation compensation from taxation (in order not to diminish the compensation received by the owner)[2] , in line with the practices of some countries that treat compensation as tax neutral. Overall, the regime in the Republic of Moldova is in line with the Franco-Romanian model: there is a control of public utility by prior administrative act, court intervention to validate expropriation and determine compensation, and the constitutional guarantee of compensation before actual deprivation. As practical challenges, Moldova has sometimes faced difficulties in implementation - for example, contested property valuations, protracted processes for determining compensation or budgetary delays in paying compensation - which require attention to ensure the effectiveness of the legal principles set out.

1.5. Legislative and enforcement similarities and differences.

Comparative analysis of the four legal systems (France, Germany, the United Kingdom and the Republic of Moldova) reveals a common

---

[1] Informative Note to the draft law on amending some normative acts (speeding up expropriation procedures) https://justice.gov.md/sites/default/files/document/attachments/2_nota_informativa_proiect_lege_modificare_lege_expropriere.pdf

[2] People whose property will be expropriated will be exempt from paying income tax on the compensation received https://www.justice.gov.md/ro/content/persoanele-ale-caror-bunuri-vor-fi-expropriate-vor-fi-scutite-de-la-plata-impozitului-pe#:~:text=Persoanele%2C%20ale%20c%C4%83ror%20bunuri%20vor,expropriate%20nu%20vor%20fi%20impozitate

core of principles, but also a number of notable differences in the way expropriation is legislated and enforced.

Similarities.

– all jurisdictions require the existence of a *public purpose* as the basis for expropriation. Whether called public necessity, public good or public interest, the teleological criterion is paramount (Golden, Szabó, & Erne, 2025). No system allows expropriation purely arbitrary or for the private benefit of others. This convergence is due to both mutual historical influence (the French Declaration of 1789 having echoes in modern constitutions[1] , including that of Moldova[2]) and international obligations (the ECHR requires legitimacy of purpose).

– ***Compensation to the expropriated owner*** is an invariable element in all systems, albeit with procedural nuances. The idea of fair compensation for loss has become a general European standard[3] . Even in the absence of an express constitutional provision (the case of the UK), legal practice and human rights imperatives have led authorities to provide fair compensation, otherwise expropriation would be unconstitutional (in countries with written constitutions) or incompatible with the rule of law.

The principle of legality and judicial review is also common. Everywhere, expropriation is carried out on the basis of the law and under the supervision of a court of law or a judicial body (either for validation or at least for the calculation of compensation). This ensures that owners have access to an appeal and an independent assessment of their case, as due process standards require. (Hernández-Alemán, Cruz-Pérez, & Santamarta, 2022, p.194)

---

[1] T. Stahi, The evolution of the concept of expropriation for reasons of public utility and the regulation of expropriation in comparative law https://ibn.idsi.md/ru/vizualizare_articol/147463/gscholar

[2] Constitution of the Republic of Moldova No 1 of 29-07-1994, Published : 29-03-2016 in Official Gazette No 78 art. 140 https://www.legis.md/cautare/getResults?doc_id=111918&lang=ro

[3] Basic Law of the Federal Republic of Germany https://constitutii.wordpress.com/

– Another common element is the attempt to *avoid forced expropriation* if possible. In all four systems there is either a legal obligation or common practice that the authority first tries voluntary acquisition or a negotiated solution. Only in the absence of agreement is expropriation resorted to, reflecting the last resort nature of this measure.

Legislative and enforcement differences.

– ***constitutional vs. customary framework*.** Whereas France, Germany and the Republic of Moldova (similarly Romania) enshrine the conditions of expropriation in the Constitution, the UK relies on ordinary law and common law principles, supplemented by obligations under the ECHR. This does not mean less protection in the UK, but formally there is a difference: there is no supreme domestic text guaranteeing compensation, for example, but in practice the same result is achieved through legislation and case law.

– ***the "prior" aspect of compensation*.** Continental jurisdictions tend to require compensation *prior to* (or concurrent with) the transfer of ownership - e.g. France and Moldova explicitly require prior character. Germany requires a law providing for compensation, but does not specify textually that it must be paid in advance, although practice and the principle of fair balance imply that it should not be unduly delayed. In the UK, payment is often post-possession (especially when the amount is challenged in court), but there is an obligation to provide a sum as soon as title passes and to pay interest, otherwise the authority risks sanctions and the "*Art.1 Prot.1 ECHR*". The difference therefore lies in the timing of the set-off: the French/Moldovan model favors a set-off before the seizure of the property, whereas the Anglo-Saxon model accepts a somewhat *ex post* set-off, provided that the right to set-off is secured.

– ***administrative vs. judicial procedure*.** In France, the initial emphasis is on an administrative procedure, followed by the intervention of a specialized judge for compensation only. In Germany, the administrative order of expropriation can be challenged in court, but no trial is required to issue the order. In Moldova, on the contrary, a court judgment is required to finalize the expropriation if there is no amicable agreement - the court plays a central role, as in Romania. In the United

Kingdom, the procedure is administrative (order confirmed by the Minister), with a possible subsequent appeal to the court only on the compensation side. These variants show differences in institutional design: civil law countries sometimes involve the courts more in approval, while common law countries separate the role - the administration decides on necessity, the court only remedies possible abuses.

– ***scope of expropriation.*** Comparative laws differ on what can be expropriated and for what precise purposes. Moldova (and Romania) have detailed lists in the expropriation law of works considered of public utility (roads, energy networks, defense works, etc.) and the categories of property that can be expropriated. France takes a more general approach - any project declared to be in the public interest can justify expropriation, there is no exhaustive list, but case law has developed criteria. Germany similarly leaves the definition quite broad ("*public good*"), but special laws concretize it. In the UK, '*public benefit*' is a flexible concept; it has ranged from major infrastructure to urban regeneration projects, neighborhood regeneration - virtually any '*overriding public interest*' can be accepted, which has given a wide margin to authorities, tempered by government policy (guidelines requiring justification of the public case). Thus, we can speak of a difference between an enumerative (Eastern Europe in particular) and a principled (Western Europe) vision in defining public utility.

– ***calculation of compensation and items included.*** All countries give market value as a benchmark, but the UK stands out by consistently including additional costs (relocation costs, inconvenience bonus, etc.), formalized by law[1] . France and Germany sometimes provide such additional amounts by case law (interest, possibly damages for lost benefit between expropriation and payment). Moldova (and Romania)

[1]Compulsory purchase in England and Wales https://en.wikipedia.org/wiki/Compulsory_purchase_in_England_and_Wales#:~:text=Today%2C%20the%20Land%20Compensation%20Act,Compensation%20is%20often%20also

have a simpler model, focused on the value of the asset; for example, there is no express provision for compensation for the "ordeal" of relocation or loss of clientele of a business - although such damages can be claimed separately in court, they are not automatically included. This highlights a difference in the comprehensiveness of the concept of full compensation.

– ***the length and efficiency of proceedings.*** Although difficult to quantify here in detail, it is known that French and Romanian/Moldovan procedures can be quite lengthy, due to formalism (public inquiries, procedural deadlines, possibly multiple appeals). Germany has a reputation for a faster procedure, because after the administrative order, if the owner does not contest promptly, the state can proceed. The UK, although the administrative procedure can be lengthy (especially with public consultation and possibly public inquiry), has mechanisms to speed up for priority projects (e.g. special orders of Parliament for large projects such as HS2 - the high speed rail). Moldova has also tried to speed up its legislative procedures recently[1] . However, it should be emphasized that increased speed should not prejudice the rights of owners; it is a different balancing exercise managed by each state.

In conclusion, *convergences* dominate over differences in expropriation: all the countries analyzed adhere to a common set of legal requirements (publicity, compensation, judicial review) and purpose (public utility). *The differences* lie mainly in the *mode of institutional organization and legal techniques*: constitutional codification vs. ordinary legislation, judicial vs. administrative procedure, details on the assessment of compensation and the management of particular situations. These differences are influenced by the legal culture (civil law vs. common law), historical experiences (France having the revolution that

[1] Informative Note to the draft law on amending some normative acts (speeding up expropriation procedures) chrome-extension://efaidnbmnbmnnnibpcajpcglglclefindmkaj/https://justice.gov.md/sites/default/files/document/attachments/2_nota_informativa_proiect_lege_modificare_lege_expropriere.pdf

sacralized property, UK having an evolutionary continuity) and current priorities (e.g. transition countries like Moldova emphasize alignment with established models and avoidance of abuses that existed in the previous Soviet period).

Conclusions

To summarize the conclusions, the regulation of expropriation in European Union law and in the legislations of the Member States examined is based on a common set of fundamental principles - legality, the existence of a legitimate public purpose, proportionality in achieving the purpose and the obligation of fair compensation to the owner. This essential core is firmly established both by high-level written rules (constitutions, EU Charter, international treaties) and by the converging case law of the European (CJEU and ECHR) and national courts. This ensures a uniform basic protection of property rights throughout Europe, while expropriation remains a public policy instrument available to States, but subject to democratic guarantees and the rule of law.

The comparative analysis showed that the Republic of Moldova, through its Constitution and its special law on expropriation, has aligned its regulatory framework with these European standards. The principles on paper are virtually identical to those in France or Germany, reflecting a de jure harmonization already largely achieved. However, de facto harmonization, in day-to-day application, still requires further work. Good practices can be drawn from the experience of Western countries which could be adopted or strengthened by Moldovan legislation and administration:

1. The Moldovan legislation could benefit from more precise guidelines (possibly at regulatory level) on the assessment of public need, in order to avoid formal declarations of public utility without a solid rationale. France provides a useful example where public utility is subject to prior investigation and a proportionality test. Introducing similar (though not as elaborate) consultative procedures could increase the legitimacy of expropriation decisions and reduce subsequent challenges.

2. To truly ensure *"just compensation"*, Moldova could establish standard assessment methodologies, neutral expert panels or guidelines on the factors to be taken into account (following the German or British model). It could also consider the explicit inclusion of additional compensation where appropriate - e.g. compensation for relocation, loss of business clientele, notarial costs. These elements, if not expressly provided for, may leave landlords partially dissatisfied and prone to litigation.

3. Drawing inspiration from recent reforms in other countries, shorter deadlines for procedural steps could be put in place without removing safeguards. For example, the UK imposes a 3-month deadline for the authorities to pay the compensation set, otherwise interest and possible legal action will follow. Establishing clear time limits in Moldovan law for each phase (declaration of public interest, referral to court, delivery of judgment, payment of compensation) would increase procedural discipline. At the same time, the creation of a specialized panel of judges or panels dedicated to expropriations (on the model of the French expropriation judge) could speed up the resolution of cases and standardize practice.

4. Expropriation procedures, being intrusive, require transparency. Measures such as online publication of public utility decisions, detailed information to each owner about their rights (e.g. an expropriation guide, similar to the *"compulsory purchase and compensation"* guides offered to citizens in the UK[1]), could prevent conflicts by clarifying expectations and obligations.

5. As the Republic of Moldova moves further down the road of European integration, terminological and conceptual harmonization with relevant EU legislation would be useful. Although the EU does not

[1]Compulsory purchase and compensation: guide 4 - compensation to residential owners and occupiers https://www.gov.uk/guidance/compulsory-purchase-and-compensation-guide-4-compensation-to-residential-owners-and-occupiers#:~:text=Compulsory%20purchase%20powers%20can%20support,projects%20in%20the%20public%20interest

directly have an expropriation directive, there are sector-specific regulations (e.g. in the field of trans-European transport infrastructure) that impose compensation and consultation standards. By ensuring that national legislation does not conflict with these, Moldova facilitates its participation in European projects. At the same time, cooperation with Member States (exchange of experience, training for officials involved in expropriations, etc.) can help to align practices at a common level.

In the light of the above, we can conclude that expropriation remains an area where the fine balance between the public interest and individual rights needs to be constantly recalibrated. Europe offers a model of balance: private property is firmly protected, but does not become an insurmountable obstacle to the development of public projects designed to serve the common good. The solution lies in clear legislation, fair and swift enforcement, and generous and fair compensation to those affected - because, ultimately, the moral legitimacy of expropriation derives from the fair treatment of expropriated owners. The Republic of Moldova, sharing the traditions of European law, has the necessary foundation to guarantee this balance and, by following successful examples and uniform European jurisprudence, can ensure even greater convergence of its practice with that of EU Member States. In this way, expropriation truly becomes a legal tool of community progress, used responsibly, and not a source of inequity or protracted litigation.

Acknowledgements: The article was carried out within the framework of research project no. 020408. Research on ensuring sustainable development and increasing the competitiveness of the Republic of Moldova in the European context.

References

Acquisition of Land Act 1981 https://www.legislation.gov.uk/ukpga/1981/67/contents

Basic Law of the Federal Republic of Germany constitutions.wordpress.com

Benedetti, A. (2022). The Proceduralisation of Public Decisions in Public Utilities: Issues from a Comparative Law Study. *European Public Law Organization's - EPLO Publications*, 34(2), 124

Case Of James And Others V. The United Kingdom (Application no. 8793/79) https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57507%22]}

Charter of Fundamental Rights of the European Union (2012/c 326/02) https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:C2012/326/02

Compulsory Purchase Act 1965 https://www.legislation.gov.uk/ukpga/1965/56/contents

Compulsory purchase in England and Wales https://en.wikipedia.org/wiki/Compulsory_purchase_in_England_and_Wales#:~:text=Compulsory%20purchase%20is%20the%20power,overriding%20or%20compelling%20public%20interest

Compulsory purchase and compensation: guide 4 - compensation to residential owners and occupiers https://www.gov.uk/guidance/compulsory-purchase-and-compensation-guide-4-compensation-to-residential-owners-and-occupiers#:~:text=Compulsory%20purchase%20powers%20can%20support,projects%20in%20the%20public%20interest

Compulsory purchase in England and Wales https://constitutii.wordpress.com/wp-content/uploads/2024/01/constitutia-ddr-1949.pdf

Constitution of the Republic of Moldova No 1 of 29-07-1994, Published : 29-03-2016 in Official Gazette No 78 *art. 140 https://www.legis.md/cautare/getResults?doc_id=111918&lang=ro*

David Elvin QC, CPO: compelling case, human rights and alternatives https://www.landmarkchambers.co.uk/wp-content/uploads/2020/07/CPO-compelling-case-human-rights-and-alternatives.pdf

Declaration of the Rights of Man and of the Citizen of 1789 https://www.conseil-constitutionnel.fr/le-bloc-de-

constitutionnalite/declaration-des-droits-de-l-homme-et-du-citoyen-de-1789

Document 61979CJ0044. Judgment of the Court of December 13, 1979. Liselotte Hauer v Land Rheinland-Pfalz. Reference for a preliminary ruling: Verwaltungsgericht Neustadt an der Weinstraße - Germany. Prohibition on new planting of vines. Case 44/79. European Court Reports 1979 -03727 ECLI identifier: ECLI:ECLI:EU:C:1979:290, https://eur-https://eur- lex.europa.eu/legal-content/EN/TXT/?uri=celex:61979CJ0044#:~:text=4%20,PROTECTION%20OF%20HUMAN%20RIGHTS

European Convention On Human Rights https://www.echr.coe.int/european-convention-on-human-rights

Golden, D., Szabó, I. and Erne, R. (2025). Commodifying Public Utilities: EU's New Governance Prescriptions for Rail and Water. *Governance*, 38(1)

Hernández-Alemán, A., Cruz-Pérez, N. and Santamarta, J. C. (2022). Rethinking Legal Criteria for Assessing Compensation for Rural Land Expropriation: Towards a European Institutional Framework. *Land*, 11(2)

Human Rights Act 1998 https://www.legislation.gov.uk/ukpga/1998/42/contents

Jourdan, J., Czapracka, K., Killick, J., Komninos, A. and Citron, P. (2023). *The EU Court of Justice clarifies the scope of the essential facilities doctrine in a case involving the Lithuanian national railway* (Lietuvos geležinkeliai). Concurrences

Judgment of the Court of December 13, 1979. Liselotte Hauer v Land Rheinland-Pfalz. Reference for a preliminary ruling: Verwaltungsgericht Neustadt an der Weinstraße - Germany. Prohibition on new planting of vines. Case 44/79. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri= celex:61979CJ0044#:~:text=4%20,PROTECTION%20OF%20HUMAN%20RIGHTS

Law No. 488-XIV of 08.07.1999 on expropriation for public utility reasons Published : 20-04-2000 in the State Gazette No. 42-44 art. 311 AMENDED LP59 of 20.03.25, MO154-156/27.03.25 art.173; in force

01.04.25 https://www.legis.md/cautare/getResults?doc_id=147849&lang=ro#
Informative Note on the draft law on amending some normative acts (speeding up expropriation procedures) https://justice.gov.md/sites/default/files/document/attachments/2_nota_informativa_proiect_lege_modificare_lege_expropriere.pdf
People whose property will be expropriated will be exempt from paying income tax on the compensation received https://www.justice.gov.md/ro/content/persoanele-ale-caror-bunuri-vor-fi-expropriate-vor-fi-scutite-de-la-plata-impozitului-pe#:~:text=Persoanele%2C%20ale%20c%C4%83ror%20bunuri%20vor,expropriate%20nu%20vor%20fi%20impozitate
Right To Property In The Context Of Article 1 Protocol 1 To The European Convention On Human Rights And Freedoms rm.coe.inteur-lex.europa.eu
Sluysmans, J.A.M.A., & Waring, E.J.L. (2016). Core Principles of European Expropriation Law. *European Property Law Journal*. 5(3), 276-300
Stahi, T. The evolution of the concept of expropriation for reasons of public utility and the regulation of expropriation. *Comparative law* https://ibn.idsi.md/ru/vizualizare_articol/147463/gscholar
Town and Country Planning Act 1990 https://www.legislation.gov.uk/ukpga/1990/8/contents
Treaty of Lisbon https://www.europarl.europa.eu/factsheets/ro/sheet/5/tratatul-de-la-lisabona
UK Parliament https://researchbriefings.parliament.uk/
Verfassung der Deutschen Demokratischen Republik, 7. Oktober 1949 https://constitutii.wordpress.com/wp-content/uploads/2024/01/constitutia-ddr-1949.pdf
World Constitutions https://constitutii.wordpress.com/

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 280-286

THE PRINCIPLE OF PROPORTIONALITY – AN ELEMENT OF LEGAL CONSTRAINT IN ADMINISTRATIVE PROCEDURE

Oleg TĂNASE
ORCID ID: https://orcid.org/0000-0002-9789-069X
*E-mail:*o.tanase@tanase-law.md
Afiliation: Technical University of Moldova, Faculty of Constructions, Geodesyand Cadastre, Republic of Moldova

Abstract: *This article contains some considerations regarding the content of the principle of proportionality in the administrative procedure, as well as some reflections on judicial control over such administrative decisions.*

Proportionality in the administrative procedure - comes up against abuses of power or abuses of law, it is created and developed in order to restrict and constrain certain freedoms of participants in relation to the public authority or the state in sensu lato

Keywords: *proportionality; legal relationship of administrative law; liability; state authority.*

Introduction

Proportionality, as it is enshrined, would in itself represent a "unit of measure", representing the active element, having philosophical roots and interfering in all areas of social relations.

This "unit of measure" is present even in moral theology, especially when a certain form of action is envisaged, an expression of vindictive justice - when there is a will to restore justice that has been violated, through a punishment proportionate to the guilt. This expression

of morality has as its objective only the common good and good morality.

Proportionality as a "unit of measure" has been reconfigured into a principle, which is not just a state of fact or a theoretical, scientific state of affairs, but a legal instrument created and developed by case law, which has been taken up by legal systems and introduced into national law, specifically in order to react to any excess of public power.

This force of the principle of proportionality governs the activity of public administration bodies, being propelled for the satisfaction of a public interest, applying from the initiation of the procedure for issuing the administrative act, during the period of its adoption, as well as the verification of the legality of the act's issuance.

Considering that the principle of proportionality stands out as a remedy for reviewing the discretionary power of public administration, and essentially – as a phenomenon applicable to any public institution, it becomes a necessary balance to scrutinize any excess or potential abuse of power. Measures taken by public authorities within the scope of their legally recognized competences and responsibilities are initiated, subsequently adopted, and reassessed when they are guided by the need for the public interest or individual interest – especially when the administrative procedure is directed towards a specific individual subject. Indeed, the recipient of an individual administrative act is only the person to whom the act is directed, while third parties, whose rights are affected by the individual administrative act, are not its recipients[1].

The principle of proportionality

The principle of the rule of law (enshrined in Article 1 of the Constitution of the Republic of Moldova) requires that the executive's authority to adopt administrative acts in any given domain be sufficiently determined and limited by law, in terms of content, object, and purpose,

[1]Enshrined by Art. 2 of the Administrative Code of the Republic of Moldova, no.116 of 19.07.2018 in force since 01.04.2019.

so that its interventions are predictable and quantifiable for the citizen, even when they impose new obligations on him. The individual must know to what extent the administration can intervene in the sphere of his rights. In accordance with the principle of the rule of law, it is necessary to ensure, as much as possible, the protection of individuals against interventions by public authorities (Tănase, Secrieru, Strulea, Rusu, & Vîlcu-Bajurean, 2017, p. 361).

This condition aims to impose a legal constraint, stemming from the principle of the rule of law, related to the activity of the public authority in relation to the will and freedom of the individual.

The restriction of public activity, dressed in the form of constraint, does not have a harmful effect on the individual as the holder of rights and obligations, but is aimed at protecting the individual from abuse of rights by the public authority.

In this regard, it could be said that a form of censorship is established regarding the powers and competences of public authorities, without affecting the principle of discretion in substance and the discretionary right of the public authority *in concreto*.

Any activity of the administration can be described as a public one, aimed at ensuring social stability through the regulation of the most important social relations, but not because the "*common good*" is the true purpose of its existence. Maintaining peace and social harmony through the regulation of social relations is a guarantee of the durability of the entire state system, as any state that cannot reconcile social interests cannot exist (Tanase, 2022, p. 8).

Therefore, the official measure taken by the authority must be adapted and aligned with the objectives of the Law. This observation highlights the principle of proportionality, which derives from the principle of the rule of law and involves: "*an interference of the public administration in the course of a specific activity, in the rights and freedoms of the individual, but with the respect of a justified balance in its substance"*

Being enshrined in the rule of law[1], any measure taken by public authorities which infringes rights or freedoms provided for by law must comply with the principle of proportionality.

Given that the activity of the public authority is circumscribed to the administrative procedure, initiated at the request of the person or *ex officio*, proportionality is that unit of measurement for verifying the legitimacy of the actions taken by the public authority or its abstention, which applies *abinitio* to the administrative procedure.

Therefore, the public authority as defined by law[2], has "freedom of movement in the decision-making process", it is recognized "a margin of discretion" in the application of the "triple test" rule.

Without questioning the application of the latter rule, it follows from an analysis of the case law of the European Court of Human Rights, which has found in precise terms the following landmarks with regard to:

(i) whether an interference is provided for by national law,

(ii) whether it pursues one or more legitimate aims; and

(iii) whether it is proportionate to the aims pursued and necessary in a democratic society (Poalelungi, & Rotari, 2023, p. 33).

In a particular case[3], which was the subject of judicial review in the national courts, the public authority in the customs field disregarded the principle of proportionality and ordered the termination of the employment relationship with the customs official, on the grounds that "*a customs check lasting 2-3 minutes was carried out, and no other reprehensible acts in the performance of work or material damage or other damage to the image were found".* The principle of proportionality is at odds with this margin of discretion of the discretion of the public

[1]Provided by Art. 29 paragraph 1 of the Administrative Code of the Republic of Moldova, no.116 of 19.07.2018 in force since 01.04.2019.

[2]From the text of Article 7 of the Administrative Code of the Republic of Moldova, no. 116 of 19.07.2018 in force since 01.04.2019 - *public authority is considered any organizational structure or body established by law or other normative act, acting under public power in order to achieve a public interest.*

[3]https://jc.instante.justice.md/ro/court-decisions?pdf_content=rosca%20nicolae&type=Civil&apply_filter=1

authority to apply a particular disciplinary sanction to an employee. From the legal concept of proportionality, we note that the sanction must correspond to the legitimate aim and be appropriate to the act committed by the customs official at fault in disciplinary proceedings.

Concerning the measure taken by the public authority, we note that the interference with the rights and freedoms of the person ***must not be*** detrimental to the holder of the limited rights, but the administrative procedure of the authority must be kept within the "action limit", without exceeding the discretionary power and in the absence of an abusive power.

Taking the view that the public authority does not have rights and freedoms, but competences and powers, and in order to assess whether a power is abusive, the principle of proportionality implies, depending on the legitimate aim, the adoption of less restrictive means that would generate the same effects, but all of them must be carried out in a lawful manner. And legality excludes illegalit.

This constraint in the promotion of the discretionary right of the public authority - is the possibility for the public authority to choose between several possible solutions corresponding to the purpose of the law, when applying a legal provision (legal definition of discretionary right found in Art. 16 para. 1 of the Administrative Code of the Republic of Moldova, No. 116 of 19.07.2018). However, since the legislator has conferred public authorities to choose, from several legal options, the most suitable one to achieve the public interest, this should not constitute a disregard of individual or group interest, especially when the administrative procedure is initiated at the request of the person or group.

The legal condition for the application of proportionality as an instrument of legal constraint is determined by the fact that:

- *a discretionary right* - which is granted by law, in the sense that the powers and duties of the public authority are established by law, not arbitrary. Consequently, we note that this discretionary power is limited by the law, not being absolute in substance, both in terms of time/period of action, as well as in terms of administrative solution - which is adopted in an administrative procedure *in concreto*.

- *the existence of a margin of appreciation and of the aim pursued* - which implies an appreciation of the facts and administrative operations, compared to a fair balancing test to achieve the objective set by the legislator when adopting the law *stricto sensu*.
- *that it is subject to the law* - "even the law is subject to the law", as enacted by the principle of legality.
- *that it is applied judicially, when a judicial review of the administrative activity of the public authority is carried out* - the administrative judge verifies whether the means used by the public authority is appropriate and necessary, and consequently whether or not this legality filter is appropriate to the purpose pursued by the law.

In the case law of the European Court of Human Rights on Article 1 Additional Protocol 1 to the European Convention, the application of the so-called "*fair balance test*" has been set out, whereby the Court must determine whether the requirements of the general interest of the community and the protection of individual rights are equal. The European Court also pointed out that it respects the way in which a State "conceives the imperatives of the general interest", unless they do not have "*a reasonable basis"* (Dinu, 2023, p. 13).

In situations where the principle of proportionality is called into play, either in the preliminary procedure or in the legal action, the control of this principle is determined by the "triple test rule".

This reasoning is also emphasized by the European Court of Human Rights, stating that the "revocation of the right" has produced prejudicial effects of substance, the measure adopted by the public authority was not of a just proportion[1], the situation in which the court would have the legal duty to analyze the conformity of the individual administrative act with the law, and in the case of the unfavorable individual administrative act - in the case of subjective litigation - the existence of an injury to the plaintiff, in a right or legitimate interest, in

[1]The judgment of the European Court of Human Rights, *Stăvila v. Republic of Moldova*, application no. 25819/12, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-242782%22]} .

the absence of which the sanction of annulment of the unfavorable individual administrative act cannot be incurred.

Conclusions

Consequently, we would say that this legal constraint deriving from the principle of proportionality is a genuine legal instrument available to the right holder to protect himself from an excess of power of the public authority, realized in the administrative procedure.

This legal mechanism is compatible with the Preamble of the European Convention and Article 6 of the European Convention, since it confers a "legitimate expectation" that the administrative procedure may be subject to a certain degree of jurisdiction, and the "proportionality test" is the fair balance between the power of the public authority and the rights and freedoms of the individual.

References

Dinu, C.G. (2023). *Contracte administrative.* C.H. Beck.

Poalelungi, M., & Rotari, O. (2023). Ingerința; Calitatea legii; Triplu test; Proporționalitate. Aspecte teoretico-practice și aplicabilitate. *Studii Juridice Universitare, no.1.*

Tănase, A., Secrieru, R., Strulea, M., Rusu, L., & Vîlcu-Bajurean, N. (2017). *Compendiu al jurisprudenţei Curţii Constituţionale a Republicii Moldova.* Wolters Kluwer.

Tanase, O. (2022). Проблеми стоновленя правовоі демократичноі держави, in *The South Ukrainiain Law Journal, no.3.*

Administrative Code of the Republic of Moldova, no.116 of 19.07.2018 in force from 01.04.2019.

The judgment of the European Court of Human Rights, *Stăvila v. Republic of Moldova*, application no. 25819/12, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-242782%22]}.

https://jc.instante.justice.md/ro/court-decisions?pdf_content=rosca%20nicolae&type=Civil&apply_filter=1

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 287-301

DO YOU HAVE AN ORIGINAL RESEARCH PAPER USING AI?

Andreea TABACU
ORCID ID: https://orcid.org/0009-0006-7407-8769
E-mail: andreea.tabacu@upb.ro
Afiliation: UNST POLITEHNICA Bucharest,
Faculty of Economic Sciences and Law, University Centre Pitești

Abstract: *AI technology is proving to be increasingly invasive in the life of the average person, in school, in public systems, and therefore, in the university environment, where its advantages can be discovered but where it is also necessary to identify the shortcomings, one of the most significant risks found so far being related to the loss of independence in conducting scientific research.*

The help offered by artificial intelligence systems is obvious, determined by the assistance provided in identifying sources and necessary materials, summarizing the text, extracting ideas, translating, generating images text, and correcting it.

To meet the requirements of the higher education law regarding the originality of the research work, which is prepared with the help of AI, the use of these systems must be carried out with discernment, without substantial reliance on these systems, on the contrary, the input and contribution of the user is required.

Keywords: *Higher education; research activity; artificial intelligence systems; originality.*

Introduction

The significant challenges brought by modern technology, which is developing at an unimaginable pace in recent times, also target one of the essential activities that members of the academic community, teachers,

researchers, or students must carry out under Law no. 199/2020, namely research.

One of the missions of universities, scientific research, along with development, innovation, and technological transfer, must be carried out through individual or collective creation and must be relevant to the progress of knowledge and the socioeconomic environment (art.3 paragraph 1 letter b) of Law no. 199/2023). In fact, the traditional definition of research also refers to a creative activity (original investigation) to acquire new scientific or technological knowledge (DEX).

The creative, respectively original character of the work is a distinct one but closely related to that of the relevance of the activity carried out to be able to meet the requirements imposed by the higher education law to recognize the specific effects (for teachers, the fulfillment of the professional obligation to carry out research activity and for students, the obligation necessary for graduation).

On other occasions (Tabacu, 2023, 2024) we have addressed the issue of the originality of works prepared in the university environment by teaching staff and students, mainly from the perspective of deviations from the rules of academic ethics, noting on that occasion, among other things, that it is necessary to adapt the so-called anti-plagiarism programs for the correct detection of deviations and that in all cases human intervention should not be eliminated.

Currently, the situation has become much more complicated in the context in which artificial intelligence makes its presence felt in university activity frequently, the curiosity of participants in the act of education determining the use of these systems or technological tools on a large scale, including for the preparation of papers that the education law requires.

This time, the issue is no longer simply identifying sources or using them in an uncontrolled, sometimes abusive manner but rather the actual preparation of a work, which in all cases must be the fruit of the work of the legal subject bound by the obligation to carry out the respective research activity.

Is it ethical to use AI? How, to what extent, and how much can I rely on the technology? What negative consequences do I risk?

We attempt to answer these questions based on regulation and its purpose, good practices, and psychosocial arguments.

Research and AI

The development of AI systems has led to the expression in the specialized literature(Al-Busaidi et al., 2024; Obreja et al., 2025) of a series of concerns regarding the risk that people performing certain activities will lose their jobs, as they may be replaced by such artificial intelligence systems that can reach the desired result much faster and which could also involve lower costs for the beneficiary or the one who implements it.

Almost all sectors of social, economic, and educational life are affected by this massive development of AI systems, which are slowly penetrating the lives of everyone under the pretext of being useful. However, if attention is not paid to regulation policies to address this invasion of human life, there is a risk that they will completely lose their independence. After all, they will rely so much on technology that, over time, they will no longer be able to make decisions, organize their lives, or carry out a particular activity coordinated through their forces because...they have become lazy.

However, in the academic environment, young people have embraced with great joy the emergence of such a tool that facilitates their work and thus indirectly gives them more free time (Forman et al., 2023; Stöhr et al., 2024). Studies have shown that the use of these systems by students is frequent, even if some have raised problems related to compliance with ethical rules and equality in evaluation in the context in which not everyone has equal access to such resources (Cotton et al., 2024) or even the risk of affecting the rights of others through such use (Moise & Nicoară, 2024).

The specialized literature recognizes the usefulness of this tool - artificial intelligence - in the specific activity of education (Bai et al.,

2024), whether we are talking about its use by teachers or students. Any of the participants in the act of education can find real benefits in this tool that can make work easier, facilitating the identification of resources access to them, which can generate text, correct grammatically, translate, construct text, images, graphics, provide solutions, to answer questions, etc.

The advantages of such a tool are obvious since a long time spent on documentation, searching for resources and materials, systematizing them, summarizing, and even extracting essential ideas can be saved.

However, how such a system can be used must be taken into account, primarily since the regulations at the level of universities in Romania do not specifically provide for this aspect, and it is certain that negative consequences may occur on the rights of individuals, as we will show.

But what is provided for in the norms that are beginning to be developed in AI use?

In the law, fundamental research is defined as experimental or theoretical activity carried out mainly to acquire new knowledge regarding the foundations of observable phenomena and facts without particularly aiming at immediate practical application or use (point 1 of the Annex to Government Decree no. 57/2002 on scientific research and technological development – Official Gazette no. 643/30.08.2002 with subsequent amendments).

The Higher Education Law refers to university scientific research. It indicates that this "includes scientific research proper, artistic creation and activities specific to sports performance in higher education institutions" (point 16 of the Annex to the law) without further details.

From these two notions, it follows that the research activity is carried out to obtain new knowledge in a specific field based on a theoretical or experimental activity that confers a certain degree of originality to the obtained result.

According to O.G. no. 57/2002, the result of the research can be represented by documentation, studies, works, plans, patents, certificates of registration of industrial designs and models, technologies, processes,

IT products, recipes, formulas, methods, physical objects and products made within the framework of a contract, collections and databases containing analog or digital recordings, historical sources, samples, specimens, photographs, observations, rocks, fossils and the like (art.74 para.1).

Among these, concerning the specifics of the university environment, as far as the student is concerned, the result of the research activity must materialize in a final paper that is publicly defended to obtain the intended legal consequences, namely the acquisition of graduate status. In contrast, for teaching and research staff, any of the results mentioned above can be capitalized on and reported for the fulfillment of their professional obligation.

A large part of these results can also be obtained using artificial intelligence systems, so, given that the law says nothing, it becomes necessary to determine whether and to what extent such a system can be used so that the result generated with the help of AI can be used to produce legal effects?

At the European level, regulation accepts the use of AI systems. However, in all cases, humans must be the core of attention (AI Act), i.e., an anthropocentric treatment is necessary not to give AI systems a power that can no longer be limited later. They must somehow remain a tool that helps humans in their activities, not to replace them. As for higher education, European law excludes high-risk systems if they are intended for activities indicated in point 3 of Annex III of the Regulation. These include AI systems designed to guide the learning process of individuals in educational and vocational training institutions at all levels. Only the learning process is considered, without reference to research activity, the regulation of which is thus left to the discretion of universities, including from the perspective of the use of AI.

Therefore, as follows from Regulation No. 2024/1689 (paragraph 1 of the Preamble – "adopting trustworthy and human-centered artificial intelligence (AI)"), the European legislator was concerned with protecting human beings, thus showing that the use of AI can be controlled depending on the degree of risk that the systems proposed to

be introduced on the market pose about the fundamental values of the individual (paragraph 96 of the Preamble, art. 27 of the Regulation).

However, not all authors believe that regulation for the control of AI systems is welcome, given that it could hinder technological development (Mueller, 2025).

The ethical and deontological norms enshrined in the law on higher education do not refer to artificial intelligence or other systems or models that may or may not be used but only impose certain conditions for the activity of research, communication, publication, dissemination, and scientific popularization, carried out in the academic environment (art.168 para.1 and 2). From this, no prohibition of the use of AI can be inferred; on the contrary, being a significant technological innovation, the academic environment must be interested in its use under the conditions in which it can ensure scientific progress.

The use of AI systems in academia cannot be denied; being a reality, this situation determines the need to approach it most seriously, first at the regulatory level and then by establishing good practices for their use, given that they not only present advantages but also raise some problems, mainly due to the lack of transparency regarding how they work (Basic, 2023)

In scientific research, the law of higher education requires the work to be original, not plagiarized, and, at the doctoral and habilitation levels, relevant to the scientific world in the respective field.

Thus, in addition to originality, the law of higher education also refers to the relevance of the research in direct connection with the progress of knowledge and the socioeconomic environment (the doctoral thesis must reveal original scientific understanding, which must be internationally relevant, and for the habilitation thesis, it must present the relevance of academic, scientific and professional contributions).

It cannot be concluded from this that other works (dissertation, bachelor's degree, articles, etc.) must not be relevant. On the contrary, any research activity in the academic environment must pursue the progress of knowledge (Tabacu 2024, deviations).

In this context, it turns out that academic community members are concerned with writing original and relevant research papers. Still, sometimes, the idea for a particular topic is not easily discovered, and a tool like AI could help. Then, collecting data, information, and materials, a complex and even expensive activity, can be made easier using the same AI system. Systematization, summarization, extraction of main ideas, translation, etc., can be achieved using AI in a much shorter time than the classical method. After identifying and reviewing the sources, the paper is written.

Can AI do it? YES, but...

The fact that an AI system has the ability to solve, write text, correct, translate, write code, develop photos, images, film, etc., in a much shorter time than the classical method reveals its advantages, but the disadvantages must always be seen.

Two issues concern the work created with AI:

Is it original in the sense of the law? Who is the author, or to whom does it belong?

The specialized literature has analyzed this situation starting from the idea that only a human person can be an author (COPE, 2023; Visoiu, 2025) and that a minimum human contribution must consistently be recognized, without which AI cannot generate new content (Fenwick & Jurcys, 2023) and reaching the possible recognition of the authorship of AI as the holder of personal non-patrimonial copyrights (Gorraiz, 2025; Hwang et al., 2025), given that it is even recognized as a subject of distinct law (Kurki, 2019).

Therefore, an important aspect is the authorship of creations generated by AI, which is closely linked to copyright infringement by AI.

The questions concerned the link between the result obtained by using an AI system and the system's owner, its user, the manufacturer of the AI system, or the one who develops or modifies it and trains it (Fenwick & Jurcys, 2023).

In the specialized literature, researchers have analyzed a multitude of variants, proposing solutions, noting that it is difficult to establish with certainty that AI could have the authorship of the work in the context in

which the human factor is at the basis of the creations used for learning and the concrete use of the system a human is also needed (Fenwick 2023). It has been proposed, for example, to introduce a license for using pre-existing data. It works for machine learning purposes by AI systems in order not to discourage innovation and AI development and, at the same time, not to marginalize the role played by humans in the act of creation using AI (Geiger & Iaia, 2024).

The AI system itself cannot be liable since, to discuss the quality of authorship, it must have a legal personality, which will be challenging to recognize in the conditions in which the AI system is not sensitive, does not realize the process, and the result, but this personality could be identified only formally, to regulate issues related to responsibility, to cover possible damages caused to other people (Kurki 2019).

Therefore, we must consider that the author is human even when his contribution to the AI system used to create a particular work is minimal.

It is also essential to determine how a generative AI system uses pre-existing data through content generation, as first there is the issue of acquiring it, then processing and training on this data, which may be protected by copyright or represent personal data.

Data acquisition is carried out from the public system, from the internet, being extracted by AI content generator providers through web scraping tools, which involves digital reproduction of web content, extraction of raw data, transformation into a format suitable for AI training and storage of the data thus structured for preprocessing (Huang & Chen, 2025). After data extraction, they are transformed into symbols or tokens (tokenization) in the sense that the collected works receive a word or part of a word, being prepared for training. The specialized literature shows that in this phase, the AI model reproduces works in a completely distinct format (tokens), which are incomprehensible to humans and are essentially different from the original work used (Bridgelall, 2024) extracted from the internet. The training aims to ensure that the result is as close as possible to the desired one. In this phase, the model encodes the training data into a mathematical representation and

then decodes the mathematical representation and generates new data that is analyzed, the difference from the desired result being communicated to the model, which is exposed to a new round of training (Oh & Zhang, 2022). In the content generation phase, the user gives specific instructions to the content-generating AI model. It encodes the message and through various techniques (it is mapped to a specific vector representation within the latent space and subsequently, based on the input vectors and the optimized parameters learned during the training phase, the model infers the output vectors, decodes them by transforming them into a meaningful sequence of tokens) finally delivers the output text (Huang 2025).

In this process, it is claimed that sometimes the result provided by the AI model resembles the original work used as input data before training (Huang 2025), which means that similarity is possible without it being revealed to the user by the respective model. This aspect affects copyright (reproduction, distribution).

Another problem comes from the fact that the model does use not only the data received as training data but also data provided by the user himself, who aims to receive a specific result and who is not careful about what he uploads to the system so that the data in question can still be used by the AI, without the person who uploaded it being able to recover it.

Regarding the result obtained using an AI system, the issue of respecting the copyright of those who developed the materials used as training data or provided by the user was raised (Quintais, 2025).

The insufficient regulation of copyright rules was observed (Watiktinnakorn et al., 2023; Yang & Zhang, 2024), the possible violation of copyright (the right to authorize the reproduction of the work) by "using, for machine learning, without authorization, the data that subsists in copyrighted works" (Buta, 2025), but also by the outputs that such a system provides, in the context in which it uses protected works, without authorization in this regard (Al-Busaidi et al., 2024).

Also, the risk of violating the obligation to protect personal data has been observed (Gimpel, 2023; Novelli et al., 2024) when, on the one

hand, the system is provided with such data for learning and, on the other hand, by users who upload such data erroneously or knowingly.

At the university level, one of the problems that may immediately arise is related to the author's contribution to the preparation of the respective work since it must belong to the person who declares or presents it as a research activity and not to an artificial intelligence system, which cannot be the holder of rights (Dutu, 2025) and, consequently, of copyright (Novelli 2024, p. 12), even if only of non-patrimonial ones.

It is certain that a work prepared exclusively by the AI system, not reviewed, revised, or censored by the human person who presents it as the result of his activity, does not meet the requirement that the respective work be his own to produce specific legal effects. Similarly, ghost authors (writing done by a person other than the one using it – (Popescu, 2018) or various borrowings from other unreported works (plagiarism – (Rughiniș, 2018) are equally reprehensible situations in specialized literature when we discuss title and originality.

When the contribution of the AI system is not exclusive, the human uses his work using only materials systematized, summarized, extracted, or identified by such a modern technology tool. The final work can be considered as belonging to the human subject since the respective system served only as an assistant in research activity, the data being compiled, interpreted, and put together by the author.

It is not the percentage of contribution that should be considered essential since, as in the case of plagiarism, a regulation that provides for a specific size of the loan is neither feasible nor viable since the effective contribution of the author is determined differently depending on the total volume of the resulting work (Popescu et al., 2018).

Significant will be the operations that can be considered to belong to or are performed by a human using artificial intelligence technology. Exploiting the respective work must be excluded when the individual does not make a concrete contribution to the result. Here, we consider that how the question was asked, or the problem was formulated is not enough to feel the paper as a result of human work if only one such

procedure takes place. But when a first result is reanalyzed, reintroduced into the AI system, and the new result is again censored, modified, and adapted according to the need justified by the human author, the result can be considered to be a labored one, even the original since the consecutive censorship applied to the material determined the emergence of a unique work (Fenwick, 2023), which is the result of human intervention.

In this context, it must be considered that the result of the use of AI may affect copyright if there is no authorization regarding the use of the data in question. The European legislator indicates that "any use of copyrighted content requires authorization from the right-holder in question, unless relevant exceptions and limitations to copyright apply" – para 105 of R (EU) 1689/2024. Here, Directive (EU) 2019/790 provides for exceptions that allow reproductions and extractions of works or other protected subject matter for text and data extraction, and even if rightsholders can choose to reserve their rights over their works, they cannot do so if the use is for scientific research.

However, failure to fall within these exceptions concerning the data used as training compared to the result obtained may make the latter not original since it overwhelmingly resembles the source.

Conclusions

The usefulness of AI tools cannot be denied in scientific research, given that it is certain that they facilitate the certain activity of identifying sources, summarizing, extracting ideas, generating text, images, even sound, translation, text correction etc.

However, their use may result in the violation of the rights of other persons concerning the creations over which they justify copyright or about personal data, which must be protected, especially in the online environment.

In the context when an AI system cannot be considered an author, the research work carried out with its help can be considered as original only if the AI contribution is not substantial and, then, if the "owner"

human polishes the result given by the AI, in the sense of verifying the sources, citing them correctly, removing similarities with other works or works that inspired the AI system in its "creative" activity.

References

Al-Busaidi, A. S. et al. (2024). Redefining boundaries in innovation and knowledge domains: Investigating the impact of generative artificial intelligence on copyright and intellectual property rights. *Journal of Innovation & Knowledge*, *9*(4), 100630. https://doi.org/10.1016/j.jik.2024.100630

Bai, Y., Kosonocky, C. W. & Wang, J. Z. (2024). How our authors are using AI tools in manuscript writing. *Patterns, 5(10)*, 101075. https://doi.org/10.1016/j.patter.2024.101075

Basic, Z., Banovac, A., Kruzic, I. & Jerkovic, I. (2023). *ChatGPT-3.5 as writing assistance in students' essays. Humanit Soc Sci Commun 10, 750.* https://doi.org/10.48550/arXiv.2302.04536

Bridgelall, R. (2024). Unraveling the mysteries of AI chatbots. *Artificial Intelligence Review, 57*(4), 89. https://doi.org/10.1007/s10462-024-10720-7

COPE. (2023). https://publicationethics.org/guidance/cope-position/authorship-and-ai-tools

Cotton, D. R. E., Cotton, P. A., & Shipway, J. R. (2024). Chatting and cheating: Ensuring academic integrity in the era of ChatGPT. *Innovations in Education and Teaching International*, *61*(2), 228–239. https://doi.org/10.1080/14703297.2023.2190148

Dutu, M. (2025). Towards the fourth category of human rights, human rights regarding artificial intelligence? – For an international pact on new rights for the AI era. *UJ Premium*. https://www.universuljuridic.ro/spre-cea-de-a-patra-categorie-de-drepturi-ale-omului-drepturile-umane-privind-inteligenta-artificiala-pentru-un-pact-international-relativ-la-noile-drepturi-ale-erei-ia/

Fenwick, M., & Jurcys, P. (2023). Originality and the future of copyright in an age of generative AI. *Computer Law & Security Review*, *51*, 105892. https://doi.org/10.1016/j.clsr.2023.105892

Forman, N., Udvaros, J., & Avornicului, M. S. (2023). ChatGPT: A new study tool shaping the future for high school students. *International Journal of Advanced Natural Sciences and Engineering Researches*, *7*(4), 95–102. https://doi.org/10.59287/ijanser.562

Geiger, C., & Iaia, V. (2024). The forgotten creator: Towards a statutory remuneration right for machine learning of generative AI. *Computer Law & Security Review*, *52*, 105925. https://doi.org/10.1016/j.clsr.2023.105925

Gimpel. (2023). Gimpel, H., Hall, K., Decker, S., Eymann, T., Lämmermann, L., Mädche, A., Röglinger, M., Ruiner, C., Schoch, M., Schoop, M., Urbach, N., Vandirk, S. *Discussion Paper, Unlocking the Power of Generative AI Models and Systems such as GPT-4 and ChatGPT for Higher Education*, *https://www.econstor.eu/bitstream/10419/270970/1/1840457716.pdf*.

Gorraiz, J. (2025). Acknowledging the new invisible colleague: Addressing the recognition of Open AI contributions in in scientific publishing. *Journal of Informetrics*, *19*(2), 101642. https://doi.org/10.1016/j.joi.2025.101642

Huang, W., & Chen, X. (2025). Does generative AI copy? Rethinking the right to copy under copyright law. *Computer Law & Security Review*, *56*, 106100. https://doi.org/10.1016/j.clsr.2024.106100

Hwang, Y., Shin, D., & Lee, J. H. (2025). Who owns AI-generated artwork? Revisiting the work of generative AI based on human-AI co-creation. *Telematics and Informatics*, 102266. https://doi.org/10.1016/j.tele.2025.102266

Kurki, V. A. J. (2019). The Legal Personhood of Artificial Intelligences. In *A Theory of Legal Personhood* (pp. 175–190). Oxford University PressOxford. https://doi.org/10.1093/oso/9780198844037.003.0007

Moise, G., & Nicoară, E. S. (2024). Ethical aspects of automatic emotion recognition in online learning. In *Ethics in Online AI-based Systems* (pp. 71–95). Elsevier. https://doi.org/10.1016/B978-0-443-18851-0.00003-2

Mueller, M. L. (2025). It's just distributed computing: Rethinking AI governance. *Telecommunications Policy*, *49*(3), 102917. https://doi.org/10.1016/j.telpol.2025.102917

Novelli, C., Casolari, F., Hacker, P., Spedicato, G., & Floridi, L. (2024). Generative AI in EU law: Liability, privacy, intellectual property, and cybersecurity. *Computer Law & Security Review*, *55*, 106066. https://doi.org/10.1016/j.clsr.2024.106066

Obreja, D. M., Rughiniș, R., & Rosner, D. (2025). Mapping the multidimensional trend of generative AI: A bibliometric analysis and qualitative thematic review. *Computers in Human Behavior Reports*, *17*, 100576. https://doi.org/10.1016/j.chbr.2024.100576

Oh, M., & Zhang, L. (2022). Generalizing predictions to unseen sequencing profiles via deep generative models. *Scientific Reports*, *12*(1), 7151. https://doi.org/10.1038/s41598-022-11363-w

Popescu, M. , S. D. , S. B. (2018). Plagiatul, în Deontologie academică, Curriculum cadru, Coordonator L.Papadima. In *Editura Universității din București, 2018, p.67*.

Quintais, J. P. (2025). Generative AI, copyright and the AI Act. *Computer Law & Security Review*, *56*, 106107. https://doi.org/10.1016/j.clsr.2025.106107

Rughiniș, C. (2018). *Plagiatul*, p.*7, sursă on line http://cursuri.sas.unibuc.ro/etica/wp-content/uploads/2018/12/Ce_este_plagiatul.pdf*.

Stöhr, C., Ou, A. W., & Malmström, H. (2024). Perceptions and usage of AI chatbots among students in higher education across genders, academic levels and fields of study. *Computers and Education: Artificial Intelligence*, *7*, 100259. https://doi.org/10.1016/j.caeai.2024.100259

Tabacu, A. (2023). Is your work original?. *Legal and administrative studies, no 2*. C.H.Beck.

Tabacu, A. (2024). Deviations in research activity. *European Union's Hystory, Culture and Citizenship XIII, Piteşti*. CHBeck. pp.560-572.

Visoiu, R. (2025). *Artificial intelligence and moral rights*. UJ Premium. https://www.universuljuridic.ro/inteligenta-artificiala-si-drepturile-morale/

Watiktinnakorn, C., Seesai, J., & Kerdvibulvech, C. (2023). Blurring the lines: how AI is redefining artistic ownership and copyright. *Discover Artificial Intelligence*, *3*(1), 37. https://doi.org/10.1007/s44163-023-00088-y

Yang, S. A., & Zhang, A. H. (2024). Generative AI and Copyright: A Dynamic Perspective. *SSRN Electronic Journal*. https://doi.org/10.2139/ssrn.4716233

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 302-324

INSOLVENCY - POSSIBLE TRANSPOSITION INTO INTER - AND TRANSDISCIPLINARY MODELS OF ANALYSIS

Ionel DIDEA[1]
ORCID ID: 0009-0008-9684-8490
Email: ionel.didea@upb.ro
Diana Maria ILIE[2]
ORCID ID: 0009-0009-2487-1648
Email: diana_maria.ilie@upb.ro
Paul DIDEA[3]
ORCID ID: 0009-0005-1861-390X
Email: notar.didea@yahoo.com
Affiliation: [1] University Professor, PhD, Faculty of Economics and Law, Politehnica National University of Science and Technology of Bucharest - Pitesti University Center, Faculty of Law - Doctoral School, Titu Maiorescu University, Bucharest, Romania
[2] Legal Adviser, PhD, Legal Department, Politehnica National University of Science and Technology of Bucharest – Pitesti University Center
[3]Legal Adviser, Professional Notary Society Didea Cornelia Narcisa and Didea Ionel

Abstract: *In the "world of high-class researchers", transdisciplinary analysis and the tendency of interconnection of disciplines and juxtaposition of theories has become a way of deciphering the mysteries and meanings "hidden" in the depth of words and theories, a way of creating, being and opening and "treading" new roads of knowledge, new directions of disciplines and sciences.*

Under the umbrella of these research aspirations, we can decipher new "echoes" and collisions of legal institutions such as insolvency, which is in turn in the tumult and "rustle" of the relentless process of transformation through the filter of artificial intelligence. Insolvency is itself a procedure that involves multidimensional approaches and perspectives, based on economics, management, legislation, culture, sociology, political impact and evolution of international law and the newer paradigm of new technologies. However, new technologies,

everything related to AI, blockchain, cloud computing, etc. cannot be investigated from a disciplinary perspective, but certainly involve penetration into both technical and legal, economic and social aspects.

Keywords: *insolvency; interdisciplinary/transdisciplinary research; digital economy; care economy; new business models; interference between branches of law; new visions in research and teaching.*

Introduction

Transdisciplinarity is about the attitude towards research, about the "magnifying glass" by which you choose to look at the researched material and to shape your own opinion, overcoming disciplinary barriers and borders and freeing the mind "constrained" by the traditional ideas of analysis and vision of a research. We are talking about another "kind" of thinking, with an unlimited and innovative outline. Rigor, openness and tolerance, however, remain fundamental characteristics of a transdisciplinary attitude and vision.

Of course, science plays a central role, and it is also science that has invoked precision in research for centuries, but the method of understanding the world proposed through transdisciplinarity requires a paradigm shift.

Through our research we aim to refer to insolvency law, a law that has reached the stage of remodeling in a global economic context, being permanently "imprinted" by international, Union and regional legal instruments, and, at the same time, a law that can shed light on this inter- and transdisciplinary dialogue, through which we open new horizons of analysis and vision, having the courage to resize the "legal architecture" and, why not, to develop new University study programs and to advocate, together with other researchers, for the creation of transdisciplinary university chairs. The idea of transdisciplinarity must also be transposed into the law and the curricula of the law field (Popa Tache & Seino Wiviurka, 2024).

If we try to put the institution of insolvency "under the magnifying glass" of inter-and transdisciplinary research, we will find that the whole

conglomerate of social, economic or political elements constantly "rolls" this "legislative snowball", context in which the classical branches of law are resized by acquiring mixed characteristics.

Moreover, the "magnitude" of technological transformation and innovations has led to profound changes in the global economic structure, affecting also the practices and legal framework associated with insolvency. It may even take a fresh breath to insolvency proceedings, making it imperative for insolvency practitioners to harness their capabilities effectively to "navigate" through complex financial scenarios. In any case, the field of insolvency is on the table of the discussions of the European fora for a future legislative amendment, as follows from the *Strategic agenda for the European Union (EU) for the period between 2024 and 2029, adopted by the European Council on 27 June 2024*,[1] all the more so as the Capital Markets Union becomes a key priority for the next European Commission.

Moreover, in addition to geopolitical frictions and successive economic crises, we are talking about the transition from the classical economy to the digital economy, characterized by e-commerce platforms, hybrid economy systems, virtual services, digital assets, digital information consumption, but also the role of Artificial Intelligence (AI) in the re-establishment of businesses, aspects that contribute to the modification of the global insolvency forecast.

We relate to different approaches even in the sphere of economy, where we consider interference with the social area, which results, for example, from what researchers call "*Care economy*" (Carrey, 2024, pp. 83-89), a concept that integrates two dimensions that conventional economics ignores. Here we are talking about a transdisciplinary perspective and consideration of the common good. Thus, beyond the purely economic dimension, this concept integrates new areas such as sociology, anthropology or political science, meaning in which one goes beyond classical economic theory, approaching philosophy based on solicitude and on concern and attention for the other.

[1] https://www.consilium.europa.eu/ro/policies/strategic-agenda-2024-2029/ .

Aristotle said that "*thinking in itself deals with that which is best in itself, and that which is thinking in the fullest sense with that which is best in the fullest sense. And thought thinks itself through participation in the object of thought.*" (Aristotle, 1965), quote that also crowned Hegel's work, *Philosophy of spirit.* In this work, Hegel outlined the idea of good as the highest form of thought, starting from the idea that good is the one that "binds", the one that gathers and preserves, merges. This aspirational philosophy seems to translate the vision *transdisciplinarity*, in the idea of interpenetration of different ideas, from different fields, which are not excluded and which do not generate "a source of disorder" in science.

Incidentally, the transdisciplinary chair (Landier & Carrey, 2024, pp. 176-183) advocates a profound reassessment of values and priorities to ensure the survival and flourishing of both humanity and the planet. Contemplating the unique intelligence that pertains to the essence of people, spirituality and the divine spark within us, we could quote the late Pope Francis, who pointed out that it "allows us to look at things with the eyes of God, to see connections, situations, events and to discover their true meaning... it is a type of wisdom without which life becomes bland... such wisdom cannot be sought from machines" (Tan, 2025).

1. Transdisciplinary perspective - an approach *sine qua non* in insolvency matters. Developments in regulation

Beyond any philosophical speculation, a transdisciplinary legal thinking, opposed, moreover, to the specific rigidity of traditional disciplinarity, becomes an approach *sine qua non* of a "chameleonic" and dynamic field such as insolvency, where bankruptcy, judicial reorganization or restructuring become "sides of the same coin", the way of regulation at global or national level highlighting the various forms that this phenomenon can take but also its impact on the evolution of the economy.

Insolvency is still a controversial and topical subject that offers a broad spectrum of analysis, in an inter - and transdisciplinary manner.

Moreover, insolvency law is "metamorphosed" by other sciences and branches related to the sphere of economics, sociology, psychology but also other branches of law, by interfering with other domestic and international normative acts, such as labour law regulations, criminal law, civil law, civil procedural law, administrative law, public procurement, etc., which have left their mark on the evolution of the insolvency institution and have created new perspectives of analysis, new legal views, outlining, why not, a new law, a special, particular, self-contained law, that of insolvency, which transcends the boundaries of traditional branches of law, by incorporating social, economic, administrative, management factors.

Let us not forget that in order to give brightness to the research of the future, renowned researchers advocate the establishment of international chairs of transdisciplinarity in law (Popa Tache & Seino Wiviurka, 2024, pp. 90-134), evoking the dialogue between culture, technoscience, economics and law and the need to design a transdisciplinary legal curriculum adapted to fuse social, technological and ethical considerations.

Insolvency is a transcendent matter that has transcended the boundaries established between traditional branches and systems of law and which it has evolved remarkably throughout history and up to the present day, being indeed a result, a product of the intertwining of legal, social, economic factors, which move towards an autonomous law that has filtered its own principles and functioning procedures (Ilie, 2021). We must admit that insolvency can turn into a viable mechanism of "resuscitation" of the economy, a survival mechanism against budgetary imbalances, which is why it has also been and is at the centre of interest of national, Union and international bodies.

Moreover, the accelerated legislative expansion enjoyed by the insolvency field, expansion outlined from a multitude of social, economic and financial perspectives, led to the creation of a complex system of legal norms. This normative corpus has "endured" numerous transformations under the pressure of globalization, but also under the pressure of the domino effect of the economic crisis, such as

unemployment, refugee crisis, security and citizens' rights, subjects of interest in the implementation of strategies by the European Union bodies.

The institution of insolvency has emerged as a complex, multidimensional and harmonized legal "product" with the current reality, after going through a "thorny" road of "ageing", from disciplinarity, to interdisciplinarity and transidisciplinarity, cultivating an integrative style and trying to overcome the boundaries of traditional disciplines, the boundaries between public and private law. Thus, at present, insolvency transcends the boundaries of civil law, commercial law, by integrating and intersecting with norms of public interest, with an emphasis on the reorganization, recovery, rehabilitation part, as procedures that extend especially towards the direction of safeguarding the subjects involved.

Thus, the essence of the modern normative purposes of insolvency for all subjects of law to which it is addressed remains the identification of a balance between the interests of the debtor and those of the creditors, through their constructive harmonization, which is reflected in the judicial reorganization regulated by Law no. 85/2014 on insolvency prevention and insolvency procedures, financial recovery according to GEO no. 46/2013 on the financial crisis and insolvency of administrative-territorial units, approved by Law no. 35/2016, as well as the well-deserved fresh start granted to natural persons, as regulated by Law no. 151/2015 on insolvency of natural persons.

We cannot deny the economic prevalence, as an essential characteristic of insolvency, which transforms it into an institution permanently connected to the requirements and socio-economic changes, such as the emergence of an economic crisis. Moreover, the specialists point out that "in an environment of economic and social life characterized by interconnection and interdependence, the enterprise/business is not a mere competitive vehicle, but also a vital centre, around which revolve a multitude of interests, other than those of the entrepreneur", that is why, viewed globally, the enterprise of the insolvent debtor can represent both a job, a taxpayer to the State budget,

a commercial partner, a source of income and profit for shareholders, etc., all this leading to the acceptance of the idea of compromise and general sacrifice.

Thus, considered to be a cross-cutting area of civil law, insolvency law must strike a "delicate" balance between the legitimate interests of creditors and debtors, as well as between those of different types of creditors, and an effective insolvency law should help to quickly and efficiently liquidate non-viable firms and restructure, in insolvency proceedings, viable firms.

We must point out that the traceability of uniform insolvency rules at European and international level, in an attempt to create economic performance, proved to be a real challenge, the development of concrete strategies for financial recovery and economic recovery becoming perhaps the most claimed object of research and analysis in the last 3 years.

2. Interference of insolvency law with other branches of public and private law

Among the great challenges of insolvency law we find the fact that it greatly interferes with other legislative areas, while being strongly influenced by EU and international law. For example, the unique manner in which insolvency law "invades" the governing principles of common law such as freedom of contract, obligation and irrevocability of contracts concluded by the insolvent debtor before the opening of the procedure, demonstrates once again the specificity of the insolvency matter and its prioritization in the national law system, given the degree of intrusion on legal relations and placing the analysis of civil law and contract in the background by virtue of the declared economic objective of general interest of insolvency.

Moreover, the doctrine characterizes insolvency as the - *rebel daughter of the Civil Code* - this one managing to shape the norms belonging to the other branches of law, the principles and the stable, unattainable elements of the Civil Code or the Labour Code, which in the

interference with insolvency behave totally differently. In this sense, very eloquent and interesting becomes the doctrinal statement in the sense that "*the opening of insolvency proceedings is but the beginning of a procedure built of paradoxes and riddled with defies of the principles of law that seemed to last an eternity. Contracts having equal force to the law crumble with incredible ease or become malleable in the interests of the debtor*" (Turcu, 2006, p.442).

Therefore, in the field of insolvency, the analysis of the incidence or application of certain rules of law in the field of civil law, labour law, administrative law, tax law, etc., passes in the subsidiary plan by virtue of the economic objective and the favouring of the patrimonial value, which this time claims a character of general interest and primes a particular interest, such as that of a single creditor, context in which the economic philosophy governs in the sense of safeguarding the enterprise and the economic environment in general.

Consequently, in the analysis of any confluence between insolvency law and other branches, institutions of law, it is necessary to identify an optimal framework of compatibility, so that insolvency achieves its purpose as a special law, with a strong degree of specificity resulting, on the one hand, from the economic elements that characterize it, and, on the other hand, from the social elements that began to reform it, and that make insolvency a dynamic institution permanently adapted to socio-economic realities.

Indeed, the common law and the insolvency law interact and influence each other, but insolvency enjoys a special legal regime, since the legislator has created the necessary levers to save the insolvent but still viable debtor, using in this respect the contractual relations created by them before the opening of the proceedings. At the same time, we must take into account the new principles, which visualize the contract in the sense of a more flexible link between the contracting parties, principles designed to govern the new theory of contract law: the principle of contractual equality, the principle of contractual balance, the principle of contractual fraternity, the principle of social utility (and the principles deduced: the principle of legal certainty and the principle of

freedom and responsibility), but also the demonstrative principle of contractual solidarity.

Such a novel approach was shaped by an insolvency analysis passed through the filter of the rights and interests of all "actors" on the insolvency scene, the result being the development with priority of measures and procedures to rescue the debtor in financial difficulty by reintegrating it into the economic circuit, in order to contribute to the "healing" of the economy through honesty and innovation. In addition to being an instrument intended to save the debtor, insolvency also becomes the "realm" where law intersects very deeply with the economic phenomenon. Therefore, this field involves a hybrid legal construction, which also involves viable and sustainable economic mechanisms so that the rules of law can have concrete finality.

What is the place of insolvency law in the Romanian law system? This question can be a starting point in the analysis of the compatibility issue, given the coercive nature of the legal conduct imposed in the insolvency matter, a character that must be preserved regardless of the completion of the other rules of law in the matter.

At the legislative level, the solution of compatibility between the insolvency procedure and the common law is regulated only by the provisions of art. 342 of Law no. 85/2014, which may give rise to multiple and complex interpretations: "the provisions of this law are supplemented, insofar as they do not contradict, with those of the Civil Procedure Code and the Civil Code". Considering the fact that currently insolvency is an institution harmonized with the monist system implemented by the new Civil Code but correlated, at the same time, with the principles promoted at the level of the European Union, admitting that the recipients of insolvency matter are no longer limited to professional traders,[1]and starting from the idea that commercial law has

[1] The expanded scope *ratione materie* and *ratione personae* of the insolvency law, regulated by Law no. 85/2014, establishes that the provisions of this law apply, in principle, to any professionals, natural or legal persons, as defined by the new Civil Code:

lost its autonomy and existence, we can say that insolvency has turned from an essentially commercial institution into an institution of civil law, once the Commercial Code was absorbed by the Civil Code.

In this context, a specific commercial institution, such as bankruptcy, has turned into a new special law - insolvency law, which enjoys the existence of its own principles found in its entire structure, procedures and own resources for excluding and filtering rules coming from outside specific to other branches of law. Taking into account all these aspects we tend to outline a special insolvency law, which is indeed complemented by the provisions of the new Civil Code, insofar as they do not contradict.

At the legislative and jurisprudential level, we encounter a primary concern in trying to find and identify the best balance between the "own exigencies of each branch of law and the imperative of insolvency law" (Turcu & Szombati, 2012), but in confronting the common law of contracts with insolvency law, the common law is evinced by the expansionism that characterizes this revolutionary matter in evolution and regulation.

The doctrine refers to two perspectives regarding the field of interference between the insolvency procedure and the civil procedure, with the mention that the rules of reference to the common law regulated by art. 342 of the insolvency law are incomplete and make it difficult to identify in practice this compatibility, creating a certain "zone of uncertainty" of the law, as follows: the application of the civil procedure in insolvency, without a correct determination, can affect the essential characteristics of the insolvency procedure and the purpose of the legal

---

"(1) The provisions provided by this law apply to professionals, as defined in art. 3 (2) of the Civil Code, with the exception of those who exercise liberal professions, as well as those in respect of which special provisions are laid down regarding the regime of their insolvency.
(2) The procedure provided by this law shall also apply to the autonomous regions.
(3) The procedure provided by this law is not applicable to units and institutions of pre-university education, university and entities referred to in art. 7 of Government Ordinance no. 57/2002 on scientific research and technological development, approved with amendments and completions by Law no. 324/2003, as amended and supplemented".

norm of substantive law, and the lack of procedural completeness rules in insolvency may generate a vacuum in the functioning of the envisaged norm, which again leads to the lack of finality of the legal reasoning thus built (Deli Diaconescu, 2019).

In relation to these aspects, we consider that this interaction of insolvency with the common law and the modelling of the latter in an almost unique way at the normative level, can only represent a justified "alteration" of the established guiding principles, this vocation earned by insolvency law to the common law by virtue of clear reasoning and specifics can be defined as "rights earned to insolvency" (Deli Diaconescu, 2019).

Therefore, at the doctrinal level, two essential rules of interaction between these two subjects have been identified. If an express procedural law rule in insolvency matters is identified, an analysis of compatibility with common law becomes unnecessary. Thus, in the absence of such an express regulation and in the event of the need to identify a norm to supplement with the norms of the common law, when there is a gap in the insolvency matter in the resolution of a case, the compatibility analysis is carried out by means of the reference rule.

In other words, the rule of law specific to insolvency will attract in its regulatory sphere other rules of law, which through interconnection with the insolvency procedure can be neutralized and adapted to its specificity. More specifically, a common law rule is considered compatible with insolvency law as long as it does not go beyond the scope and limits allowed by the latter. Moreover, in a global, general, objective view, according to the general theory of law, general rules, such as those related to the common law, "are only virtualities that, depending on the concrete play of particular situations and depending on their specifics, automatically undergo alterations or implicit changes...the general rules are also constantly subject to reasoning, in order to remove all the consequences that they entail and that may interest at a given time... by themselves they are imperfect and insufficient" (Djuvara, 1995).

In violation of the common law principles, the legislator opted for special regulations that would provide levers of economic recovery of the viable debtor, with positive effects on the entire social-economic circuit and flow, objectives that developed and shaped dynamically and inevitably in the national and international economic context.

Sometimes, the common sacrifice is less felt compared to the individual sacrifice, the more so as the satisfaction of a common sacrifice is that of relaunching the national economy, since a bankruptcy can trigger chain bankruptcies, while a successful reorganization can lead to the stabilization of the entire business chain but also to the development of other entrepreneurs.

Moreover, one cannot invoke the emergence of a "parallel civil law", since we are in the presence of express and limiting exceptions provided by law. Furthermore, in the literature (Popa Tache, 2002) it was stated that "the principles of law are the fundamental prescriptions that characterize the creation of law and its explanation, but are subject to an internal dialectic and an external one. Internal dialectics concerns the set of internal links characteristic of the legal system, the interference of its component parts, while external dialectics concerns the dependence of principles on the set of social conditions, on the structure of society". Therefore, in its regulation, law cannot evade external dialectics, namely social conditions and needs that often influence and subordinate standard principles of law.

As regards the intervention of the criminal law in the sphere of insolvency procedure, which in turn includes many forms of special civil liability, we cannot fail to note that although the intervention of the criminal legislator is obvious, by incriminating facts in direct and mandatory connection with insolvency, it is minimal compared to the regulations of the past. If we look back, in Roman law, for example, any trader who found themselves unable to honour their obligations was subject to penalties of a civil nature, but also of a criminal nature, regardless of whether the reasons were purely objective. Or, the first restrictions of the intervention of criminal law in the field of insolvency appeared only in the 16th century, and now we are witnessing the

approach under a new vision of the phenomenon of insolvency, respectively of discouraging the stigma of bankruptcy and practically of rarefaction of the incriminated facts.

We must point out that the premise on which the insolvency procedure is based is precisely the good faith of the debtor and of the other participants in the procedure, a context in which neither the criminal legislator appreciates to intervene, even in the situation when the creditors do not fully recover the claim and the debtor fails to implement a reorganization plan. Or, the criminal law represents an additional protection of creditors against debtors who use fraudulent means in connection with the insolvency procedure or, moreover, use in a fraudulent manner the rescue levers offered by the insolvency institution. The special tort liability regulated by the insolvency law is supplemented by the criminal liability under the criminal law, related to the offences on simple bankruptcy and fraudulent bankruptcy.

Interference imposes an interdisciplinary view by the fact that although the notion of insolvency is regulated in art. 240, respectively 241 Criminal Code, being able to take into account a particular meaning of the notion from the perspective of criminal law, these crimes refer to a field of law of its own, special, operating with its own notions and its own terminology, each of the incriminations having an indissoluble link with the notion of insolvency. Moreover, for certain legal notions used in the constitutive content of certain offences, the criminal legislator felt the need to take over the definition already existing within other branches, law institutions. A problem debated at a doctrinal level is the determination of the extent to which criminal law can fully take over the definition of insolvency enshrined in the special law, putting into question the very need to adapt the definition in order to achieve the meaning of incrimination according to the will of the legislator.

3. The economic versus social dimension of insolvency

The new vision is somewhat detached from the purely economic dimension of insolvency, as configured in the past, by integrating into its

structure the side, the social dimension and the gradual elimination of that personal stigma attributed to the honest or not debtor. By its specificity, however, insolvency maintains a close and balanced link between the economic dimension and the social dimension, respecting the principles of business ethics, without destabilizing the civil and commercial legal circuit. Focusing on "second chances" for distressed debtors is a reflection of the European Commission's communications calling on Member States to encourage second chances for the debtor, in the sense of supporting business restructuring at an early stage, as well as facilitating the adoption of a reorganization plan towards honest, viable debtors.

The interaction between the economic sphere and the social sphere that characterizes insolvency implies a balancing of the two sides that complement and reject each other in certain circumstances, a balance that is shaped by the ethical harmonization of divergent, polar interests, such as those of employees with those of entrepreneurs, citizens with those of governors, consumers with those of professionals. We cannot deny that all these social categories, although polar, enjoy interests and values that become common and intertwine at some point, beyond the relations of competition being some relations of cooperation, which should favour the regulation of a harmonious and stable social climate, through common sacrifices, through the development and awareness of the need for social responsibility, overcoming those economic barriers that often concern only profit.

Moreover, in the social aspect we also speak of the convergence between the economic dimension, specific to insolvency law and the social dimension, specific to labour law, this "rivalry" between the special rights outlined in the economic and social fields having to be annihilated. A balance can only be achieved through mutual sacrifices and compromises, through an open and flexible law, the reverse of the intangibility of the legal matrix of laws enshrined in labour legislation being the impossibility of economic and social progress (Didea, Duminică & Ilie, 2018). In terms of social impact, insolvency reforms

designed to encourage debt restructuring and internal reorganisation help to maintain jobs.

Furthermore, touching on the area of interference between the field of labour law and insolvency law, which highlights perhaps the most social dimension of insolvency, we find that there is a prioritization of the social character in the insolvency procedure, by focusing the national and Union legislature on measures to guarantee wage rights and social insurance rights, as well as on the protection of employees' rights in case of transfer of enterprise, business and dismissal.

In this context, employees of insolvent employers enjoy a preferential legal regime, salary claims reflecting a strong social component that, in contraposition with the other claims of the debtor, includes special labour law norms – the Labour Code, special norms for harmonization and implementation of European Union law, such as Law no. 200/2006 on the establishment and use of the guarantee fund for the payment of salary claims, in balanced interference with the special norms on insolvency procedure regulated by Law no. 85/2014. At the same time, the insolvency legislation incorporates in perfect balance the protection of pension rights in the insolvency procedure, as well as the protection of employees in the case of the transfer of enterprises made in the context of the transferor's insolvency, being outlined a specific legal regime for the dismissal of employees in the insolvency procedure.

This "rivalry" between the special rights outlined in the economic and social fields must be annihilated, erroneously considering that social policy is an opponent of economic policy. Or, the social dimension must be anchored in economic reality and vice versa, due to the interdependence of the two sides in an open democratic system.

Putting into light all these aspects, we find that at present, the insolvency institution presents new valences, we can call them valences of equity, which somewhat rebalances the position between the economic dimension and the social dimension of this institution, since the modern normative purposes provide for supporting the continuation of the debtors' activity, the preservation of jobs and the coverage of claims on the debtor, with an emphasis on amicable procedures of renegotiation of

claims, reorganization procedures, recovery, the rules governing the procedures for preventing insolvency and insolvency thus acquiring a manifest social character.

4. Insolvency from a psychological perspective

People who go through such an experience, whether they are natural persons debtors, whether they are administrators of legal persons debtors, or whether they are employees, encounter numerous inner "turmoils".

We wonder: *What is the psychological impact on them? What would be the effects of the financial, economic crisis on human behaviour? How does insolvency affect their ability to work? How do the effects of a gradually unbalanced economy affect society and people who have experienced the consequences directly, people who have lost their jobs or lost their home or retirement savings, or even people who have kept their jobs but felt insecure about their finances? How is a person who has come into contact with insolvency proceedings viewed in society and what will be their status?*

Considering that we still face the stigma of bankruptcy that is pervasive in modern societies, from China to Europe and the United States, the answers to these questions are not very encouraging. That is why we are talking about the stigmatization – restructuring interface, an indicator also identified in the OECD analysis, a balance being needed between them in order to function the philosophy of the second chance, as a reform in the structure of insolvency law. Stigmatization can affect not only consumers, but also entrepreneurs, directors and managers of companies, and ultimately also the enterprises themselves, as consumers, suppliers or creditors of such companies, also who change their position when facing bankruptcy.

The experience of the pandemic, followed by the concretization of the economic crisis, the war and the AI revolution, have further emphasized our desire to promote these ideas and have somewhat confirmed our need to emphasize this indisputable link between the

social dimension and the economic dimension of insolvency, which is a reality that we should not shy away from, the "rescue culture" through the insolvency procedure being claimed at present by society itself, through the need to relaunch and reset.

We believe that this perspective of granting a second chance to the debtor in financial difficulty becomes a reality, which is presented to us more than ever and is a second chance for Romania, a country where social and economic challenges are becoming more complex, an effective approach to the law institutions, such as insolvency, becoming essential for reactivating the levers of economic and social progress.

5. Insolvency – "chameleon" subject in the "assembly" of an inter- and transdisciplinary curriculum of university study programs

Transdisciplinarity represents the highest degree of integration of a curriculum, and the current context claims such a vision not only at pre-university level, but especially in university education.

Such an approach, indeed, of depth, refinement and "mastery" in interpretation and understanding, must not only remain a "facet" of research and a way of life of certain researchers, but must be slowly and surely "planted" in the consciousness of the new generations, forced by circumstances to adopt a behaviour of adaptation to the new in a lightning-fast way, unlike previous generations.

As recently stated by OECD experts, "*the curriculum cannot be imposed from above, implemented in isolation, but must be continuously developed, refined and assumed by those who put it into practice daily in classes*" (Florea, Paulo Santiago, OECD, 2025), meaning that it is necessary to overcome rigid content transmission, learning by heart, and traditional written tests.

We are at a time when we are forced to detach ourselves from education that has often followed a rigid and segmented approach, through information truncated into isolated fragments, being responsible for building a curriculum adapted to the needs of the future of humanity.

As Paulo Santiago, OECD representative, said, "*knowledge specific to each subject remains essential, but in today's world, true value and innovation come from integrated and transdisciplinary perspectives, from connections between ideas and the application of a wide range of skills to solve challenges*."[1]

Higher education in Romania also started the curriculum reform, the (r)evolution of study programs being generated by the scale and impact of artificial intelligence (AI). Thus, not only the exact sciences such as mathematics and computer science, but also the social ones such as law, are obliged to contribute to infusing and disseminating new technologies in everyday life or to shaping the principles that also apply to the laws that are emerging in the growth of AI, and this can only be achieved through an inter-and transdisciplinary approach.

In our view, insolvency could be one of the highly attractive legal institutions in reforming and "assembling" the current and future university curricula, through the various "facets" it offers for exploration, from the economic dimension and the social dimension, especially the procedures for preventing insolvency and the development of the culture of "second chance" given to honest debtors as a Union vision, the dimension of universalism, through what we call cross-border insolvency and the trend of legislative harmonization, the crystallization of the uniform principles and models proposed by the World Trade Organization, UNCITRAL, the OECD, the World Bank or the European Commission, to evoke it from the perspective of current challenges such as geopolitical conflicts, technological innovations, the digital economy and new business models, including the role of artificial intelligence in the success of insolvency practices and the prevention of business failures.

---

[1] Statements made by the OECD representative Paulo Santiago in the framework of the project "Strengthening the capacity of Bulgaria and Romania to design and implement curricular reforms and improve student learning outcomes" - https://www.edupedu.ro/paulo-santiago-ocde-curriculumul-nu-poate-fi-impus-de-sus-implementat-in-izolare-ci-trebuie-dezvoltat-continuu-si-asumat-de-profesorii-care-il-pun-in-practica-zilnic-in-clase /

Moreover, the glorious path of the insolvency institution, which in turn tends towards a stand-alone law, which has transcended the boundaries of commercial law and extended to natural persons and administrative-territorial units, a law in interference with the monist system implemented by the new Civil Code but trained, at the same time, in evolution, by the principles promoted at the level of the European Union, highlights it among the other law institutions.

An inter-and transdisciplinary research within a master's programme would thus allow the analysis of the transformative effects of artificial intelligence (AI) and digitisation on insolvency law and practice, in the context of global economic uncertainties and geopolitical transformations that have altered the way businesses operate and restructure and that have generated a steep increase in the number of insolvencies globally. We must consider uniform principles that facilitate cross-border restructuring, making it imperative to integrate AI-based solutions and create a culture of rescue that prioritises reorganisation, giving the honest debtor second chances and economic sustainability. The future of insolvency is set to be shaped by a combination of economic factors, technological progress and evolving regulatory frameworks.

Through such study programs dedicated to insolvency, the education will also contribute to strengthening a culture of negotiation and to educating consumers, investors, business participants about the advantages of insolvency proceedings, second chance policy and restructuring laws, which today target both individuals, professional traders and administrative-territorial units. In this sense, studying this subject becomes *a must have* of the university education system, which can obviously contribute to the elimination of the stigma of insolvency, which should be regarded as absolutely normal phenomenon in a society. The same recommendation was made by the World Bank in its personal insolvency report back in 2013, which suggested that "*debtors do not know the benefits of the system, they can overestimate the disadvantages and dangers of such a procedure, and a public campaign for education*

and awareness can correct wrong impressions about new rescue options".

For example, the Sorbonne enjoys a master's degree in restructuring and insolvency – "Administration et liquidation des entreprises en difficulté"[1] (ALED), which also constitutes one of the two avenues of access to professions regulated by administrators and legal representatives introduced by the Macron Law of 6 August 2015, as a concurrent method of the exam for access to these professions.[2] The law comes as an incentive to promote insolvency, restructuring frameworks and business safeguarding, with "echo" in the university curriculum.

This inter-and transdisciplinary "fan" that can be exploited by addressing insolvency will lead to the consolidation of attractive Master's degrees or even Bachelor degree programs, through a curriculum "anchored" in the current socio-economic context.

We could say that this is only the palpable beginning of inter- and transdisciplinarity, since all subjects will be studied in relation to the current real context. Transdisciplinarity will become a way of being of the human being, our way of studying, of us all, a way of researching and relating to everything around us.

Conclusions

Insolvency, as it is constantly shaping and resizing, seems to pay attention to interests above those of creditors, emphasizing social and distributive purposes, as well as values such as fairness and responsibility, going beyond the stage where the former maximizes the

[1] https://iej.univ-paris1.fr/entreprises-en-difficulte/master2/

[2] Law no. 2015-990 of 6 August 2015 for growth, activity and equal economic opportunities, known as the Macron Law, reformed the law of companies in difficulty and the new provisions also refer to the status of legal representatives (access to the profession, their remuneration and the conditions of their professional practice). Thus, the access to the position of judicial administrator has been simplified, among the requirements being the granting of a Master's degree 1 and Master's degree 2 in "management and liquidation of companies in difficulty", plus, of course, the conditions of experience or internship established by the regulation.

gain of creditors. Thus, insolvency tends more and more towards a "social" approach, as opposed to an "economic" one, which allows the rescue and justifies, at the same time, the rescue action based on a series of objectives and values.

Viewed from a transdisciplinarity angle, insolvency analysis allows an "assembly" of ideas both in social context, but also psychological and economic context. It is certain that the economy of the future will work "breathing" technological innovations, and the "wave of propagation" of these innovations will penetrate the codification of international, regional and national law norms, profoundly changing the nature of corporations, capital markets and the structure of the global economy, being reconfigured new regulatory paths that allow companies to adapt to "digital mixes" such as data protection, cybersecurity, emerging technologies, ethics, etc.

References

Aristotle (1965). *Metaphysics.* RPR Academy.

Dănișor Gh. (2024). *Justiție. Filosofie aspirațională.* [*Justice. Aspirational philosophy]*. ProUniversitaria.

Carrey, E. (2024). Economics of Care and Meaningfulness for an International Transdisciplinary Chair, in Popa Tache, Cristina Elena, Hubert Landier, Leonardo da S.G. Martins da Costa & Mariana Thieriot Loisel (eds.), For an International Transdisciplinary Chair. About the Dialogue Between Culture and Technoscience, *ADJURIS – International Academic Publisher*, Bucharest, Paris, Calgary, pp. 83-89, https://doi.org/10.62768/ADJURIS/ 2024/2/05 - https://adjuris.ro/books/fitc/5.pdf.

Deli Diaconescu, A. (2019). Analiza unor criterii de stabilire a compatibilităţii dintre insolvenţă şi procedura civilă, Partea I. *[Analysis of criteria for establishing compatibility between insolvency and civil procedure, Part I]*. *Phoenix Magazine*, no. 67.

https://www.unpir.ro/documents/phoenix/pdf/revista-phoenix-67.pdf.

Didea, I., Duminică, R. & Ilie. D. M. (2018). Interference between the insolvency law and the labour law. Convergence between interests - integrative vision. *JOLAS Magazine* no. 10/2018, pp 1-21, http://jolas.ro/wp-content/uploads/2018/12/jolas10a1.pdf.

Djuvara, M. (1995). *Teoria generală a dreptului. Drept raţional, izvoare şi drept pozitiv [General theory of law. Rational law, sources and positive law]*. All Restitutio.

Florea, R. & Santiago, P. (26 March 2025, OECD). The curriculum cannot be imposed from above, implemented in isolation, but must be continuously developed and assumed by teachers who put it into practice daily in classes - https://www.edupedu.ro/paulo-santiago-ocde-curriculumul-nu-poate-fi-impus-de-sus-implementat-in-izolare-ci-trebuie-dezvoltat-continuu-si-asumat-de-profesorii-care-il-pun-in-practica-zilnic-in-clase /

Ilie, D. M. (2021). Efectele insolventei asupra mediului economic si social din Romania în contextul globalizarii *[The effects of insolvency on the economic and social environment in Romania in the context of globalization]*. Universul Juridic.

Landier, H. & Carrey, E. (2024). A Transdisciplinary Chair in the Service of an Economy of Care and Meaning. *For an International Transdisciplinary Chair: From Knowledge to the Future*, Volume II, *ADJURIS – International Academic Publisher,* Bucharest, Paris, Calgary, https://doi.org/10.62768/ADJURIS/ 2024/4/12 - https://www.adjuris.ro/books/fitc_v2/12.pdf. pp. 176-183

Popa T., Cristina, E & Wiviurka E. S. (2024). Designing a Transdisciplinary Legal Curriculum Tailored to Fuse Social, Technological, and Ethical Considerations. Elevating the Voice of International Law. *For an International Transdisciplinary Chair. About the Dialogue Between Culture and Technoscience, ADJURIS – International Academic Publisher*, Bucharest, Paris, Calgary, https://doi.org/ 10.62768/ADJURIS/2024/2/06., pp. 90-134

Popa, N. (2002). *Teoria generală a dreptului*. *[General Theory of law]*.

All Beck
Tan, E. (2025). La intersecția dintre AI și spiritualitate, *apud* Ovidiu Predescu, Inteligența artificială, spiritualitatea, sacrul și religiile. *[At the intersection of AI and spirituality, apud Ovidiu Predescu, Artificial intelligence, spirituality, the sacred and religions]* - https://www.juridice.ro/essentials/9047/inteligenta-artificiala-spiritualitatea-sacrul-si-religiile .
Turcu, I. (2006). *Tratat de insolvenţă*. *[Insolvency treaty]*. C. H. Beck.
Turcu, I. & Szombati, A. (2012). Dreptul insolvenței. Fiica rebelă a dreptului civil. *[Insolvency law. Rebel daughter of civil law]. Mgazine of the National Union of Insolvency Practitioners in Romania "Phoenix"*, 40-41.
https://www.consilium.europa.eu/ro/policies/strategic-agenda-2024-2029/.
https://www.edupedu.ro/paulo-santiago-ocde-curriculumul-nu-poate-fi-impus-de-sus-implementat-in-izolare-ci-trebuie-dezvoltat-continuu-si-asumat-de-profesorii-care-il-pun-in-practica-zilnic-in-clase/
https://iej.univ-paris1.fr/entreprises-en-difficulte/master2/ .

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 325-341

JOINT AND SEVERAL LIABILITY IN INSOLVENCY PROCEEDINGS

Constantin Bogdan ION
ORCID[ID]: 0009-0005-1762-3620
E-mail: ion_bogdan_tom@yahoo.com
Afiliation: Universitatea Titu Maiorescu, Bucharest

Abstract: *Joint and several liability is regulated in article 169 of Law number 85/2014. The liability of the persons covered by the legal text, if their actions caused the debtor's insolvency, is subordinate to the purpose of the insolvency procedure, which is to cover the debtor's liabilities.*

Members of the management/supervisory bodies of the legal entity or any other person bear part of the liability or the entire liability not because they directly caused it to the detriment of the creditors, but because, by committing the acts described by the law, they contributed to the debtor reaching a state of insolvency, that is, that state of the patrimony characterized by the insufficiency of the funds available to pay the debts due.

Therefore, the liability is personal, tortious, which only occurs when, by committing any of the acts listed in the legal text, the debtor company has contributed to becoming insolvent.

Since it is a tort liability, in order to be engaged, the general conditions of tortious civil liability must be met, which arise from the content of Article 1357 of the Civil Code (illegitimate act, damage, causal link and fault), conditions that acquire some special connotations in this situation.

Keywords: *liability; insolvency procedure; debtor; creditors.*

Introduction

The Insolvency of Legal or Natural Persons, as understood by society and as governed by Romanian legal norms, is in fact a financial condition that prevents such persons from fulfilling their monetary obligations to creditors. It represents a de facto inability to meet current payment obligations.

In the specialized legal literature (Cărpenaru, 2016, pp. 714–715), it has been noted that insolvency and pre-insolvency proceedings aim to:

- maximize the realization of assets and recovery of claims by creditors;
- provide debtors with an opportunity for effective and efficient business recovery;
- ensure impartial and objective procedures;
- guarantee equitable treatment of creditors;
- ensure a high degree of transparency and predictability in the proceedings;
- recognize the existing rights of creditors and respect the statutory order of priority in satisfying claims;
- limit credit risk and systemic risk associated with derivative financial instruments;
- ensure access to financing during pre-insolvency, observation, and reorganization phases;
- provide a foundation for voting on the approval of the reorganization plan;
- promote negotiation and renegotiation procedures;
- enable timely realization of assets during bankruptcy proceedings; and
- ensure judicial oversight of the activity of insolvency practitioners.

This condition is not a subjective status to be determined by debtors or creditors at their discretion. Rather, the circumstances under which a person may be subjected to insolvency proceedings are strictly

and clearly regulated by Law No. 85/2014 on Insolvency and Pre-Insolvency Proceedings (Official Gazette No. 466/25.06.2014).

Moreover, this financial condition should not be confused with insolvability, as the two concepts are distinct and should not be treated as synonymous—even though, in practice, an insolvent person may also be insolvent in the economic sense. Thus, while the two situations may overlap, they are not identical.

In the legal literature (Pop, 2015, pp. 442–443), a clear distinction has been made between the two terms. It has been stated that insolvability results from the insufficiency of a person's assets in comparison to the total amount of due debts, whereas insolvency refers to the debtor's inability to meet certain, liquid, and due payment obligations due to a lack of available financial resources.

The insolvency procedure, regulated by Law No. 85/2014, is intended both to prevent insolvency whenever possible and to satisfy the debtor's liabilities through the recovery of claims by creditors.

In this context, the law provides not only for specific mechanisms of claim recovery from the debtor's estate, but also grants creditors the possibility to recover, in full or in part, their claims from certain persons whose conduct contributed to the onset of the insolvency and, consequently, to the damage suffered by the creditors—namely, the failure to recover their claims.

The latter scenario will be the focus of the following section.

Joint and several liability in insolvency proceedings

As a preliminary observation, it must be noted that, from the perspective of active legal standing, both the debtor in a state of insolvency and the creditor who has suffered prejudice due to the non-payment of their claim may file a petition for the commencement of insolvency proceedings. However, both parties must provide evidence of compliance with the legal requirements for the court to admit the request.

Thus, in situations where it is established that the debtor's entry into insolvency proceedings is attributable to the fault of certain

individuals, the imposition of joint and several liability is a procedure that can only follow the court's finding of the debtor's state of insolvency and, consequently, the opening of the insolvency proceedings.

When the state of insolvency arises from transactions that have resulted in the loss of assets, the creation of fictitious liabilities, or the deviation of the debtor's activity from its normal course, the unsatisfied liabilities of the debtor—which, in the context of insolvency proceedings, represent damage caused to the creditors—may be remedied through the imposition of liability upon those who, through their conduct, contributed to the debtor's insolvency (Bufan, Deli-Diaconescu, & Sărăcuț, 2022, p.845).

According to the provisions of Article 169(1) of Law No. 85/2014, upon the request of the judicial administrator or liquidator, the syndic judge may order that all or part of the debtor's liabilities—up to the amount of the damage causally linked to the specific act—be borne by the members of the management and/or supervisory bodies of the legal entity debtor in insolvency, as well as by any other persons who contributed to the debtor's state of insolvency through one or more of the following acts: a) using the assets or credit of the legal entity for personal benefit or that of another person; b) carrying out production, trade, or service activities for personal gain under the cover of the legal entity; c) ordering, for personal interest, the continuation of an activity which was clearly leading the legal entity to cease payments; d) keeping fictitious accounting records, causing the disappearance of accounting documents, or failing to keep records in accordance with the law (in cases where accounting documents are not handed over to the judicial administrator or liquidator, both fault and the causal link between the act and the damage are presumed; this presumption is rebuttable); h) any other intentional act that contributed to the debtor's state of insolvency, as established under this Title.

Applying these principles, Romanian courts have issued inconsistent rulings concerning the interpretation and application of this provision on joint and several liability in insolvency proceedings. As a result, the High Court of Cassation and Justice, under Articles 514–518

of the Civil Procedure Code, clarified the legal nature of the liability regulated under Article 169(1) of Law No. 85/2014 in its Decision No. 14/2022, rendered in the interest of the law and published in Official Gazette Part I No. 902 of September 13, 2022. In paragraphs 74–76, the Court held: *"The provisions of Article 169(1) of Law No. 85/2014 regulate expressly determined circumstances under which the members of the management and/or supervisory bodies of a legal entity in insolvency, or any other person, may be required to bear all or part of the debtor's liabilities, if through their actions they contributed to the debtor's insolvency.The liability governed by this article is of a special nature, distinct from general tort liability under Article 1,349 of the Civil Code. Unlike general tortious acts, which are broadly defined, the unlawful acts described in Article 169 are specific. The liability of the individuals referred to in the legal text is subordinated to the purpose of insolvency proceedings, namely to cover the debtor's liabilities, which consist of the obligations assumed by the debtor and left unsatisfied upon maturity—that is, the total claims registered in the final table of claims. Members of the management/supervisory bodies or other individuals do not bear liability because they directly created the liabilities, but because their actions led the debtor into a state of insolvency—defined as a financial state marked by the insufficiency of available funds to pay due debts. The liability regulated by Article 169(1) of Law No. 85/2014 is liability toward the debtor legal entity, as the party harmed by entering a state of insolvency. Therefore, the causal link—essential for engaging liability—must exist between one of the acts listed under Article 169(1)(a)–(h) and the debtor's resulting state of insolvency."*

From the ensemble of applicable legal provisions, along with the principles laid out in the above binding decision (pursuant to Article 517(4) of the Civil Procedure Code), it follows that the liability under Article 169 of Law No. 85/2014 is personal and tortious in nature. It arises only when one of the enumerated acts has contributed to the debtor's insolvency.

Since this is a case of tort liability, the general conditions for tortious liability must be met, as established in Article 1,357 of the Civil

Code: an unlawful act, damage, causal link, and fault. In this context, these elements gain specific legal nuances.

In practice, the judicial liquidator, appointed by the syndic judge at the opening of insolvency proceedings, is required to draft a report on the causes and circumstances leading to the debtor's insolvency. This includes analyzing all available evidence and identifying any facts that may fall within the scope of the aforementioned legal provision and that may be attributable to members of the debtor's management or supervisory bodies—or other individuals.

According to Article 72 of Law No. 31/1990 (as amended and republished, Official Gazette No. 1066 of November 17, 2004), *"The obligations and liability of administrators are governed by the provisions applicable to mandate contracts."*

The liability of former representatives of a company for the performance of their duties is contractual in nature, arising under the mandate contract concluded between the parties. Under the principles of contractual liability, proof of the existence of the mandate and of the failure to perform—or defective performance—of obligations by one party raises a presumption of fault on the part of the debtor (i.e., the administrator), as per the New Civil Code (adopted by Law No. 287/2009, Official Gazette No. 511 of July 24, 2009).

It is important to note that an administrator must be appointed at the time of incorporation of the company, with their express consent. The law does not permit the establishment of the legal fiction known as a commercial company without appointing an administrator. This is expressly stated in Article 209 of the Civil Code, which provides that: *"A legal person exercises its rights and fulfills its obligations through its management bodies, from the date of their constitution."* (Bufan, Deli-Diaconescu, & Sărăcuț, 2022, p. 303)

Given that the legislator has outlined distinct situations and corresponding legal conditions for each subparagraph of Article 169(1) of Law No. 85/2014, each case of liability must be analyzed individually.

According to Article 169(1)(a) of Law No. 85/2014, liability may be imposed where an administrator or other individuals have used the

company's assets for personal benefit. The purpose of this provision is to penalize executive abuse, where personal interest is pursued at the expense of the company's social interest, harming both the company and the broader community of stakeholders.

Accordingly, mere allegations by the liquidator or claimant are insufficient to trigger joint and several liability. The court cannot impose patrimonial liability without proper evidence, and invoking Article 169 does not automatically establish liability for members of the management bodies. The legislator did not create even a rebuttable legal presumption of guilt or liability (with the exception noted under letter d, as will be addressed below). Instead, liability may be imposed only after the administration of evidence that leads the court to a firm conclusion that the debtor's insolvency resulted from one or more of the acts enumerated by law.

Thus, the syndic judge—or, where applicable, the judicial review court—has the task of verifying the regularity of the management decisions in relation to the company's corporate interest and identifying any abuse that may have led to the debtor's insolvency. The obligation to cover the liabilities can only be attributed to those administrators who have exploited the company's capital for personal interest or who, through their management policy, have failed to safeguard the corporate interest, instead promoting other interests.

The corporate interest and the personal interest of the administrator are two of the legal and statutory limits on the powers conferred upon them. The executive's mission is clearly defined: to act in the service of the corporate interest. Any deviation from this objective must be carefully examined, as fraud constitutes a significant obstacle to the exercise of management prerogatives.

Under normal circumstances, the administrator's personal interest aligns with the corporate interest. Only when an abnormal state is introduced into the company's management dynamics do these interests diverge.

Any subordination of the corporate interest to another interest violates good governance principles. A management act becomes

unlawful if it was performed in the administrator's personal interest and to the detriment of the company.

In this context, it is observed that a company's assets are reflected in its annual inventory and balance sheet.

The inventory comprises the set of operations used to ascertain the existence—either quantitatively, valuationally, or both—of all assets and liabilities in the company's patrimony as of the date of the operation. The balance sheet reflects the patrimonial asset elements, the main asset classes being:

- Fixed assets (tangible, intangible, and financial assets),
- Current assets (inventory, receivables, marketable securities, or other values),
- Prepaid expenses and similar asset items, and
- Bond redemption premiums.

Asset diversion may take various forms, such as:

- The administrator's failure to return company-owned goods and personal use of said assets,
- Unauthorized transfers of company property (e.g., transferring goods owned by the debtor without compensation).

Such actions constitute misuse of corporate assets, and may be sanctioned under Article 169 of the Insolvency Law.

The claimant requesting the application of this article must specifically identify the wrongful act imputed to the person concerned. General assertions—such as those often made by public creditors like ANAF (National Agency for Fiscal Administration), particularly when they are the ones requesting the liability and not the court-appointed liquidator—are insufficient. For example, claims that the insolvency practitioner failed to analyze how the company's cash or receivables were used, or whether the legal representative misappropriated company funds, do not meet the burden of proof.

Another hypothetical scenario (based on admissible evidence) could involve a situation in which the judicial liquidator, analyzing financial statements and trial balances over several years and publishing a causal report in the Official Bulletin of Insolvency Proceedings (BPI), observes

significant discrepancies in the company's balance sheets on certain dates—especially between receivables, assets, and cash holdings (either in bank accounts or in hand).

In the absence of any justification from the statutory administrator regarding the reduction of company assets between those dates, and where debts remain at the same or higher level, such discrepancies may, under Article 329 of the Civil Procedure Code, raise the presumption that the diverted assets were used in the administrator's own interest or for third parties, to the detriment of the company—but only regarding inventory and liquid assets, not receivables.

This distinction is critical because receivables cannot be presumed collectible with certainty, and the administrator's passivity in collecting receivables does not in itself amount to "use" within the meaning of the legal provision. It may only be qualified as such if there is conclusive evidence that the debts were recoverable and the administrator knowingly and in bad faith failed to take the necessary steps.

In such a case, the plaintiff must demonstrate that the administrator deliberately failed to recover debts, thereby favoring the debtor clients and harming the company, and that this illicit conduct contributed to or caused the company's insolvency.

Thus, in the hypothetical scenario above, we could conclude that an administrator who used company assets for personal purposes, and who was summoned during both trial and appeal stages and failed to provide a defense or explanation for how those sums/assets were used for the benefit of the company, has satisfied the conditions for engaging joint and several liability under Article 169(1)(a) of Law No. 85/2014.

Another example would involve a situation in which the statutory administrator, after their powers were revoked by the opening of the insolvency proceedings, fails to surrender the company's assets to the liquidator—leaving the liquidator to merely identify them on paper—while continuing to use them. These assets may include cash, luxury vehicles, work equipment, etc.

Article 169(1)(b) of the Insolvency Law addresses cases in which persons engage in production, trade, or service activities for personal gain under the cover of the legal entity.

In other words, the law aims to sanction situations where the company is used as a mere façade for commercial operations carried out by individuals who are now defendants in the insolvency-related liability proceedings.

An analysis of national court practice (see Civil Judgment No. 362/19.05.2021 delivered by the Iași Tribunal and Civil Judgment No. 224/22.05.2023 rendered by the Sibiu Tribunal, both available on www.rejust.ro) reveals that this legal basis is rarely invoked and, when it is, it is often only in a formal manner, without substantiation. This occurs primarily due to the difficulty in proving the legally permitted factual scenario, and secondarily because such factual circumstances have rarely been clearly alleged in practice.

Nonetheless, one could imagine a situation within the scope of this provision in which the individuals engaging in such activities earn higher profits by using this scheme to reduce tax or social security contributions—such as health insurance, pension payments, etc.—or where the real activity is unlawful, and the legal entity is used merely as a façade to create an appearance of legality in order to evade regulatory scrutiny.

Moving forward, it is worth analyzing Article 169(1)(c) of Law No. 85/2014, which governs the situation where the person against whom joint and several liability is sought ordered, for personal interest, the continuation of an activity that was clearly leading the legal entity towards cessation of payments.

The reason the legislator limited the scope of liability to cases where the act was committed "in personal interest" is to distinguish between situations where the responsible person continued the business in the good-faith hope of recovery, versus where the continuation served their own personal interest, such as maintaining their position or profiting from the resulting economic consequences. As a result, this limitation

excludes liability for negligence or imprudence, since personal interest implies fraudulent intent, not mere fault.

Thus, without specific evidence demonstrating which activities were carried out by the defendant administrator, how they were executed, the timeframe, and most importantly, how those activities contributed to the insolvency, the alleged wrongful act cannot be deemed proven.

For example, under the ambit of this legal provision, we can imagine a scenario where the administrator, acting in that capacity, entered into contracts which the company was obviously unable to fulfill even at the time of their conclusion—contracts that were inherently detrimental to the company regardless of the performance of the other party.

A practical scenario could involve an administrator signing transport contracts, acting as carrier, for a fee per unit (e.g., per kilometer or per ton), at a rate well below the company's operating costs, making any profit impossible from the outset. These contracts may even include penalty clauses in favor of the counterparty, who may in fact be a proxy for the administrator.

Such contracts violate the principle of good faith in negotiations, creating a serious imbalance between income and expenses. This situation involves ongoing contractual performance that—although legally executed—was clearly detrimental to the company from the beginning. This ultimately leads to inability to meet payment obligations and therefore to insolvency.

In such a case, the administrator's personal interest is evidenced by the fact that they transported goods and generated personal profit, while using the company's assets and incurring costs far exceeding the contractual income. This results in the company's eventual insolvency.

Regarding Article 169(1)(d) of Law No. 85/2014, liability may also arise when the administrator of an insolvent debtor:

- keeps fictitious accounting,
- causes accounting documents to disappear, or
- fails to keep proper records in accordance with the law.

(See the Minutes of the meeting of the Presidents of the specialized sections of the High Court of Cassation and Justice and the Courts of Appeal, Căciulata, 15–16 May 2015, item 12.)

Moreover, pursuant to the Decision regarding the uniform interpretation and application of Article 169(1)(d), if the defendant fails to deliver the accounting documents to the insolvency practitioner after being formally notified, it is presumed (rebuttably) under Article 328 of the Civil Procedure Code that all conditions for liability under this provision have been met.

According to Article 11 of Law No. 82/1991 (republished in the Official Gazette No. 454/18.06.2008), the responsibility for organizing and maintaining the accounting records of a legal entity rests with the administrator. In addition, under the Civil Code, the mandatary (the agent/ the administrator) is liable not only for fraud (dol) but also for fault (culpa) in the execution of the mandate.

According to the provisions of Article 10(1) of Law No. 82/1991, republished, responsibility for the organization and management of accounting records lies with the administrator, who is obligated to manage the affairs of the respective company.

Failure to maintain proper accounting records makes it impossible to detect early financial distress, thus rendering insolvency undetectable at a point when it might otherwise have been mitigated. These adverse effects would be avoided if accounting were properly kept, as this would enable the administrator to take the appropriate preventive measures in due time.

Where accounting is properly maintained in compliance with legal requirements, a presumption of causality is established between the wrongful act and the damage suffered, namely the outstanding liabilities recorded in the creditors' table.

We refer to this presumption as rebuttable, since the person against whom liability is sought may challenge it in court by attempting to reverse the legal presumption, for example, by demonstrating:

- that they did not receive the notification from the insolvency practitioner requesting the handover of accounting documents,

due to various reasons (e.g., no longer residing at the registered address, temporary or prolonged absence from the country—an issue often encountered where Romanian nationals emigrate to other EU Member States for employment),

- or that there were procedural irregularities in the notification process.

All such claims must be substantiated before the court, and the provisions of Article 249 of the Romanian Code of Civil Procedure apply in full, requiring the defendant to present proof of these assertions.

In conclusion, based on the foregoing, it is only in the case of the conduct described under Article 169(1)(d), second sentence of Law No. 85/2014 on insolvency prevention and insolvency proceedings that a rebuttable presumption of all necessary conditions for triggering patrimonial liability arises. This is an exceptional situation compared to the other cases regulated by the same article.

Regarding the misconduct defined under Article 169(1)(e) of Law No. 85/2014, this legal provision stipulates that members of the management bodies and any other persons may be held liable if they: *"diverted or concealed part of the legal entity's assets, or fictitiously increased its liabilities."*

As with the act provided under letter (a) of Article 169, the judicial administrator's report on the causes and circumstances that led the company into insolvency must contain a detailed analysis of the debtor's assets. However, with regard to receivables, no evidence has been presented that the defendants have collected them.

At the level of jurisprudence, solutions have been identified explaining the above-mentioned mechanism (see, by way of example, civil judgment no. 311/20.06.2024 issued by the Specialized Tribunal of Argeș and civil judgment no. 177/14.03.2025 issued by the Iași Tribunal). By way of example, the following considerations can be highlighted: *thus, the misappropriation of a part of the legal entity's assets consists in changing the destination of goods belonging to it, while the concealment of liabilities means hiding certain goods or patrimonial rights of the debtor. The company's assets are reflected in the annual*

inventory and in the balance sheet. Methods of misappropriating assets include failure to return goods belonging to the company by the administrator, or transfer without consideration of goods constituting the debtor's property. The act of misappropriating the company's assets equally constitutes an abuse of social goods.

In concrete cases, concrete proof must be made of the misappropriation or concealment of a part of the legal entity's assets by the defendant, or of the fictitious increase of its liabilities; mere invocation of theoretical aspects is not sufficient. Assertions made before the courts, according to which the company appeared at the end of certain years with outstanding receivables, which were merely listed, cannot in themselves lead to the conclusion that the defendants misappropriated or concealed part of the company's assets without a detailed presentation of this asset, how the misappropriation or concealment was carried out, and how they at least contributed to the insolvency of the company.

There may also be situations where the administrator records in the accounting records operations of withdrawing sums of money without providing supporting documents regarding that operation. In this context, the absence of evidence regarding the use of the withdrawn sums may represent a fact likely to establish a presumption of their misappropriation by the defendant sued.

For the claimant to obtain a favorable ruling, beyond the concrete acts committed as provided by the applicable norm, they must also prove the time of commission of these acts, which must be prior to the occurrence of the insolvency, as the latter must be a direct consequence of the act sought to be sanctioned.

Regarding the provisions of article 169 paragraph (1) letter h) of Law no. 85/2014, which provide that any other intentional act that contributed to the debtor's insolvency may engage the patrimonial liability of members of the management or supervisory bodies of the company, as well as any other person, the act must be concretely substantiated, committed with the subjective attitude prescribed by law (intention), and have contributed to the debtor's insolvency.

Under this regulation, a person's liability cannot be engaged if the intentional act committed did not contribute to the debtor's insolvency. Therefore, it is necessary to prove the existence of a causal link between the illicit act expressly enumerated in article 169 and mentioned in the statement of claim, and the debtor's insolvency.

Thus, the claimant must invoke and prove in the action two distinct temporal moments: 1. the moment of occurrence of the company's insolvency, characterized by the insufficiency of available cash funds for the payment of certain, liquid, and due debts; and 2. the moment of commission by the defendant of the illicit acts covered by article 169(1) of Law no. 85/2014, prior or concurrent with the occurrence of the insolvency, and the manner in which the illicit acts caused wholly or partially the insolvency of the company, as defined by the legislator.

Besides this means, but correlatively to it, the insolvency law also provides another supplementary remedy through which creditors may recover their claims or reduce their liabilities, provided in articles 117–122 of the same code.

We say correlatively because it is possible that certain acts through which the debtor's assets were fraudulently alienated under the means provided in article 169 be annulled by the insolvency judge if the requesting party proves that the legal conditions are met.

If successful, and the court annuls the fraudulent acts, the movable or immovable goods (including sums of money) will return to the debtor's patrimony subject to insolvency proceedings and, as such, the estate from which claims will be satisfied will increase.

It should be noted that the success obtained in court will not benefit only the creditor who initiated the procedure, but all creditors without preference, since the legal norms do not confer such a privilege. This is because annulment means that the act is considered never to have been validly concluded and is contemporaneous with its creation, preventing it from producing effects — in other words, the civil legal act, through the finding of its absolute nullity, is considered never to have been concluded (Boroi, 2012, p. 270).

The effect occurs conditioned on the retention, through the court's ruling, in the patrimony of the same debtor, while creditors collectively, according to the rank and extent of their claims, will benefit from that patrimonial value.

Beyond these means at the disposal of any creditor to recover their claims, it is also relevant that fiscal legislation contains special provisions available to tax creditors through which they can realize their fiscal claims only if the debtor is declared insolvent, without the need to open insolvency proceedings, as results from article 25 of the Fiscal Procedure Code.

Conclusions

The analyzed article must be interpreted and applied restrictively and preserves the natural balance between the free will that the administrator must have in managing the business—an administrator who must act in good faith—and that of an administrator who intentionally and through fraudulent maneuvers distorts, in their own interest or that of another, the purpose and activity of the company, committing the acts described by the legal text.

In practice, this measure is most often subsidiary to the recovery of claims by creditors; the interest in exercising such actions usually arises only to the extent that the recovery of claims is unsuccessful through reorganization or liquidation procedures.

This is because when the judicial administrator or, as the case may be, the judicial liquidator identifies assets in the debtor's patrimony whose value clearly exceeds the value of the claims forming the creditors' table, they no longer exercise it, even though the applicable rules oblige the administrator/liquidator to conduct checks regarding such acts from the beginning of the insolvency procedure.

The norm is beneficial to corporate life because it seriously draws attention to the responsibility that company administrators have towards the company, but also, indirectly, towards creditors, being a possible

sanction that will be borne by the persons named by the legal norms from their personal assets.

The liability of administrators in this legislative form is all the more justified since their form of legal representation of the company is not one of ordinary mandate law but a much broader one that reaches the situation where the administrator's will represents even the will of the commercial company itself, so the loyalty towards the interests of the company they represent must be much deeper.

References

Boroi, G. (2013). *Civil Law Course. General Part, 2nd edition*. Hamangiu.

Pop, L. (2015). *Civil Law Course. Obligations*. Universul Juridic.

Bufan, R., Deli-Diaconescu, A. & Sărăcuț, M. (2022). *Practical Treatise on Insolvency, Vol. I, 2nd edition, revised and supplemented*. Hamangiu.

Cărpenaru, S. D. (2016). *Commercial Law Treatise, 5th edition, updated.* Universul Juridic.

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 342-353

ON THE EUROPEAN CERTIFICATE OF INHERITANCE IN RELATION TO THE REGISTERED REAL RIGHTS IN IMMOVABLE PROPERTY OF THE ESTATE

Oana ISPAS
ORCID [ID]: https://orcid.org/0009-0003-5137-0925
E-mail: oana.ispas@icj.ro, oana.ispas@rau.ro
Afiliation: "Acad. Andrei Rădulescu", Romanian Academy,
Faculty of Law, Romanian-American University, Bucharest, Romania

Abstract: *This paper analyzes the procedure for issuing the European Certificate of Succession (CEM) in the context of the opening of the estate of a Romanian citizen, whose last domicile is abroad, and whose estate includes tabular real estate rights located in Romania. The paper examines the harmonization of the application of the provisions of Regulation (EU) No 650/2012, which establishes the legal framework for obtaining the European*

Keywords: *European certificate of inheritance; register of succession; lex rei sitae; registered real rights in immovable property; cross-border inheritance.*

Introduction

Regulation (EU) No 650/2012 of the European Parliament and of the Council (hereinafter referred to as the Regulation)[1] has unified important rules on conflict of laws and international jurisdiction in matters of succession and introduced an innovative tool: the European Certificate of Succession (CEM). This certificate is intended to simplify

[1]https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A02012R0650-20120705

the proof of the capacity of heir or legatee and the exercise of succession rights in cross-border situations. Once issued, the CEM is recognized in all participating member states, without the need for any special exequatur procedure. The introduction of the European Certificate has not done away with domestic succession documents (such as the certificate of autochthonous heir issued by the notary public in Romania), as the Regulation explicitly states that it does not replace domestic documents used for similar purposes (Art. 62(3)).

To understand the role and effects of the European Certificate of Succession in relation to the rights in rem in immovable property forming part of the estate, it is necessary to analyze the interaction between European law and the national rules of the State on whose territory the succession property is located (*lex rei sitae* principle). A frequently encountered practical situation is a cross-border inheritance left by a Romanian citizen whose last residence was abroad (e.g. in another EU member state) and who owned real estate in Romania. Questions arise concerning the competence of the authorities dealing with the succession, the law applicable to the transmission of the inheritance and the way in which the European Certificate of Succession[1] can be used for the registration in the land register of the succession rights acquired over these immovable properties.

The main objective of the present research is to highlight the harmonization (or possible disagreements) between the European and Romanian framework in the field of cross-border successions, with a focus on the effects of the EMF. Although the regulation has brought more unity and legal certainty in the field, in practice, procedural differences persist between member states, especially in terms of the *lex successionis* (law applicable to the succession) and the *lex rei sitae* (law of the place where the immovable property is situated) so that the

[1] Relevant case law - including judgments of the Court of Justice of the European Union (CJEU) - and national legislative adaptations (Notaries Public Act No 36/1995, Cadastral Act No 7/1996, Civil Code, etc.) are examined to ensure the effective application of Regulation 650/2012.

succession rights over immovable property are fully recognized and enforceable against third parties.registration in the land register requirements for succession transfers. It is therefore necessary for notaries and heirs to pay particular attention to the conditions imposed by the land register publicity in Romania.

I. European legal framework and applicable national framework

Regulation (EU) No 650/2012 constitutes the fundamental legal basis at EU level. It lays down the rules on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession, as well as the rules on the creation of the European Certificate of Succession.[1] As of August 17, 2015, successions with foreign elements will be settled according to these unified rules, which are designed to remove the difficulties that European citizens used to face in exercising cross-border succession rights.

Internally, several pieces of legislation are relevant:

- Law no. 36/1995 on notaries public and notarial activity regulates the notarial succession procedure in Romania. It was amended by Law No 206/2016 in order to facilitate the new instrument of the European Certificate of Succession. Romanian law provides that a notary public may issue a CEM only after having debated the succession and having previously issued a domestic heir certificate (or simultaneously with it). This solution is based on the consideration that the CEM does not replace the national certificate, but is in addition to it, ensuring the international circulation of the probate certificates issued domestically.
- Law no. 7/1996 on cadastre and immovable property are entered in the land register on the basis of a notarized authentic notarial deed or the land register publicity is the legal framework for the registration in the land register of real property rights, including

[1] The Regulation applies in most EU member states (Denmark and Ireland have opted out), is directly applicable and takes precedence over national law in the areas it covers.

those acquired by inheritance. According to Art. 24 para. (3) of the Law, ownership and other real rights over a certificate of succession (issued by a Romanian notary public), a final court decision or an administrative act. Law 7/1996 required the notary public to immediately forward the certificate of inheritance issued for immovable property to the cadastre office for registration.

- The Romanian Civil Code (2009) contains rules on the law applicable to succession (Art. 2633 Civil Code)[1] . In the EU context, the applicable law is determined according to Art. 21 of the Regulation, which enshrines as a general rule the law of the habitual residence of the deceased at the date of death. The Civil Code also contains, in Art. 95 and 31, the principle of unity of succession as a mode of transmission of property and previously provided for the *lex rei sitae* rule for immovable property, but these conflicting national conflict rules have largely been replaced by EU Regulation 650/2012 for the cases it covers.[2]

The national notarial registers kept by the National Union of Notaries Public in Romania (UNNPR). In application of art. 22 of Law 36/1995 and the Regulation, the National Notarial Register of Succession Records (RNNES) was created. This register allows for quick verification whether a succession has already been debated or whether there are any parallel succession proceedings in error. The National Notarial Notarial Register of Inheritance Options (RNNEOS) also registers acts of acceptance or renunciation of inheritance. The importance of these instruments is underlined by the European Regulation itself, which in Recital (32) emphasizes the need to simplify the procedures that heirs have to carry out abroad.[3]

---

[1] Art. 2633 Civil Code "Inheritance is subject to the law of the State on whose territory the deceased had, at the date of death, his habitual residence."

[2] However, the lex rei sitae remains applicable to real estate advertising.

[3] The register of succession facilitates the application of the principle of a single European Certificate of Succession, ideally a single CEM should be issued in a cross-border succession

II. Competence to issue the European

Determining international jurisdiction in a cross-border succession is the first step and often a source of confusion. Regulation 650/2012 established as the main connecting factor the habitual residence of the deceased at the time of death. According to Article 4 of the Regulation, the authorities of the member state on whose territory the deceased was habitually resident at the time of death are competent to settle the succession as a whole. Therefore, if a Romanian citizen died having last resided in another EU member state, in principle the authorities of that member statewill be competent to settle the succession and issue the European Certificate of Succession.

But there are also rules of alternative or suppletive jurisdiction. Article 10 of the Regulation provides for subsidiary jurisdiction in favor of the State of nationality of the deceased, if the habitual residence of the deceased at the time of death was not in a member state. In this situation, the authorities (notaries public, personnel assimilated to the courts in matters of non-contentious succession) of the member state of nationality may settle the succession as a whole if part of the succession property is located in the EU. Article 10(2) extends subsidiary jurisdiction to cases where there are succession property located in a member state and no other member state has jurisdiction. Then the courts of that member state can settle the succession limited to those assets. Thus, if a Romanian citizen had his last domicile in a third State and his immovable property is located in Romania, the Romanian notary public may have jurisdiction at least over that property (if not even over the entire succession, on the basis of nationality, under Art. 10(1)(b)). 1 lit. a).

The particular case of a Romanian with habitual residence in another EU member state and assets in Romania is more nuanced. Here, the State of residence has primary jurisdiction (Article 4). However, the heirs may agree, after the succession has been opened, that a court of the State whose law was chosen by the deceased should have jurisdiction to settle the succession (Article 5 of the Regulation). Thus, if the deceased (a Romanian citizen) chose Romanian law for his succession (Article 22)

and the heirs agree, the Romanian authorities (the Romanian notary) may take over jurisdiction, even if the habitual residence of the deceased was in another member state. In the absence of such a prorogation, jurisdiction remains with the State of residence.[1]

These provisions must be interpreted in the light of the European Regulation and apply only to the extent that jurisdiction is not already determined by the Regulation. Romanian notaries will first check whether the succession falls within the scope of the Regulation. If another member state is competent (e.g. the State of last residence), the Romanian notary cannot debate the succession on its merits and cannot issue certificates (neither national nor European) in that succession. [2]
Thus, if a Romanian citizen has died having last resided in an EU member state, the Romanian notary public does not, as a rule, have the competence to discuss the inheritance, except in the case of prorogation of competence or in rare cases falling under Article 10. As a result, the succession will be settled in the state of residence, where the estate, the status of the heirs, etc. will be determined, applying the law designated by the Regulation. The competent authority in that State will issue the European Certificate of Succession. This CEM will be valid in Romania and can be used by the heirs to exercise their inheritance rights over real estate in Romania.

On the other hand, if a Romanian citizen had his or her final residence in a third state (or if the habitual residence cannot be determined), the Romanian notary will probably have jurisdiction (on the basis of citizenship, Art. 10 of the Regulation, in conjunction with Art. 101-103 of Law 36/1995). The Romanian notary will apply the Regulation in a substantive sense, determining the law applicable to the

[1] The Romanian legislation (Art. 101-104 of Law 36/1995) contained also before 2015 its own rules of territorial jurisdiction for successions with foreign elements.
[2] The case-law of the CJEU (Oberle Judgment, C-20/17, June 21, 2018) confirms this interpretation, holding that an authority of a is bound by the jurisdiction rules of the Regulation even when issuing a national, non-contentious certificate of heirship. https://curia.europa.eu/juris/document/document.jsf?docid=201707&doclang=RO

succession according to its rules.[1] The notary will issue the national certificate of succession and, subsequently, upon request, may also issue the European Certificate of Succession. The use of EMFs is not compulsory, as heirs are free to use other means of proof. However, CMS offers significant advantages: automatic and direct recognition, standardized content, presumption of validity.

III. The European Certificate of Inheritance and the registration of real rights in immovable property in the Land Register - *the Lex rei sitae* perspective

The *lex rei sitae* principle, in its traditional formulation, states that rights in immovable property are governed by the law of the place where the immovable property is located. Regulation 650/2012 has preserved this principle in a specific form: while the law applicable to succession is unique, certain aspects are excluded from the scope of the Regulation and left to the relevant national laws. One of these aspects is the formalities for the publication of land registration and the effects of the registration of rights in rem. Recital (18) of the Regulation explicitly states that a CEM should constitute a valid document for the registration of succession property in a member state. Recital (19) immediately adds, however, that the effects of the registration of a right in a register are excluded from the scope of the Regulation, so that the effect of registration (declaratory or constitutive) remains a matter of national law.[2] This duality requires cooperation and information between the authority issuing the CEM and the authority of the land register. The

[1] The procedure before the Romanian notary will follow national rules, with the particularities imposed by the international element.

[2] In other words, the Regulation does not harmonize member states' land registration procedures. It ensures that the CEM is recognized as a supporting document and, in principle, must be accepted by the land registration authorities. However, the actual method of registration and the domestic legal conditions remain governed by the law of the place where the immovable property is situated (lex registri).

Regulation provides (recital 68) that the authority issuing the CEM should include the information necessary for the registration of immovable property.

The rules of Romanian final court judgment. Traditionally, this referred to documents issued by Romanian authorities. Nowadays, the question arises whether the Romanian cadastre office can proceed with the registration of the property right on the basis of a foreign CEM.[1] Romanian land register publicity rules require that the registration of inheritance rights be made on the basis of a Certificate of Succession or a final court judgment.

Practice at European level shows different solutions regarding the use of EMF in land registration procedures :[2]

- France does not allow direct access of the CEM to the land register without an additional domestic notarial act. The CEM must be transposed into national law.
- Belgium does not register the transfer of ownership mortis causa in the land register at all.
- Italy and Spain allow the use of EMFs, but require additional formalities (Italy requires an authentic act of acceptance, Spain requires provisional registration).
- Germany and Austria allow registration on the basis of a CEM, but with distinctions; Austria requires a title with jurisdictional force, which a Romanian notarial CEM does not have.
- The Baltic countries and Greece allow direct registration of the EMF but require additional documents.

[1] The answer, in the light of EU law and domestic legislative changes, is yes, with some nuances.

[2] This information is detailed in the final report of the MAPE project, available at: https://www.notariesofeurope.eu/wp-content/uploads/2023/09/MAPE-Successions-final-study.pdf CN CN . The MAPE project stands for "Monitoring and Evaluating the Application of the EU Succession Regulation 650/2012", coordinated by the Council of Notaries in the European Union (CNUE).

- The Netherlands and Poland are mentioned as models of flexibility, registering EMFs directly without additional requirements.
- As regards Romania (together with Croatia and Lithuania), practice has shown that direct registration of succession rights on the basis of a CEM issued in another state is allowed, provided that it includes cadastral identification of the immovable property in the estate.

The practical importance of the principle of *lex rei sitae* (also called *lex registri*) is clear. The law applicable to the succession (*lex successionis*) determines who the heirs are and the extent of their rights, as well as the manner of transmission of property. By contrast, the law of the register (*lex rei sitae*) lays down the legal conditions for the registration of those rights in the land register.

A relevant jurisprudential development is the CJEU judgment of October 12, 2023, Case C-354/21[1]. The Court held that a CEM which does not identify inherited immovable property may be refused by the land register of another member state. The CJEU confirmed that such a requirement is *lex rei sitae* and not contrary to the Regulation. The Court emphasized that the authority issuing the CEM must take into account the requirements of the law of the land register of the place where the immovable property is located and include the property in the certificate. This case law has a particular practical impact: heirs and notaries must insist that immovable property situated abroad is listed separately in the European certificate.

Romanian law, through the provisions of the Cadastral Law and ANCPI procedures, seems ready to receive any valid certificate of inheritance, be it national or European. A CEM issued in accordance with Regulation 650/2012 is equivalent, for the Romanian registrar, to an "act

[1]https://curia.europa.eu/juris/document/document.jsf?text=&docid=262971&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=763681

issued by a public authority" by which the right in rem has been transferred, within the meaning of Art. 24 para. (3) of Law 7/1996. [1]

However, the effect of the registration remains that provided for by Romanian law.[2] The right of ownership of the heirs exists from the date of death, the certificate of succession having declaratory value. Therefore, registration on the basis of the CEM merely confirms publicly the right of the heirs. In other systems, such as the Austrian system, registration has a constitutive effect. The Regulation does not alter these principles: each member state remains free to determine whether heirs become owners automatically on death or whether they need an additional formal act.

Conclusions

The European Certificate of Inheritance has proved to be a valuable tool for simplifying cross-border inheritances and ensuring their unity. In the case of a deceased Romanian citizen whose last domicile was abroad, the CEM is the legal bridge linking the different jurisdictions involved, allowing automatic recognition of the capacity of heir and inheritance rights throughout the EU. European and Romanian law have been harmonized in a satisfactory manner: jurisdiction is determined according to the Regulation, the Romanian notary cooperates within the limits imposed, and the Romanian land registry receives the CEM as a valid entry for the land register.

But practical challenges remain. Tabular registration procedures differ from one country to another, which can affect the useful effect of the European certificate and may require extra diligence on the part of

[1] Of course, the usual formalities will be followed: certified translation, verification of authenticity and payment of fees. There will no longer be any need for judicial "homologation" or a new domestic certificate, which is a step forward for the free movement of succession documents.

[2] In Romania, in principle, registration has the effect of opposability against third parties, not the constitutive effect of the right

the heirs. If the succession is entirely settled abroad, heirs should ensure that the foreign notary includes all the relevant details for the Romanian (or other) real estate in the content of the CEM.

In the context of Romanian law, it can be concluded that *the lex rei sitae* principle, although not abolished by the European Regulation, has restricted its impact to a strictly formal level. Rights of succession to immovable property situated in Romania arise and are transmitted according to the law applicable to the succession (which may be Romanian or foreign), but become fully enforceable only through registration in the land register, in accordance with the requirements of Romanian law. The European Certificate of Inheritance is the instrument that facilitates this registration, saving heirs from having to resort to cumbersome recognition procedures or obtaining a new local certificate. With the EMF, heirs can quickly and uniformly prove their status and rights before the Romanian authorities.

In this way, the inheritance of a Romanian citizen with assets in Romania and links with other member states can be settled efficiently, with the guarantee that the rights in rem in the estate will be correctly and completely recorded.

References

Briciu et al. (2017). Regulation (EU) 650/2012 - Comments and explanations. Universul Juridic.

Civil Code of Romania. (2009). Art. 953-963, 2633.

CJEU. (June 21, 2018). Oberle judgment, C-20/17.

CJEU. (July 1, 2021). EU v. Vorarlberger Landes- und Hypothekenbank, C-301/20.

CJEU. (October 12, 2023). E.E. Judgment (C-354/21).

European e-Justice Portal - European Certificate of Succession.

Law no. 36/1995 (republished) on notarial activity, art. 101-104, 113-120.

Law no. 7/1996 (republished) on cadastre and land register publicity, Art. 24, 54.

Olaru, I. (2021). European Certificate of Heir - practical aspects, interview *Notar de București no. 74*.

Regulation (EU) No 650/2012 of the European Parliament and of the Council of July 4, 2012 (European Succession Regulation). Preamble, Art. 4-5, 10, 62 and others.

Șărban, D. C. (2025). Complex issues of registration of EMC in national registers. *Notar de București*, 86.

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 354-368

THE RIGHT OF WORKERS TO SPECIAL PROTECTION IN CASE OF MATERNITY, FROM THE PERSPECTIVE OF THE EUROPEAN SOCIAL CHARTER, INTERNATIONAL AND DOMESTIC LAW

Carmen Constantina NENU[1]
ORCID [ID]*:* https://orcid.org/0009-0002-6251-0113
E-mail: carmen.nenu@upb.ro
Sorina Octavia HONȚARU[2]
ORCID [ID]*: ….*
E-mail: dr.octavia1969@yahoo.com
Afiliation[1,2]*:* National University of Science and Technology POLITEHNICA Bucharest

Abstract: *Maternity protection is a fundamental right of workers who perform dependent or independent professional activity, enshrined in the most important international human rights treaties. Maternity, in safe and healthy conditions for mother and child, is the foundation of quality of life. Maternity protection is essential for both the creation of decent jobs and the development of women's professional careers, as well as for ensuring equal treatment and opportunities at work.*

However, social reality reveals the existence of a discrepancy between assumed legal values and practice, with maternity continuing to be a criterion of discrimination both at birth and at the termination of the legal employment relationship. Pregnant women continue to lose their jobs, even those covered by protective legislation. Discrimination against women because of their reproductive role remains a major barrier to equal opportunities and treatment between men and women. Finding effective ways to combat this discrimination and ensure that practices comply with the law is a major challenge for governments and social partners.

The aim of this study is to identify, from a legal and medical perspective, the levers of action at the political decision-making level, so that the protection of working mothers does not remain just a value

recognized at the normative level but not implemented in everyday life, in contemporary society, which is in permanent and profound dynamics.
Keywords: *maternity protection; fundamental rights; discrimination.*

Introduction

Discrimination against women in relation to maternity is a widespread problem throughout the world. In countries where maternity protection legislation exists, ensuring its effective implementation remains a persistent challenge. This social reality has been taken into account by the International Labour Organization (ILO), which, since its establishment, has been concerned with identifying areas of child and maternity protection. Data provided by this organization[1] for a number of 185 countries and territories reveal that only one third of them fully meet the requirements of ILO Convention No. 183/2000 concerning the revision of the Maternity Protection Convention (Revised)[2] and Recommendation No. 191 of 2000[3]. The analysis took into account two main elements: the leave period of at least 14 weeks and the level of compensation, of at least two thirds of previous earnings, paid from social security funds or public funds.

The drastic decline in the birth rate throughout Europe requires the implementation of a strategy for maternity protection at work, the protection of pregnant women, of postpartum women, of those who are breastfeeding, of those who are caring for children, and, in general, of all

[1] ILO Report, Maternity and Paternity at Work International Law and Practice, Gender, Equality and Diversity Branch Conditions of Work and Equality Department International Labour Office. https://webapps.ilo.org/public/libdoc/ilo/2014/114B09_84_roma.pdf

[2] Maternity Protection Convention, No. 183 of 15 June 2000, concerning the revision of the Maternity Protection Convention (Revised), 1952, adopted at the 88th Session of the General Conference of the International Labour Organization in Geneva on 15 June 2000*), published in the Official Gazette no. 535 of 23 July 2002

[3] https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312529

workers. Maternity protection is guaranteed by the treaties of the Council of Europe, in particular in the European Social Charter of 1961, revised in 1996[1], which regulates the right of workers to maternity protection. In order to ensure the effective exercise of the right of workers to maternity protection, the parties that have ratified the treaty undertake: to ensure that workers, before and after childbirth, have a rest period of a total duration of at least 14 weeks either through paid leave, through adequate social security benefits or through public funds; to consider it unlawful for an employer to give notice of dismissal to a woman during the period between the notification of her pregnancy and the end of her maternity leave, or on a date on which the notice period expires during that period; to ensure that mothers who are breastfeeding their children have sufficient breaks for this purpose; to regulate night work for pregnant women, women who have recently given birth or those who are breastfeeding their children; to prohibit the employment of pregnant women, of postpartum women or those who are breastfeeding their children in underground work in mines and in any other work of a dangerous, unhealthy or arduous nature and to take appropriate measures to protect the rights of these women in matters of employment.

At the national level, Government Emergency Ordinance No. 96/2003 was adopted[2], which supplemented the existing legislative framework with specific measures to protect the health and safety of pregnant employees and mothers at their workplaces, measures that are not found in other normative acts in force. When drafting this normative act, the basic principles of Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant women, of postpartum women or breastfeeding women, of the revised European Social Charter, ratified by

---

[1] European Social Charter, https://rm.coe.int/the-european-social-charter-treaty/1680a078c9

[2] Emergency Ordinance No. 96/2003 on maternity protection at work, with subsequent amendments and supplements, published in the Official Gazette, Part I No. 750 of 27 October 2003

Romania by Law No. 74/1999, were taken into account, fulfilling the legal commitments contained in the provisions of Article 8 of the Charter, as well as the principles of the International Labor Organization Convention No. 183/2000 on maternity protection, ratified by Romania by Law No. 452/2002. The legal, social and economic dimensions of maternity protection for workers constitute major and decisive challenges for the development of society, for ensuring social justice and an appropriate level of education for citizens of the contemporary world, subject to unprecedented economic and technological transformations. Therefore, in the study we will address the issue of maternity protection from the perspective of the duration of maternity leave, maternity allowance, as well as the health and safety at work of workers.

1. The duration of the maternity leave

The most recent standard of the ILO regarding the duration of maternity leave stipulates a minimum leave period of 14 weeks. Recommendation No. 191 encourages ILO member States to increase the length of maternity leave to at least 18 weeks. The length of leave is essential to allow mothers to recover from childbirth and to safely return to work, while providing adequate care for their children. If the length of leave is too short, mothers do not feel ready to return to work and sometimes quit. If the length of leave is too long, women may develop a diminished attachment to their careers, with significant consequences in terms of lower income levels. Of the 185 countries and territories analyzed in the ILO Report, 98 countries met the standard of providing a minimum period of leave of 14 weeks; 42 of these countries respected or the suggested period of 18 weeks; 60 countries had established leave periods of 12-13 weeks, periods shorter than those stipulated in Convention No. 183/2000; 27 countries provide leave for periods of less than 12 weeks

Article 8 of the European Social Charter stipulates the obligation of states to ensure to workers, before and after childbirth, a rest with a total duration of at least 14 weeks, either through paid leave, or through

adequate social security benefits or through public funds. The Charter complies with the ILO standard on the minimum duration of maternity leave, applicable in the 46 member states of the Council of Europe. The European Committee of Social Rights[1] found, with regard to compliance with Article 8 paragraph 1[2], in the Conclusions of the Analysis of the Report of the United Kingdom of Great Britain for the period 1982-1983, that women have an obligation not to work for six weeks after giving birth, As far as national legislation is concerned, currently, the duration of maternity leave is established by the provisions of Emergency Ordinance no. 158/2005 on holidays and social health insurance benefits[3]. According to art. 23-24 of this normative act, insured women are entitled to pregnancy and maternity leave, for a period of 126 calendar days, during which they benefit from maternity allowance. Pregnancy leave is granted for a period of 63 days before childbirth, and maternity leave for a period of 63 days after childbirth and can be offset against each other, depending on the doctor's recommendation and the beneficiary's option, in such a way that the minimum mandatory duration of maternity leave is 42 calendar days. Insured disabled persons benefit, upon request, from pregnancy leave, starting with the 6th month of pregnancy. In the case of a stillborn child or in the event that the child dies during the maternity leave, the maternity allowance is granted for its entire duration.

[1]The European Committee of Social Rights is the monitoring body of the European Social Charter. It is composed of 15 independent, impartial members which are elected by the Council of Europe's Committee of Ministers, https://www.coe.int/en/web/european-social-charter/european-committee-of-social-rights

[2] IX-1/def/GBR/8/1/EN/English|Conclusions|IX-1|30/06/1985|01/01/1982-31/12/1983 https://hudoc.esc.coe.int/eng?i=IX-1/def/GBR/8/1/EN

[3] Published in the Official Gazette, Part I, No. 1074 of November 29, 2005, with subsequent amendments and additions.

2. Cash benefits for workers during maternity leave

According to ILO Convention No. 183, cash benefits granted during maternity leave must amount to at least two-thirds of a woman's previous earnings – or a comparable amount if other methods of calculating cash benefits are used. The basic general principle is that the level of benefits must ensure that the woman can maintain herself and her child in adequate health and at an adequate standard of living.

States that have ratified the Convention use different methods to determine the level of cash benefits paid during maternity leave. Some States grant benefits only for part of the leave, others reduce the level of benefits during the leave, and others provide maternity benefits only for certain categories of workers.

The 2013 ILO Report[1] noted that, in a subset of 167 comparable countries, only 74 countries provide cash benefits of at least two-thirds of earnings for a minimum of 14 weeks; of these, 61 countries provide 100% of previous earnings. In 93 countries, maternity leave is unpaid, the amount of the benefit is less than two-thirds of previous earnings, or the leave is paid for periods of less than 14 weeks. The most common types of financing of cash benefits during maternity leave are: social insurance, based on contributions; the employer, through direct payment of maternity benefits; a combination of the two.

More than half of countries provide cash benefits through national social security systems based on the contributory principle. Employer liability systems are more common in Africa, Asia and the Middle East, where the challenges of creating maternity branches of social security are considerable. Research shows that employer liability systems work against the interests of employed women by placing a financial burden on employers and creating a potential source of discrimination against

[1] Source: ILO Database on Maternity Protection Legislation at Work, 2013, www.ilo.org/travdatabase. Source of funding Unpaid Employer liability Mixed Social security. International law and practice Maternity and paternity at work

women. Employers may be reluctant to hire or promote pregnant women or women with family responsibilities, or they may find reasons to dismiss their employees to avoid the cost of replacing wages during maternity leave. In many cases, women of childbearing age are not employed for this reason.

Supporting member states in the process of progressive transition from employer-based to social security systems is a priority for ILO technical assistance. This support materializes in: activities to raise awareness among the population regarding maternity protection benefits, based on evidence, as well as the need to create fiscal facilities to subsidize them; technical expertise for the review and drafting of legislation and the preparation of financial and actuarial feasibility studies.

At the Council of Europe level, the European Social Charter provides that during maternity leave, workers should be paid either by their employer, through adequate social security benefits or through public funds. The European Committee of Social Rights noted in the Report submitted by the United Kingdom of Great Britain and Northern Ireland that certain changes had been made to maternity legislation: among other things, maternity pay became a non-contributory benefit in July 1983, and women employed by their husbands have been entitled to maternity pay since 1 December 1982.

As regards the problems raised in Conclusions VIII, the Committee found that the situation remained essentially the same, despite an increase in maternity allowance (from £22.50 to £25.95 in November 1983). This allowance had always been considered by the Committee to be too low in the light of the obligation imposed by Article 8(1) of the Charter. Furthermore, the conditions for granting the additional benefit and its amount were not sufficiently clarified in the 9th United Kingdom report for the Committee to be able to determine whether, in all the circumstances, the amount of maternity allowance plus the additional benefit could be considered to constitute an adequate benefit within the meaning of the Charter. The Committee would like the next report to contain concrete examples in this regard. The Committee also noted that,

despite the explanations provided in the British report, women receiving a low salary may be required to complete a rather long qualifying period, which could extend to two years, and that, in addition, two years of employment are required for entitlement to maternity benefit, which is paid for only six weeks.

At national level, Government Ordinance 158/2005, in Article 25, states the following: the gross monthly amount of maternity benefit is 85% of the calculation base determined as the average of the gross monthly income of the last 6 months of the 12 months of which the insurance period is constituted, up to the limit of 12 gross minimum salaries per country per month, on the basis of which the insurance contribution for work is calculated. Maternity benefit is fully covered by the budget of the Single National Health Insurance Fund. This normative act regulated the legal framework necessary for the application of social measures aimed at ensuring the right of insured persons to social health insurance leaves and allowances within the system, the right to leaves and allowances provided for by the normative act in question being conditional on the payment of the contribution intended to support these allowances.

In the case of individuals who are not employees, the regulatory provisions establish that they can optionally insure themselves in the system to benefit from medical leave and social health insurance benefits, based on an insurance contract, through which they ensure a chosen monthly income that cannot be lower than the value of the minimum gross basic salary per country guaranteed in payment, established according to the law, nor higher than the value of 3 times its value, with the exception of persons who opt for concluding an insurance contract to benefit from medical leave and maternity benefits, for whom the monthly income for which the payment of the contribution is opted for is a chosen income that cannot be lower than the value of the minimum gross basic salary per country guaranteed in payment, established according to the law, nor higher than the value of 12 times its value.

In practice, these individuals are insured for social health insurance at a minimum gross monthly salary, with the exception of persons who

are insured only for maternity leave and allowances, in which case these persons choose an income of up to the value of 12 minimum gross basic salaries per country guaranteed in payment. For the latter situation, maternity leave is insured by paying a percentage of 1% calculated on a calculation basis of 12 minimum gross monthly salaries, for 6 months, for which, from the FNUASS budget, a monthly allowance is paid, for a period of 126 days (4 months), calculated as a percentage of 85% of the average income thus declared[1].

From the analysis of these regulations, it results unequivocally that Romania complies with the standards of the ILO and the European Social Charter, opting for the payment of maternity allowance, within a social health insurance system, which is based on the contributory principle.

3. Maternity protection in the workplace

The ILO's concerns regarding maternity protection are limited to protecting the health and safety of the mother and the newborn child, ensuring the necessary conditions for women to be able to reconcile private and professional life, implementing a non-discrimination mechanism in the workplace and promoting the principle of equal treatment between women and men. The ILO has adopted three conventions in the field of maternity protection: in 1919, 1952, and, most recently in 2000, Convention No. 183 on Maternity Protection, which contain measures of protection for pregnant women and women who have recently given birth, including the prevention of exposure to risks to their health and safety during and after pregnancy, the right to paid maternity leave, the provision of medical care for mothers and children

[1] Explanatory note to Government Emergency Ordinance no. 10/2023 amending and supplementing Government Emergency Ordinance no. 158/2005 on leave and social health insurance benefits. https://gov.ro/ro/guvernul/procesul-legislativ/note-de-fundamentare/nota-de-fundamentare-oug-nr-10-15-03-2023&page=203

and paid breastfeeding breaks, protection against discrimination and dismissal in connection with maternity, and a guaranteed right to return to work after maternity leave. Sixty-six countries have ratified at least one of the three conventions on maternity protection, but the influence of ILO standards goes beyond the ratification process.

Most countries have enacted measures to protect maternity and to support workers with family responsibilities, including fathers. This dynamic perspective falls within a general social context of the increase in the number of new paid jobs for women, the increasing incidence of atypical forms of work, the aging of the population, and changes in traditional family models.

At the Council of Europe level, the European Social Charter establishes, through the provisions of Article 8, standards for maternity protection at work, obliging the States Parties to ensure that mothers who are breastfeeding their children have sufficient breaks for this purpose, to regulate night work for pregnant women, women who have recently given birth or those who are breastfeeding their children, to prohibit the employment of pregnant women, women who have recently given birth or those who are breastfeeding their children, in underground work in mines and in any other work of a dangerous, unhealthy or arduous nature and to take appropriate measures to protect the rights of these women in terms of employment, to consider it unlawful for an employer to announce the dismissal of a woman during the period between the moment she notified her pregnancy and the end of her maternity leave, or on a date on which the notice period expires during this period.

At national level, Government Emergency Ordinance 96/2003 was adopted, which transposed the provisions 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], published in the Official Journal of the European Union (OJEU), L series, No. 348 of 28 November 1992. The normative act mainly provides for the following:

- definition of terms and expressions such as: pregnant employee, employee who has recently given birth, employee who is breastfeeding, leave for prenatal consultations, maternity risk leave;

- granting the right to leave for prenatal consultations to pregnant employees during their working hours;

- establishing the right to maternity leave and allowance for pregnant employees or mothers who, under certain conditions, employers cannot change their workplace;

- establishing mandatory postnatal leave of 42 days;

- specifying the mutual obligations of the employer and the employee who requests measures to protect her health, that of her fetus or child;

- establishing sanctions for persons guilty of violating the provisions of the normative act.

Social protection measures are established for pregnant employees and mothers, postpartum women or breastfeeding mothers, of Romanian citizenship or of a member state of the European Union and the European Economic Area, citizens of other states or stateless persons who have employment or service relationships with an employer in Romania.

Analyzing the definitions presented by each legislator, it is found that maternity protection only targets female employees, and not all categories of workers. These definitions are as follows:

- maternity protection is defined as the protection of the health and/or safety of pregnant employees and/or mothers at their workplaces;

- the workplace is the area delimited in space, depending on the specifics of the work, equipped with the means and materials necessary for the work, in order to carry out an operation, work or to carry out an activity by one or more performers, with their training and skill, under appropriate technical, organizational and occupational health and safety conditions, from which an income is obtained based on an employment or service relationship with an employer;

- a pregnant employee is a woman who notifies the employer in writing of her physiological state of pregnancy and attaches a medical

document issued by the family doctor or specialist doctor attesting to this state;

- an employee who has recently given birth is a woman who has resumed her activity after taking maternity leave and requests the employer in writing the protection measures provided for by law, attaching a medical document issued by the family doctor, but no later than 6 months from the date of birth;

- a breastfeeding employee is a woman who, upon resuming work after maternity leave, breastfeeds her child and notifies the employer in writing of the presumed beginning and end of the breastfeeding period, attaching medical documents issued by the family doctor to this effect;

- the dispensation for prenatal consultations represents a number of free hours paid to the employee by the employer, during normal working hours, for carrying out prenatal consultations and examinations based on the recommendation of the family doctor or specialist doctor;

- mandatory maternity leave is the 42-day leave that the mother employee is obliged to take after giving birth, within the pregnancy and maternity leave with a total duration of 126 days, from which employees benefit under the law;

- maternity risk leave is the leave that employees benefit from provided for in letter a c)-e) for the protection of their health and safety and/or that of their fetus or child.

Employers are required to adopt the necessary measures to prevent employees from being exposed to risks that may affect their health and safety and not to force them to perform work that is harmful to their health or their pregnancy or their newborn child, as the case may be.

For all activities that may present a specific risk of exposure to agents, processes or working conditions, the employer must assess the nature, degree and duration of the employees' exposure in the enterprise and/or unit concerned and, subsequently, to any change in working conditions, either directly or through protection and prevention services in the field of occupational safety and health.

The employer is required to maintain confidentiality regarding the employee's pregnancy and will not notify other employees except with

her written consent and only in the interest of the smooth running of the work process, when the pregnancy is not visible.

Based on the recommendation of the family doctor, a pregnant employee who cannot work the normal working hours for health reasons, her own or her fetus's, has the right to a reduction of one-fourth of the normal working hours, while maintaining her salary, fully borne by the employer's payroll, according to legal regulations.

Employers are obliged to grant pregnant employees leave for prenatal consultations within a maximum of 16 hours per month, if the investigations can only be carried out during working hours, without reducing salary rights.

Employers are obliged to grant breastfeeding employees, during working hours, two breastfeeding breaks of one hour each, until the child is one year old. These breaks also include the time needed to travel back and forth from the place where the child is. At the mother's request, breastfeeding breaks will be replaced by a reduction in the normal working hours by two hours daily.

In order to ensure the safety and health at work of pregnant employees and/or mothers, postpartum women or those who are breastfeeding, the internal regulations of the units must contain measures regarding their hygiene, health protection and safety at work, in accordance with the provisions of this emergency ordinance and other normative acts in force. Pregnant employees cannot be required to perform night work, in unsanitary or unbearable conditions.

Maternity protection also includes the temporary prohibition of dismissal of pregnant women, of those who are on maternity leave, of maternal risk leave, as well as of leave for raising a child up to 2 years old or 3 years old in the case of a disabled child. By establishing these cases of temporary prohibitions on dismissal, the Romanian legislator aimed to protect employees in certain situations perceived, in essence, as vulnerable (Dimitriu, 2017)[1]. These prohibitions are found not only in the

[1] https://www.universuljuridic.ro/prezenta-femeilor-pe-piata-muncii/

content of the Emergency Ordinance 96/2003, but also in the provisions of the Labor Code, of Law 202/2002 on equal opportunities and treatment between women and men, of the Emergency Ordinance no. 111/2010 on leave and allowance for raising the child. The purpose of establishing these prohibitions is to prevent abuses by employers, who could otherwise fire employees who are unable to defend themselves, to protect their rights and interests and to contribute to the creation of a work environment governed by social justice.

Conclusions

Maternity protection constitutes a challenge at the legislative, political, doctrinal, jurisprudential, economic and social levels. In Romania, maternity protection at work only considers salaried women, those who perform work on the basis of a classic legal employment relationship. leaving uncovered the independent professional activity of women, an activity that is acquiring increasingly broad dimensions in contemporary society. The architecture of the types of legal employment relationships is constantly changing and therefore it is necessary to ensure the protection of workers regardless of the contractual nature in which the professional activity is carried out.

Normative regulations regarding maternity protection need permanent adaptation to the requirements of social reality and jurisprudential optics. Maternity is a concept that benefits from legal protection, being in its essence an emotional-physiological state of a woman, generated by her biological capacity to procreate and give birth to children. Maternity thus relates to the state of a mother-in-becoming and subsequently to the legal status and quality of being the mother of a newborn child, essentially expressing the social role of the woman.

Putting maternity protection at the center of a normative social security system is a proof of social responsibility, which has as its main objective demographic growth, but also ensuring a high level of education for children and a better society, which ensures the necessary

conditions for a superior quality of life for citizens, in an intensely regulated and technologically advanced world.

References

Dimitriu, R. (2017). The presence of women on the labor market. https://www.universuljuridic.ro/prezenta-femeilor-pe-piata-muncii/.

European Social Charter. https://rm.coe.int/the-european-social-charter-treaty/1680a078c9.

Emergency Ordinance No. 96/2003 on maternity protection at work, with subsequent amendments and supplements, published in the Official Gazette, Part I No. 750 of 27 October 2003.

ILO Report, Maternity and Paternity at Work International Law and Practice. Gender, Equality and Diversity Branch Conditions of Work and Equality Department International Labor Office. https://webapps.ilo.org/public/libdoc/ilo/2014/114B09_84_roma.pdf.

International legislation and practice Maternity and paternity at work https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312529.

Government Emergency Ordinance no. 158/2005 on Medical Leave and Social Health Insurance Benefits, published in the Official Gazette, Part I, no. 1074 of November 29, 2005, as subsequently amended and supplemented.

https://gov.ro/ro/guvernul/procesul-legislativ/note-de-fundamentare/nota-de-fundamentare-oug-nr-10-15-03-2023&page=203

https://www.coe.int/en/web/european-social-charter/european-committee-of-social-rights

https://hudoc.esc.coe.int/eng?i=IX-1/def/GBR/8/1/EN

Maternity Protection Convention, No. 183 of 15 June 2000, concerning the revision of the Maternity Protection Convention (Revised), 1952, adopted at the 88th Session of the General Conference of the International Labor Organization in Geneva on 15 June 2000*), published in the Official Gazette No. 535 of 23 July 2002.

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 369-387

LAW, RISK MANAGEMENT AND ENTREPRENEURIAL CULTURE IN THE FRAMEWORK OF PUBLIC POLICIES

Nicoleta DASCĂLU
ORCID ID: 0009-0004-3408-3059
E-mail: maria.dascalu2801@upb.ro
Afiliation: Faculty of Economic Sciences and Law, The National University of Science and Technology POLITEHNICA Bucharest, Pitești University Centre, Romania

Abstract: *Modern society is undergoing a deep transformation in the relationship between the public and private sectors. In this context, law and public policies define the normative framework for entrepreneurial initiatives, while risk management and entrepreneurial culture provide the adaptive mechanisms necessary for sustainability. Entrepreneurial culture encourages innovation, risk-taking, and opportunity-seeking behavior. However, these cannot thrive without a coherent and predictable legal framework.*

Public policies—formulated at the intersection of administrative, economic, and social law—can either stimulate or hinder the entrepreneurial spirit. Through fiscal regulations, access to funding, administrative digitalization, or startup incentives, the state significantly influences the economic climate. In this sense, law is not merely restrictive but also enabling, when effectively aligned with sustainable economic development goals.

Simultaneously, risk management plays a pivotal role in modern entrepreneurial decision-making. Legal, financial, and reputational risks must be proactively assessed. For instance, awareness of legal risks such as non-compliance with labor law or consumer rights can prevent costly failures. Therefore, an interface between regulation, entrepreneurship, and public policy is essential to building a resilient and ethical economic ecosystem.

Keywords: *Public policy; entrepreneurial culture; risk management; legal framework; sustainable development.*

Introduction

Contemporary society is undergoing complex structural transformations, requiring increased interdependence between the public and private sectors. Recent OECD studies emphasize the role of collaborative governance in stimulating entrepreneurship, particularly through legal and policy mechanisms (OECD, 2022, p. 12). Within this framework, law, entrepreneurial culture, and risk management form a triadic architecture that supports sustainable economic ecosystems.

This article offers a strategic vision on how these three dimensions can be integrated into coherent public policies that foster, not hinder, responsible entrepreneurship.

The relationship between the public sector and private initiative is becoming increasingly complex, requiring new forms of collaboration, regulation, and adaptation. In this evolving landscape, entrepreneurship is no longer an isolated act, but an integral part of public policies, sustainable development strategies, and social innovation.

More and more frequently, public authorities are called upon to create a favorable environment for entrepreneurial development, not only through regulations, but also by means of support tools, education, and incentives. Within this framework, law, entrepreneurial culture, and risk management become interdependent elements, fundamental for the resilience of the economic system

How can a legal and public policy framework be built in such a way as to stimulate entrepreneurship without suffocating it? How can entrepreneurial culture be encouraged responsibly, without ignoring legal, financial, or ethical risks?

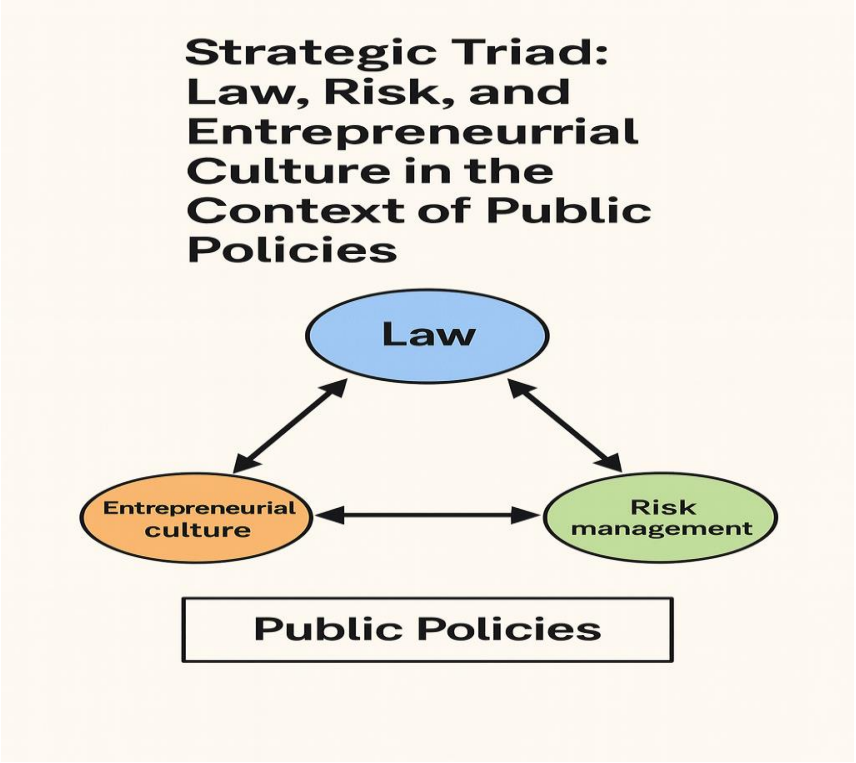
Hypothesis:

✔ The coherent integration of the legal framework, public policies, and a robust risk management mechanism can generate a sustainable and ethical entrepreneurial ecosystem.

The article aims to provide a strategic vision on how:

- law does not only restrict but can also stimulate entrepreneurship;

- entrepreneurial culture can become a resource for systemic innovation;
- and risk management must be an active component in the construction of public policies.



This objective is structured in Figure no. 1

In the collective mindset, law is often perceived as a 'hindering mechanism': rigid rules, sanctions, bureaucracy, fines. However, this perception is superficial and counterproductive. In reality, law represents the invisible infrastructure that makes private initiative possible in a safe, fair, and predictable way (North, 1990, p. 3).

Without law, entrepreneurship would function like a jungle in which the most aggressive prevails, not the most innovative or ethical (Acemoglu & Robinson, 2012, p. 74).

Law acts as a platform of trust in business relations, protecting investments and establishing clear rules of the game (Williamson, 2000, p. 598).

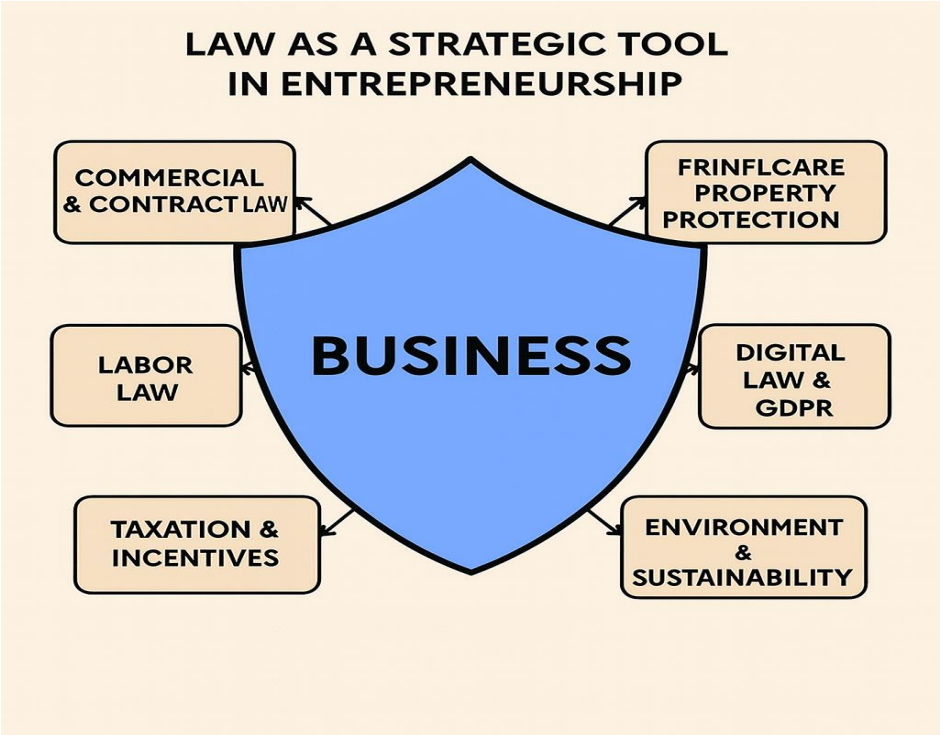
Legal Domain	Strategic Role for Entrepreneurs
Commercial & Contract Law	Ensures transaction and investment security through clear contracts
Labor Law	Provides legal protection and stability in employee relations
Taxation and Incentives	Creates levers for attracting capital and encouraging investments
Intellectual Property Protection	Encourages innovation, protects patents, trademarks, and know-how
Digital Law and GDPR	Ensures the legality of data processing and customer trust (Voigt & von dem Bussche, 2021, p. 45)
Environment and Sustainability	Provides a clear framework for green businesses, ESG, and circularity

A tech startup from Romania aims to create an AI platform that analyzes medical data.

✔ Without clear regulation: risk of violating GDPR, loss of public trust, potential lawsuits.

✔ With clear regulation and legal consultancy: compliance with EU standards, attraction of investors, scalability in international markets (European Commission, 2023, p. 10).

→ Conclusion: Law was not an obstacle but became a shield, a guide, and a strategic resource.



From Bureaucracy to Entrepreneurial Governance

Traditionally, public policies were viewed as an expression of the state's will, often difficult to understand, inflexible, and bureaucratic

Today, however, they can be transformed into strategic mechanisms for stimulating entrepreneurship, if built on foundations of:

1. legislative coherence,
2. result-oriented output
3. openness to public-private partnerships,
4. adaptability in the face of change

Simple definition:: Entrepreneurial public policies are sets of measures adopted by the state to encourage private economic initiative, under conditions of transparency, fairness, and sustainability.

Modern public policies are no longer limited to traditional areas such as education or health, but are increasingly involved in shaping the

business environment. The European Union and its member states have acknowledged the active role of the state as the architect of entrepreneurial infrastructure (European Commission, 2022, p. 5)

Key Areas of Public Intervention

Here are the five major areas in which public policies decisively influence the entrepreneurial ecosystem

Domain	Example of Public Policy	Impact on Entrepreneurship
Fiscal Regulation	Reduces entry barriers, stimulates innovation (IMF, 2021, p. 34)	
Administrative Digitalization	Lowers compliance costs and bureaucratic time (World Bank, 2023, p. 22)	
Startup and Incubation Programs	Provides access to capital, know-how, and networks (Nesta, 2020, p. 19)	
Educational and Cultural Policies	Creates a proactive mindset, supports entrepreneurial culture (OECD, 2020, p. 9)	
Taxation and Incentives	Tax exemptions for startups, reduced VAT for green activities	
Access to Finance	Non-reimbursable funds, state guarantees, business incubators	
Administrative Digitalization	Online platforms for company registration, government cloud	
Education and Training	Entrepreneurship programs in schools and universities	

Domain	Example of Public Policy	Impact on Entrepreneurship
Sustainability and Inclusion	Programs for women entrepreneurs, social businesses, green innovation	

- **Estonia** – Estonia, in contrast, offers e-Residency, funding for tech startups, and a consolidated digital culture (E-Estonia, 2022).
- **Germany** – strong programs for SMEs ("Mittelstand"), with partnerships with universities.
- **Singapore** – a hybrid public-private ecosystem for innovation and emerging technologies.
- **Romania** has a fluctuating fiscal environment and only partial administrative digitalization.

Romania can learn from, adapt, and scale such models.

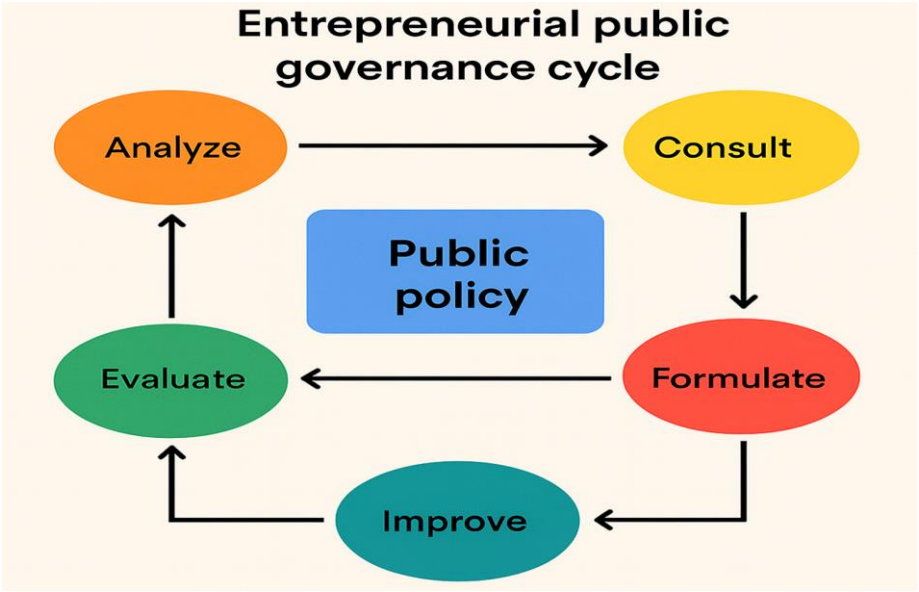
Analytical Model: Public Policy ≠ Isolated Measure

We now create a simple and clear visual model called:

◈ *The Cycle of Entrepreneurial Public Governance*

- Analyzed
- Consulted
- Formulated
- Implemented
- Evaluated
- Improved (continuous cycle)

The following scheme illustrates how a well-designed public policy should function



The circular entrepreneurial public policy is a modern governance model, oriented towards innovation and sustainable economic development, which involves a continuous cycle of analysis, consultation, formulation, implementation, evaluation, and improvement, with the active participation of public, private, and civic actors.

The model promotes:

- institutional adaptability,
- cohesion between regulation and practice,
- dialogue between the state and the entrepreneurial environment,
- and systemic resilience in the face of socio-economic risks

Stages of the Model

1. Analysis (Strategic analysis and diagnosis)

This stage involves collecting relevant data about the real needs of the business environment and the existing legislative, economic, or social barriers.

What it involves:

- SWOT, PESTEL analyses, benchmarking with other countries
- Statistical data (NIS, Eurostat, OECD)
- Identification of vulnerable categories (e.g., young entrepreneurs, women, rural SMEs)

Example: Observing that 68% of startups in Romania close within the first 3 years → causes: taxation, lack of mentoring, difficult access to financing."

2.Consultation (with public and private actors)

The state must NOT create policies in a vacuum. There is a need for:

- Meetings with representatives of the business environment, chambers of commerce, economic NGOs
- Questionnaires, online public consultations, policy hackathons
- Mixed working groups (ministries – startups – universities)

This is the voice of the entrepreneurial ecosystem.

3. Formulation (actual drafting of the policy)

Based on data and feedback, experts draft the public policy document, including:

- SMART objectives
- Performance indicators
- Budgeting and sources of financing
- Institutional responsibilities
- Implementation timeline

This is the architecture of the strategic intervention.

4. Implementation (application in the field)

The practical phase of execution includes:

- Funding guidelines
- Online application portals
- Training of civil servants

- Information campaigns

Frequent risk: a 'paper policy' with no impact in practice → avoided through detailed action plans and inter-institutional collaboration.

5. Evaluation (monitoring and impact analysis)

After launch, results are measured:

- How many entrepreneurs have benefited?
- Have the obstacles identified in phase 1 been reduced?
- What are the social, economic, and territorial effects?

The following are used:

- Quantitative indicators
- Case studies
- Feedback from beneficiaries.

6. Improvement (revised and adapted version)

Public policy is updated based on results and newly emerging contexts (crises, opportunities, feedback):

- It returns to the analysis phase → and the cycle continues.

This circularity provides responsiveness, durability, and a genuine closeness to the needs of entrepreneurs.

The result? A partner state, not just a regulator. An entrepreneurial ecosystem that does not merely survive, but flourishes.

Entrepreneurial culture represents a set of values, norms, and behaviors that encourage initiative, risk-taking, creativity, and solution-oriented thinking (GEM, 2021, p. 6). It is often influenced by the educational context, role models in society, and openness to failure as part of the learning process (Shane, 2003, p. 98).

It is not an individual talent but a social energy that is shaped in schools, families, companies, and NGOs, and is either supported or hindered by public policies.

According to the AmCham study (2023), Romania faces significant gaps between entrepreneurial potential and the actual implementation of initiatives. Only 12% of young Romanians feel encouraged by the

educational system to pursue an entrepreneurial career, compared to 35% in Poland or 45% in the Netherlands.

Key Components of Entrepreneurial Culture

Component	**Meaning / How it manifests**
Initiative	Action-oriented thinking, not passivity
Innovation	Finding new solutions to old problems
Risk-taking	Accepting uncertainty as part of the game
Clear communication	Transparent relations with the team, partners, and the public
Goal orientation	Setting and pursuing a clear objective
Ethical responsibility	Decisions that consider social and environmental impact

Recommendations for Stimulating Entrepreneurial Culture

- Integrating entrepreneurial education into primary and secondary school cycles (Ministry of Education, 2022)
- Promoting local success stories in the media
- Creating spaces for entrepreneurial experimentation (labs, incubators, bootcamps)
- Encouraging intergenerational mentoring among entrepreneurs
- Entrepreneurial culture does NOT emerge spontaneously
  It requires:
- Entrepreneurial education – starting from middle school
- Authentic success stories – entrepreneurs who inspire, not just those who got rich
- Entrepreneurial communities – coworking, networking, accelerators
- Media that promotes innovation, not scandal
- Public policies that support a growth mindset

Example of Systemic Impact

A university in Cluj creates an innovation hub with 10 student startups. After 2 years:

- ✓ 3 startups become registered companies
- ✓ 2 receive EU innovation grants
- ✓ 1 expands internationally

Impact: the area becomes attractive to investors + a mindset shift among young people.

Visual Model: The DNA of Entrepreneurial Culture

We now generate a clear infographic that presents entrepreneurial culture as a DNA structure composed of six essential behavioral genes.

Risk = the possibility of an unforeseen event occurring that may negatively affect a business's objectives.

Entrepreneurial risk means uncertainty regarding outcomes: it may involve financial loss, reputational damage, litigation, or operational failure. Peter Drucker emphasized that "taking calculated risks is the essence of entrepreneurship" (Drucker, 1985, p. 27).

In entrepreneurship, risk is not an exception but a natural and permanent component.

Type of Risk	Concrete Example	Management Solution
Legal	Non-compliance with GDPR / labor legislation	Legal audit, external consultancy

Type of Risk	Concrete Example	Management Solution
Financial	Lack of cash flow / lost investments	Realistic budgeting, financial reserves
Operational	Supply chain blockages	Backup plans, alternative suppliers
Technological	Cyberattack, software failure	Backup, IT security, ISO 27001
Reputational	Viral negative review, image crisis	Crisis communication, transparency
Strategic / Environmental	New ecological regulations	ESG, adaptation to the green economy

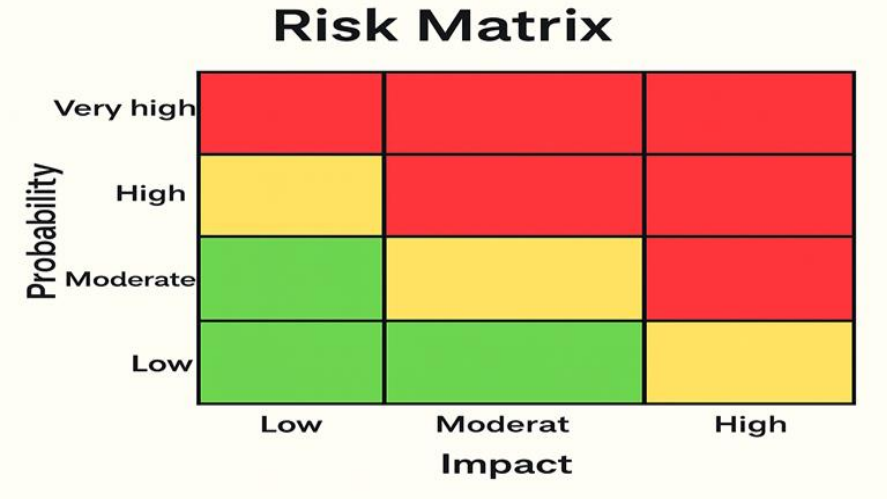
Basic Principles of Risk Management

Identification – determine what risks exist
Assessment – measure them according to probability & impact
Treatment / Response – prevent, reduce, transfer, or accept them
Monitoring – track whether risks evolve
Learning – adapt strategy after each incident

Simple Algorithm for Risk Management

Step 1: Identify possible risks (brainstorming, interviews, studies)
Step 2: Assess them on two axes: Probability (P) and Impact (I)
Step 3: Prioritize them (P x I) → risk matrix
Step 4: Choose a strategy: avoid, reduce, transfer, accept
Step 5: Constantly monitor and learn from what emerges

Risk Matrix



Analytical Model: R.A.T.E.

A recent European model proposed by EASME (2022) suggests a 4-step approach:

- ✓ Recognition – identifying relevant risks
- ✓ Analysis – assessing impact and probability
- ✓ Treatment – preventive and corrective measures
- ✓ Evaluation – continuous monitoring of evolution

Entrepreneurs should not avoid risk but rather understand it, control it, and transform it into opportunity. A mature risk culture brings resilience and confidence in strategic decision-making.

Premise: From Analysis to System

We have explored four essential pillars of modern governance in entrepreneurship:

Law – the framework of protection and stability
Public Policy – the strategic direction and applicable instruments
Entrepreneurial Culture – the human and social fuel
Risk Management – the adaptive and defensive compass
We now integrate them into a single circular conceptual model, called

Dimension	Main Function	Key Strategic Question
Law	Regulates and protects	What is allowed, what is forbidden, what is encouraged?
Public Policy	Orchestrates and stimulates	What instruments does the state create to support private initiative?
Entrepreneurial Culture	Activates positive behaviors	Who are the actors that innovate, and how do they think?

Risk Management	Anticipates and corrects	How do we avoid collapse and transform crisis into progress?

The L.P.C.R. Model – The Systemic Framework for Sustainable Entrepreneurship

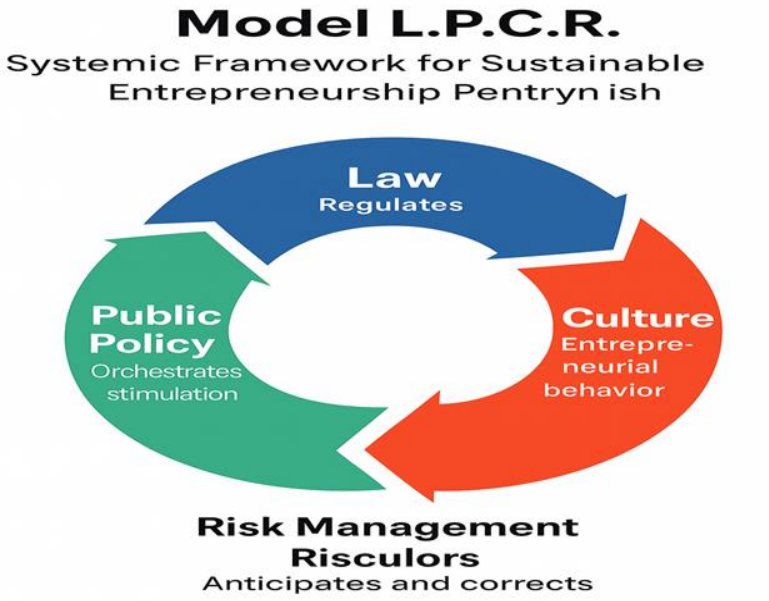
Key Links Between Dimensions

Link	Concrete Example
Law → Public Policy	Law establishes the framework for grants and funds
Public Policy → Culture	Educational programs shape entrepreneurial mindsets
Culture → Risk	A strong culture accepts and manages failure
Risk → Law	Lessons from crises lead to better regulations

Logical Formula of the Model (symbolic version)

Sustainable Entrepreneurship = f(Law, Public Policies, Entrepreneurial Culture, Risk)

↪ *S.E. = f(L + P + C + R)*



It is an open, circular, dynamic, and self-regulating system.

General Conclusions

- ✓ Law can no longer be treated as a brake, but as a mechanism for stabilizing and encouraging economic initiative.
- ✓ Public policies must be conceived as adaptable instruments, result-oriented, and developed in collaboration with the private sector.
- ✓ Entrepreneurial culture is a long-term investment: not a course, but an ecosystem of values, models, and motivations.
- ✓ Risk management transforms uncertainty into opportunity, and failure into a strategic lesson.
- ✓ The L.P.C.R. model proposes a circular, dynamic, and coherent governance framework, capable of supporting ethical, resilient, and sustainable entrepreneurship.

Innovative Public Policy Proposals

1. **StartupCheck** – instant legislative verification platform for business ideas

What does it do? Entrepreneurs input their business idea → they automatically receive:

- ✓ applicable legal requirements,
- ✓ necessary documents,
- ✓ potential legal risks,
- ✓ available funding options.
- ✍ Objective: reduce bottlenecks in the initiation phase and prevent bureaucratic failures.

2. **EduPrenor Package** – modular national curriculum for entrepreneurial culture development (Grade 5 – university level)

Content:

- ✓ Growth mindset
- ✓ Critical thinking and acceptance of failure

- ✓ Development of social / economic projects
- ✓ Ethical and sustainable entrepreneurship
- ✍ Objective: shaping entrepreneurs with values and vision, not just business ideas.

3. **RisCoLab** – local laboratories for business risk testing and simulation
They function as mini-innovation centers where:

- ✓ SMEs can analyze their vulnerabilities in real time,
- ✓ students participate in crisis simulations,
- ✓ resilience scenarios are generated.
- ✓ Objective: normalizing "risk thinking" as an intelligent strategy.

4**. ThinkForward HUB** – public-private hub for co-created public policies
Legislative co-design mechanism between:

- ✍ entrepreneurs
- ✍ public officials
- ✍ ethics and sustainability specialists
- ✍ NGOs and think-tanks
- ✓ Objective: eliminating the gap between decision and reality → policies created by those who actually use them.

5**. L.P.C.R. Certification** – voluntary standard for businesses that follow the Law – Policy – Culture – Risk model
Benefits:

- ✓ Strengthened public image
- ✓ Priority access to grants
- ✓ Increased investor confidence
- ✓ Objective: formal recognition of best practices in responsible entrepreneurship.

References

Acemoglu, D., & Robinson, J. A. (2012). *Why Nations Fail: The Origins of Power, Prosperity, and Poverty.* Crown.

AmCham Romania. (2023). *Entrepreneurship in Romania: Challenges and Recommendations*. AmCham.

Drucker, P. (1985). *Innovation and Entrepreneurship*. Harper & Row.

EASME. (2022). *Risk Management Toolkit for SMEs. European Agency for SMEs and Startups.*

E-Estonia. (2022). *E-Residency White Paper. Government of Estonia*.

European Commission. (2022). T*he SME Strategy for a Sustainable and Digital Europe.* Publications Office of the EU.

European Commission. (2023). *Artificial Intelligence in Healthcare – Legal and Ethical Considerations*. Publications Office of the EU.

GEM. (2021). *Global Entrepreneurship Monitor: Global Report 2021*. Babson College.

IMF. (2021). *Fiscal Policies to Support SMEs. International Monetary Fund.*

Ministry of Education (Romania). (2022). *National Strategy for Entrepreneurial Education. Government of Romania*.

Nesta. (2020). *The Startup Ecosystem Report*. Nesta Research.

North, D. C. (1990). *Institutions, Institutional Change and Economic Performance.* Cambridge University Press.

OECD. (2020). *Entrepreneurial Education in Practice*. OECD Publishing.

OECD. (2022). *Entrepreneurship Policies for the Future*. OECD Publishing.

Shane, S. (2003). *A General Theory of Entrepreneurship*. Edward Elgar.

Voigt, P., & von dem Bussche, A. (2021). *The EU General Data Protection Regulation (GDPR): A Practical Guide*. Springer.

Williamson, O. E. (2000). The New Institutional Economics: Taking Stock, Looking Ahead. *Journal of Economic Literature, 38(3)*, 595–613.

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 388-399

THEORETICAL AND JURISPRUDENTIAL EXAMINATION OF THE PROFESSIONAL STATUS OF WORKERS ON DIGITAL WORK PLATFORMS

Livia-Florentina PASCU
ORCID ID: https://orcid.org/0009-0008-0780-4702
E-mail: livia.pascu@ymail.com
Afiliation: Doctoral School of Law, Bucharest Academy of Economic Studies

Abstract: *Theoretical and jurisprudential examination of the professional status of workers on digital work platforms*

Digitalization is changing the world of work, the use of digital technologies in the field of work has led to the emergence of new forms of work provision, has led to the emergence and development of digital work platforms. Work on platforms is carried out by people through the digital infrastructure of digital work platforms, that provide a service to their clients.

The question arises whether the service provider through the digital platform is an independent worker or a worker to whom labor law legislation applies, whether the activity performed by the worker on the

digital platform can be defined as an employment relationship or is it only a service provision activity subject to civil law rules.

Courts are tasked with disputes in which they must determine the professional status of the service provider through digital work platforms.

***Keywords**: professional; worker; employee; self-employee; digital platform work.*

Introduction

Digitalization is changing the world of work, the use of digital technologies in the field of work has led to the emergence of new forms of work provision, and has led to the emergence and development of digital work platforms.

Work on digital platforms can be carried out exclusively through online electronic tools, or it can be carried out in a hybrid manner, by combining online communication with the performance of a physical activity.

Working through digital platforms facilitates access to the labor market, creates new employment opportunities for those who would normally be excluded from the labor market (due to age, illness, disability, gender), ensures additional income by performing a secondary activity, offers flexibility in organizing working time, but at the same time raises questions regarding the professional status of those who perform work through digital platforms, whether existing social systems offer them protection, whether there are guarantees regarding compliance with working time, minimum income, and the right to private life.

Professional status of workers on digital work platforms

The European Agency for Safety and Health at Work (EU-OSHA, 2022) defines digital platform work as: paid work provided or brokered through an online platform. The main characteristics of digital platform work are the following: paid work is organised/coordinated through a digital work platform; specific tasks are performed or specific problems are solved; algorithmic management based on digital technologies is used

to allocate, monitor and evaluate the work performed, the behaviour and performance of platform workers, including based on customer assessment mechanisms; three parties are involved, namely a digital work platform, a customer and a worker; there is a prevalence of non-standardised working arrangements, digital work platforms tend to classify workers on digital platforms as self-employed.[1]

According to Eurofound, platform work is a form of employment in which organizations or individuals use an online platform to access other organizations or individuals to solve certain problems or provide certain services in exchange for a price.[2]

The employment relationship necessarily presupposed the existence of an employer and an employee. This means that the system of employment relations of this type is a binary one: employer - employee. The status of employee is dependent on the way in which the employer, in this capacity, relates to the employee. This argument has often been used by digital platforms to claim that, in reality, service providers registered on these platforms do not meet the conditions to be qualified as employees and, therefore, are not entitled to benefit from the rights regulated by labor legislation in their favor (Vlăsceanu, & Athanasiu, 2021).

Digital work platforms tend to position themselves as beneficiaries of services rather than as employers, with those who perform work through work platforms being considered independent workers and not workers within the meaning of labor law.

To the extent that people working through work platforms are considered to be self-employed, they do not have access to the minimum labour and social protection rights that apply to workers in all Member States, being exposed to inadequate working conditions (the right to a

[1] Digital platform work and occupational safety and health: overview of regulation, policies, practices and research, osha.europa.eu/ro/publications, accessed on 24.03.2025

[2] Platform work, www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/platform-work acccessed on 16.03.2025

minimum wage, working time regulations, occupational health and safety, social security rights).

Work through digital platforms is characterized by precariousness, the provider faces job insecurity, there is no guarantee of a minimum income, there is no minimum standard of social protection.

Given that three parties are involved in the work performed on a digital platform, that the work performed is often temporary in nature, that the worker enjoys autonomy regarding the place and time of work, the standard concept of work - the binary employer-employee relationship seems to be inapplicable.

Digital work platforms through algorithmic management establish task allocation, set prices for individual tasks, determine work schedules, provide instructions, evaluate work performed, offer incentives or apply unfavorable treatments, behave like an employer.

Why would a worker performing work on a digital platform conclude a collaboration or service contract and not an employment contract?

As has been shown in the specialized literature, sometimes the parties do not give the contract concluded by them the name corresponding to its legal nature out of ignorance, sincerely believing that what they conclude is a "collaboration contract" or a "services contract". Often, however, the parties deliberately hide the true nature of the contract concluded by them, for fiscal reasons: the contributions paid on the income obtained under a civil contract are usually lower than those mandatory in the case of salaries. But there are also causes related to the desire to avoid the projective norms of labor law, the employer being thus "freed" from the restrictions imposed by labor legislation, and the employee - deprived of the minimum rights from which, in labor law, there is no derogation. Another frequent reason is an attempt to avoid bureaucratic provisions, such as the registration of employment contracts in the General Register of Employees (Dimitriu, 2021).

Initially, the concept of worker was defined by the CJEU, which developed in its case law criteria for qualifying a person performing an activity as a worker.

In the Lawrie-Blum case[1], the CJEU identified the fundamental criteria for defining the concept of worker. According to the Court, the concept of worker should be defined by reference to objective criteria that differentiate the employment relationship, namely the rights and obligations of the person concerned. The essential characteristic of the employment relationship is that a person carries out work of economic value, under the authority and control of another person, in return for remuneration. The field in which the benefits are provided and the nature of the legal relationship between the worker and the employer are irrelevant.

The CJEU jurisprudence has outlined the definitive and cumulative elements that characterize the notion of worker: the activity performed must be remunerated, the remunerated activity must be carried out within the framework of an employment relationship, characterized mainly by subordination to the beneficiary of the benefit, the worker must perform real and genuine work, the worker must perform an economic activity (Moarcăș, 2022, in Ștefănescu, p. 176).

In its case law, the Court has analysed the hypothesis of the formally self-employed worker but economically dependent, ruling that a person may be qualified as a "worker" within the meaning of Union law if his independence is only fictitious, thus disguising a genuine employment relationship.[2]

In this context, Directive 2024/2831[3] was adopted. It defines a digital work platform as a natural or legal person providing a service that meets all of the following requirements: it is provided, at least in part, remotely, by electronic means, such as through a website or a mobile

[1] Case 66/85, European Court Reports 1986 -02121, EUR-Lex - 61985CJ0066 - RO - EUR-Lex

[2] Judgment in Allonby, EU:C:2004:18, paragraph 72, https://curia.europa.eu/juris/document/document.jsf?docid=160305&doclang=EN

[3] Directive 2024/2831 of the European Parliament and of the Council of 23 October 2024 on the improvement of working conditions in platform work

application; it is provided at the request of a recipient of the service; it involves, as a necessary and essential component, the organisation of work carried out by persons in return for remuneration, regardless of whether that work is carried out online or in a specific location; it involves the use of automated monitoring systems or automated decision-making systems.

The Directive operates with two concepts, "person performing work on platforms" and "platform worker".

A person who provides work on platforms is a person who provides work on platforms, regardless of the nature of the contractual relationship or the qualification of that relationship by the parties involved.

Platform worker is any person performing work on platforms who has or is considered to have an employment contract or employment relationship as defined in national law, collective agreements or practices in force in the Member States, taking into account the case law of the Court of Justice.

According to the Directive, the professional status of a platform worker is determined in accordance with the legislation, collective labour agreements or practices in force in the Member States, taking into account the case law of the Court of Justice, including by applying the legal presumption of an employment relationship.

The Directive enshrines the principle of the preponderance of the facts, which means that the finding of the existence of an employment relationship should be based primarily on the facts relating to the actual performance of the work, including remuneration for the work, and not on the description of the relationship by the parties, in accordance with ILO Recommendation No. 198 (2006) on Employment Relations.

The European legislator also establishes a relative legal presumption in the sense that the contractual relationship between a digital work platform and a person who provides work on platforms through that platform is an employment relationship in situations where facts are found indicating management and control, in accordance with national law, collective labour agreements or practices in force in the

Member States and taking into account the case law of the Court of Justice.

The determining element for the presumption to operate is the existence of facts indicating management and control of the activity performed.

The digital work platform may overturn the legal presumption established by proving that the contractual relationship in question is not an employment relationship, as defined by national law, collective agreements or practices in force in the Member States, taking into account the case law of the Court of Justice.

In some cases, platform workers do not have a direct contractual relationship with the digital work platform, but are in a relationship with an intermediary through whom they provide platform work. In this case, platform workers are also subject to the same risks related to the misdetermination of their professional status.

And with regard to this category, the Directive provides for measures to ensure that persons who provide work on platforms and who have a contractual relationship with an intermediary benefit from the same level of protection granted under this Directive as those who have a direct contractual relationship with a digital work platform.

The deadline for transposition of the Directive is December 2, 2026.

In national law, art. 1 point 5 of the Social Dialogue Law no. 367/2022 defines the employee-worker as a natural person, party to an individual employment contract or an employment relationship, as well as one who performs work for and under the authority of an employer and benefits from the rights provided by law, as well as from the provisions of applicable collective labor contracts or agreements.

The term worker is also used by Law No. 319/2006 on occupational safety and health. This is the person employed by an employer, as well as students, pupils during internships, apprentices and other participants in the work process.

According to art. 1 paragraph 4 of the Labor Code, the legal employment relationship is the relationship regulated by law under which

a natural person, called a worker, undertakes to perform an activity for and under the authority of another natural or legal person in exchange for remuneration.

If in the past the concept of worker was specific to EU law, the emergence of atypical forms of work led to the introduction of the concept of worker in domestic law.

In tax law we also find the criteria under which the activity performed can be qualified as an independent activity (art. 7, point 3, Tax Code).[1]

Currently, there are disputes pending in national courts in which the courts must qualify the nature of the legal relationship under which service providers carry out activity on ride sharing platforms, such as Uber, Free Now, Bolt.

The factual situation that generated this type of litigation is the following: The Territorial Labor Inspectorates carried out checks on commercial companies engaged in alternative passenger transport, finding that the transport service providers had not concluded an employment contract, although the activity report extracted from the electronic platform of the collaborator Bolt, Uber, Free Now, as the case may be, showed that they had performed the activity.

In general [2], the defense of the sanctioned companies was that the labor inspectors wrongly qualified the commercial relationships existing between these companies, intermediaries between labor providers and electronic platforms, as commercial relationships and not labor relationships. It is claimed that the activity was provided under civil service contracts, through which the sanctioned company benefited from the services of service personnel/drivers for the cars made available for

[1] Fiscal Code, Law 227/2015, published in the Official Gazette 688 of 10.09.2015

[2] Civil Judgment no. 6433/04.03.2024, Timişoara Court, Civil Section I, file no. 17834/325/2023; Civil Judgment no. 2578 /07.06.2024, Târgovişte Court, file no. 1529/315/2024; Civil Judgment no. 898/07.11.2024, Timiş Court, Administrative and Fiscal Litigation Section, file no. 4322/30/2023, rejust.ro

their exploitation in a ridesharing regime through online platforms such as Uber, Bolt or similar, the personnel made available to the company, despite the fact that they carry out their activity for its benefit and under the direct coordination of the petitioner, had relationships of predominance with the economic agents with which the petitioner as beneficiary had concluded the service contracts.

In defense, the Territorial Labor Inspectorate essentially showed that the persons who provided the passenger transport activity are parties to an employment relationship and not a commercial relationship, the notions of working time or work schedule (specific elements of an individual employment contract) being expressly mentioned in the service contract, moreover, the conditions under which the driver can carry out the alternative transport activity are imposed by the beneficiary, a fact that denotes a relationship of subordination of the provider to the beneficiary, the activity is carried out constantly (repetitively) and not occasionally (accidentally), with the beneficiary's means.

In the aforementioned cases, the courts essentially held that there were undeclared employment relationships between the parties, concealed by service contracts concluded with various economic agents, whose administrators were the drivers themselves who provided the transport activity. The fact that the work was performed personally by the respective drivers, according to a certain schedule (12 hours/day), having a continuous nature, the services being paid periodically, compared to the fact that the work was carried out in accordance with the instructions and under the control of the plaintiff and for its main benefit, leads to the conviction that the legal relationship between the parties is an employment relationship.

There were also contrary solutions, in the sense that the court considered that between the plaintiff sanctioned for a contravention, as a beneficiary, and the alternative passenger transport service provider, there

is no subordination relationship specific to an individual employment contract. [1]

The court held that the plaintiff was not obliged to conclude individual employment contracts with its collaborators, as they had the status of legal entities, and the administrators of the collaborating companies who were the drivers performing the trips did not have to have concluded individual employment contracts with the plaintiff, as long as a civil service agreement existed between the two companies.

Another type of litigation that imposed the qualification of the professional status of persons providing transport activity through digital platforms started from situations in which tax inspectors, following the checks carried out, qualified the activity of drivers providing transport through the Uber, Bolt, Free Now platforms as a salaried activity and issued administrative acts by which they established additional amounts consisting of social security contributions, social health insurance contributions, payroll tax, additional labor contribution as the responsibility of the companies. In fact, the companies were authorized to carry out alternative transport of people, but during the period in which they provided the services, the companies did not own the means of transport, so they concluded leasing contracts, for a fixed period, with various individuals who owned the cars used in the alternative transport activity, for which they bore all the expenses regarding their maintenance and use. The drivers who carried out the trips were various individuals, some of them administrators of the company, but their only activity was that of drivers (chauffeurs). The companies' defense was that the activity performed by the drivers was an independent activity.

The court held that the individuals who had the capacity of administrators/drivers do not have the freedom to choose the place and the way of carrying out the activity, nor the freedom to carry out the

[1] Civil Judgment no. 243/27.01.2025, Oradea Court, file no. 19339/271/2024, rejust.ro; in the same sense Civil Decision no. 900/A/06.11.2024, Timiș Court, Administrative and Fiscal Litigation Section, file 31526/325/2023;

activity for several clients and do not assume the risks inherent in the activity, since the orders regarding the transport services are transmitted through the Uber, Bolt, Free Now IT applications, of which the company is the authorized partner, as a result of the conclusion of service provision and affiliation contracts to the digital platform with the aforementioned external partners. Also, the criterion according to which the activity is carried out by using the assets of the individual who carries it out is not met, since the company is the holder of the right to use the cars used in the alternative transport activity, as a result of the conclusion of loan agreements with individuals, and the company has settled the expenses for fuel, parts and car repairs.[1]

Conclusions

Therefore, a judicial practice has emerged in national jurisprudence, which, by applying the criteria that define the concept of employee, or rather worker - namely the person who carries out a remunerated activity under the authority and control of another person - qualifies the status of the person who performs remunerated activity through digital platforms as a worker and not an independent worker.

However, there are also cases in which the court considered that the worker performing work through digital platforms is an independent worker.

As noted in the literature, law plays a critical role in anticipating and guiding, naming and shaping technological change (Aloisi & De Stefano, 2022, p. 19).

Therefore, legislating work on digital platforms is a necessity today that will put an end to discussions regarding the professional status of those who perform work through digital platforms.

[1] Civil sentence no. 1081/07.05.2024, Brașov Court, Second Civil Section, Administrative and Fiscal Litigation, file no. 1081/62/2023, rejust.ro.

References

Aloisi, A., & De Stefano, V. (2022). *Your boss is an algoritm. Artificial Intelligence.* Platform Work and labour, Hart Publishing.

Civil Sentence no. 6433/04.03.2024, Timişoara Court, Civil Section I, file no. 17834/325/2023; Civil Sentence no. 2578 /07.06.2024, Târgovişte Court, file no. 1529/315/2024; Civil Sentence no. 898/07.11.2024, Timiş Court, Administrative and Fiscal Litigation Section, file no. 4322/30/2023; Civil Sentence no. 243/27.01.2025, Oradea Court, file no. 19339/271/2024; in the same sense Civil Decision no. 900/A/06.11.2024, Timiș Court, Administrative and Fiscal Litigation Section, file 31526/325/2023 rejust.ro.

Deborah Lawrie-Blum/Land Baden-Württemberg, C-66/85 (3 iulie 1986). ECLI:EU:C:1986:284

Dimitriu, R. (2021). The Worker, Beyond the Employment Contract. In *Legal Studies and Research*, sintact.ro.

Digital platform work and occupational safety and health: overview of regulation, policies, practices and research, osha.europa.eu/ro/publications/ .

Directive 2024/2831 of the European Parliament and of the Council of 23 October 2024 on the improvement of working conditions in platform work, https://eur-lex.europa.eu/ .

Fiscal Code - Law 227/2015, published in the Official Gazette 688 of 10.09.2015.

Labor Code of 2003 (Law no. 53 of January 24, 2003), published in the Official Gazette 345 of 2011.05.18.

Law 367/2022 on social dialogue, published in the Official Gazette 1238 of 20.12.2022.

Law 319/2006 on occupational health and safety, published in the Official Gazette 646 of 2006.07.26.

Moarcăș, C. A. (2022), The extension of the concept of "worker" from the "Lawrie-Blum formula" to the transnational dimension. In *In memoriam Ion Traian Ștefănescu*. Universul Juridic.

Platform work. www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/platform-work accesat la 16.03.2025.
Vlăsceanu, Ana-Maria, & Athanasiu Alexandru. (2021). Labor protection in the digital age. On the need to reevaluate the concepts of 'worker'. *Universul Juridic Premium 4* . sintact.ro.

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 400-410

LEGAL REGIME APPLICABLE TO THE REMOVAL AND TRANSPLANTATION OF ORGANS, TISSUES AND CELLS OF HUMAN ORIGIN FOR THERAPEUTIC PURPOSES FROM THE LIVING DONOR

"What we have done for ourselves alone dies with us; what we have done for others and the world remains and is immortal".
(Albert Pike, American lawyer, journalist, and soldier, 1809-1891)

Ramona DUMINICĂ[1]
ORCID ID: https://orcid.org/0000-0002-3416-2329
E-mail: florina.duminica@upb.ro
Andreea DRĂGHICI[2]
ORCID ID: https://orcid.org/0000-0003-3427-7334
E-mail: andreea.draghici75@upb.ro
Afiliation[1,2]*:* Faculty of Economic Sciences and Law, The National University of Science and Technology POLITEHNICA Bucharest, Pitești University Centre, Romania

Abstract: *Transplantation of organs, tissues and cells of human origin is considered to be the best and often the only form of treatment for patients with organ failure.*

Although the contribution of this medical intervention to saving human lives or to increasing the quality of life of sick people is undeniable, it also involves a number of dangers.

Improper use of organs or tissues could prejudice fundamental human rights, such as the right to life, the right to physical and mental integrity or the right to dignity. Also, the insufficiency of available organs and the pressure to increase their number can favour the emergence and development of practices that go beyond ethical and legal limits. Beyond these possible dangers, the psychological and sociocultural implications inherent in carrying out such medical intervention that significantly and irreversibly affect the lives of the persons involved must be considered.

Based on these considerations, this article examines the strengths and weaknesses of the legislation governing the transplantation of organs, tissues and cells of human origin in Romania. Finally, it advocates the existence of a firm and balanced legal framework through which to maximize the quality, safety of interventions, to guarantee the rights and freedoms of donors and recipients, without, however, representing an obstacle to medical progress.

Keywords: *transplant; organs; donor; recipient; consent.*

Introduction

The idea of transferring an organ from man to man or from animal to man is very ancient, existing since prehistory. In the period of myths and miracles, transplants performed by gods, saints and healers are mentioned.

There is the myth that in the 3rd century the surgeon saints Cosmas and Damian performed the "successful transplantation" of an entire leg, a procedure depicted in several famous paintings (Barker & Markmann, 2013). The miracle of saints Cosmas and Damian concerned the transplantation of the leg from a black man to a white man that would have taken place in medieval Rome (van Gulik, 2024). Although technically this event is considered a miracle or a dream, the choice of a leg graft from a black deceased donor onto a white recipient is

remarkable in its symbolism for the further development of the field of transplantation both from the perspective of medical technique, but also from an ethical and legal perspective.

This choice demonstrates that even in times when surgeons could only dream of transplantation, altruism prevailed without racial problems. Altruism is the fundamental principle that must govern organ donation. According to this principle every available organ should go to anyone who needs the organ, regardless of race, religion or any other criteria (van Gulik, 2024).

References to a form of transplantation we also find in the Bible where it can be concluded that Eve owes its existence to a rib "transplanted" from Adam: "*And the Lord God caused a deep sleep to fall upon Adam, and he slept: and he took one of his ribs, and closed up the flesh instead thereof; And the rib, which the Lord God had taken from man, made he a woman, and brought her unto the man*" (The Old Testament, 21:22).

Although the history of transplants is not of divine origin, yet the role of various religions in the development of this medical technique cannot be disputed.

For example, the Orthodox Christian Church is favourable to this form of intervention on the human body, showing that it blesses any medical practice in order to reduce the suffering in the world, and sees in the organ donor a man capable of self-healing and fulfilling his gesture out of love for his neighbour (Romanian Orthodox Church). In turn, the Islamic religion also supports organ transplantation, blood transfusion and scientific research in the field provided that the freedom, dignity and responsibility of donors, recipients and health operators are respected (Ionaşcu, 2005).

1. Brief historical considerations on organ transplantation

The first medical scientific achievements in the field of organ transplantation barely appear in the late 19th and early 20th centuries and are connected with the name of the great French surgeon Alexis Carrel.

His research is the cornerstone of organ transplantation by perfecting the technique of blood vessel ligation (Mustață, 2019).

In 1954, the first successful kidney transplantation between identical twins was performed by dr. Joseph Murray of Harvard University, and in 1967 the first liver transplantation with receptor survival performed by dr. Thomas Starzl. An important moment in the history of world transplantation is the first heart transplant, performed in 1967 by the surgeon or Romanian origin Christiaan Barnard (Deac, 2010).

Regarding the history of Romanian transplantation, data attest that it begins in 1980, with the first kidney transplantation performed by Prof. dr. Eugeniu Proca, followed shortly by the first kidney transplantation from a deceased donor, performed by Prof. dr. Petru Drăgan. However, the modern stage in transplantation will start in our country only after December 1989 (National Transplant Agency, 2025; Deac, 2010).

Regarding the legal regulation of organ transplantation in Romania, the first rules in this matter are found in Law no. 3/1978 on ensuring the health of the population. A distinct regulation of this medical field is identified quite late by the Law no. 2/1998 on the procurement and transplantation of human tissues and organs and Law no. 104/2003 on the handling of human cadavers and the procurement of organs and tissues from cadavers for transplantation purposes.

Currently, the removal and transplantation of organs, cells, tissues and organs from the living donor for therapeutic purposes is regulated by the provisions of art. 68 Civil Code which is supplemented by the provisions of Title VI called "Performing the removal and transplantation of organs, tissues and cells of human origin for therapeutic purposes" (art. 141-art.162) Law 95/2006 on health care reform. The national provisions are in agreement with the European Union legislation, with the European and international legislation in the matter.

2. Principles and conditions for the removal and transplantation of organs, cells, tissues and organs from the living donor for therapeutic purposes in Romania

From the set of legal provisions listed above, a number of principles are derived that govern the removal and transplantation of organs, cells, tissues and organs from the living donor for therapeutic purposes, namely: the principle of legality of intervention, the principle of non-patrimoniality and altruism, the principle of confidentiality of the procedure and respect for personal data and the principle of freely consented donation.

The *principle of legality* emerges from Thesis 1 of art. 68 Civil Code according to which the removal and transplantation of organs, cells, tissues and organs can be carried out only in the cases and conditions prescribed by law. Also, the procedure is carried out under state control. In this regard, art. 143 para. 2 and para. 3 of Law 95/2006 stipulate that the coordination, supervision, approval and implementation of any provisions regarding the transplantation activity are the responsibility of the National Transplant Agency. The inspection and control measures regarding the transplant activity are the responsibility of the Ministry of Health, through the control structure in the field of health.

The *principle of non-patrimoniality and altruism* refers to the fact that the donation and transplantation of organs, tissues and cells of human origin cannot be the subject of legal acts and facts for the purpose of obtaining material or other use, are made only for humanitarian purposes and are altruistic in nature, as emerges from art. 144 para. 1 letter e) and f) of Law 95/2006 on health reform. We are thus in the presence of an application of the principle of non-patrimoniality of the human body, enshrined in art. 66 Civil Code. According to it, it is forbidden to evaluate the human body in money and to conclude patrimonial legal acts having as object the body in its whole or its component parts. The foundation of this principle lies in the fact that this body is the physical person themselves, the biological support of their existence. The non-patrimoniality also extends to the constituent elements of the body (organs, tissues, cells), as well as to its biological products (blood, breast milk, sperm).

Donation in order to obtain material benefits for oneself or for another is an offence according to art. 156 para. 1 of Law no. 95/2006. According to par. 3 of the same article constitutes an offence also the publication or media coverage of announcements regarding the donation of organs, tissues or cells of human origin, donation that would be carried out in order to obtain material benefits for oneself or for others. The law also qualifies as an offence the organization or carrying out of the removal of organs, tissues or cells of human origin for transplantation, in order to obtain a material benefit for the donor or organizer, as well as the purchase of organs, tissues or cells of human origin, for the purpose of resale (art. 157 para. 1 and para. 2 of Law no. 95/2006) (Diaconescu et al., 2009).

The *principle of confidentiality and respect for personal data* is another principle that underlies the performance of these types of medical interventions. Art. 144 para. 2 of Law 95/2006 establishes that "removal and transplantation centres will keep a record of living donors who have donated to the centre in accordance with national provisions on personal data protection and statistical confidentiality". At the same time, according to art. 146 para. 8 and par. 9 of the same law "data on the donor and receiver, including genetic information, to which third parties may have access, will be disclosed anonymously so that neither the donor nor the receiver can be identified. If the donor does not wish to disclose their identity, the confidentiality of the donation will be respected, except in cases where the declaration of identity is mandatory by law".

The *principle of freely consented donation* is the rule that the removal and transplantation of organs, cells, tissues and organs can only be carried out after obtaining the informed, written, free, prior and express consent of the donor and recipient.

The terms of the consent of the donor/recipient are established by art. 68 para. 1 Civil Code and art. 144 letter a) of Law no. 95/2006. No removal may be made without the consent of the person concerned and the donor may revoke such consent at any time prior to removal. The legislation in force prohibits by removal and transplanting human organs, tissues and cells from potential minor donors, as well as from people

without discernment. It is thus established the rule according to which removal can be carried out only from persons who have full capacity for exercise (Chelaru & Duminică, 2017).

By exception, according to art. 145 para. 2 of Law no. 95/2006, the removal of medullary or peripheral hematopoietic stem cells may also be performed from a minor who is related to the recipient up to the fourth degree, subject to the following requirements: the salvation of the minor who has reached the age of 10 years and the written consent of the legal protector (parents, guardian or curator) according to the model form approved by order of the minister. If the minor has not reached the age of 10, the removal can be done with the consent of the legal guardian. The written or verbal consent of the minor who is at least 10 years old is expressed before the president of the court, after the mandatory carrying out of a psychosocial investigation by the General Directorate of Social Assistance and Child Protection. The written or verbal refusal of the minor prevents any removal.

Concluding, from the legal provisions mentioned above, it results that the following *conditions have to be met by the consent given* in the case of removal and transplantation of human organs, tissues and cells from the living donor (Chelaru & Duminică, 2017; Chelaru & Chelaru, 2023):

- consent must be free, that is, it must not be altered by any vice of consent, being forbidden to remove organs and/or tissues and/or cells if it is carried out following the exercise of a physical or moral constraint on a natural person, being in this case in the presence of violence as a vice of consent;
- consent must be prior, and it is not allowed to express it later;
- consent must be express, which cannot be deduced from the conduct of the person concerned, nor determined in certain aspects by a third person as in common law;
- consent must be informed of the possible risks and consequences on the physical, mental, family and professional level resulting from the act of removal. The doctor's obligation to inform the donor/recipient and/or the legal protector is such as to eliminate the possibility of error or mourning.

The externalization of the consent is made by written deed, concluded in authentic form and having a predetermined content by order of the minister of health. Specific to the removal of organs, tissues or cells is the revocable nature of the consent without the need to comply with any form, which constitutes an exception to the irrevocable character of the unilateral legal deeds.

The removal of organs, tissues or cells from the living donor shall be carried out with the consent of the Commission for the approval of donation from the living donor, set up within the hospital where the transplant is performed. This Commission will assess the motivation of the donation and guarantee the observance of the rights of patients, according to the model of the form approved by order of the minister of health, as follows from art. 146 of the Law on health care reform. The Commission will assess both the donor and the recipient who will undergo a psychological and/or psychiatric examination, with the aim of testing the capacity for exercise, as well as determining the motivation for the donation. The psychological/psychiatric examination will be carried out by a specialist, psychologist or psychiatrist, independent of both the team performing the transplant and the families of the donor and recipient.

The members of the Commission will also sign the document expressing their consent to the removal, thus certifying that all the conditions provided by law have been respected. In turn, the recipient will sign this document. The signature of the document by the recipient confirms that the removal is not the subject of legal acts and facts for the purpose of obtaining material or other use. In this way, proof is provided of compliance with another condition provided by law: the removal must be carried out only for the purpose of carrying out a transplant whose beneficiary will be a determined person. The signing of that document by the recipient does not, however, transform the donation of human cells, tissues or organs into a contract, the human body being out of trade. Therefore, consent to removal is a unilateral, essentially free and solemn legal act (Chelaru & Chelaru, 2023).

Removal or transplantation of organs, cells, tissues and organs from living donors without consent given under the law constitutes an offence (art. 154 para. 1 of Law no. 95/2006). It is an offence and coercion of a person to donate organs, tissues or cells of human origin (art. 156 para. 2 of Law no. 95/2006).

All these principles are strengths of the relevant legislation guaranteeing respect for human dignity, as well as for other rights such as the right to life, the right to physical and mental integrity, the right to health, the right to privacy and the right to the protection of personal data.

However, there is a lack of accessible and unitary regulations that include in a separate normative act all the norms in the matter. Unlike other European states, Romania does not have a special law dedicated exclusively to organ transplantation although there have been attempts to do so over time. Unfortunately, no consensus has yet been reached for its adoption. The lack of a special law, as well as the poor financing of the medical system, the low number of transplant coordinators, the small number of donors, the excessive bureaucracy, as well as the poor cooperation between hospitals are just some of the causes of a low rate of organ donations in our country (National Transplant Agency, 2025).

Conclusions

Organ transplantation is one of the greatest medical performances of the 20th century. Currently, it constitutes a routine therapeutic method capable of saving the lives of people with serious health problems around the world. Since the first human-to-human organ transplant performed in 1954, when a kidney was successfully transplanted between identical twin brothers, and to this day, medical science in this area has evolved substantially. In 2024, surgeons at a hospital in Massachusetts, United States, transplanted the kidney of a genetically modified pig into a human receptor, and in March 2025, in a world premiere, surgeons in China reported that they transplanted the first genetically modified pig liver to a patient (Tao et al., 2025). The progress in the field of medical sciences,

with all the benefits that it brings to man and society, is also accompanied by a series of ethical and legal dilemmas, as is the case with this new revolutionary medical procedure, called xenotransplantation. It consists in transplanting to humans tissues, cells, organs, coming from animals subjected to genetic modification. Recent achievements in this field raise a number of bioethical problems, such as limiting genetic diseases transmissible from animals to humans, respect for animal welfare, crossing the inter-species barrier and social acceptance of the practice, as well as a number of legal issues relating to the regulation of research in the field or access to this form of organ transplantation.

In this context, the intervention of the legislator becomes essential for guaranteeing human rights, for the safety and quality of research and medical interventions carried out, but especially for guaranteeing human dignity, understood as the foundation of all human rights and as a guarantee of the genetic specificity of man.

References

Barker, C. F. and Markmann, J. F. (2013). Historical overview of transplantation. *Cold Spring Harbor perspectives in medicine*, 3(4), 1-18. doi:10.1101/cshperspect.a014977, https://perspectivesinmedicine.cshlp.org/content/3/4/a014977.full , accessed on 28/04/2025.

Chelaru, E., & Chelaru, M. (2023). *Drept Civil. Persoanele. [Civil Law. Persons]*. 6th edition. C.H. Beck.

Chelaru, E. and Duminică, R. (2017). Brief considerations about the informed consent of the patient. *Legal and Administrative Studies*. *Journal*, 2, 7-27.

Deac, R. (2010). Istoria transplantării de organe în România" [History of organ transplantation in Romania]. *Chirurgia Magazine*, 5, 597-602. https://www.revistachirurgia.ro/pdfs/2010-5-1.pdf, accessed on 28/04/2025.

Diaconescu, H., Cercel, S., Diţă, R. D. and Gazdovici, G. (2009). *Răspunderea juridică în domeniul prelevării şi transplantului în dreptul român. [Legal liability in the field of procurement and transplantation in Romanian law]*. Universul Juridic.

van Gulik, Thomas M. (2024). The miracle transplantation of a black leg by the surgeon saints Cosmas and Damian. *Hepatobiliary Surgery and Nutrition* 13(1). doi: 10.21037/hbsn-24-26, https://hbsn.amegroups.org/article/view/120908/html , accessed on 28/04/2025.

Ionaşcu, I. (2005). Elemente de bioetică în Islam [Elements of bioethics in Islam]. *Bioethics Magazine* 4, 13-18.

Law 9/2016 on the ratification of the Additional Protocol to the European Convention for the protection of human rights and the dignity of the human being towards the applications of biology and medicine, regarding the transplantation of organs and tissues of human origin, Official Journal, Part I no. 62 of 28 January 2016.

Law no. 287/2009 on the Civil Code, republished, Official Journal no. 505 of 15 July 2011.

Law no. 95/2006 on health reform, republished, Official Journal no. 652 of 28 August 2015.

Mustață, M. (2019). Retrospectivă istorică asupra transplantului. [Historical retrospective on transplantation]. *eAsistent Magazine*, 25-29. https://www.easistent.ro/new/revistapdf/eAsistentDecembrie2019.pdf#page=25.64, accessed on 28/04/2025.

National Transplant Agency, http://transplant.ro/istoric/, accessed on 28/04/2025.

National Transplant agency, http://transplant.ro/registru1/, accessed on 28.04.2025.

Romanian Orthodox Church, *Transplantul de organe [Organ transplantation]*, https://patriarhia.ro/transplantul-de-organe-1451.html, accessed on 28/04/2025.

Tao, KS., Yang, ZX., Zhang, X. *et al.* (2025). Gene-modified pig-to-human liver xenotransplantation. *Nature*. https://doi.org/10.1038/s41586-025-08799-1 .
The Old Testament, Genesis, Chapter II (21: 22), https://www.bibliaortodoxa.ro/carte.php?id=25, accessed on 28/04/2025.

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 411-424

RESTRICTION ON THE EXERCISE OF CERTAIN RIGHTS OR FREEDOMS: LEGISLATIVE AND JURISPRUDENTIAL STANDARDS

Elena ANGHEL
ORCID [ID]: https://orcid.org/0009-0003-7157-5418
E-mail: elena_comsa@yahoo.com
Afiliation: The Faculty of Juridical Sciences Nicolae Titulescu University, Bucharest

Abstract: *The notion of individual freedom, used in Article 23 of the Romanian Constitution, designates the physical possibility of a person to manifest himself within his natural limits, without being subject to any restrictions or impediments other than those established by law. Thus, as in the case of other fundamental rights and freedoms, individual freedom is not absolute, so its exercise may be restricted in the cases provided for in Article 53 of the Constitution, namely, "for the defense of national security, public order, health or morals, the rights and freedoms of citizens; the conduct of criminal proceedings; the prevention of the*

consequences of a natural calamity, a disaster or a particularly serious incident".

As established by Art. 53 para. (2) of the Fundamental Law, the restriction in these cases may be ordered only if it is necessary in a democratic society, and the measure must be proportionate to the situation that determined it, be applied in a non-discriminatory manner and not prejudice the existence of the right or freedom. These coordinates, established by the fundamental provisions of art. 53, have the value of a constitutional principle, being applicable to all fundamental rights and freedoms of citizens.

In addition to analyzing the legislative standards that circumscribe the content of the restriction of the exercise of certain rights or freedoms, this study also aims to highlight the requirements that emerge from the jurisprudence of the Constitutional Court and the European Court of Human Rights.

Keywords: *freedom; restriction; fundamental rights; Constitutional Court; European Court of Human Rights.*

Introduction

In its case law, the Constitutional Court has held that the exercise of a right cannot be made absolute by eliminating all restrictions inherent in the existence of other rights belonging to other holders, to which the state authority is equally bound to protect. In other words, liberty, with its usual meaning, that of a legal framework within the limits of which the exercise of rights is legitimate, ends where the liberty of other subjects of law begins[1].

In legal terms, liberty is a subjective right and the subjective right is a freedom, so that the shades of meaning assigned to the same legal concept are explained by considerations of history and tradition.

Positive law is "the unit of measurement by which we measure freedom", notes Professor Gh. Mihai (Mihai, 2005, p. 100), adding that law without man's freedom of action is without substance. If the general

[1] Decision no. 587 of 8 November 2005, Official Journal no. 1159 of 21 December 2005.

principle of liberty represents the foundation of objective law and a universal, unconditional value for human beings, positive law is limited to recognizing in favor of the subject of the law only certain prerogatives - subjective rights, which "are nothing else than potential content of legal freedom, not freedom in general".

Therefore, the State legally guarantees the freedom of individuals, by stating in Article 23 of the Constitution that "Individual freedom and security of a person are inviolable". The constitutional text refers to "the physical liberty of the person, his right to behave and move freely, not to be held in slavery or in any other form of servitude, not to be detained or arrested, except in the cases and in the forms expressly provided for by the Constitution and the laws". Constitutional law decisively shapes freedom at the level of jurisdiction and gives it specific coordinates.

Constitutional law is "an expression of the reconciliation of freedom and authority", of the balance between the individual and the community, between the part of freedom that the individual sacrifices and the benefit that society gives him in return. Therefore, the law is designed to establish the necessary balance between the exercise of the rights and freedoms of individuals, which cannot be suffocated by excessive coercive measures, and the need to ensure social order and harmonious coexistence of the members of society.

The analysis of the concept of freedom-autonomy, developed by Kant, allows us to understand that, by defining law through the coexistence of freedoms and emphasizing the need to limit individual freedom in order to make the freedom of all subjects of law possible, only an apparent restriction of freedom is achieved. Essentially, it is a subtle mechanism which the law uses so that, by disciplining individual freedoms, the freedom of all members of society is secured, which in fact means that individual freedom is confirmed rather than restricted.

Kant substantiates law, understood as the necessity of the coexistence of freedoms, on the interdependence between free wills. For the German philosopher, "law is the set of conditions under which the arbiter of one can agree with the arbiter of the other, following a general law of freedom". It is the idea of freedom-relation. Since the purpose of

law is to make the coexistence of freedoms possible, it intervenes to limit each freedom, to mediate between freedoms, to ensure the freedom of all and social order.
The doctrine states that if individuals were capable of understanding the freedom of others, of accepting their fellow human beings and relating to them by setting their own limits and rules, they would no longer need external constraining rules. But the basis of law is not human nature but a kind of "human distortion"; law exists as long as individuals are incapable of morality (Dănişor, Dogaru, & Dănişor, 2006 , p.33).

Restriction on the exercise of certain rights or freedoms

Seen from this philosophical perspective, restricting the exercise of certain constitutional rights and freedoms is not only permissible, but also necessary to meet the need to ensure legal certainty for the rights and freedoms of others. However, the essence of the constitutional legitimacy of the restriction on the exercise of a right or freedom is its exceptional and temporary nature. As the Constitutional Court has ruled in its case-law, in a democratic society, the rule is that fundamental rights and freedoms may be exercised without restriction, and the restriction is provided for as an exception, unless there is no other solution to safeguard the values of the State which are jeopardized[1].

Therefore, the adoption of measures restricting the exercise of certain rights can only be realized under the strict and limitative conditions set out in Article 53 of the Constitution. Thus, in order for the restriction to be justified, the requirements expressly laid down in Article 53 of the Constitution must be cumulatively met, namely: it must be provided for by law; it must be necessary and fall within the scope of the grounds expressly provided for by

[1] Decision no. 1414 of 4 November 2009, Official Journal no. 796 of 23 November 2009

the Constitution, for: the protection of national security, public order, public health or morals, the rights and freedoms of citizens; the conduct of criminal investigations; the prevention of the consequences of a natural calamity, disaster or particularly serious disaster; it must be necessary in a democratic society; it must be proportionate to the situation which has given rise to it; it must be applied in a non-discriminatory manner; it must not prejudice the existence of a right or freedom.

The Constitutional Court and the courts of law are the main national state institutions that have the competence to guarantee respect for the exercise of citizens' fundamental rights and freedoms, therefore the conditions and limits of this constitutional principle have been developed through case law.

First of all, the Contentious Constitutional Court has consistently held that the scope of art. 53 of the Constitution is limited to the restriction of the exercise of rights or freedoms provided for by the Fundamental Law, and not to the restriction of the exercise of any subjective right, even if it arises from a normative act[1]. Therefore, the enjoyment of additional salary entitlements, such as vacation bonus, does not represent a fundamental constitutional right, and the provisions of art. 53 of the Constitution are not relevant to their regulation. Consequently, the legislator is entitled to grant, amend or terminate them and to determine the period during which they are granted[2].

The Constitutional Court has also ruled that the right to drive a motor vehicle is not one of the rights laid down in the Constitution, and art. 53 of the Constitution sets out the conditions and limits for restricting the exercise of certain fundamental rights or freedoms, not other rights[3].

The exercise of a right by its holder can only take place within a certain framework, established in advance by the legislator, in compliance with certain requirements, to which the establishment of certain time limits, after the expiry of which the exercise of the right is no

[1] Decision no. 65 of 27 January 2011, Official Journal no. 133 of 22 February 2011
[2] Decision no. 117 of 24 February 2005, Official Journal no. 405 of 13 May 2005
[3] Decision no. 503 of 16 November 2004, Official Journal no. 53 of 17 January 2005

longer possible are also subject. Far from representing a denial of the right in itself, such requirements give expression to the order of law, the absolutization of the exercise of a particular right having the consequence of either denying or cutting off the rights or legitimate interests of other persons, to whom the State is bound to protect, in full accordance with the provisions of art. 53 of the Constitution[1].

As regards the requirement that the restriction be provided for by law, the Constitution limits the possibility of intervention of the law of restraint only to certain situations, clearly and restrictively provided for, situations that involve the defense of social and human values which, by their functions and importance, can substantiate such measures.

In this background, it should be recalled that in its case law on the actions and measures ordered during a state of alert, pursuant to the provisions of Government Emergency Ordinance no. 21/2004[2], the Constitutional Court has ruled that the provisions of art. 4 of Government Emergency Ordinance no. 21/2004 are constitutional only to the extent that the actions and measures ordered during the state of alert do not aim at restricting the exercise of fundamental rights or freedoms.

Therefore, with regard to the objection concerning the possibility of imposing restrictive measures on fundamental rights by means of administrative acts, the Court holds that the actions and measures ordered during a state of alert, pursuant to the provisions of Government Emergency Ordinance no. 21/2004, cannot relate to fundamental rights or freedoms. Furthermore, the Court finds that the delegated legislator cannot delegate to an administrative authority/entity what he does not himself have competence to do. As the Court has consistently held, according to the constitutional rules contained in art. 53 para. (1) and art. 115 para. (6) the impairment/withdrawal of fundamental rights or freedoms can only be achieved by law, as a formal act of Parliament.

The principle of proportionality, as laid down in the particular case of art. 53 of the Constitution, entails that the restrictions on the exercise

---

[1] Decision no. 61 of 17 February 2004, Official Journal no. 213 of 11 March 2004

[2] Decision no.157 of 13 May 2020, Official Journal no. 397 of 15 May 2020

of fundamental rights or freedoms are exceptional in nature, which necessarily implies that they are temporary. Since the public authorities can resort to restricting the exercise of certain rights in the absence of other solutions, in order to safeguard constitutional values, it is logical that this serious measure should cease under the conditions and within the time-limit laid down by law, when the cause which led to the measure being ordered has ceased to exist.

Therefore, the legislator must be concerned to ensure that the requirements laid down are sufficiently reasonable not to entail an excessive restriction on the exercise of the right such as to call its very existence into question[1]. Therefore, in one case, the Constitutional Court found that the measure to reduce the amount of salary/allowance/pay by 25% represents a restriction on the exercise of the constitutional right to work which affects the right to a salary, *under the observance of the provisions of art. 53 of the Constitution*[2].

According to the principle of proportionality, any measure taken must be appropriate - objectively capable of achieving the aim, necessary, indispensable for the fulfillment of the scope and proportionate: the right balance between actual interests in order to be appropriate to the aim pursued[3].

According to the constitutional provisions of art. 53 para. (1), the restriction on the exercise of certain rights, by law, shall not be conditioned by the general interest, but by the "defense of national security, of public order, health, or morals, of the citizens' rights and freedoms; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or an extremely severe catastrophe"[4].

---

[1] Decision no. 119 of 1 March 2005, Official Journal no. 375 of 4 May 2005

[2] Decision no. 874/2010, published in Official Journal. 433 of 28 June 2010

[3] Decision no. 462 of 17 September 2014, Official Journal no. 775 of 24 October 2014, Decision no. 270 of 7 May 2014, Official Journal no. 554 of 28 July 2014

[4] Decision no. 375 of 6 July 2005, Official Journal no. 591 of 8 July 2005

The revision of the Constitution added an extra condition for the restriction to operate: it must be necessary in a democratic society, thus capitalizing on the provisions of the international documents in the field. The criterion of the necessity of limitation, placed in the context of a democratic society, represents a point of reference in the particular analysis of each individual situation, both for the legislator, when he adopts such measures, and for the constitutional judge, when he is called upon to review the constitutionality of such a measure (Constantinescu, Iorgovan, Muraru, & Tănăsescu, 2004, p. 109).

The existence of limits on the exercise of certain fundamental rights is justified by constitutional protection or the protection of important human or state values by international legal instruments. Notwithstanding, state authorities shall not be allowed to restrict in a discretionary and abusive manner the exercise of rights which are themselves constitutionally guaranteed, in the name of such values.

From the analysis of the case law of the Constitutional Court, we note that art. 53 para. (1) of the Constitution provides, among other situations, that the exercise of certain rights may be restricted in order to protect public order, citizens' rights and freedoms. Therefore, between the exercise of the right to drive motor vehicles by certain persons for whom there are indications that they have acquired a driving license without having completed a training course or without passing the theoretical and practical examination stages or by formally passing them, and the protection of the general interest, which in this case is identified with the need to maintain road safety on public roads, the legislator has understood to give priority to the latter[1].

The interest of protecting national security also justifies the restriction of certain rights: the temporary restriction of the right to freedom of movement is within the limits provided for by art. 53 para. (1) of the Constitution, being expressly established for the protection of

[1] Decision no. 399 of 24 March 2011, Official Journal no. 337 of 16 May 2011

national security, public order, public health or morals, the rights and freedoms of citizens[1].

Furthermore, constitutional case law has also held that the use of audio or video recordings as evidence in a criminal trial is consistent with art. 53 of the Constitution, which recognizes the legitimacy of restrictions on the exercise of certain rights or freedoms, including the exercise of the right to respect and protection conferred by public authorities to intimate, family and private life, if they are made by law and in order to protect important social values, such as the conduct of criminal investigation or prevention of criminal offences[2].

The introduction of precautionary measures is intended to protect certain categories of persons, in view of the special situation in which they find themselves, and does not infringe the provisions of art. 44, para. (1) and (2) on private property rights. The reasons for the measure justify the restriction of the exercise of this right, in full compliance with the provisions of art. 53 of the Fundamental Law[3].

Both the Romanian Constitution, in art. 53, and international documents on human rights, for example, the European Convention on Human Rights, the International Covenant on Civil and Political Rights, allow for the possibility of reasonably reducing the degree of protection afforded to certain fundamental rights, at certain times or in certain situations, subject to certain conditions, as long as the very substance of the rights is not affected. The reasonable and temporary reduction in the salaries of the staff of budgetary units, combined with a series of measures to manage the financial problems facing the state budget in the period of global financial crisis, represents a restriction of the right to work of this category of employees which is compatible with the Fundamental law[4].

---

[1] Decision no. 544 of 7 December 2004, Official Journal no. 152 of 21 February 2005
[2] Decision no. 134 of 1 February 2011, Official Journal no. 188 of 17 March 2011
[3] Decision no. 1364 din 26 October 2010, Official Journal no. 819 of 8 December 2010
[4] Decision no. 1414 of 4 November 2009, Official Journal no. 796 of 23 November 2009

Constitutional Court Decision no. 226/2001 found that some provisions of international regulations do not preclude circumstances and even restrictions on the exercise of freedoms. Therefore, according to the provisions of art.19 item 3 of the International Covenant on Civil and Political Rights, "the exercise of the rights can be subject to certain restrictions, but these shall only be such as are prescribed by law and are necessary, among others, for the protection of national security or of public order". Furthermore, art.2 para. 2 of the same covenant provides that the rights must be exercised without unreasonable restrictions, which implies that the exercise of those rights may be subject to conditions.

The Constitutional Court has found that the Universal Declaration of Human Rights, adopted and promulgated by the General Assembly of the United Nations by Resolution No. 217 A (III) of December 10, 1948 provides the following in art. 29, item 2: "*In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society*." In the light of these provisions, as well as of art. 6 and 8 of the European Convention on Human Rights, the European Court of Human Rights held in case *Klass and Others v. Germany*, 1978, that "the power of secret surveillance of citizens is a characteristic of the police state and is tolerable under the Convention only in so far as strictly necessary for safeguarding the democratic institutions". Furthermore, it held that "the existence of some legislation granting powers of secret surveillance over the mail, post and telecommunications is, under exceptional conditions, necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime"[1].

Therefore, at the level of European legislation, which forms part of domestic legislation under art. 11 of the Constitution and takes precedence under art. 20 of the Fundamental Law, the European

[1] Decision no. 57 of 21 February 2002, Official Journal no. 182 of 18 March 2002

Convention on Human Rights expressly regulates, in art. 8 to 11, that the rights enshrined in these provisions may be subject to limitations/restrictions. These limitation clauses are expressed by 3 conditions: “prescribed by law”, “legitimate aim pursued” and “necessary in a democratic society”; they are to be interpreted restrictively since they provide for an exception to the right regulated in para. (1) of the conventional texts. In its turn, the first mentioned standard, namely “prescribed by law”, entails two essential components, namely the accessibility and predictability of the law, while the second standard, the legitimate aim pursued, is the prohibition of arbitrary measures being regulated by law.

With regard to the condition that the interference must be provided for by law, we emphasize that, in a rich jurisprudence, the European Court of Human Rights has mentioned the importance of ensuring the accessibility and predictability of the law, establishing a series of guidelines that the legislator must take into account to ensure these requirements. The expression "prescribed by law" requires, first of all, that the contested measure be based on national law. Second of all, it refers to the quality of the law in question, requiring that it must be formulated with sufficient precision to be accessible to the person concerned, who must, moreover, be able to foresee, to an extent that is reasonable in the respective circumstances, the consequences which a given action may have [*see, among other judgments, The Sunday Times v. United Kingdom (no. 1), 26 April 1979, item 49, series A. no. 30, and Michaud v. France, no. 12.323/11, item 94-96 ECHR 2012*]: “a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct. He must be able to foresee the consequences which a given action may entail”; “a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen – if need be with appropriate advice – regulate his conduct”; “In particular, a norm is foreseeable when it offers a certain guarantee against arbitrary encroachments of public power” - *Sunday Times v. United Kingdom of Great Britain and Northern Ireland, 1979, Rekvényi v. Hungary, 1999, Rotaru v. Romania, 2000, Damman v. Switzerland, 2005.*

Furthermore, the European Court of Human Rights, by means of the Judgment of 9 February 1995, pronounced in case *Vereniging*

Weekblad „Bluf!" v. The Netherlands, decided that the access to public information can be restricted in order to protect national interest, according to the provisions of art. 10 para. 2 of the European Convention on Human Rights. Therefore, in order to comply with the provisions of the Convention, the restrictions on freedom of information must meet the following conditions: a) to be prescribed by the law; b) to have legitimate aim pursued; c) to be necessary in a democratic society. By the judgment of July 8, 1999, delivered in case *Sürek v. Turkey*, the human rights court ruled that it is within the discretion of the state to decide if and when certain information needs to remain confidential and, consequently, the state has a wide margin of appreciation in this matter[1].

The limitation on the use of restrictions of rights is also provided for in art. 18 of the Convention: "*The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed*", this article serves as a reference point for the European Court of Human Rights in interpreting the restriction clauses contained in other provisions of the Convention or in its protocols[2].

The notion of a hidden purpose is related to that of bad faith, but they are not necessarily equivalent in every case. A right or freedom is sometimes restricted solely for a purpose which is not prescribed by the Convention. But it is equally possible that a restriction is applied both for an subsequent purpose and a purpose prescribed by the Convention; in other words, that it pursues a plurality of purposes [*Merabishvili v. Georgia (MC), 2017, item 292*].

Therefore, when examining a claim under Article 18, the Court must therefore determine: whether the restriction imposed on the applicant's right or freedom had a hidden purpose; whether the restriction pursued both a purpose provided for by the Convention and a hidden one, that is, whether there was a plurality of purposes; and which purpose was the predominant one [*Merabishvili v. Georgia]*

---

[1] Decision no. 302 of 1 March 2011, Official Journal no. 316 of 9 May 2011

[2] https://ks.echr.coe.int/documents/d/echr-ks/guide_art_18_rum

Similarly to art. 14, art. 18 of the Convention does not have an independent existence; it can only be applied in conjunction with an article of the Convention or its Protocols which sets forth or defines the rights and freedoms that the High Contracting Parties have undertaken to secure to persons within their jurisdiction.

In the following cases, the Court based its finding of a violation of art. 18 taken in conjunction with art. 5 on direct written evidence of the existence of a hidden purpose. In the case of *Gusinskiy v. Russia*, *2004*, the applicant, a wealthy businessman, was charged and placed in pre-trial detention in order to pressure him into selling his media company to a state-owned enterprise. The direct evidence results from a written agreement, approved by a government minister, which links the dropping of charges against the applicant to the sale of the company, as well as from the wording of the decision to discontinue the criminal proceedings against him, which referred to that agreement; the respondent government did not attempt to deny this connection. In the case of *Lutsenko v. Ukraine, 2012*, the Court relied on the arguments presented in the prosecutor's request for the applicant's pre-trial detention, namely that by communicating with the media, he was attempting to mislead public opinion, discredit the prosecution authorities, and influence his future trial. The Court considered that this demonstrated that the detention was aimed at punishing the applicant for publicly proclaiming his innocence.

Conclusions

From a philosophical perspective, it has been argued in legal doctrine that, since law imposes and constrains, freedom within the framework of law lacks authenticity: "freedom, in its absolute sense, is only possible in the field of Ethics" (Popa, Dogaru, Dănișor, & Dănișor, 2002, p. 221). The purpose of law is not the exercise of freedom, but its limitation.

The action of the general principle of liberty is achieved through the just limitation of individual freedom, in the sense of coordinating all

freedoms. However, we have emphasized that this limitation is only apparent; In the final instance, this leads to a confirmation of freedom. Essentially, it is a brake against a potential excess of freedom in society to the detriment of individuals; in this way, the individual receives the necessary guarantees regarding the exercise of their own freedom. Therefore, unlike true freedom, which knows no limits or constraints, freedom in law requires restrictions.

Article 53 of the Constitution provides a legal solution for adapting the legal regime for guaranteeing fundamental rights and freedoms to the realities of the constantly changing social, economic, and political life. In order for public authorities to fulfill their role, without abandoning the legal protection of human rights, art. 53 of the Constitution allows for the restriction of the exercise of certain rights and freedoms of citizens, but with respect for the standards regarding the exceptional nature of the measure.

References

Anghel, E. Principiile fundamentale, un dat al dreptului (The Fundamental Principles, a „Given" in The Field of The Law), *SARA Law Research Center, International Journal of Legal and Social Order,* https://www.ccdsara.ro/ijlso, pp 181-187.

Boghirnea, I. (2023). *Teoria generală a dreptului. Curs universitar, (General Theory of Law)*. Sitech.

Constantinescu, M, Iorgovan, A., Muraru, I., & Tănăsescu, E.S. (2004). *Constituţia României revizuită- comentarii şi explicaţii (The revised Constitution of Romania - comments and explanations)*. All Beck.

Dănişor, D. C., Dogaru, I., & Dănişor, Gh. (2006). *Teoria generală a dreptului (General Theory of Law)*. C. H. Beck.

Djuvara, M. (1995). *Teoria generală a dreptului (General Law Theory. Legal Encyclopedia)*. All.

Mihai, Gh. (2005). *Fundamentele dreptului. Dreptul subiectiv. Izvoare ale drepturilor subiective (vol. IV*). All Beck.

Popa, N., Anghel, E., Ene-Dinu, C., & Spătaru-Negură, L. (2023). *Teoria generală a dreptului. Caiet de seminar, Ed. 4*. C.H. Beck.
Popa, N., Dogaru, I., Dănişor, Gh., & Dănişor, D.C. (2002). *Filosofia dreptului. Marile curente (Philosophy of law. Major currents)*. All Beck.
Popescu, S. (2000). *General theory of law.* Lumina Lex.
https://ks.echr.coe.int/documents/d/echr-ks/guide_art_18_rum.

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 425-438

MEDIATION IN CRIMINAL CASES. THE LEGAL FRAMEWORK, THE MEANING AND THE MULTIFACETED NATURE OF THE INSTITUTION

Igor ZGOLIŃSKI
ORCID [ID]: https://orcid.org/0000-0002-5097-6170
E-mail: igozgo4681@gmail.com
*Afiliation:*Jan and Jędrzej Śniadecki University of Technology Bydgoszcz, Poland

Abstract: *Mediation is an alternative form of dispute resolution to court proceedings. By submitting a case to mediation, the power is transferred, as it were, to the parties to the dispute to reach a consensus and give a final shape to the resolution of their dispute. The role of this institution has long had a basis in law, both international and domestic. It is also enjoying increasing popularity. Moreover, it has an important practical value as it reduces the number of cases before the courts. It also reduces the length of court proceedings. It is also a versatile institution, which can be used on many levels, not only in civil or criminal law. This article presents the legal framework of this institution and panoramically demonstrates its potential with particular reference to the Polish solution.*

Keywords: *law; penal cases; mediation; restorative justice; consensus.*

Mediation in the context of European law

Mediation has been present in society for a long time. As civilisation has progressed, it has been formalised and put into a legal framework. As a rule, a self-drafted agreement produces more lasting results than a court judgment. This is because the conflict between the parties has been resolved, a quality that is usually absent in court proceedings. The entire procedure, both the negotiation stage and the enforcement stage, is faster than formal court proceedings. This translates into faster compensation or redress. Mediation is already present in almost all branches of law. The European Union, however, sees the need to develop the instruments developed so far to protect freedom, security and justice. It is in this context that the idea of mediation, in its broadest sense, as a leading component of efficient, modern restorative justice, fits in. Within the EU, as far as mediation is concerned, there has been a great deal of harmonisation over the years between the law and the standards in force in the individual Member States. There has been standardisation on key issues, mainly in the area of procedural law. Relatively improved cross-border cooperation has been developed, albeit mainly in family, commercial and civil matters (Zgoliński, 2025). This improvement, however, undoubtedly strengthens the functioning of mediation in the European arena (Czabaj, p.12)[1] . Still, the details of mediation remain different in the legal orders of the different Member States.

As a consequence, different patterns can be encountered, ranging from comprehensive, even systemic, regulations to punctual regulations. Within the framework of European law, mediation is generally defined as a form of support for the development of a consensus between the parties

[1] http://malopolskiecom,pl.

to a dispute, which is provided by a third party who has no interest in resolving the dispute[1]. At the same time, the possibility has been given to judges, obviously in agreement with the parties, to refer a case to mediation if this may prove beneficial in the circumstances of the case. Agreements reached as a result of mediation can then be given the necessary enforcement clause by the executive. The directive further introduces a standard for mediation by indicating that it is to be confidential. It also gives a party the right to initiate court proceedings after the mediation. In the European Union, mediation is undoubtedly an important tool for dispute resolution. Its importance is recognised socially.

It is promoted by various international organisations and institutions, which encourage its implementation. It is worth emphasising that this is also visible in the context of criminal cases, where the position of the victim is systematically increasing and strengthening. It is being provided with various instruments. It is intended to compromise compensation and reparation for the crime. It can be said that this process began in the 1980s. There are numerous recommendations of the Council of Europe in this regard[2]. Moreover, a broader coherence is apparent here, including with the position of the UN in the form of the Declaration on the Basic Principles of Justice for Victims and Abuses of Power, as well as the position of the Council of the European Union, that is, with the EU Council Framework Decision of 15 March 2001 on the status of victims in criminal proceedings. It accepts that mediation is the search for a solution to a specific problem during or before criminal proceedings between the victim and the offender, in the presence of a mediator.

---

[1] Vide: Council of the European Union, Concept on Strengthening uncil of the European Union, Concept on Strengthening EU Mediation and Dialogue Capacities, doc. 15779/09, http:// www.eeas. europa. eu/cfsp/ conflict_ prevention/docs/concept _strengthening_eu_med_en.pdf , (accessed 17.03.2025).

[2] *Mediation as an alternative to criminal trial*, https://kurator.org.pl/2006/01/03/mediacja-jako-alternatywa-procesu-karnego/ (accessed 20.03.2025).

The parties to a mediation proceeding should be given the opportunity to meet directly, or to communicate through available communication tools, in order to establish the details of the agreement and, in particular, the issue of reparation. The provision of Article 2 of this act stipulates the right of the victim to appropriate respect, which is immanently linked to human dignity, including consideration of the legal rights and interests of that party to the dispute. This is an extremely important aspect. Human dignity is the essence and the bedrock of humanism. Dignity belongs to every human being and should therefore also be a point of reference for the regulation of offenders. It has an inalienable value. This means that dignity cannot be done away with on its own. It is, as it were, integrated into the ontic structure of human beings. Understood in this way, dignity is the basis for the existence of social norms that are designed to protect human beings and interpersonal relations. This is reflected, inter alia, in Article 2 of the TEU, which states that the EU is founded on the values of respect for the human person, freedom, democracy, equality, the rule of law and respect for human rights, including those of persons belonging to minorities. These are values common to EU states. The normative imperative to protect dignity is established by the Charter of Fundamental Rights. The Explanatory Memorandum attached to it indicates that human dignity is a fundamental right in itself and is the real basis of fundamental rights (Wiśniewski, in Lis, & Balicki (ed.), 2012, pp.275 - 282).

The recommendations of the Council of Europe set out in the Recommendations provide a guiding framework for the use of mediation within the European countries that are members of the EU. Each Member State is obliged to take into account the recommendations and recommendations of the EU and to implement the recommendations set out therein in its own legal order. Among the other most important acts of the Council of Europe[1] related to this matter are: a) Recommendation

[1] Mediation Procedures in the European Union Countries, *https://kurator.org.pl* /2006/01/03/mediation-as-an-alternative-to-the-penal process

No. 83.7 on public participation in criminal justice policies, b) Recommendation No. 85.11 on the position of the victim in substantive and procedural criminal law, c) Recommendation No. 87.18 on the simplification of criminal justice, d) Recommendation No. 87.20 on the social response to juvenile delinquency, e) Recommendation No. 87.21 on assistance to victims of crime and prevention of victimisation, f) Recommendation No. 88.6 on social responses to crime, g) Recommendation No. 92.16 on European rules on community sanctions and measures, h) Recommendation No. 95 on criminal justice management, i) Recommendation No. 99.19 on mediation in criminal matters.

The normative shape of mediation on the grounds of criminal proceedings in Poland

The Polish Code of Criminal Procedure does not contain a legal definition of this legal institution. However, mediation here boils down to assistance in negotiating a dispute between two or more parties, which is carried out by a person who is not involved in the conflict. It assists the parties in voluntarily working out an agreement acceptable to them. Most criminal procedure cases can, of course, be handled in this mode. However, mediation in the framework of criminal proceedings concerns a specific conflict, as its background is always a criminal act. The subject of negotiation here is obviously not the facts of the case, so the question of the circumstances of the commission of the offence and other issues related to establishing the material truth are outside its scope. As a form of restorative justice, it cannot be used for such activities. In any case, they would be of little relevance, as this sphere always falls within the competence of law enforcement and the courts. What is at stake here, therefore, are other aspects, above all in the form of rationalising the accused's behaviour and attempting to verify the condition, needs and expectations of the victim. Particularly important against this background are health issues, including psychological and emotional ones, but also material issues, including compensation. These elements, generally with

a clear negative tinge, are always an aftermath of the defendant's previous behaviour. Sometimes mediation leads to much greater success, as it also allows a consensus to be reached that is a good basis for rebuilding the relationship between the participants. A good example of this is reconciliation with a commitment to undertake addiction treatment without the need for legal coercion (Rogula, & Zemke - Górecka, 2024).

Historically, it should be noted that mediation was formally introduced into the Polish legal system in 1997, when the new Penal Procedure Code was enacted. It should be noted that the introduction of mediation into the Polish criminal procedure is the result of a specific recommendation stemming from Article 10 of the Framework Decision of the Council of the European Union of 15 March 2001 (2001/220/JHA), specified by the Recommendation of 19 September 1999 No R (99) 19 of the Committee of Ministers of the Council of Europe to Member States concerning mediation in criminal matters (hereinafter: the Recommendation). Since then, mediation has been used more or less successfully in criminal matters, and over the years its normative shape has been modified in a more pragmatic direction. Mediation proceedings are always voluntary. The case is referred to mediation by the court or the court registrar, and in pre-trial proceedings by the public prosecutor or another body conducting those proceedings. It is conducted by an institution or a person authorised to do so (the mediator). Beforehand, however, the consent of the parties must be obtained and they must be properly instructed, informing them in particular of the objectives and principles of mediation proceedings (Article 23a of the Polish Code of Criminal Procedure). Consent to participate in mediation proceedings is taken by the authority referring the case to mediation or the mediator, after explaining to the accused and the victim the objectives and principles of mediation proceedings and instructing them about the possibility of withdrawing this consent until the mediation proceedings are completed. The mediator shall then be given access to the case file to the extent necessary for the mediation proceedings. The institution or person entitled to do so, after the mediation proceedings have been conducted, is obliged to draw up a

report on the results of the mediation proceedings. It shall be accompanied by a settlement agreement signed by the accused, the victim and the mediator, if any. Mediation proceedings shall be conducted in an impartial and confidential manner. It is intended to be dynamic in that it should not last longer than one month. Its course, however, affects the course of the criminal proceedings. It is also strictly forbidden to question the mediator before the court as a witness about facts about which the mediator has learnt from the accused or the victim while conducting the mediation proceedings, with the exception of information about the most serious offences, which are enumerated. This is a closed catalogue of acts that are characterised by a shift in the limits of criminalisation, as their criminalisation covers the entire course of the offence, i.e. not only the commission and attempt but also the preparation. This prohibition has an important guarantee function.

As far as the effects of mediation on the course of the trial are concerned, it must be stated that the conclusion of a settlement agreement as a result of mediation does not by itself end the criminal proceedings. Instead, it constitutes a document setting out the position of the parties with regard to the termination of the case. It does not in itself have legal force. Consequently, the final decision (ruling) in the case will be made by the court. However, it must, as stipulated by substantive criminal law (Article 53 § 3 of the Criminal Code), take into account the content of the mediation agreement when deciding the case. In passing, as it were, a kind of statutory superfluum existing in the Polish Criminal Code may be noted here. The fact of reconciliation between the accused and the wronged party constitutes a circumstance which coincides with the content of Article 53 § 2b(5) of the Penal Code. The mention of this circumstance in the latter provision should result in the deletion of Article 53 § 3, which, however, has not yet occurred. In fact, reconciliation between the offender and the victim has a much broader scope here than that indicated by Article 53 § 3 of the Penal Code. In particular, the manner of reconciliation is not important. It can be achieved by means of other instruments than mediation (Budyn - Kulik, 2025) .

Reconciliation with the victim is always a mitigating circumstance in the assessment of the penalty. As a result, it may be mitigated, even in an extraordinary formula, or the penalty may be waived, or the mandatory penalty measure may be dispensed with. Of course, all options other than conviction are also open for the completion of such proceedings. It must be recognised that mediation is beneficial for both parties. It gives the victim a chance to purge his or her emotions, resolve problems arising from the criminal act and obtain compensation and reparation more quickly. The accused, on the other hand, has the opportunity to communicate with the victim in a transparent manner and to bring the proceedings to a quicker and more lenient end (which also translates into quicker use of the institution of erasing the conviction).

Institutions and instruments supporting mediation

When discussing the issue of mediation in Poland, it should be mentioned that the year 2010 turned out to be quite important in this regard, when the Department for Victims of Crime and Promotion of Mediation was established within the structure of the Ministry of Justice. It was located within the Department for International Cooperation and Human Rights. From that point on, mediation was placed under institutional paternalism. Although there have been modifications in later years, the specially designated cell has been continuously operating within the ministerial structure since then. Currently, it is the Mediation Unit, which is located in the Department of Strategy and European Funds. It is an important official cell that monitors the title institution and is tasked with supporting and popularising it. Currently, the aspect of supporting the effectiveness of mediation and all forms of ADR in general is quite popular in Poland. This is done, among other things, by a network of mediation coordinators which has been in operation since 2010. Coordinators are appointed from among judges and their task is to carry out activities for the development of mediation, to ensure efficient communication between judges and mediators, as well as to cooperate in the organisation of various informational and popularisation meetings.

From the formal point of view, the mediation coordinator is appointed by the president of the district court concerned, by means of a decree, from among the judges of that court (Article 16a of the Law on the Common Courts System[1]). The Social Council for Alternative Dispute and Conflict Resolution (the so-called ADR Council) is also important in this context. This body is composed of a dozen or so members, recruited from among judges, mediators, advocates and legal advisers, academics and representatives of administration. It is an advisory body to the Minister of Justice. Its main purpose is to promote activities aimed at the development of alternative dispute resolution methods, give opinions on draft legislation, promote the principles concerning the work of a mediator and mediation proceedings, and mediator training standards. Furthermore, it deals with the development of various recommendations and principles for the functioning of the national system of alternative dispute resolution[2] , harmonisation of the ADR system with the provisions of the EU law; improvement of the mediation institution model in the Polish legal system, dissemination of basic standards of mediation proceedings, promotion of ADR mechanisms as methods of conflict resolution in the society, creation of institutional conditions for supporting and evolving various forms of ADR, as well as ad hoc undertakings undertaken in order to develop mediation. It should be emphasised that the main information on mediation, gathered by the Social Council for ADR, including documents, legal regulations, information and promotional brochures, is generally and widely available in the public space. This state of affairs significantly strengthens the popularity of mediation. The "International Mediation Day", which has been organised since 2008, also contributes to this. "International Mediation Day", which has become "Mediation Week" since 2013. The Ministry of Science and Higher Education, in turn, attaches great

[1] Consolidated text Official Gazette 2024, item 334.

[2] *Mediation in EU countries-Poland,* [online], https://e-justice.europa.eu /64/EN/ mediation _in_eu_countries? POLAND &member=1

importance to making alternative forms of dispute resolution a part of the training of students in law faculties. Elements of mediation are also present in the training programme of trainee prosecutors and judges at the National School of Judiciary and Public Prosecution. They also receive appropriate attention within the framework of continuing education, as they are present in the training programmes of judges and prosecutors. This is complemented by the independent activities of the judges - mediation coordinators. who are additionally trained to fulfil this function. This training particularly concerns communication, management of the human team and cooperation with mediators.

In parallel, social organisations are creating a supportive role in mediation. They define their own standards in terms of relevant training, certification, requirements for mediator candidates and, finally, mediation methods, its additional ethical standards and good practice. These regulations are purely internal, applying to mediators who are members of the respective organisation. Units established within legal professional corporations, such as the Mediation Centre at the Supreme Bar Council, the Mediation Centre at the National Chamber of Legal Advisers or the Mediation Centre of the Association of Notaries of the Republic of Poland, also play a similar supporting role. Importantly, these organisations, as well as universities, are entitled to maintain their own lists of mediators. Information about these lists is provided to presidents of district courts, hence the range of people who can conduct mediations is relatively large.

The multifaceted nature of mediation in criminal matters

However, it must not be overlooked that in criminal proceedings it is not permissible to treat both parties to mediation in the same way. After all, they are not partners, as is the case in civil and especially commercial proceedings. Referring a case to mediation in the context of a criminal trial therefore requires careful consideration of its necessity, advisability and any other needs and, moreover, taking into account any victimological aspects. This issue is recognised in the arena of European

law. The Recommendation of 19 September 1999 No. R (99) 19 of the Committee of Ministers of the Council of Europe to Member States concerning mediation in criminal matters even indicates that mediation should not be implemented in certain situations. According to the Recommendation, mediation should be limited by certain sociodemographic factors as well as by certain types of offences. According to the Recommendation, certain categories of offences, such as cases of abuse of a person close to the offender, can also be a negative factor for mediation. However, this is also the case where there is an apparent disproportion between the parties. This may be for a variety of reasons. The first that comes to mind is a gross material, financial or property disparity between the victim and the perpetrator, who is living on the poverty line. These are quite common situations, as one of the main criminogenic factors is poverty. Mediating in such realities usually has little chance of being realised financially and leads to social frustrations. A parallel situation arises when there is a significant age or health disparity between the perpetrator and the victim. It is, of course, not a rule that mediation in such cases will not be effective. Finally, the facts of the case may be a negative indication for referring the case to mediation. This becomes more apparent in those situations where there is significant doubt as to causation. Similarly, the situation may be similar in complex cases, complex in terms of subject and object. Particularly relevant here is the analysis of the motives of the defendants in the context of referring a case to mediation. It must be stressed that these are, however, relative obstacles and can be labile depending on the stage of the proceedings. To illustrate - at the enforcement stage, the obstacle of doubt as to perpetration no longer exists. Mediation is generally beneficial for the authority conducting criminal proceedings. It can shorten the length of proceedings considerably. In those situations where mediation does not even take place, the authority has the positions of the parties and has knowledge of what they expect.

Conclusions

Compensation through mediation, and even more so out of court, does not on its own fulfil the essential functions of criminal law (Zgoliński, 2012, p. 116). It is only an instrument, albeit a very important one, for the implementation of a specific element of criminal policy. However, it should be recognised that it fulfils one of the objectives of the process in the form of restorative justice (Czerwińska, 2024, p. 126). On the other hand, the primary functions of the criminal process, i.e. the protective and guarantee function, must nevertheless be realised through state proceedings. Undoubtedly, however, mediation plays an important role in the course of criminal proceedings and significantly supports the realisation of the above-mentioned functions. Above all, it makes it possible to put an end to mutual settlements between the victim and the perpetrator of the criminal act.

Mediation in the context of criminal proceedings has a clearly visible, specific character, determined by the background against which the dispute has arisen. On the other hand, the circumstances described in the body of the article are extremely relevant in the course of criminal proceedings. They dictate, however, that summarised, mediation should be implemented first and foremost in cases that are uncontested, evidentially transparent, not complex and in those situations where there is no gross disproportion between the parties. Above all, cases should be referred to mediation in respect of which there is a positive forecast of the possibility of a successful conclusion of the negotiations. Then it will be not only to the benefit of the parties themselves, but also to the authorities conducting the proceedings, which consequently builds a positive image of the broader justice system.

Mediation is one of the key forms of alternative dispute resolution (ADR), whose importance is constantly growing, both in European and national law. The European Union considers mediation as an essential component of a modern restorative justice system, promoting its use especially in civil, commercial and family matters. EU legislation, including Directive 2008/52/EC, introduces common minimum standards for mediation, emphasising its voluntariness, confidentiality and the enforceability of the settlement agreement.

The mediation process is supported by state institutions (e.g. the Mediation Division of the Ministry of Justice, a network of mediation coordinators), as well as social and professional organisations that maintain lists of mediators, organise training and promote good practices. Systematic education of lawyers and judges and popularisation initiatives (e.g. Mediation Week) strengthen public understanding and acceptance of mediation.

However, the specific nature of criminal mediation requires consideration of the asymmetry between the parties and victimological conditions. Therefore, not every case is suitable for mediation - contraindications may include, for example, crimes against relatives, a large disproportion in assets or age of the parties, as well as cases with complex evidence or an unclear aspect of perpetration.

Taken as a whole, mediation in criminal matters is a valuable criminal policy instrument, contributing to greater party participation, shorter proceedings and greater public confidence in the justice system. Implemented sensibly and with respect for the rights of the parties, it can add real value to the legal system as a whole.

References

Budyn – Kulik, M. (2025). Commentary to Article 53 of the Penal Code, in: M. Mozgawa (ed.), *Penal Code. Commentary*. LEX/el.

Czabaj, W. Genesis of selected legislative actions of the European Union in the field of intra-community use of mediation institutions in resolving commercial disputes, http://malopolskiecom,pl .

Czerwińska, D. (2024). *Procedural agreements in criminal matters. Between efficiency and justice*.

Rogula, C., & Zemke - Górecka A. (2024). *Mediation proceedings in a criminal case*. LEX/el.

Wiśniewski, P. (2012). Ochrona godności człowieka w prawie Unii Europejskiej przed i po wejściu w życie Traktatu Lizbońskiego. Zarys problematyki in: W. Lis, & A. Balicki (ed.), *Normatywny wymiar godności człowieka*, p.275 - 282.

Zgoliński, I. (2012). Compensation, restorative justice, mediation - an analysis of several sensitive issues, in: Zgoliński, I. *Compensation and reparation in Polish law*. Bydgoszcz, passim.

Zgoliński, I. *Cross-border mediation proceedings within the European Union*

Mediation in EU countries-Poland, [online], https://e-justice.europa.eu /64/EN/ mediation _in_eu_countries? POLAND &member=1

Mediation Procedures in the European Union Countries, https://kurator.org.pl/2006/01/03/mediation-as-an-alternative-to-the-penal process

Council of the European Union, Concept on Strengthening uncil of the European Union, Concept on Strengthening EU Mediation and Dialogue Capacities, doc. 15779/09, http:// www.eeas. europa. eu/cfsp/ conflict_ prevention /docs/concept _strengthening_eu_med_en.pdf,

Mediation as an alternative to criminal trial, https://kurator.org.pl/2006/01/03/mediacja-jako-alternatywa-procesu-karnego/

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 439-452

NATIONAL AND EUROPEAN CASE LAW – A REMARK FOR THE HIGH COURT OF CASSATION AND JUSTICE IN PRELIMINARY JUDGMENTS

Cornelia Beatrice Gabriela ENE-DINU
ORCID [ID]: https://orcid.org/0009-0001-5924-5876
E-mail: cdinu@univnt.ro
Afiliation: Faculty of Law, „Nicolae Titulescu" University of Bucharest

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.

References

Boghirnea, I. (2009). *Scurt istoric al jurisprudenței ca izvor al dreptului,* article published in *In honnorem Prof. univ. dr. George Antoniu. Culegere de studii juridice*. Sitech.

Ene-Dinu, C. (2022). *Rolul practicii judecătorești în elaborarea dreptului*. Universul Juridic.

Popa, N. (2021). *Teoria generală a dreptului*, 6 Edition. CH. Beck.

Popescu, S. (2002). *Teoria generală a dreptului*. All Beck.

Decision no. 11/2014, pronounced by the High Court of Cassation and Justice published in the Official Gazette of Romania, Part I, no. 503 of July 7, 2014, https://www.iccj.ro/2014/10/20/decizia-nr-11-din-20-octombrie-2014/

Decision no. 17/2014, pronounced by the High Court of Cassation and Justice published in the Official Gazette of Romania, Part I, no. 691 of 22 September 2014, https://www.iccj.ro/2014/09/01/decizia-nr-17-din-01-septembrie-2014-2/

Decision no. 24/2014, pronounced by the High Court of Cassation and Justice published in the Official Gazette of Romania, Part I, no. 823 of 11 November 2014, https://www.iccj.ro/2014/10/06/decizia-nr-24-din-06-octombrie-2014/

Decision no. 23/2014, pronounced by High Court of Cassation and Justice published in the Official Gazette of Romania, Part I, no. 843 of November 19, 2014, https://www.iccj.ro/2014/10/06/decizia-nr-23-din-06-octombrie-2014/

Decision no. 16/2018, pronounced by High Court of Cassation and Justice published in the Official Gazette of Romania, Part I, no. 993 of

November 23, 2018, https://www.iccj.ro/2018/09/17/decizia-nr-16-din-17-septembrie-2018-privind-dispozitiile-art-207-alin-1-si-2-din-codul-de-procedura-penala/
Decision no. 7/2020, pronounced by High Court of Cassation and Justice published in the Official Gazette of Romania, Part I, no. 568 of June 30, 2020, https://www.iccj.ro/2020/02/17/decizia-nr-7-din-17-februarie-2020/
Decision no. 65/2021, pronounced by High Court of Cassation and Justice published in the Official Gazette of Romania, Part I, no. 81 of January 27, 2022, https://www.iccj.ro/2021/09/29/decizia-nr-65-din-29-septembrie-2021-privind-dispozitiile-art-426-alin-1-lit-d-din-codul-de-procedura-penala/
Decision no. 38/2022, pronounced by the High Court of Cassation and Justice published in the Official Gazette, Part I no. 671 of July 5, 2022, https://www.iccj.ro/2022/06/09/decizia-nr-38-din-9-iunie-2022-privind-interpretarea-dispozitiilor-art-250-indice-2-din-codul-de-procedura-penala/
Decision no. 2/2022, pronounced by High Court of Cassation and Justice published in the Official Gazette of Romania, Part I, no. 234 of March 9, 2022, https://www.iccj.ro/2022/03/22/decizia-nr-2-din-31-ianuarie-2022-2/
Decision no. 64/2023, pronounced by High Court of Cassation and Justice published in the Official Gazette, Part I no. 1047 of November 20, 2023, https://www.iccj.ro/2023/10/02/decizia-nr-64-din-2-octombrie-2023/
Valenzuela Contreras v. Spain, Judgment of July 30, 1998, application no. 27671/95, Collection of judgments and decisions 1998-V, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58208%22]}
Roman Zakharov v. Russia, Grand Chamber, application no. 47143/06, Decision of December 4, 2015, https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-159324%22]}
Kopp v. Switzerland, Judgement from March 25, 1998, request 23224/94, Reports 1998-II, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58144%22]}
Ramanauskas v. Lithuania, Judgment of February 5, 2008, application 74420/01, Grand Chamber, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-68969%22]}

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 453-461

THE EVOLUTION OF THE CONCEPT OF CULPA IN ROMAN LAW

Daniela IANCU
ORCID [ID]: 0000-0002-7733-3642
E-mail: daniela.iancu@upb.ro
Afiliation: Faculty of Economic Sciences and Law, National University of Science and Technology Politehnica Bucharest

Abstract: *The concept of culpa in Roman law underwent a significant evolution, from its early association with objective liability to the nuanced distinctions developed by classical jurists and codified under Justinian. Initially centered around the idea of harm (damnum) caused iniuria (unjustly), legal responsibility was assessed without regard to the internal state of the wrongdoer. Over time, however, the interpretation of the Lex Aquilia by Roman jurists introduced a shift toward subjective fault. Culpa, alongside dolus (intent), gradually emerged as a decisive element in determining civil liability, especially in delictual and contractual contexts. This paper traces the development of culpa, with particular focus on its various forms—lata, levis in abstracto, and levis in concreto—and analyzes how these distinctions influenced the legal treatment of obligations in Roman jurisprudence.*

Keywords*: damnum; iniuria; culpa; liability; obligations; Aquilian Law.*

Introduction

As with most primitive legal systems, early Roman law — particularly the Law of the Twelve Tables — operated on the principle of strict liability. This meant that a person could be held responsible for causing damage, regardless of whether they had acted intentionally or negligently. The act itself and its consequences were the only relevant factors.

This rigid approach began to change with the adoption, around 287 BC, of the Aquilian Law, which regulated liability for damage to property and in whose text, according to Niels Jansen (2012), the foundations of all general continental provisions on tort liability for negligence can be identified. According to Niels Jansen (2012), the text of the Aquilian Law contains the basis for all general continental provisions on tort liability for negligence.

Although Ulpian states in the Digesta[1] that "Lex aquilia omnibus legibus, quae ante se de damno iniuria locutae sunt, derogavit, sive duodecim tabulis, sive alia quae fuit: quas leges nunc referre non est necesse" (the Lex Aquilia repealed all laws that had been formulated before it regarding damages caused unjustly, whether they were from the Law of the Twelve Tables or from another law; it is not necessary now to mention those laws), specialists question this statement with arguments. For example, according to Dana McCusker (1999), Grueber argues that a main reason to question this statement is that Lex Aquilia does not provide a definition of unlawful damage, and Daube states that certain older laws relating to damage to property remained in force, existing in parallel with Lex Aquilia for a period of time, or even permanently (p. 381).

The Aquilia Law – regulatory content

[1] D.9.2.1, https://www.thelatinlibrary.com/justinian/digest9.shtml

Although it also began with the punishment of offences, the text of the Aquilian Law paved the way for a much more nuanced legal interpretation. The law comprised three main chapters, each addressing a particular type of damage.

The text of Chapter I is provided by Gaius in D.9.2.2.pr: " ut qui servum servamve alienum alienamve quadrupedem vel pecudem iniuria occiderit, quanti id in eo anno plurimi fuit, tantum aes dare domino damnas esto".

Therefore, anyone who unlawfully killed a slave or cattle belonging to someone else had to pay the owner the highest value that the property had had in the previous year (McKusker, 1999, p. 381).

The exact content of Chapter II has not been preserved in Roman documents, as it has fallen into disuse.

According to Gaius (Institutions Gai. 3.215): The second chapter establishes an action for an amount equivalent to the value of the damage against an adstipulator who, with the intention of defrauding the stipulator, has released a debt. ("Capite secundo adversus adstipulatorem, qui pecuniam in fraudem stipulatoris acceptam fecerit, quanti ea res est, tanti actio constituitur") (Bauman, 1983, p. 84).

Chapter III punished any other damage to a person's property, as well as injury to slaves or animals (Molcuț, 2011, p. 348).

According to Geoffrey MacCormack (1970, p. 164), Chapter III contained the following provisions: "if anyone causes damage to property, other than a person or cattle killed, which he has burned, broken, or destroyed without right, he shall be obliged to pay the owner the value of that property in the last 30 days ." The full value could be recovered regardless of the severity of the injury or damage, as compensation was not proportional to the harm caused.

The basis for legal liability under the Aquilian Law was unjust damage (damnum iniuria datum).

The conditions regarding damage that had to be met for the Aquilia Law to apply were:

- it had to have been caused unjustly, contrary to the law - injuria, which excluded damage committed in self-defence,

An act causing harm did not incur liability if it was committed in justified circumstances. One justification for killing was self-defence. According to the jurist Gaius (D. 9.2.4pr.), if a person killed a slave who was a thief and attacked them, they were not considered liable because their act was a response to imminent danger. In this case, the element of injuria was missing, and the act did not entail liability.

However, Roman law established strict limits to prevent abuse. Ulpian (D. 9.2.5 pr.) emphasises that the right to self-defence does not confer the right to kill. If an individual was able to immobilise their attacker but chose to kill them, that individual was considered to have acted unjustly (iniuria) and could be held responsible. This demonstrates an essential distinction: the act was judged not only in terms of the action itself, but also in terms of the moral context and necessity.

- it must have been caused by the fault or intent of the person who committed it,
- it must have been caused corpore, i.e. by a material and direct act of the offender on the object and not by the action of an external cause set in motion by the offender,
- it must have been caused corpori, in the sense that the offender must have caused damage or injury to the object.

Only the owner of the thing was protected by the application of the provisions of the Aquilia law, but, thanks to the intervention of the praetor, the application of the Aquilia law was extended "also in favor of persons other than the owners...and to cases where the damage was not caused directly, but only indirectly" (Bob, 2019, p.322).

Roman lawyers transformed a rigid text into a flexible instrument by reinterpreting concepts in light of practical cases. To support this, we will present the case of the barber (D. 9.2.11pr.). A barber placed his chair where people usually played ball. A player hit the ball so hard that it bounced into the barber's hand. This caused the barber to cut the slave's throat while he was cutting it. Proculus attributed the blame to the barber. By performing his dangerous task in an area where there was a foreseeable risk, he created a dangerous situation. This decision

emphasises that liability was not based solely on direct action, but also on failure to anticipate danger.

A similar case is that of the carrier (D. 9.2.7.2) who, when overloaded, either drops the load and kills a slave, or slips and falls on a slippery path due to the excessive weight, crushing a slave. He is considered guilty because he did not behave according to the standard of diligence. A prudent person would not overload themselves and would be careful when walking on a dangerous road. Thus, lack of diligence and prudence were punished.

Guilt and Causation: Beyond the Letter of the Law

The Aquilian law was originally designed to punish damage caused by direct, physical actions (corpore corpori). However, jurists recognized that damage could also be caused by indirect causation. Celsus (D. 9.2.7.6) makes the fundamental distinction between killing directly (occidere) and causing death (mortis causam praestare).

In these cases of indirect causation, the praetor granted an action in factum (an action "based on facts"), which did not fall strictly within the text of the Aquilian Law, but sanctioned illicit conduct. Fragments from the Digesta provide clear examples:

- person who gives poison instead of medicine (D. 9.2.7.6),
- the one who gives a gun to a madman, who commits suicide (D. 9.2.7.6),
- one who blocks the exit from a building, causing death by starvation (D. 9.2.9.2),
- the one who, by shaking a horse, causes a slave to fall into the river and die (D. 9.2.9.3),

Thus, by creating in factum actions, the law was adapted to complex social realities, ensuring that a culpable act did not remain unsanctioned simply because it did not fit into the initial formulation of the law.

Fault and standards of diligence

At first, iniuria was interpreted as a simply illegal, “unrightful” action. The great transformation took place in the classical period of Roman law, under the influence of jurists. They considered that a purely formal interpretation of the term injuria was insufficient to deal with the complexity of social and economic life. Therefore, they began to explain injuria in terms of personal guilt, that is, dolus (intention, bad faith) and culpa (negligence or lack of care), which made the system of liability subjective.

According to Andrew Mason (2022), Roman citizens were obliged to act in such a way as to avoid causing harm to others. "The 'standards of care' in the Aquilian Law were therefore not codified, but were based on a fundamental social norm: citizens were expected to behave in a manner worthy of a Roman."

Culpa denoted any negligence that a good administrator would not have committed, but also the failure to take normal precautions or to observe the rules accepted in the exercise of a profession. This concept is demonstrated by the writings of Roman jurists, such as Ulpian in the Digesta (D. 9.2.7.8), where he quotes the opinion of Proculus: “Proculus ait, si medicus servum imperite secuerit, vel ex locato vel ex lege aquilia competere actionem.” (Proculus says that if a doctor operated on a slave in an unprofessional manner, there is an action either under the lease or under the Aquilian Law). This passage confirms that culpa also included a specific standard, imposed by a profession. A professional, such as a doctor, was judged by the standards of diligence and skill of his profession, not just by those of an ordinary person. The text shows that, for the same act, two distinct actions could be brought: a contractual one (ex locato), based on the promise to provide a competent service, and a tortious one (ex lege aquilia), based on the fact that the lack of professionalism caused damage.

Omission and liability

Another issue, which frequently arises in the Digest, is whether a person can be held liable for an omission to act. Roman jurists did not approach this issue through a rigid distinction, but through the lens of fault.

Texts such as D. 9.2.8 (Gaius) demonstrate that omission could engage liability. A surgeon who successfully operated on a slave but failed to provide post-operative care was held liable for the slave's death. In this case, it was not the act itself but the culpable omission that was the source of liability. Similarly, in D. 9.2.7.9, a slave who fell asleep while watching over a furnace and caused a fire was held liable, even though he had not committed a positive act.

This approach is supported by Paulus (D. 9.2.45pr.), who states that a master is responsible for the acts of his slave if he had knowledge of them and failed to prevent them.

Contractual liability and degrees of fault

Tort liability is differentiated from contractual liability as the latter referred to the debtor's liability for non-performance or poor performance of the obligations arising from a contract.

Contractual fault designated the fault of the person bound by a contract, that is, the fault of the debtor of a certain body. This fault was an act or an omission done without intention and which had led to the loss of the thing owed.

It was only in the classical era, and only in what concerned the obligations of good faith, that it was admitted that the debtor was liable only for his acts, but also for having refrained from doing what he should have done.

In strict law contracts, the debtor was not liable for his omission, even if it was in bad faith. However, if the creditor inserted a clause of tort in the stipulation, it was possible to bring an actio de tort against the debtor.

In Justinian's law, a distinction was made between culpa levis and culpa lata (Iancu & Gălățanu, 2025, p. 295).

Culpa levis denoted slight fault and sometimes it was assessed in the abstract by comparing the debtor's activity in the execution of the contract with that of a careful and conscientious head of the family - diligens pater familias. This slight fault assessed in the abstract was called *culpa levis in abstracto*. The special care that the debtor had to have in this case towards a thing was designated by the name of *diligentia*.

At other times, *culpa levis* was assessed in a concrete way, comparing the debtor's activity in the execution of the contract with the way in which he administered his own assets. This form of fault was called *culpa levis in concreto*.

Culpa lata was a gross fault that even the most clumsy administrator would not have committed.

Although less frequently mentioned and applied, there was also a third form of fault, *culpa levissima*. This represented the lowest degree of guilt, a tiny negligence, a deviation from the highest standard of diligence. This applied in exceptional cases, such as custodial obligations, where a debtor had to take special care of an asset, greater even than that of a bonus *pater familias*.

Fault, of whatever kind it was, differed from malice in that the latter was committed intentionally.

There were some contracts in which the debtor was liable only for malice and not for his culpa, namely contracts where he had no vested interest. In contracts where he had a vested interest he was also liable for his culpa.

Conclusions

From a primitive justice system based on mechanical and objective liability, the Romans created a system of remarkable complexity that recognized the importance of intent and negligence in determining guilt.

The classical period marked a fundamental advance, with subtle distinctions between culpa lata, culpa levis, and culpa levissima, standards that allowed for a flexible and equitable application of the law.

The bonus pater familias principle became a universal standard of prudence, while the utilitas contrahentium principle ensured that liability was proportional to the benefit obtained from a contract.

References

Bauman, R. A. (1983). *Lawyers in Roman Republican Politics: A Study of the Roman Jurists in Their Political Setting, 316-82 BC*. C.H. Beck'sche Verlagsbuchhandlung. https://www.google.ro/books/edition/Lawyers_in_Roman_Republican_Politics/gX7bsjeQcIAC?hl=ro&gbpv=0

Bob, M. D. (2019). *Manual elementar de drept privat roman*. Universul Juridic.

Iancu, D., & Gălățanu, C. (2025). *Drept privat roman*. Sitech.

Jansen, N. (2012). *Law of Torts/Delicts, General and Lex Aquilia*. Max-Planck-Institut für Europäische Rechtsgeschichte. https://max-eup2012.mpipriv.de/index.php/Law_of_Torts/Delict,_General_and_Lex_Aquilia

MacCormack, G. (1970). On the third chapter of the Lex Aquilia. *The Irish Jurist*, *5*(1), 164-169. https://doi.org/10.2307/44026568, https://doi.org/10.2307/44026568, https://www.jstor.org/stable/44026568?seq=1.

Mason, A. (2022). *The Standards of Care & the Lex Aquilia Roman Laws*. Roman-Empire.net. Adresă web: https://roman-empire.net/society/lex-aquilia-laws

McCusker, D. (1999). Liability for omission under the Lex Aquilia. *Northern Ireland Legal Quarterly*, *50*(3), 381-396. https://doi.org/10.53386/nilq.v50i3.593

Molcuț, E. (2011). *Drept privat roman*. Universul Juridic.

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 462-471

TAXATION IN ROMAN LAW

Adriana Ioana PANȚOIU[1]
ORCID ID: 0000-0002-5540-9159
*E-mail:*adrianapantoiu@yahoo.com
Daniela IANCU[2]
ORCID ID: 0000-0002-7733-3642
E-mail: danutaian74@yahoo.com
Afiliation: [1,2] Faculty of Economic Sciences and Law,
National University of Science and Technology Politehnica Bucharest

Abstract: *The Roman Empire is often recognized as one of the most important military powers in history. The empire would not have achieved this well-deserved status if it had not relied on an extremely advanced and efficient fiscal system. Although it has not received special attention from historians, the Roman fiscal system is an important legacy for subsequent civilizations.*

The Roman fiscal system evolved gradually, from the kingdom period to that of the empire, regulating direct and indirect, fixed and variable, personal and real taxes. The evolution of the Roman fiscal system was based on the need to cover the increasing expenses of the governing structures, military expeditions and those generated by accelerated urban development. The analysis of the Roman fiscal system highlights the importance of a well-developed and applied fiscal system in the construction of a complex, strong, evolved state.

Keywords: *tax; fiscality; fiscal system; censors.*

Introduction

Throughout history, taxes and levies have proven essential for the development of societies. Their regulation and collection are fundamental to state-building and the maintenance of social order.

Taxation is intrinsically linked to an individual's ability to produce or contribute—either materially or otherwise—to the public good. The state, as the custodian of the general interest, could not function without a well-organized fiscal system.

If we look further back, taxation systems may be conceptually linked to religious sacrifices. These sacrifices were offerings made to appease or thank deities, involving the voluntary surrender of a portion of one's goods, often by burning them on altars.

Even if this interpretation may seem exaggerated, it is noteworthy that the emergence of coinage itself has been associated with ritual practices. According to Bernhard Laum's religious hypothesis (Laum, Hyun, 2023), money originated from sacred practices, functioning as a means of payment for divine services or clerical duties. This concept aligns closely with the modern understanding of taxes—as payments made in exchange for public services. Clergy and other ritual participants often received portions of sacrificed animals as a symbolic distribution of the state's resources, based on their societal rank and role (Șaguna).

Whether or not one subscribes to the religious origin theory, it is evident that the roots of taxation run deep, nearly lost in the mists of history.

Even the Bible, in Genesis (Chapter 47, Verse 24), references taxation under Egyptian rule, demonstrating its longstanding role in governance. Sacred texts with historical value frequently note the existence of taxes in ancient civilizations.

Among these, Greece and Rome stand out. Ancient Greece relied on tariffs from maritime trade and revenue from state properties and consumption taxes. Direct taxes were introduced later.

After Rome's conquest of Greece, the Romans adopted many elements of Greek culture, including fiscal institutions. Thus, the Roman tax system had significant Hellenistic influences.

Types of Taxes and Levies Regulated by Roman Law

The revenues generated from taxes and levies were of great importance to the Romans, as they enabled the financing of infrastructure expenditures, military spending, and the costs associated with maintaining the state apparatus.

Roman law recognized two major categories of taxes and levies: those imposed upon citizens and those levied on foreigners and conquered peoples.

The taxes paied by citizens were relatively low. They applied to land, housing, slaves and animals, as well as to personal property and income. Tax rates ranged between 1% in peacetime and 3% during wartime (United Nations of Roma Victrix - UNRV).

As Rome's conquests expanded significantly, its resources evolved in parallel. This development led to the exemption of Roman citizens from the obligation to pay taxes. Conquered peoples, however, were subject to taxes on land, referred to as *stipendium* or *tributum*, and on the products of the soil, referred to as *tithe*, which amounted to a tenth of their yields (Agencia Tributaria, Sede Electrónica).

According to modern classifications, taxes may be divided into direct taxes—*tributa*, imposed on property and income—and indirect taxes—*vectigalia*, imposed on certain transactions.

Tributum soli was a land tax levied in the imperial provinces, whereas *stipendium* was imposed on land in the senatorial provinces. Initially, this tax had a fixed rate, but over time it began to vary based on the quality of the soil (Cox, McLure).

Collatio lustralis was a tax imposed on exchange operations, as well as on services that generated income for their providers. Initially, services rendered by physicians, teachers, and craftsmen who sold their own products were exempt. Essentially a form of business tax, it was collected every five years. Although initially not burdensome to businesses, it gradually became increasingly onerous (MacGillivray, Matthews).

Centesima Rerum Venalium was a 1% sales tax (as its name suggests—"one hundredth of the value of everything sold") applied to sold goods.

Portoria referred to customs duties collected on imports and exports conducted through seaports. Over time, these customs duties were extended to all commercial routes, not just maritime ones (Burton).

Vicesima Hereditatium was an inheritance tax imposed on testamentary succession. Inheritances received from close relatives (grandparents, parents, children, grandchildren, siblings) were exempt from taxation. The tax rate was 5% of the value of the inheritance.

This tax was paid only by citizens, since only they had the legal capacity to dispose of property via testamentary instruments.

It is believed (Gilliam, 397) that the purpose of this tax was to fund the *aerarium militare* (military treasury).

Vicesima Libertatis or *Vicesima Manumissionum* was a tax on manumission—the release of slaves—and amounted to 5% of the slave's value.

This tax was paid either by the owner releasing the slave or by the slave himself, in cases where he paid to redeem his freedom (UNRV).

Some tax revenues had specific designations.

Members of the equestrian military order received *aes equestre* and *aes horderarium*, sums that enabled them to acquire horses and provide for their upkeep. According to researchers (Murray, 1875), *aes horderarium* was paid by unmarried women, widows, and orphans, provided they held property. The rationale was that both women and children had a duty to support those who fought on their behalf and on

behalf of the community—especially since they were otherwise exempt from taxation and not counted in the census.

Aes uxorium was a tax levied on men who reached a certain age without marrying (Murray, 1875) or on both men and women who could not have children. The purpose of this tax was to stimulate birth rates and, consequently, to increase the population of the empire, by encouraging individuals to marry and have children (UNRV).

Fiscus Judaicus was a tax imposed on non-enslaved Jews following the Roman conquest of Jerusalem. This tax effectively redirected the amounts Jews would have otherwise paid to the Temple toward the Roman treasury, which used these funds for the reconstruction of the Temple of Jupiter (Heemstra, 2010).

Tax Collection and Administration

The *fiscus* referred to the imperial treasury, where revenues derived from taxes and levies were collected. The fiscal apparatus was composed primarily of the *curatores fisci* and the *publicani*.

The *curatores fisci* served as administrative heads of the imperial treasury—that is, of the private treasury of the Roman emperor (Strechie, 11).

The *publicani* were the tax collectors. These are the individuals referred to in the Bible as "tax collectors" or "publicans." They were widely despised because they were often citizens of nations conquered by the Romans who chose to "perform the dirty work" of the empire, thereby being regarded as traitors to their own people.

Initially, the *publicani* collected taxes and levies without remuneration, but they were entitled to retain any amount collected beyond the target sum established by the authorities. The *publicani* were private contractors rather than public officials (Campbell, 3). They paid for the right to collect taxes and, in doing so, were empowered to collect in the name of Rome. In practice, the *publicani* retained control over the collected amounts, transferring to the state only the fixed sum agreed upon. The term used in English is *tax farming*, which metaphorically

implies the ability to "cultivate" revenue sources and "harvest the profits." Tax farming is a financial management technique in which the management of a revenue stream is contractually delegated to a third party, while the original holder of the revenue stream receives regular fixed payments from the contractor.

To streamline the collection of public revenue, the *publicani* were granted the right to enforce payment: they could execute those unable to pay the levies or seize and sell their assets to remit the amount owed to Rome.

However, *publicani* were not granted absolute freedom in their collection activities, even though they acted ostensibly in the public interest. Roman law imposed extremely severe penalties on dishonest *publicani*. Moreover, the law provided mechanisms through which taxpayers could appeal directly to the Senate in cases of arbitrary or unjust taxation. If a *publicanus* was found guilty of such misconduct, he could be sentenced to death. The act of causing harm to the authorities through misconduct in tax collection was legally considered a *delictum*—a punishable offense.

As the power of the Roman Empire began to decline, the state experienced an increasing need for financial resources. In this context, abuses committed by the *publicani* began to be overlooked. The more corruption and abuse spread among tax collectors, the more effectively taxpayers learned to evade taxation. This dynamic led to a dramatic decline in state revenue—an important contributing factor to the eventual fall of the Roman Empire (Introvigne).

The tax farming system, employed during the Republic, functioned relatively well for a considerable period. However, over time, severe dysfunctions emerged within the system. Chief among these were long-term, incomplete contracts concluded between the "tax farmers" and Roman authorities, which led to opportunistic behavior by both government officials and *publicani* (Gutiérrez, Martínez-Esteller). Consequently, the Senate displayed little genuine interest in establishing a robust monitoring system for tax farming operations in the provinces.

Tax Evasion and Sanctions

The payment of taxes and levies was mandatory. Not only did Rome's economic and social development depend on these public revenues, but so too did its very defense. Taxes and levies constituted a significant share of public income, and thus their regular collection was essential. Failure to pay taxes on time or in the amounts established incurred penalties that, over time, varied in severity—from substantial fines and permanent exile to forced labor in salt mines and, in the most extreme cases, *damnatio ad bestias*, a form of public execution in which the condemned were devoured by wild beasts (Lidz).

A recently discovered document, concluded between provinces situated at the frontiers of the Roman Empire, demonstrates that even in antiquity, increasingly sophisticated methods were being sought to evade tax obligations. The document, referenced in the press in April 2025, was drafted by a Roman prosecutor investigating an attempted fraud against the Roman fiscal system. The case involved the son of a notary, who allegedly possessed the means to falsify a contract for the sale of a slave, followed by the slave's manumission. The presumed objective was either to remove the slave from administrative records or to subject him to a different legal framework—namely, the law applicable to the buyer, who was of Jewish origin.

The document illustrates that Roman law was not only well known but also thoroughly applied within the provinces of the empire, even those located at the imperial borders.

On the other hand, it becomes evident that although we consider ourselves to have made considerable progress compared to our Roman ancestors, in certain respects we have not strayed far from their practices. One such aspect concerns the scope of taxation. The aforementioned document, drafted in the context of a case involving tax evasion, highlights the fact that taxes were due on the export of a slave, the sale of the slave, the ownership of the slave, and his manumission. Accordingly, just as we are today, it seems that the Romans, too, were taxed on virtually everything (Arunasalam).

Conclusions

Ancient documents, recently discovered and analyzed, reveal situations strikingly similar to those encountered in contemporary society (Wasser).

For example, they recount the case of Petaus, a wealthy man from Egypt, who was accused of falsifying a tax receipt. In a comparable manner, modern tax evasion is sometimes achieved through the artificial reduction of taxable income by means of fraudulent expenses or purported "charitable donations."

Likewise, as previously discussed, ancient sources detail the practices of tax collectors (*publicani*, or customs officers) in the service of Rome, who frequently accepted bribes in exchange for turning a blind eye. Although we live in a modern era, equally elaborate methods and schemes are employed today with the same objective—namely, to avoid the imposition of "excessively burdensome" taxes on certain legal subjects. Such avoidance typically relies on legal loopholes, the creation of fictitious companies, and the use of offshore accounts that are difficult to trace, all with the aim of minimizing tax liabilities.

Finally, it is worth noting that both the ancient and modern fiscal authorities have employed strict enforcement tactics. Roman tax collectors were feared for their aggressive methods of debt recovery—much like today's tax authorities, who conduct audits to identify and penalize high-level tax fraud.

References

Arunasalam, S. 1,900-year-old Roman papyrus details elaborate tax evasion scheme, research suggests. https://www.cbc.ca/radio/asithappens/papyrus-rome-tax-fraud-1.7510739.

Burton, G. (2016, March 07). Portoria. Oxford Classical Dictionary.

Retrieved 27 May. 2025, from https://oxfordre.com/classics/view/10.1093/acrefore/9780199381135.001.0001/acrefore-9780199381135-e-5263.

Campbell, A. D. (1986). Monetary system, taxation, and publicans in the time of Christ, Accounting Historians Journal, Vol. 13 [1986], Iss. 2, Art. 11. https://egrove.olemiss.edu/aah_journal/vol13/iss2/11/.

Cox, M. S. McLure. C. E. History of taxation. https://www.britannica.com/money/taxation/Shifting-and-incidence.

Gilliam, J. F. (1952). The Minimum Subject to the Vicesima Hereditatium. *The American Journal of Philology.*Vol. 73, No. 4. Published By: The Johns Hopkins University Press. https://www.jstor.org/stable/291742.

Gutiérrez, O. Martínez-Esteller, M. (2022). Tax collection in the Roman Empire: a new institutional economics approach. Const Polit Econ 33, 378–401. https://doi.org/10.1007/s10602-021-09355-5. https://link.springer.com/article/10.1007/s10602-021-09355-5.

Heemstra, M. (2010). The Fiscus Judaicus and the parting of the Ways. https://www.livius.org/articles/concept/fiscus-judaicus/.

Introvigne, M. (2021). The Roman Empire, Taxes, and the Tai Ji Men Case, https://bitterwinter.org/the-roman-empire-taxes-and-the-tai-ji-men-case/.

Laum, B., Hyun, H.D. (2023). Sacred Money: A Historical Investigation into the Sacred Origin of Money (Masterpieces on Money), https://www.amazon.com/Sacred-Money-Historical-Investigation-Masterpieces/dp/1088203248.

Lidz, F. How to Evade Taxes in Ancient Rome? A 1,900-Year-Old Papyrus Offers a Guide. A manuscript discovered in the Judean desert contains trial notes on an intricate tax-evasion scheme that involved forgery, fiscal fraud and the false sale of slaves. https://www.nytimes.com/2025/04/14/science/archaeology-papyrus-tax-fraud-trial.html?searchResultPosition=1.

MacGillivray, D. & Matthews, J.F. Legacy of Constantine I, https://www.britannica.com/biography/Constantine-I-Roman-

emperor/Legacy#ref384524.
Murray, J. (1875). A Dictionary of Greek and Roman Antiquities, John Murray, London. https://penelope.uchicago.edu/Thayer/E/Roman/Texts/secondary/SMIGRA*/Aes_Equestre.html.
News Staff (2025), *1,900-Year-Old Papyrus Reveals Criminal Case from Roman Empire*, https://www.sci.news/archaeology/papyrus-cotton-13616.html
Strechie, M. (2023). Vocabularul instituțiilor militare romane augustane. Analele Universităţii „Dunărea de Jos" din Galaţi, Nr. 1(29). https://www.researchgate.net/publication/380073333_ANALELE_UNIVERSITATII_DUNAREA_DE_JOS_DIN_GALATI_Lexic_comun_Lexic_specializat_General_Lexicon_Specialized_Lexicon_Lexique_commun_Lexique_specialise.
Șaguna, D.D., Drept financiar public. http://file.ucdc.ro/cursuri/D_2_N24_Drept_financiar_Saguna_Dan_Drosu.pdf.
Wasser, R.E. Forgery, Fraud, and Taxes: Inside a Roman Courtroom Drama. https://www.raywassercpa.com/blog/forgery-fraud-and-taxes-inside-a-roman-courtroom-drama/46382.
Agencia Tributaria, Sede Electronica. *Taxes in ancient times: Greece and Rome*, https://sede.agenciatributaria.gob.es/Sede/en_gb/educacion-civico-tributaria/programa-educacion-civico-tributaria/cuando-impuestos/sugerencias-uso-educacion-secundaria/exposicion-profesor/impuestos-antiguedad-grecia-roma.html
United Nations of Roma Victrix. *Roman Taxes*, https://www.unrv.com/economy/roman-taxes.php.

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 472-482

THE ORIGIN AND HISTORICAL EVOLUTION OF THE INSTITUTION OF UZUCAPION

Mariana-Alina ZISU[1]
ORCID ID: 0000-0003-2778-3749
E-mail: stefanoaia.mariana@yahoo.com
Rodica-Raluca ȘTEFĂNOAIA[2]
ORCID ID: 0009-0007-3113-1715
E-mail: stefanoaia.raluca@yahoo.com
Afiliation: [1] Legal adviser drd., member of the Methodological and Professional Guidance Commission of the "College of Legal Advisers Suceava" Association, member of the Methodological and Professional Guidance Commission of the Federation "Order of Legal Advisers from Romania"
[2]Legal adviser at the Lostun Răzvan Laurian Individual Notarial Office, member of the Association "College of Legal Advisers Suceava"

Abstract: *Usucapion (or acquisitive prescription) is a fundamental legal institution in civil law, with deep roots in history. It allows the acquisition of ownership of an immovable or movable asset through long-term, continuous and uncontested possession, according to conditions established by law. Usucapion is a legal institution that evolved from the need to ensure the stability and security of the civil circuit. From its origins in Roman law to modern regulations, usucapion has remained an essential mechanism for clarifying and consolidating property rights, adapting to the needs of society and legislative changes.*

Keywords: *usucapion; property right; real estate; civil circuit.*

Introduction

The Romans arrived late at the abstract concept of the mode of acquiring property, progress in the sense of abstracting this concept being recorded only towards the end of the classical era. Analysis of Roman texts reveals several classifications of the modes of acquiring property: civil law and gentile law, universal title and particular title, original and derivative, conventional and unconventional.

Occupation represented the taking possession of an ownerless thing (res nullius) and was one of the oldest and, at the same time, long-lived modes of acquiring property. Mancipation originally constituted a way of creating property-power over mancipi things, later becoming the original form of carrying out the legal operation of sale, subject to complicated formal conditions.

Usucapion was a way of acquiring ownership of mancipi things through long-term use, which initially had the function of ensuring the use of these goods according to their economic destination, a function to which was added along the way that of eliminating uncertainties regarding ownership.

In iure cessio was a conventional derivative way of acquiring property, which involved organizing a simulated trial within a gracious jurisdiction. Unlike the complicated modes of civil law, tradition – a legal act of the gentiles – ensured the transmission of ownership, possession or detention of non-mancipi corporeal things in an efficient way and without the need for solemn forms. Specification, as the original way of acquiring property, involved the making by a person of a new thing with the material belonging to another person.

Accession was achieved by the legal absorption of the accessory thing by the main one. Other ways of acquiring property were adiudicatio, the law and the alienation carried out by the Roman state.

I. Historical evolution of the institution of usucapion

A. Roman law

Present since Roman private law, usucapion has evolved over time, forming a rich and controversial history. Likewise, we must mention the fact that some European countries took over the institution of prescriptio longi temporis of Roman law, and other countries – usucapio (the classical form of usucapion). Usucapion, in Roman law, was regulated, in particular, by the Law of the Twelve Tables, which granted this institution a single article (art. 2 of the 6th Table). According to it, the term of usucapion for movable property was 1 year and 2 years for immovable property. The effects of usucapion could be invoked by Roman citizens and only on Roman property. It assumed the fulfillment of certain conditions: possession of the thing, the term, just cause, good faith and a thing susceptible to be usucaped.

A first condition is the possession of the thing for the entire period of time provided by law by the one who usucapates. The Law of the Twelve Tables required both possession and use of the thing, because initially possession did not imply use but only the preservation of the thing. Another condition is the term established by law. The term for the possessor of a movable thing is one year, and in the case of immovables the term is two years in order to acquire the right of ownership by usucapion.

From the moment the term has expired, the possessor becomes the owner of the goods possessed as a result of possession and the passage of time. The term must not be interrupted.

A simple notification addressed to the possessor entails the interruption of the term for usucapion. The thing must be susceptible to usucapion. Res habilis is the condition that designates the thing susceptible to usucapion. Usucapion applies only to quiritary property. Not all things were susceptible to be acquired by usucapion. Stolen things (res furtive), stolen and hidden things (res subrepte), things possessed by violence (res vi possessae), city walls, tombs, etc. could not be usucaped. According to the provisions of the Law of the Twelve Tables, houses could not be usucaped, except starting from a much later period.

Also, inalienable things such as the immovables of wards and minors, the endowment fund and things over which there is a dispute (res litigiosae) could not be the object of usucapion. Just title was also required for usucapion. Just title is understood as an act or a legal fact of the possessor susceptible to take possession of the property.

In addition to just title, good faith (bona fides) was also necessary, that is, the firm and sincere conviction of the usucapant that the person from whom he acquired the property is the full owner of it. This belief must exist at the moment when the transfer of possession from non dominus to usucapant took place.

Also, usucapion is accessible in the event that someone has acquired the property of res mancipii by tradition. As for the persons who could usurp, only Roman citizens benefited from this way of acquiring property, peregrini not being able to have qiuiritary property, no matter how long their possession was.

Over time, the Roman emperors, inspired by Greek law, created another institution similar to usurpation, to which peregrini also had access, being applied also to provincial funds.

This new institution was called prescriptio longi temporis. Through it, the gaps of usurpation tend to be removed. Praescriptio longi temporis partly imitates the effects of usurpation but also presents differences from it.

Praescriptio longi temporis imposes a term of ten years between the parties present, when the parties lived in the same city (later it was sufficient if they lived in the territory of the same province) and twenty years between the absentees, when the parties did not live in the same city or province respectively. No distinction was made regarding the term when movable or immovable property was acquired through usucapion. The possession exercised by the one who invokes the praescriptio logi temporis must be based on just title and good faith. The Law of the Twelve Tables is not the only act that introduced, during the Republic, the prohibition of usucapion of stolen property. Thus, in 149 BC, the Atinian Law to a certain extent modified the prohibition on usucapion

declared in the Law of the Twelve Tables. As regards the object of usucapion, the Atinian Law is quite narrowly limited to stolen things.

The usucapion of things acquired by other means is dealt with by a separate law - the Iulian and Plautian laws. The significance of the Atinian Law in the development of usucapion lies in the additional interpretation of the rule contained in the Law of the Twelve Tables. It is extended to include the usucapion of stolen things, which have returned to the power of the person from whom they were appropriated. This has come to be known as reversio in potestatem Domini.[5, p. 59] One of the few Romanian laws that regulates the institution of usucapion is the Code of Callimachus, which grants 68 articles to acquisitive prescription. Although chapter 4 of part III of the Code is entitled "On usucapion and on prescription", the legislator carefully differentiates these two institutions.

Thus, while "the loss of a right due to non-use within the term determined by law is called prescription", "if the right, which has expired by prescription, is transferred to another person in the power of lawful possession, it is called the right acquired by use, and the manner of its acquisition is called usucapy". [3, art. 1906-1907] The Calimach Code specified that the goods that can be the object of usucapy are those that are in commerce, and the goods whose possession is prohibited (goods that have gone out of commerce, inalienable, such as, for example, the rights due to the owner, the ruler: the right to collect customs duties, to mint money, to impose taxes, etc.) cannot be the object of usucapy, although art. 1935 results otherwise.

At the same time, for usucapion to exist, the following conditions had to be met: just and worthy possession, in good faith and without prejudice, and the passage of time. Just and worthy possession implied possession based on a just title, such as: bequest, donation, loan, sale-purchase, exchange, payment of a debt, dowry, gambling, acquisition in good faith of the found good.

The law also established 2 forms of usucapion: movable and immovable. The right of ownership over movable things was acquired through possession in good faith, followed by the passage of three years,

while over immovable things – through possession followed by the passage of ten years, and if the owners were alienated, by the passage of twenty years.

Through long-term possession for 30 years, goods acquired in good faith and with just title from a possessor in bad faith could be obtained. As for church, monastery, hospital, city immovable property, as well as things whose alienation is prohibited by law (public domain goods) or will, these were acquired by usucapion within a period of 40 years.

At the same time, the law provides prohibitions regarding the subjects of the right of usucapion. Thus, bad faith acquirers, according to the Calimach Code, cannot become subjects of usucapion, not even by possessing the property for a period of 40 years. [3, art. 1940]

Likewise, the following persons cannot acquire the right of ownership by usucapion, until guardians or curators are established over them: persons who lack discernment, minors, paupers, lunatics, the insane or stupid, slaves. [3, art. 1964]

B. Communist regime

During the communist period, usucapion was largely limited, especially for real estate, as private ownership of land was restricted. However, it continued to operate for certain assets, being maintained in the Civil Code of 1864, with some adaptations.

C. The Romanian Civil Code of 1864

The Romanian Civil Code of 1864 regulated two forms of usucapion: the 10-20 year usucapion (consecrated by the provisions of art. 1895), that is, the usucapion proper of Roman law, which consolidates, through possession in good faith, a just title that could not produce its translatable effect, and the 30-year acquisitive prescription (consecrated by the provisions of art. 1390), [2, art. 1390] for the fulfillment of which no other condition is required than that of exercising possession over the property, for the duration established by law. Each of these is distinguished by specific features and, therefore, in what follows, we will analyze them separately.

The Civil Code of 1864 prohibits usucapion of inalienable goods, but it allows the acquisition of property even by a possessor in bad faith. 30-year usucapion. There is a 30-year usucapion if the person who claims to have acquired the right of ownership or another main real right in this way can prove:

- that he has possessed the thing for 30 years and;
- that his possession was useful; defective possession, as well as simple precarious detention, do not have acquisitive effects. It should be noted that the law presumes the regularity of possession. In this variant, usucapion is carried out even through bad faith possession. Usucapion of 10 to 20 years.

According to art. 1895 Code. civil, "he who acquires in good faith and through a just cause a certain immovable shall prescribe the property of that person after ten years, if the true owner resides within the territorial area of the (county) tribunal where the immovable is located, and after twenty years, if he resides outside that territorial area". From the economy of this text it results that the usucapion of 10 to 20 years involves two cumulative conditions, namely:

- The possession must be in good faith and
- The possession must be based on a just title or, in the terminology of the Civil Code, on a "just cause".

Regarding the objects of usucapion, the Romanian legislator establishes that "the domain of things which, by their own nature or by a declaration of the law, cannot be objects of private property, but are taken out of commerce, cannot be prescribed".

The provision of art. 1844 means that goods cannot be usucaped inalienable, whether their inalienability is due to a natural unavailability, or whether it is due to a legal unavailability. [2, art. 1844]

All other goods that are not removed from commerce, that is, are alienable, can be usucapated. Thus, usucapation flows even against the Private Domain of the state, counties, communes and public establishments, as well as in their favor (art. 1845). [2, art. 1845]

In addition, the Romanian Civil Code mentions the conditions of possession. Thus, possession must be continuous, uninterrupted,

undisturbed, public and under the name of the owner. In a word, possession must not be vitiated.

D. Current Civil Code (2011)

With the entry into force of the new Civil Code of Romania (Law no. 287/2009, in force since 2011), the institution of usucapation was modernized.

The main seat of the matter of usucapation is regulated by art. 928-934, art. 939 C. civ. Therefore, usucapion is regulated, in the Civil Code, in the matter of the effects of possession, applying, however, appropriately, the provisions regarding the extinctive prescription (art. 934 Civil Code) and can be defined as a way of acquiring the right of ownership and other main real rights by exercising uninterrupted possession over an asset, within the term and under the conditions provided by law (Dima, 2006, p. 206).

a. Justification of the institution is analyzed:

– by reference to the situation of the possessor: the need for stability of situations and legal relationships requires, subject to certain conditions, the recognition of legal effects to the long-standing appearance of ownership, until the transformation of a factual situation into a state of law;

– by reference to the situation of the former owner: indirectly, usucapion also constitutes a sanction against his passivity, because he dispossessed his property and lost interest in it for a long time, leaving it in the possession of another person, who behaved as the owner or as the holder of another main real right;

– due to the fact that it is an original way of acquiring the right of ownership, it can constitute absolute proof of the right of ownership, thus removing the existing difficulties in proving the right of ownership, both in the matter of the action for claim, and in other matters.

The justification for usucapion lies in the fact that, although possession is a state of fact, most of the time it corresponds to the right of ownership, but the proof of this is quite difficult to produce and thus usucapion removes any evidentiary inconveniences. In the person of the

true owner, usucapion operates as a sanction for the fact that he has neglected his property, leaving it for a long time. The jurisprudence of the European Court of Human Rights recognizes the acquisitive effect of the right of ownership as a result of usucapion, ruling that, although it represents an interference with the right of the true owner, this interference is compatible with art. 1 of Protocol no. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms. The Court has shown that, even in the situation where a real estate right must be subject to real estate advertising formalities, the legislature of each state may give precedence to long-term possession[1].

b. Typology of usucapion.

Depending on the goods over which possession is held, as the basis for acquiring the main real right through acquisitive prescription, the new Civil Code distinguishes between real estate usucapion, established by art. 930-934 and movable usucapion, established by art. 939. Real estate usucapion is regulated in a similar way to real estate usucapion in the vision of Decree-Law no. 115/1938 for the unification of provisions regarding land registers [published in the Official Gazette no. 95 of 27 April 1938 and repealed by art. 230 letter g) of the Civil Code (Ungur, 2007, pp. 71-83.). The Civil Code maintains the concept of the types of usucapion, extratabular and tabular, with the notable difference being the reduction of the terms from twenty years to ten years, in the case of extratabular usucapion, and from ten years to five years, in the case of tabular usucapion (Stoica, 2006, pp. 9-33).

c. Application of civil law over time.

In analyzing the institution of usucapion regulated in the current Civil Code, the provisions of art. 82 of the Civil Code must also be taken into account, according to which the provisions of art. 930-934 of the Civil Code apply only if possession began after the entry into force of the Code. If possession began before this moment, the provisions relating to

---

[1] ECtHR, judgment of 30 August 2007, J.A. Pye (Oxford) Ltd and J.A. Pye Land (Oxford) Ltd v. United Kingdom, p. 74.

usucapion in force on the date of commencement of possession remain applicable. In the case of real estate not registered in the land register, on the date of commencement of possession, the provisions of the Civil Code of 1864 remain applicable.

In addition, as a principle in the matter of the application of civil law over time, the new Civil Code states, in art. 6 paragraph (4), that usucapion begun and not completed on the date of entry into force of the new law, is subject in its entirety to the legal provisions that established it. Usucapion in the system of the Civil Code of 1864 is of two types: usucapion of 30 years (art. 1890) and usucapion of 10 to 20 years (1895-1899). The two types of acquisitive prescription assume the fulfillment of common conditions that concern the existence of a useful possession and its exercise for the period of time provided by law, and specific conditions, such as possession in good faith and its foundation on a just title, in the case of short usucapion.

Currently, usucapion is of two types:

1. Extratabular usucapion represents a way of acquiring the right of ownership or its dismemberments over an immovable property, through uninterrupted possession thereof for at least 10 years, with the fulfillment of the conditions provided by law and by the positive exercise of the potestative right of option regarding usucapion.

Usucapion regulated by the text of art. 930 paragraph (1) of the Civil Code is called extratabular because it operates in favor of a person who is not registered in the land register. Also, if the owner was registered, this type of usucapion will have effects against the person who already enjoys the presumption arising from registration in the land register.

In accordance with the provisions of art. 930 paragraph (1) of the Civil Code, both the right of ownership and its dismemberments can be acquired through extratabular usucapion, unlike the regulation provided by art. 28 of Decree-Law no. 115/1938, according to which only the right of ownership could be acquired through usucapion.

2. Tabular usucapion represents a way of acquiring a main real right over an immovable property, through uninterrupted possession of it for at least 5 years, with the fulfillment of the conditions provided by law.

Usucapion regulated by the text of art. 931 paragraph (1) is called tabular because it operates in favor of the person who is registered in the land register, and not against the person who already enjoys the presumption arising from registration in the land register.

By the will of the legislator, tabular usucapion applies to the main real rights registered in the land register, without legitimate cause, namely the right of ownership and its dismemberments.

Conclusions

Therefore, usucapion is a general way of acquiring the right of ownership, but it also constitutes an indirect sanction directed against the former owner of the property, who, showing negligence, left it in the possession of another person for a long time, allowing him through his passivity to behave publicly as the owner. Therefore, the active procedural capacity in the request for the establishment of the right of ownership by usucapion can only be held by the former owner of the property and since the plaintiff did not prove ownership of the land in dispute, and the defendant has consistently demonstrated to the court that the plaintiff never had the land in question in his patrimony, it is obvious that the plaintiff does not have active procedural capacity.

References

Dima. (2006). *Usucapiunea. Studiu de doctrină si jurisprudence* (*Usucapion. Study of doctrine and jurisprudence*). Hamangiu.

ECHR, decision of 30 August 2007, J.A. Pye (Oxford) Ltd et J.A. Pye Land (Oxford) Ltd v. United Kingdom, p. 74.

Law 287/2009 regarding the Civil Code.

Stoica, V. (2006). Usucapiunea tabulară și usucapiunea extratabulară (Tabular usucapion and extratabular usucapion). *Dreptul*, 6.

Ungur, D.C. (2007). Law applicable to actions in ascertaining the acquisition by usucapiunea of the right of ownership over a property located in the area of incidence of Decree-Law no. 115/1938, introduced after the entry into force of Law no. 7/1996. *Dreptul*, 6.

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 483-495

THE UNITY OF PRIVATE LAW, PART OF THE REFORM ORGANIZED BY THE 2009 CIVIL CODE

Dumitru VĂDUVA
ORCID [ID]: https://orcid.org/0009-0000-7866-9845
E-mail: dumitru_vaduva@yahoo.com
Afiliation: National University of Science and Technology Politehnica Bucharest, Pitești University Center

Abstract: *The 2009 Civil Code reformed almost all the institutions of civil law: marriage, matrimonial regime, contract, obligations, etc. It also unified the two branches of private law that existed in the era before its adoption, civil law and commercial law. Technically, the unification was carried out mainly by taking over the rules of the law of obligations from the Commercial Code 1887 and integrating them into the law of obligations from the Civil Code, some of these rules being merged into civil law, intended to be applied to both professionals and non-professionals, others subordinating exclusively the legal relations of professionals. The resulting body of rules constitutes the monistic system of private law. The 2009 Civil Code is a common law of all private legal relations, without distinguishing between those of civil law and commercial law in the classical sense, leaving the role of developing (completing, derogating, adapting) the categories of private law legal relations, organized in the Civil Code as common law, to special laws. Through this technique of regulating private law relations, there is no*

longer a division between civil law and commercial law, but a common law of the various categories of legal relations under civil law.

The monism of private law is announced by art. 2-3 of the Civil Code. In the first, the object of the Civil Code is enshrined, "(...) the patrimonial relations (...) between the subjects of civil law" its rules constitute "the common law for all areas to which the letter or spirit of its provisions refers" (paragraph 2). In art. 3, the novelty brought by the 2009 Civil Code regarding the monism of private law is enshrined, providing that not only the civil relations of the subjects of civil law in the classical sense are subordinated to it, but also those of professionals, more precisely, "(...) the relations between them and any other subjects of civil law".

The current state of economic development, the socio-economic order of consumerism, electronic commerce, the performance of economic activities by a wide category of legal entities, not only those qualified as traders in the classical sense, the imprecision of the subjective and objective criteria used by the Commercial Code 1887 in qualifying the commercial or civil nature of a legal relationship, constitute the determining reasons for the shown reform of civil law. The shown reform of private law also consists in expanding the categories of legal subjects classified as professionals, including, in addition to traders in the classical sense, legal subjects who perform economic activities organized in enterprises, regardless of whether they have a profit-making purpose or not.

Keywords*: reform; monism; professionals; utility; obligations.*

1. The legislative technique of unification of Romanian private law

The 2009 Civil Code unified the two branches of private law that existed in the era prior to its adoption. Technically, the unification was carried out by absorbing the rules of the 1887 Commercial Code into the body of the 2009 Civil Code and in many cases by merging them into the common law of obligations and special contracts. At the same time, the Commercial Code was repealed, thus consecrating the monist system of Romanian private law, revealed in other words by. The repeal of the Commercial Code and the absorption or merging of its rules into the Civil Code cannot in themselves cause the disappearance of commercial law, as some authors argue[i]. In reality, however, commercial economic

relations still exist today, but commercial law, as it was organized in the Middle Ages and continued in the modern era, can no longer survive in the current era of consumerism, as we will develop below.

In short, in order to achieve the unification of private law, the legislator of the Civil Code organized a common law of all private legal relations, including those that previously belonged to commercial law, leaving the task of developing the categories of legal relations that require special development to special laws. However, the regulation of some of the categories of civil legal relations by special laws does not change their qualification, they remain civil law relations, since the aforementioned code organized them as institutions of civil law. For example, the special rules of insurance law are nothing more than a development of the special insurance contract organized by the Civil Code, as well as corporate law, whose common law is the company contract regulated by the Civil Code, both of which were in the legislation prior to this code institutions of commercial law, etc. Through this technique, the legislator removed the division civil law - commercial law by organizing a common law of the different categories of civil law legal relations. For this purpose, the 2009 Civil Code has set out the new organization of private law since art. 2, which regulates the "Object and content of the Civil Code", providing that it "(...) regulates patrimonial and non-patrimonial relations (...) and that its rules "(...) constitute the common law for all areas to which (...) its provisions refer." (art. 2, paragraphs 1-2). Through this text, supplemented by that of art. 3, the legislator establishes a rule for the direct regulation of private law relations, including commercial ones, by the Civil Code[ii]. The text shown is supplemented by art. 3, paragraph 1 of the Civil Code, setting out the unification of private law. The latter text expressly mentions that the rules of the Civil Code also apply to "(...) relations between professionals and between them and any other subjects of civil law." The text of paragraphs 2-3 of the same art. 3 defines the notion of professional announced in the first paragraph, shown above. “(2) Professionals are all those who operate an enterprise. (3) The operation of an enterprise is the systematic exercise, by one or more persons, of an organized activity

consisting of the production, administration or alienation of goods or the provision of services, regardless of whether it has a profit-making purpose or not." In other words, the two texts clarify the fact that there is no longer a special right of traders but a right of professionals organized by the Civil Code.

Article 8 of Law no. 71/2011 on the implementation of the Civil Code clarifies the concept of professional in terms of the categories of subjects that fall under its scope, stipulating that "(1) The notion of professional provided for in Article 3 of the Civil Code includes the categories of traders, entrepreneurs, economic operators, as well as any other persons authorized to carry out economic or professional activity, as these notions are provided for by law on the date of entry into force of the Civil Code. (2) In all normative acts in force, the expressions "trade acts" and "trade acts" are replaced by the expression "production, trade or service activities". The legal situation of traders in the legislation prior to the 2009 Civil Code is thus clarified; they are subject to the rules of professional law, therefore, their legal relationships are no longer acts or facts of trade but an economic activity (production, trade, provision of services) with a specific regime, different from that of persons carrying out a domestic economic activity. From all the legal texts it results that the phrase "trade activity" has the meaning of a category of professionals who intervene in the exchange of goods. This interpretation also results from the fact that in the current legislation there is no regulation dedicated to "trade activity", so that the existence of a right of this activity can be retained, it being only one of the three categories

2. Professional law is a sub-branch of civil law

The Civil Code has regulated, within the general regime of obligations, specific rules that apply to legal relations between professionals concluded in the exercise of their economic activity. At the same time, in the law of special contracts, it has regulated, in addition to the types of contracts that can be applied by professionals and non-professionals, a series of types of contracts that, by their nature, are

intended for the exercise of professional activities, for example, the insurance contract, the agency contract, the transport contract, the forwarding contract, etc. Also, other special contracts intended exclusively for the activity of professionals are regulated by special laws, for example, the leasing contract, the franchise contract, etc.

The set of legal rules intended to be applied in the relations between professionals in the exercise of their professional activity make up the special law of professionals.

Essentially, from the texts shown, it can be deduced that there is a special civil law of professionals, the relationships that fall under it being qualified according to the quality of the subject, that of a professional, and not according to the nature of the legal act or activity. The special law of professionals, organized by the Civil Code, is not a branch of law but a special civil law. The special rules applicable exclusively to professionals, organized by the Civil Code in the regime of obligations and in the matter of special contracts, meet the specific needs of professionals, especially those referred to in the old legislation as traders, but these are few in number so that a branch of law consisting of a few special rules in the areas shown cannot be justified. It is true that the Commercial Code also included rules other than those of commercial obligations in general, such as rules regarding traders and their professional obligations, rules of commercial jurisdiction, rules on bills of exchange, etc. The latter can no longer justify the existence of commercial law either. By repealing the Commercial Code, art.225 of Law no.71/2011 ordered that the commercial sections existing before the entry into force of the Civil Code within the courts and courts of appeal will be reorganized into civil sections. By art.227 of the same law, the commercial courts were also abolished. Consequently, one of the pillars of commercial law, commercial jurisdiction, also disappeared. Also, with regard to the law that organized traders and their commercial obligations, by art.18 of Title IV of Law no.76/2012 implementing the Code of Civil Procedure, the title of Law no.31/1990 was amended from the law on “commercial companies” to “Law no.31/1990 on companies”. Law no. 265/2022 has retained the phrase "trade", regulating, in principle, the

registration of categories of professionals whose object is to make a profit, the law providing that professionals whose organizational law does not provide for this obligation are not obliged to register (art. 4 paragraph 2).

Finally, the law of bills of exchange and that of commercial effects in general, is a particular application of the law of obligations, more precisely being a special category of claims subject to a particular law regarding their assignment, regulated generally by the rules in section 2, "Assignment of a claim established by a nominative title, to order or to bearer", of title VI. "Transmission and transformation of obligations".

In conclusion, the special rules applicable exclusively to professionals do not constitute a branch of law but a discipline of civil law, a sub-branch thereof.

3. The requirements that justified the emergence of a special right within private law, derogatory to civil law, still constitute the criterion for delimiting the special right of professionals from that of non-professionals. However, new requirements are added to these that justify the unification of private law and the creation of a special right within civil law.

The common law organized by the Civil Code of 1864 regulated the conclusion and execution of legal acts by non-professionals, in principle little familiar with the rules of law because they concluded such acts in complete isolation, so that the rules shown were much more formalistic and did not offer sufficient guarantees regarding the execution of contracts and the protection of investments, which would thus compensate for the risk inherent in the nature of trade, which traders assumed.

In contrast, commercial law developed as a set of rules derogatory to civil law, in order to facilitate the conclusion and execution of commercial operations.

a. The conclusion of contracts was exempted from the formal regime of the requirement ad probaționem of the ascertainment by a

written document of the conclusion of any legal act over 250 lei and of the requirement of a duplicate copy or the formula "good and approved".

b. The negotiation of contracts, the execution and transmission of commercial receivables were subject to derogatory rules. In order to facilitate the conclusion, guarantee the execution and the security of the payments made, the acausal claim, securities and special techniques for their circulation were invented. Through these instruments, payments once made or payment commitments cannot be called into question.

c. Good faith of traders, moral but also professional behavior, is presumed in them, substantiating the special instruments intended to expedite the conclusion and the speed, guarantee and security of the execution. The requirement for the speed of conclusion and execution of contracts, security and guarantee of execution and protection of investments were translated into special rules, derogating from common law, which made up commercial law.

The entire bill of exchange law was built starting from the presumption of good faith of the debtor, on which his creditor relies, who trusts the appearance created by the documents through the signature on the title.

The rules of publicity imposed for the exercise of commercial activity and for numerous operations also contribute to this legal certainty.

d. Collective procedures in the event of insolvency of the debtor and the instruments for preventing this situation, for example, the preventive composition, are also specific techniques of commercial law intended to guarantee the security of the execution of claims and implicitly of investments.

4. Contemporary socio-economic relations require a common law for all private law legal relations

Contemporary socio-economic changes have brought important changes regarding the impact of the law of obligations in the lives of non-professionals. The era of consumerism is characterized by the

behavior of the non-professional to conclude a multitude of legal relations with professionals on a daily or almost daily basis: subscriptions, transportation, insurance, schooling, food and clothing, utilities, the purchase of housing and land, rentals, care, health, entertainment, tourism, etc. This behavior raised the level of legal knowledge of the non-professional. Thus, the need to create a common law for professionals and non-professionals was imposed, in order to protect the non-professional, who by virtue of art. 56 of the Commercial Code 1887 the relationship between the two was qualified as commercial, thus putting the latter at an inferiority complex, as he was also forced to know commercial law, the law of the professional.

The legislator of the 2009 Civil Code thus organized civil law, as the common law of private law relations, merging a good part of the rules of the law of commercial obligations into common rules of obligations and special civil contracts. Other rules of obligations and special commercial contracts were absorbed into civil law. These constitute a set of special rules of civil law, intended exclusively for professionals, which respond to the specifics of economic relations organized by professionals and their need for investment protection. However, these rules constitute a special civil law, not a branch of law, as shown above. The special norms shown, of the law of obligations and the law of special contracts, are too few to justify the existence of a branch of law autonomous from civil law. The other rules, other than those of obligations and contracts, which formed parts of commercial law in the previous regulation of the Civil Code shown, now each constitute a special law, for example, corporate law or insolvency law or bill of exchange law. As a special right, they are united within civil law and not in a supposed commercial law, acclaimed by some of the doctrine.

Finally, the need to create a common law of all private law relationships was also determined by the fact that, in addition to traders, there is a large category of professionals whose legal relationships were qualified as civil but they carried out activities that were very similar to commercial ones, for example, providers of medical and notarial services, or by associations and foundations, even if by law they were

considered non-profit legal entities, although in reality they made significant profits.

This tendency towards civilization of commercial law was manifested long before the appearance of the 2009 Civil Code. As early as 1940, Italy created a monist law, the Italian Civil Code of 1942, followed then by the Swiss Code of Obligations, the Quebec Civil Code, etc.

5. The scope of the law of professional obligations

As is evident from the legal texts shown, the Civil Code states that legal relationships concluded by professionals are distinct relationships from those of non-professionals. Legal relationships concluded by professionals between themselves or in relation to non-professionals, if they arise in connection with their economic activity, constitute the scope of application of professional law. It is true that, from an economic point of view, the most important category of professionals is that of traders, that is, those categories of professionals who are obliged to register in the trade register, these being, with minor exceptions, such as economic interest groups, professionals who have a profit-making purpose.

6. The criterion for defining the right of professionals

Legal acts concluded by professionals derogate from the common law regime and are subordinate to the right of professionals. The criterion for identifying the right of professionals is a formal one. In the Civil Code as well as in the Code of Civil Procedure, the rules applicable to professionals are expressly provided for by using the term professional or enterprise. For example, art. 1446 C. civ., establishes the presumption of solidarity of the debtors of the obligation contracted "in the exercise of the activity of the enterprise"; similarly art. 1523 para. 2 letter d provides that, by exception, the debtor of an obligation to pay the sum of money assumed "in the exercise of the activity of an enterprise" is legally in default, etc.

In contrast, the New Code of Civil Procedure uses the term "professional" to identify the derogatory regime from the common law applicable to legal acts concluded by them (art.280, art.300, art.309 paragraph 2) but also that of "enterprise" (art.277 paragraph 2).

The criterion for qualifying the legal relationship of professionals is the subjective one, the professional or the enterprise.

In relation to these, the legal acts of non-professionals concluded in connection with their domestic economic activity, constitute the common law of obligations and special contracts.

7. The notion of professionals

In current law, the criterion for determining the scope of application of special law, the law of professionals, is the notion of professional, fundamental today in the New Civil Code, replacing that of trader in the old Commercial Code.

The text of art. 3 of the Civil Code defines the professional through another notion, that of enterprise, indicating that "those who operate an enterprise are considered professionals" (art. 3 paragraph 2 of the Civil Code); "the operation of an enterprise constitutes the systematic exercise, by one or more persons, of an organized activity consisting of the production, administration or alienation of goods or the provision of services, regardless of whether it has a profit-making purpose or not" (art. 3 paragraph 3 of the Civil Code). Therefore, professionals within the meaning of the texts shown are those who operate an enterprise, that is, carry out organized activities of production, trade, provision of services. Only those who operate an enterprise exercise an economic activity as a profession and not by chance or for domestic consumption are professionals.

All these activities, except for the service activity, defined traders in the past. Why did the legislator replace the notion of trader with that of professional if at first glance it would seem that they overlap? We find an answer in the descriptive definition of professionals given by art.8 paragraph 1 of Law no.71/2011.

According to this text, the notion of professional used in art.3 of the Civil Code "includes the categories of trader, entrepreneur, economic operator, as well as any other persons authorized to carry out economic or professional activities, as these notions are provided by law, on the date of entry into force of the Civil Code."

The notion of trader, referred to in the text above, essential in the old Commercial Code, is useful in the Civil Code only to identify one of the categories of subjects included in the sphere of professionals, "traders", i.e. merchants who intervene in the sphere of the circulation of goods (art. 3 C. civ corroborated with art. 8 of L. no. 71/2011.). However, it is the core of the notion of professional because the activity of traders is what dictated the special regime of the law of professionals, and constitutes the engine of the national economy.

Therefore, professionals are, first of all, traders and entrepreneurs (art. 8 paragraph 1 of Law no. 71/2011), i.e.: commercial companies, individual enterprises, family enterprises organized by entrepreneurs or authorized natural persons, cooperative societies or cooperative organizations, etc., regulated by Law no. 31/1990, GEO no. 44/2008, Law no. 1/2005, Law no. 566/2004, Law no.36/1991, etc. All these companies or individuals are subject to registration in the Commercial Register (art.4 of Law no.265/2022) and insolvency rules (art.3 paragraph 1 of Law no.85/2014). The notion of trader here has a broad meaning, of legal entities or entrepreneurs who carry out production, trade and service provision activities for profit, freelancers being excluded from this category.

Economic operators also fall within the scope of professionals (art.8 paragraph 1 of Law no.71/2011). This name is synonymous in current legislation with that of trader in the broad sense, i.e. producer, merchant or service provider (art.2 point 3 of OG no.21/1996). Sometimes the names shown are also synonymous with that of economic agent (art.6-7 and point 1 of the annex to the Consumer Code).

The following also fall within the scope of economic operators: associations, foundations and other non-profit legal entities. Such as non-governmental organizations (NGOs) if they carry out a systematic service

activity, even if it is not profitable, or operate an enterprise, systematically exercising an economic activity (art. 3 para. 2-3 C. civ.) organized to achieve the purpose for which they were established. This is the case, for example, of consumer protection associations because they perform the service of consumer protection by defending their rights and interests, among other things by exercising legal action on their behalf (art. 31-32 and art. 37 lit. h of OG no. 21/1992).

Finally, professionals are also persons authorized to carry out professional activities (art. 8 para. 1 of Law no. 71/2011). They are therefore included in the category of professional, which constitutes the proximate gender, along with merchants, lawyers, architects, pharmacists, liquidators, doctors, mediators, notaries, psychologists, etc. The professional activity of freelancers is organized in the form of: individual offices, associated offices, professional civil societies, etc. These are registered in the professional registers, from that moment being authorized to carry out their activity.

Autonomous governments, societies and national companies are legal entities under public law organized in the branches of national interest: the armaments industry, energy, mineral and natural gas exploitation, post and railway transport, as well as in some areas belonging to other branches established by the Government (art. 2 of Law no. 15/1990). The law expressly qualifies as being assimilated to administrative legal acts the contracts concluded by contracting authorities (public institutions, administrative-territorial units or other state economic agents or autonomous government or company/commercial company with full or majority capital held by a public law body (art.3 letter l of Law no.98/2016 on public procurement).

In the doctrine they have also been qualified as mixed legal persons, of public law and private law.

The majority doctrine as well as judicial practice have qualified some legal acts concluded by autonomous governments as well as national societies and companies as commercial acts. It is the same for legal acts concluded by public authorities and institutions, such as hospitals, educational institutions, etc. In fact, OUG no.119/2011

expressly qualifies the contract between a trader and a contracting authority as a commercial contract (art.1 paragraph 1); the contracting authority being defined by this normative act as any public authority of the Romanian state or of a member state of the European Union, acting at central, regional or local level; any body of public law, with legal personality, which was established to meet needs of general interest, not commercial in nature, and which is in at least one of the situations provided for in the text (art.1 paragraph 2 letters a-c)

According to these criteria, the regulatory, supervisory and control authorities (CAS, NBR, CNVM) also fall into the category shown.

Therefore, autonomous regies and national companies/companies are also professionals, if they carry out commercial acts.

In conclusion, from the text of art.3 C. civ. and art.6 and 8 of Law no.71/2011, professionals are all those who operate an enterprise, regardless of whether or not they have registered in the trade register or in the professional register or of associations and foundations, or whether or not they have a lucrative purpose, whether or not they obtain profit; including institutions and economic agents of the administration of state or local authorities operating an enterprise, unless their act is expressly defined by a special law as being of public law.

References

Civil Code
Consumer Code
Law no.265/2022
Law no. 71/2011 on the implementation of the Civil Code
Law no.76/2012 implementing the Code of Civil Procedure
Law no.31/1990 on companies
Law no. 15/1990
Law no.98/2016 on public procurement
GO no. 21/1992

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 496-503

THE IMPORTANCE OF NEW TECHNOLOGIES IN PUBLIC ADMINISTRATION

Elena Emilia ȘTEFAN
ORCID ID: https://orcid.org/0009-0004-4154-3199
E-mail: stefanelena@univnt.ro
Afiliation: Faculty of Law, „Nicolae Titulescu" University, Bucharest, Romania

Abstract: *At global level, society is going through an important moment in its historical development, namely the step-by-step abandonment of the old way of interacting with public authorities, by physically going to the institutions' office and accepting remote means of communication. This means that people are open to change, they know how to use a device to help them and this is usually a mobile phone or a computer connected to the internet. Traditionally, the doctrine of administrative law operates with concepts such as: public interest, public service, public power regime etc. Nowadays, however, in the context of digitalisation, new terms have entered the collective mind that do not necessarily belong to the field of administrative law but intersect with it: digital identity, digital identification, electronic means. The global trend is that in the near future administrative procedures will be online. Therefore, in this light, the paper aims to analyse the regulatory framework applicable to new technologies in administration, in an interdisciplinary analysis, starting from administrative law.*

Key words: *public administration; artificial intelligence; digitalisation; AI ACT; administrative procedure.*

Introduction

Nowadays technology has invaded our lives. From this perspective, public administration authorities, in their interaction with citizens, are invited to include modern means of communication in the administrative procedure, always taking care to safeguard the public interest.

Moreover, the notions of public administration (Popescu, 2017, pp. 528-532.) and public authority (Cliza, 2012, pp. 94-97) have often been analysed in the doctrine.

Nowadays, particular importance is paid to the digitalisation of public administration and the imminent implementation of artificial intelligence on a global scale. These trends need to be clothed in secure regulatory clothes that protect the citizen's interaction with the administration in the online environment, an environment that can be vulnerable as it operates with personal data. Furthermore, "protecting fundamental human rights is a direction that more and more states are pursuing when allowing the development and use of AI technologies on their territory″ (Stoica, 2025, p.35).

It is interesting to know which values the new regulatory framework is guided by, bearing in mind that "the legal norm requires acceptance of and compliance with prescribed conduct" (Hegheș, 2022, p.153). The values on which the European Union is founded are set out in Article 2 of the Treaty on European Union - T.E.U.: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities (...)".

A legal interpretation of the Union regulation shows that the first fundamental value is human dignity. Furthermore, the rules of legal interpretation have been developed by specialists (Popa et al 2017, pp. 197-202; Bădescu, 2018, pp. 167-187, Boghirnea, 2018, pp. 50-57).

The present paper aims to analyse the importance of the legislation necessary for the integration of new technologies in administration, starting from the European regulatory framework and reaching the national level, the research being interdisciplinary.

On integrating new technologies in administration

Our country is bound to implement the European legislation and currently, the regulatory framework necessary for digitalisation is being created slowly, requiring state investment in infrastructure and professionalization of all civil servants in the administration. Specialists point out that "the regulation of the digital domain (...) implies the formation of new paradigms in the legal space" (Conea, 2019, p. 10).

The most relevant legal acts adopted at European level that shape the legislation applicable to the subject (regulations) are listed below. Note that ″Regulations have general applicability″ (Fuerea, 2010, 141).

First of all, 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 (published in OJ L119, 04.05.2016). This act, known as the GDPR, is now in force and has put into operation the need for mandatory compliance with rules on individuals' personal data.

Subsequently, we note the adoption of Regulation (EU) 2024/1183 of the European Parliament and of the Council of 11 April 2024 amending Regulation (EU) no. 910/2014 as regards establishing the European Digital Identity Framework, published in OJEU, L 30.4.2024.

This normative act operates with specific terms such as: electronic identification, electronic means of identification, personal identification data, electronic identification system, authentication, etc. At the same time, *the European Digital Identity Wallet* is introduced and Member States shall ensure the collection of statistics in relation to the functioning of European Digital Identity Wallets and the qualified trust services provided on their territory [art.48a para. (1)]. Analysing the European Regulation, we appreciate that it may lead to public perception concerns about the technical measures taken by authorities for data security.

Moreover, the doctrine has pointed out that "the new international triangle can be brought together in a single idea, recognizing the interdependencies and reciprocal influences between human rights, digitalisation and security in the digital world, especially in economic development" (Popa Tache, 2024, p.4).

Finally, we note one last recent piece of legislation, popularly known as the AI ACT, namely 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 (published in OJEU L 2024/1689, 12.7.2024). The normative act is centred on an AI system, which needs a virtual environment, involving the internet, in order to function. The researchers state that "thanks to this new and unprecedented regulation, Europe is the first continent to have adopted a legal and technical corpus that creates an environment favourable to its development in conditions of security for man and society" (Duțu, 2024).

According to the European AI Strategy of April 2018 (COM (2018) 237) the concept of *artificial intelligence (IA)* refers to "systems that display intelligent behaviour by analysing their environment and taking actions – with some degree of autonomy – to achieve specific goals".

According to AI ACT art. 69, para. (2): "Member States shall make publicly available information on how competent authorities and single points of contact can be contacted, through electronic communication means by 2 August 2025".

At national level, the Administrative Code has been adopted and the Code of Administrative Procedure is to be adopted. We note that "at the European Union level, the Research Network on European Administrative Law (RENEUAL) has developed (...) the Law of Administrative Procedure of the EU" (Săraru, 2017, p.234).

The future national Code of Administrative Procedure, which is currently being drafted, stipulates that during the stages of the

administrative procedure, in the interaction with the authority, remote means of communication may be used[1] art. 34.

Furthermore, civil servants have been provided with a Cyber Security Guide, through which they have received instructions on data security to protect them from various threats and vulnerabilities in the administrative procedure[2].

Another important normative act, in the light of the analysed topic, is Government Resolution no. 832/2024 on the approval of the National Strategy in the field of artificial intelligence 2024-2027 (published in Official Journal no. 730 of 25 July 2024). In fact, it has been rightly observed that "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" (Boghirnea, Niemesch & Ton, 2024, p.700).

Conclusions

Scientific research has highlighted the importance of having EU legislation applicable to the digitalisation of public administration. This regulatory framework comes with new concepts such as digital identification, digital identity, authentication, European digital identity wallet, etc.

The documentation carried out shows that "digitalisation brings with it new issues of responsibility, legal liability, limits and respect for citizens' rights and freedoms" (Ștefan, 2024, p. 565).

At the European level, legislation on modernising administration is well established. For example, the AI ACT brings a new concept, an AI system that needs a modern phone or computer in order to be able to work.

[1] https://sgglegis.gov.ro/legislativ/docs/2024/02/hx8q51ts03479d2wvkyz.pdf,
[2] https://dnsc.ro/vezi/document/ghid-protectie-functionari-publici, page 5

In terms of administrative procedure, the Code of Administrative Procedure has not yet been adopted, but the draft law provides for participation in the administrative procedure by electronic means.

Furthermore, Romania has adopted the National Strategy for Artificial Intelligence 2024-2027, which addresses the issue of artificial intelligence in the fore front.

In practice, IT systems can have vulnerabilities that can lead to damage. One of these is the lack of internet, which makes it impossible for the systems to operate and therefore leads to a lack of communication between citizens and the administration.

In conclusion, the lack of internet, coupled with a weak infrastructure in the administration, can make it difficult to carry out administrative procedures electronically.

References

Boghirnea, I. Niemesch, M. & Ton. A. – I. (2024). *Internet and artificial intelligence as law configuration factors*. Journal Legal and Administrative Studies Supplement. C.H. Beck https://www.upit.ro/_document/306048/jlas_supplement_2024.pdf .

Boghirnea, I. (2018). *The interpretation – obligation for the judge imposed by the application of the law*. Legal and Administrative Studies, 2 (19). C.H. Beck https://www.upit.ro/_document/31012/jlas_2_2018_r.pdf.

Bădescu, M. (2018). *Teoria generală a dreptului (General Theory of Law)*. Sitech.

Cliza, M.-C. (2012). *Drept administrativ, Partea a II-a, (Administrative Law, 2nd Part)*. Universul Juridic.

Conea, A. (2020). *Politicile Uniunii Europene* (*European Union Policies*). Universul Juridic.

Duțu, M. (2024). *Inteligența artificială: obiect și/sau subiect de drept? Aceasta-i întrebarea! (Artificial intelligence: object and/or subject of law? This is the question!)*,

https://www.juridice.ro/essentials/7440/inteligenta-artificiala-obiect-si-sau-subiect-de-drept-aceasta-i-intrebarea.

Fuerea, A. (2010). *Manualul Uniunii Europene (The European Union Handbook*) 6th edition, revised and supplemented. Universul Juridic.

Hegheș, N.-E. (2022). *The non - retroactivity of' new legal norms-fundamental principle of law. Exceptions.* International Journal Of Legal And Social Order, (1),https://ijlso.ccdsara.ro/index.php/international-journal-of-legal-a/article/view/74/60.

Popa, N. (coord.), Anghel, E., Ene-Dinu, C. & Spătaru-Negură, L.-C. (2017). *Teoria generală a dreptului. Caiet de seminar (General Theory of Law. Seminar Booklet)* 2nd edition. C. H. Beck.

Popa Tache, C. (2024). The new international triangle: human right-digitalization-security. *International Investment Law Journal*,Volume 4, 1, p.4, https://investmentlaw.adjuris.ro/articole/An4v1/1.%20Cristina%20Popa%20Tache.pdf .

Popescu, R. M. (2017). ECJ case-law on the concept of „public administration" used in article 45 paragraph (4) TFUE. *CKS eBook.*

Săraru, C.S. (2017). Considerations on the sources of Romanian administrative law. The need to codify the rules of Romanian administrative law. *Juridical Tribune*, Volume 7, Issue 2,.

Stoica, A. (2025). Inteligența artificială și drepturile și libertățile fundamentale constituționale (Artificial intelligence and constitutional fundamental rights and freedoms*). Buletin de informare legislative,* 1, Regia Autonomă Monitorul Oficial http://www.clr.ro/download/buletine/buletin_informare_legislativa_2025/Buletin-nr.-1-2025.pdf .

Ștefan, E.E. (2024). Integrity and Transparency in the Work of Public Authorities. Aspects of Comparative Public Law. *Juridical Tribune – Review of Comparative and International Law*, (14) 4, p. 565, DOI: 10.62768/TBJ/2024/14/4/03.

Government Resolution no. 832/2024 on the approval of the National Strategy in the field of artificial intelligence 2024-2027, published in Official Journal no. 730 of 25 July 2024.
The Treaty on European Union - T.E.U.
Communication from the Commission, Artificial Intelligence for Europe (COM (2018) 237 final), Brussels, 25.4.2018.
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, published in the Official Journal of the European Union L119/1, 4.5.2016.
Regulation (EU) 2024/1183 of the European Parliament and of the Council of 11 April 2024, amending Regulation (EU) 910/2014 as regards establishing the European Digital Identity Framework, published in the Official Journal of the European Union L, 30.4.2024.
Regulation (EU) 2024/1689 of The European Parliament European and of The Council of 13 June 2024 laying down harmonized 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) 2019/1144 and Directives 2014/90/UE, (EU) 2016/797 and (EU) 2020/1828, published in Official Journal of The European Union L 2024/1689, 12.7.2024.
Cyber security guide for civil servants, https://dnsc.ro/vezi/document/ghid-protectie-functionari-publici
Administrative Procedure Code, https://sgglegis.gov.ro/legislativ/docs/2024/02/hx8q51ts03479d2wvkyz.pdf .

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp.504-516

DO WE STILL HAVE, OR DO WE NO LONGER HAVE, THE LAW?

Andrei SOARE[1]
ORCID ID: https://orcid.org/0009-0002-8433-3672
E-mail: andrei.soare@yahoo.com
Affiliation: Faculty of Economic Sciences and Law, National University of Science and Technology POLITEHNICA of Bucharest –

Abstract: *Although the question in the title is generally formulated, this study aims to reduce its scope to a particular hypothesis: What happens if a law is repealed, and subsequently the Constitutional Court finds the unconstitutionality of the law of repeal? Although it is not so common, the problem is important by the very possibility that such situations may occur in the future, but especially in the light of the legal effects that may be generated, effects suggestively contradicted by the title question: Do we still have, or do we no longer have law?*

Keywords: *law; repeal; unconstitutionality; effects; interpretation.*

Introduction

The idea to write this material was triggered by a real-life situation when, as a lawyer, I was asked to provide legal assistance in connection with an alleged electoral offense.

Checking, within the legislation software that I use, the rule allegedly violated, I found the following mention (I specify that it is about the provisions of Art 98[1] Para1 Let t) of Law no. 208/2015[1]) – the

[1] Art 98 Para 1 Let t)* of the Law no. 208/2015 states the violation of provisions mentioned by Art 16; continuing electoral propaganda after its conclusion, as well as advising voters at polling stations on voting day to vote or not to vote for a particular

text of the law as reproduced in the legislation software has an asterisk and the explanatory text to which I am about to refer is written underneath it:

*) Point 43 of the G.E.O no. 26/2020 repealing the current letter, has been declared unconstitutional by the Decision of the Constitutional Court of Romania no. 150/2020, published in the Official Gazette no. 215/17 March 2020, let t) thus returning to its initial form.

So here's what challenged me:

Within the legislation software, the legal text represented by Art. 98 Para 1 let t) of Law no. 208/2015 is mentioned and, through the previously cited text, we are informed of the following:

- we learn that the text was expressly repealed by Point 43 of the G.E.O no. 26/2020;
- we learn that by the Decision of the CCR no. 150/2020 the repealing text was declared unconstitutional.
- finally, we are informed that, given this circumstance, the text of Art. 98 Para 1 let t) is again in force in the form it had prior to its repeal "thus returning to the previous form".

The first two aspects represent genuine information regarding changes in the legal order. We were informed that the legal text that represented the incriminating norm was repealed. Then, we were also informed that the repealing norm was found to be unconstitutional by a decision of the Constitutional Court published in the Official Gazette (therefore producing legal effects).

The third aspect obviously represents an unofficial legal reasoning belonging to the creators of the legislation software, it represents their logical-legal deduction and an explanation for maintaining the text of the norm that incriminates the act that constitutes a contravention, in the reproduced text of the law.

---

political party, a particular political alliance, electoral alliance, organization of citizens belonging to a national minority or an independent candidate.

[1] Law no. 208/20 July 2015 on the election of the Senate and the Chamber of Deputies, as well as for the organization and functioning of the Permanent Electoral Authority.

It is a well-known fact that legislation software is used by millions of subscribers, individuals, legal entities, public authorities, courts, which gives the information provided by them a direct effect on the concrete legal reality. The vast majority of participants in any form of the legal phenomenon get their information regarding regulations from this legislation software.

Therefore, the presence within the legislative information accessible to the public of the text of the law initially repealed, but whose repealing norm was found to be unconstitutional, provides full legitimacy to the question in the title of this study: "Do we still have, or do we no longer have, the law?"

In analyzing the issues raised by this question, I thought of a situation in legal symmetry with the hypothesis of our question: "The repeal of the repeal".

If the legislator shall repeal the repealing norm, then the initial repealed norm shall re-enter into force or not?

The repealing (Popescu & Gheorghe, 2012, p. 116) represents a legal institution through which a legal provision or even a normative act ceases its validity. The effect of repeal is not to annul the repealed rule or act, but rather to cease to produce legal effects for the future. The mechanism of repeal is based on the idea of the appropriateness of the repealed norm or act towards the topicality of the social realities to be adequately regulated. For the repeal we have the same reasoning, successively applied, twice. The legislator, taking into account the need to adapt legal norms to changes in society, the legal system and the fundamental values of the rule of law, finds it necessary to repeal a normative act in force. The same reasoning is necessarily to be found in the decision on the grounds for the repeal of the repeal rule. As has been consistently held in the doctrine, the repeal of the repeal does not represent a "change of mind on the part of the legislature, for this would create the premises of a legislature that is oscillating, unstable and uncertain in relation to social needs and the rules governing social

relations"[1]. This would imply a social danger, and it is unthinkable that this would come from the legislator.

Thus, both the institution, as well as the reasoning founding this legal institution, are opposite to the presumed effect according to which the repeal of the repeal would determine the rebirth of the initial norm.

We considered this analysis necessary in order to compare it with the solution chosen by the legislator.

Indeed, we can see that the legislator fully adheres to the reasoning set out above, explicitly regulating the relationship between the repeal of the repeal and the rule originally repealed.

Art 46 Para 3 of the Law no. 24/2000 expressly states the conclusion reached above, through a logical-legal reasoning: "The repeal of a provision or a legislative act shall be definitive. It shall not be permissible for the repeal of an earlier repealing act to re-establish the force of the original legislative act"[2].

---

[1] Vlad, Ș., *Despre OUG nr.14/2017*, available at https://www.juridice.ro/493559/despre-oug-nr-142017.html; "The principle of definitive repeal, which opposes the "repeal of repeal" technique, creates linearity, predictability, stability and legitimate trust, attributes that give substance to the principle of security of legal relations. The law creates in the minds of the recipients a legitimate expectation regarding the lack of fluctuation and normative stability, from the very moment of publication in the Official Gazette, regardless of the moment of entry into force. Consequently, from this moment on, the recipients of the legal norm, even if it has not yet entered into force, base their behavior, decisions, intentions, etc. on the fact that the legislator, in the activity of regulating social relations, considered that a certain legal provision no longer satisfies social needs and that it is to be eliminated from "legal life" either on the date of publication or at a time after publication. We would like to point out that repeal represents one of the firmest legislative events, this solution being applicable when the legislator absolutely considers that a certain legal norm no longer reflects the needs and values of society. Now, the legislator should not be allowed to have oscillating attitudes regarding the need to remove a legal norm. The solution of repeal is (or should be) the result of a careful analysis of the needs of society and the obsolescence of the legal provisions that regulate these needs. Therefore, we consider that the legislator's "change of mind" cannot have any effect, (…).

[2] The legislator also regulates an exception, but this exception is justified by the particularity of the legal regime of the repealing normative act: Art 46 Para 3 third

The legislator does not mince his words, explaining his will in the second sentence of the quoted paragraph, even using a plastic wording "it is not allowed" that a repealed normative act may not be reinstated into force even by repealing the repeal. The legislator's statute has in mind precisely the effect of the repeal, that of ceasing the legal effects of the repealed rule for the future, definitively (these are terms that will help us in the following analysis).

The legislator also regulates an exception, but this exception is justified by the particularity of the legal regime of the repealing normative act.

We close the parenthesis made by the incursion into the legal regime of a symmetrical institution (repeal) in order to ask the question: If the repeal of the repeal cannot reactivate the rule initially repealed, and since the repeal of a rule and the declaration that a rule is unconstitutional have the same consequences for the rule concerned, then, in application of the principle "ubi eadem est ratio, eadem solutio esse debet", would the same legal effect not be required, in the sense that it is impossible to reactivate the repealed rule even if the repealing rule is declared unconstitutional?

Let us address the same question to the Constitutional Court – The answer is in the form of a quote from a recent decision of the Court, Decision no. 409/19 September 2024[1], published in the Official Gazette in January 2025: We note that by the aforementioned decision, the Constitutional Court admitted the plea of unconstitutionality and found that Law no. 11/2024 is unconstitutional in its entirety[2].

---

sentence "The exceptions are the provisions of the Government ordinances that provided for repeal norms and were rejected by law by Parliament".

[1] Decision no. 402/19 September 2024 regarding the exception of unconstitutionality of the Law no. 11/2024 on the statute of the status of clerks and other categories of personnel occupying specialized positions within the courts, prosecutor's offices and the National Institute of Forensic Expertise, in its entirety published in the Official Gazette, no. 15/10 January 2025.

[2] Admits the exception of unconstitutionality raised by the Ploiești Court of Appeal in court case no. 3243/2/2024 of the Bucharest Court of Appeal – Section X for

We quote Para 49 of the recitals: In view of the above, the legal regulations repealed by Law no.11/2024 shall re-enter into force on the date of publication of the unconstitutionality decision. Therefore, Law no. 567/2004, as well as the other normative acts repealed by Law no. 11/2024, shall re-enter into force on the date of publication of this decision.

As explicit as the legislator has been on the effects of repeal, stating that "it is not permissible" for the repeal of the repeal to have the effect of activating the rule originally repealed, the Constitutional Court is also explicit in stating that by declaring the repealing rule unconstitutional, the repealed rule "re-enters into force". The answer is therefore clear: in almost identical situations we apply different solutions.

We now note that the spark from which the present study started (the mention in the legislative software of the wording "thus reverting to the previous form") was not a logical-legal deduction of the makers of the software but, rather, it was a takeover by them of an explicit wording of the Constitutional Court ("reintroduce into force") found, as I was to realize later, in a constant of its case law.

However, the problem of different solutions regarding the initially repealed rule should not be closed in an explanation of the kind "it is so because it is so". We need to understand why the Constitutional Court states that its decisions finding the repealing rule unconstitutional have the effect of bringing the repealed rule back into force.

We offer the explanation by means of a quotation, a quotation which obviously belongs to the Constitutional Court: "46. The Court held that, having regard to the above-mentioned constitutional texts, the finding of unconstitutionality of the provisions of the repealing primary

---

administrative and fiscal litigation and for public procurement and by the Bucharest Court of Appeal in court case no. 480/42/2024 of the Ploiești Court of Appeal – Section for administrative and fiscal litigation and finds that Law no. 11/2024 on the status of clerks and other categories of personnel occupying specialized positions within the courts, the prosecutor's offices attached to them and the National Institute of Forensic Expertise is unconstitutional, in its entirety.

regulatory act does not result in the emergence of a legislative void, but determines the re-entry of the repealed acts into the active substance of the legislation, after the publication of the Constitutional Court's decision in the Official Gazette of Romania, Part I (see, in the same sense, Decision No.1039/5 December 2012, published in the Official Gazette of Romania, Part I, No. 61/29 January 2013); 47. In such cases, in which normative acts that repeal other normative acts are found to be unconstitutional, there is no "repeal of the repeal", in order to be able to take into account the provisions of Art 64 Para 3 second sentence of Law no. 24/2000, according to which: it is not permissible for the repeal of a previous act of repeal to bring the original normative act back into force – provisions that may be relied against the legislature in its law-making activity, but this is a specific effect of decisions finding the unconstitutionality of a repealing norm, an effect based on the constitutional provisions of Art 142 Para 1, which enshrines the role of the Constitutional Court as guarantor of the supremacy of the Constitution, and Art 147 Para 4, according to which the Court's decisions are generally binding[1].

We note that the essence of the constant case law of the Constitutional Court in this regard is based on its main function as guarantor of the supremacy of the Constitution and the generally binding effect of its decisions. Starting from such a premise, the finding by the Constitutional Court of the "loss of constitutional legitimacy" ("a different and much more serious sanction than a mere repeal") of the repealing norm cannot have any other effect than that of restoring the original normative act to its original legal force.

We propose an interesting case law study composed of 4 elements:

[1] Decision no. 402/19 September 2024 regarding the exception of unconstitutionality of the Law no. 11/2024 on the statute of the status of clerks and other categories of personnel occupying specialized positions within the courts, prosecutor's offices and the National Institute of Forensic Expertise, in its entirety published in the Official Gazette, no. 15/10 January 2025.

1. Article I, item 56 of Law no. 278/2006 on amending and supplementing the Criminal Code and amending and supplementing other laws repealed the provisions of Art 205-206 of the Criminal Code, articles that criminalized offenses of insult and slander.
2. By Constitutional Court Decision no. 62/2007[1], the exception of unconstitutionality invoked was admitted and it was found that the provisions of Art I, item 56 of Law no. 278/2006 on amending and supplementing the Criminal Code, as well as amending and supplementing other laws, the part relating to the repeal of Articles 205, 206 and 207 of the Criminal Code, are unconstitutional.
3. The adoption of the Constitutional Court Decision no. 62/2007 led to the emergence of different positions in the jurisprudence of the courts on the issue of the existence or non-existence of criminalization of the two crimes of insult and slander, which led to a non-uniform jurisprudence, with solutions being, on the one hand, acquittal, justified by the non-existence of criminalization, and on the other hand, conviction, justified by the re-enactment of the criminalizing texts, as a result of the finding of unconstitutionality of the repealing rule.

The problems of law that have generated this inconsistent case law have been analysed by the High Court of Cassation and Justice which, by way of appeal in the interest of the law, by Decision No. 8/2010[2] upheld the appeal in the interest of the law ruling that: The rules criminalizing insult and slander stated by Art 205-206 of the Criminal Code, as well as

[1] Decision no. 62/18 January 2007 on the exception of unconstitutionality of the provisions of Art I, Point 56 of the Law no 278/2006 on the modification and amendment of the Criminal Code, as well as for the modification and amendment of other laws. The Decision has been published in the Official Gazette no. 104/12 February 2007.
[2] Decision no 8/18 October 2010 on the repeal in the interest of the law, regarding the Decision of the Constitutional Court no 62/18 January 2007 on the exception of unconstitutionality of the provisions of Art I, Point 56 of the Law no 278/2006 on the modification and amendment of the Criminal Code, as well as for the modification and amendment of other laws on the provisions of Art 205, 206 and 207 of the Criminal Code. Published in the Official Gazette no 416/14 June 2011.

the provisions of Art 207 of the Criminal Code on the proof of truthfulness, repealed by the provisions of Article I, item 56 of Law 278/2006, provisions declared unconstitutional by Decision No. 62/18 January 2007 of the Constitutional Court, are not in force. Mandatory, according to art. 414^2 Para 3 of the Code of Criminal Procedure.

Therefore, in 2011 (date of publication in the Official Gazette of the HCCJ's Decision no. 8/2010) we have a binding statute for the judiciary on the non-criminalization of the offenses of insult and slander.

4. The fourth element of the proposed jurisprudential study is represented by the issuance, in 2013, of the Constitutional Court Decision no. 206/2013[1].

By this Decision, the Constitutional Court admitted the objection of unconstitutionality concerning the provisions of Article 414^5 Para 4 of the Code of Criminal Procedure, and found that the "resolution of the issues of law decided" by the Decision of the High Court of Cassation and Justice – United Sections no. 8/18 October 2010, published in the Official Gazette of Romania, Part I, no. 416/14 June 2011, is unconstitutional, contrary to the provisions of Art 3, 4 and 5, Art 126 Para 3, Art 142 Para 1 and Art 147 Para 1 and 4 of the Constitution and the Decision of the Constitutional Court no. 62/18 January 2007, published in the Official Gazette of Romania, Part I, no. 104/12 February 2007.

We note that, in its capacity as guarantor of the supremacy of the Constitution, the Constitutional Court considered itself entitled to filter through constitutionality review the Decision of the High Court of Cassation and Justice delivered by Decision No. 8/2010 on appeal in the interest of the law.

It would seem that with this last element of legal conflict between authorities, the question in the title of our study would be answered: WE HAVE LAW!

---

[1] Decision no. 206/29 April 2013 regarding the exception of unconstitutionality of the provisions of Art 414^5 Para 4 of the Code of Criminal Procedure. Published in the Official Gazette no 350/13 June 2013.

And yet, in the jurisprudence after 2013 and until the entry into force of the current Criminal Code (1.02.2014), we do not find that offenses of insult and slander have been committed, which cannot be interpreted in the sense of a decrease in criminality, but in the sense that the courts considered that we NO LONGER HAVE LAWS!

The dilemma remains topical because, in spite of this rich and high-level case law, in a similar new situation, we have no binding rulings.

We state this because, in the absence of an express mention in the Decision declaring the unconstitutionality of the repealing norm, the court before which the question "do we still have or do we no longer have a law?" will appear in the future, could only give a solution by way of interpretation, referring, or not referring, to the case law of the Constitutional Court.

So, here we are in front of the question in the title of the article, in a situation where the Constitutional Court, in a new decision, finds the unconstitutionality of a repealing rule and, in the recitals, says nothing about the possible "re-entry" into force of the repealed rule!

Conclusions

Instead of Conclusion, a new question emerges: How do we think?

We believe that, in principle, the position consistently expressed by the Constitutional Court is correct.

It is a fact that a rule has been repealed and therefore no longer exists in the legal order.

At the same time, we note that the repealing rule was found to be inconsistent with the Constitution.

We say that, as a matter of principle, the position of the Constitutional Court is the correct one, because once the unconstitutionality of the abrogating norm is established, and as the Constitution is pre-existent to the abrogating norm, this implies that the abrogating norm was never in conformity with the Constitution. This translates into the fact that even in the interval between the date of its adoption and the date of the declaration of its unconstitutionality, the

repealing norm did not comply with the Constitution. Now, as the repealing norm was never in conformity with the Constitution, and as non-conformity with the Constitution is sanctioned by deprivation of legal effects, then the repealing norm could never produce legal effects, therefore it would be fair that the norm repealed by a normative act that could not produce legal effects, be considered as remaining in force.

What is right in principle, however, "clashes" with the effects of the Constitutional Court's decisions.

Art 11 Para 3 of the Law no. 47/1992 stipulates that the decisions of the Constitutional Court are published in the Official Gazette, are binding and (again a plastic expression) "have force only for the future".

Therefore, the correct principle stated above is undermined by the rule cited, in the light of the fact that the decisions finding unconstitutionality have force, and therefore produce effects, only for the future.

Although the normative act whose unconstitutionality has been found has never been constitutional, according to the provisions of Art 11 Para 3 cited above, it will be considered unconstitutional only for the future, the only exception being the lawsuits initiated previously and in which unconstitutionality was invoked or those that are still pending and are based on the same normative provision criticized for unconstitutionality.

Therefore, from the point of view of sanction, what becomes unconstitutional after the publication of the Decision in the Official Gazette can be considered as constitutional for the period prior to publication. This is correct, as I have said, only in terms of the sanction. The sanction implies that the text declared unconstitutional can no longer produce legal effects after the publication of the decision in the Official Journal, but it is considered to have produced valid legal effects until that moment.

If the repealing rule declared unconstitutional can no longer produce legal effects after the publication of the Decision in the Official Journal, but it has produced legal effects until the publication of the

Decision in the Official Journal, then the legal effect of the repeal has been produced, or not?

Clearly, the answer is affirmative, the effect of the repeal has been produced, because the repealing norm has produced legal effects between the moment of its adoption (its entry into force) and the moment of publication of the decision finding it unconstitutional.

As the repeal has "uno ictu" effect, the repealed rule ceases to exist.

The question arises, if the repealing rule ceases to produce legal effects from the moment of publication of the Constitutional Court's decision, what effect does this have on the repealed rule?

If we have previously accepted that the original rule was repealed and the repeal has taken effect, then there are two possible situations:

a) Either declaring the repealing rule unconstitutional for the future cannot produce any effect on the repeal (because the non-retroactive effect is expressly enshrined in the provisions of Art 11 Para 3 of the Law no. 47/1992;
b) Either declaring the repealing rule unconstitutional for the future would cause the repealed rule to re-enter into force.

This second situation would presuppose the existence in Romanian law of the institution of re-entry into force. As this institution does not exist, then it cannot justify such an effect of the Constitutional Court's decision declaring the unconstitutionality of the repealing rule.

We can draw a parallel between two sanctions "Unconstitutionality" and Nullity. Although they are identical in terms of the reason for the violation of the law, both unconstitutionality and nullity presuppose causes (violation of the Constitution and of the law) that occurred prior to the conclusion of the act (adoption of the normative act and conclusion of the legal act) and although this would have justified the retroactive effect of both sanctions, the legislator opted for a different legal regime of unconstitutionality, compared to nullity, in terms of the sense of the effects produced on the time axis. Unconstitutionality does not produce effects for the past, whereas nullity is retroactive.

This is the reason why the "re-entry into force" of the normative act repealed by a norm found to be unconstitutional cannot occur: the non-

existence of a legal institution that would ensure such an effect, given the express regulation of the effects (only for the future) of the decisions of the Constitutional Court.

References

G.E.O no. 26/2020

Law no. 208/20 July 2015 on the election of the Senate and the Chamber of Deputies, as well as for the organization and functioning of the Permanent Electoral Authority

Law no. 208/2015

Law no. 11/2024

Law no. 567/2004

Law no. 278/2006 on amending and supplementing the Criminal Code

Law no. 47/1992

Popescu, R.D., & Gheorghe A. (2012). Producerea efectelor juridice ale actelor normative [Producing legal effects of normative acts]. *Revista Transilvană de Studii Administrative, 2(31)*

Vlad, Ș. *Despre OUG nr.14/2017 [About GEO no. 14/2017]*, available at https://www.juridice.ro/493559/despre-oug-nr-142017.html

Legal and Administrative Studies, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 517-529

CONTINUITY OF PUBLIC SERVICES IN ROMANIA: LEGAL CHALLENGES AND INSTITUTIONAL IMPLICATIONS IN THE CONTEXT OF SYSTEMIC DYSFUNCTIONALITY

Viorica POPESCU
ORCID[ID]: https://orcid.org/0000-0003-4120-5419
E-mail: viorica.popescu@upb.ro
Afiliation: Faculty of Economic Sciences and Law
National University of Science and Technology
POLITEHNICA Bucharest, Romania

Abstract: *In any democratic state, public services play an important role, serving as a fundamental pillar not only for its functioning, but also for ensuring the well-being of its citizens. Today, one of the main objectives of the state is to address the needs and fundamental rights of all citizens, with public services being the means through which this goal is achieved. Through these services, the state not only ensures equitable and quality access to education, healthcare, infrastructure, and social protection, but this access is also considered essential for the development of any society.*

This article aims to analyze the challenges faced by public administration in Romania in ensuring the continuity of public services, a fundamental principle of administrative law. In this context, the main causes of dysfunctions are identified, such as underfunding, political instability, the lack of coherent public policies, strikes, and a shortage of resources. All the consequences of these disruptions have significant repercussions on citizens and institutions, leading to violations of fundamental rights and, not least, the loss of public trust in state authorities and the public sector. At the end of the article, concrete solutions are proposed to strengthen the state's ability to provide continuous and efficient public services. Therefore, the study advocates for a coherent reform of the public sector in Romania, based on responsibility, professionalism, and institutional resilience.

Keywords: *public administration; continuity of public services; legal regulations; dysfunctions; reform.*

Introduction

In any state governed by the rule of law, the public sector plays an important role since, on the one hand, it provides public services that are otherwise considered to be "too costly for citizens to provide" (Tanzi, 2000, 8), and, on the other hand, it manages resources that contribute to the development of the whole society.

Public services such as health, education, transportation, infrastructure or public order, regardless of how they are financed, from citizens' taxes and government funds, have a major impact on economic growth, ensuring prosperity (Baa & Chattoraj, 2022, p. 2) stability and development directions.

Public services, by the way in which they are provided to all members of society, are designed to reduce poverty and inequality, thereby contributing to a fair and socially cohesive society.

As the scope of social needs has grown, states have had to adapt and expand the scope of public services, entrusting their management to the private sector and administrative regulatory mechanisms, thus ensuring a fair and transparent distribution of public services (Afeez, 2020, p.5).

1. Public service – conceptual delimitations, normative regulation in Romania, operating principles

Unlike other institutions specific to administrative law, in Romania, public service is a concept that has evolved with society and especially with the needs of its recipients, its definition giving rise to much controversy between theorists, practitioners and beneficiaries.

These controversies concerned both the material aspects, such as the scope of the activities without which the company could not exist, and the organic aspects, i.e. the authorities which, by virtue of the law,

may set up or administer such activities and the legal regime to which they must be subjected to.

Tributaries to the French administrative law system, in the Romanian administrative doctrine, public services have been defined, from a functional point of view, and not organically, as:

- "that activity of public authorities which aims to satisfy a need in the general interest and which must be carried out regularly and continuously (e.g. police, rail transport, education, social assistance, etc.)" (Tarangul, 1944, p. 15 as quoted by Iorgovan, 1996, p. 62);
- "an organizational structure with or without legal personality, established under the law by the state, municipality, city or county or by private individuals, endowed with adequate material and financial means, which carries out an activity or a set of homogeneous activities established by the act of establishment, with the aim of continuously and permanently satisfying the general interests of a community" (Preda, 1999, p. 616);
- "human activity involving a certain specialization, having useful, immaterial and intangible results, intended to satisfy a social need" (Dincă, 2018, p.24).

As far as the legal regulation in Romania is concerned, it should be noted that the notion of "public service" is found primarily in the Constitution, where there are either express or implicit references. Thus, by way of example we mention: Art 120 Para 1 which provides that "public administration in the administrative-territorial units is based on the principles of decentralization, local autonomy and de-concentration of public services"; Art 122 Para 1 "the county council is defined as the public administration authority for the coordination of the activity of the municipal and city councils in order to realize public services of county interest"; Art 123 Para 2 specifies that "the prefect shall manage the deconcentrated public services of the ministries and other bodies of the central public administration in the administrative-territorial units".

The express use of the notion of public service in the Constitution has led scholars to consider that it has become in recent decades "an institution of constitutional order" (Iorgovan, 2005, p. 185).

As regards sector-specific regulation, the concept of public service is defined as follows:

- "an activity organized or, as the case may be, authorized by a public authority for the purpose of satisfying a legitimate public interest (Art 2 Para 1, Letter m) of the Administrative Litigation Law no 554/2000);
- "the activity or set of activities organized by a public administration authority or a public institution or authorized or delegated by it, in order to satisfy a general need or public interest on a regular and continuous basis" (Art 5 letter k) of the Romanian Administrative Code adopted in 2019).

The doctrinal point of view was also maintained in the case law of the Romanian courts, the scope of public services being analyzed from a material and functional point of view, i.e. by reference to the activities carried out by the provider, and not from an organic or formal point of view (HCCJ Decision no 28/24 April 2017, published in the Official Gazette, Part I no 378/22 May 2017, Decision no 20/29 September 2014, rendered by the Panel for the resolution of certain questions of law in criminal matters, published in the Official Gazette of Romania, Part I, no 766/22 October 2014).

The principles underlying the establishment, organization and functioning of a public service in Romania are set out in Art 580 of the Administrative Code and are as follows:

- Transparency;
- Equal treatment;
- Continuity;
- Adaptability;
- Accessibility;
- Responsibility;
- Provision of public services at quality standards.

2. The principle of continuity of public service in Romania

Unlike the other principles listed above, the content of which is defined in the Administrative Code, in relation to the principle of continuity, the Romanian legislator only mentions in Art 580 Para 4 that "in the provision of public services, public administration authorities and public institutions, as well as bodies providing public services have the obligation to ensure continuity, under the conditions laid down in Art 123, which in turn provides that "the activity of public administration shall be exercised without interruption, in compliance with the legal provisions".

It follows from the above-mentioned two legal texts that continuity is not only a feature of a public service, but also a fundamental principle of operation which implies that the activity offered in the form of a public service must be carried out without interruption and consistently, except for the limitations imposed by mandatory legal rules aimed at ensuring a legitimate purpose.

For these reasons, the state, through its public authorities and institutions, must constantly monitor how social requirements are changing and adapt the public service model to the new needs, as citizens have the right to good quality public services at all times. This adaptation requires the adoption of mechanisms and the implementation of new technologies to make access to public services much easier and more constant for all beneficiaries.

Continuity, as a fundamental principle of public administration, concerns all those public services that carry out fundamental activities for society, such as health, education, defense and public order, and an interruption in their provision can have significant, sometimes even destructive effects, including in the form of fundamental rights such as the right to health protection or education.

Also, the literature has consistently shown that the principle of continuity in the provision of public services should not be "absolutized", in the sense that "a public service once established is not forever", on the contrary, it may be abolished by the body that created it if the public

interest no longer justifies it (Negruț, 2008, p. 103) or may be subject to limitations determined either by the existence of a work program or a duration of realization (Vedinaș, 2018, p. 407).

3. Shortcomings and challenges in applying the principle

In recent years, public services in Romania have faced a number of multi-sectoral challenges, some of which are likely to affect the continuity of their provision.

Among the major dysfunctions that have affected the principle of continuity we mention:

- *Institutional crises generated by strikes of public service workers*

In Romania, the right to strike is recognized both for civil servants (Art 416 of the Administrative Code) and for those who work in the public sector, i.e. those who have to contribute to the continuous functioning of the public service, but this right is considered one of the most controversial, the controversy arising from the pre-emption of general interests achieved through public services over private interests followed by the strike (Ciubotaru, 2009, p. 120).

A relevant example of this is the strike of teachers in pre-university education. In May 2023, more than 150,000 teachers and around 60,000-70,000 auxiliary teachers stopped their work altogether (Ilie, M., July 2024).

The dissatisfaction of the participants in this form of protest was generated by the low level of salaries in the field, in contrast to other socio-professional categories working in the public sector, the impact being felt not only on the living standards of teachers, but also on the quality of education. The reports on the state of pre-university education in Romania 2022-2023 and 2023-2024 demonstrate that the education system was underfunded, being allocated less than 6% of GDP as mentioned in Art 8 of the National Education Law no 1/ 2011 in force at that time.

This radical form of protest has profoundly disrupted the Romanian education system, jeopardizing even important exams such as the national assessment or the baccalaureate.

- *Lack of financial or human resources*

The pandemic crisis in Romania has revealed the existence of a health system that does not provide adequate demographic and regional coverage, and a poorly developed health infrastructure.

The number of doctors and nurses is relatively low compared to the EU average, as many health workers have emigrated. This shortage has led in recent years to an overstretched workforce remaining in the country and limited availability of health services.

On the other hand, the problem of underfunding and lack of qualified personnel in systems such as education, health or law and order in Romania is a chronic one with long-term effects, which despite government reforms has not received concrete and firm solutions.

- *Political crisis*

Uncertainty about the continuation or not of public policies in key areas and the political instability that has led to frequent changes at government level affect the long-term development strategies of public authorities, so that there is currently a lack of synchronization between national policies and government decisions.

The lack of common vision of the Romanian political class still demonstrates the institutional fragility of the Romanian state in the face of political deadlocks.

A relevant example of this is the political crisis generated by the annulment of the presidential elections of December 2024, which led to strong economic and social instability in Romania.

- *Problems caused by incomplete or faulty digitization*

Technological advances should not only facilitate access to public services, but also improve their quality, ensuring social progress by improving the quality of life of all citizens.

The pandemic crisis has shown that access to digital platforms can ensure continuity in the provision of public services even in situations of major crisis, but nevertheless, the digitization process in Romania must be configured in such a way that it does not hinder access to public services for citizens who lack digital skills, such as the elderly or those living in rural areas or who do not have access to the internet and who still represent a high percentage of the country's population.

- *Romania's uneven social and economic development*

The OECD report for the year 2024 states that in Romania there is a wide discrepancy between the way essential public services are provided in rural and urban areas.

In big cities, people have permanent access to public services, while in rural areas, they are provided with interruptions or not at all due to lack of funds or human resources. Despite record economic growth in recent years, Romania still faces large spatial disparities (Fina, Heider, & Rațˌ 2021, pp. 5 -7).

4. The impact of not respecting the continuity principle – implications for public administration and citizens

The dysfunctions listed briefly above have had the effect first and foremost of decreasing citizens' trust in the state and its authorities.

Drafting strategic plans in public sectors providing essential services is not sufficient if they are not continuously monitored and evaluated so that they meet current social needs.

Administrative inefficiency, in this context, has only led to the fragmentation of projects to reform public services, which means a waste of public money and loss of credibility in public institutions and authorities.

The lack of real and effective public administration reforms has led to widening social and regional disparities, which threatens and fuels citizens' discontent.

In this respect, it should be mentioned that, unfortunately, according to Eurostat statistics, Romania occupies one of the last places in terms of the increase in child poverty and social exclusion, at a time when access to education is the only means of success in life.

5. Possible solutions to mitigate malfunctions in the application of the principle of continuity of public services

Planning for continuity in the provision of essential public services means putting in place systems and mechanisms that can be quickly adapted to new circumstances when disruptive or unforeseen events occur.

It is imperative that public sector governance be strong and resilient, creating the conditions for it to be exercised both through existing authorities and through the appropriate development of new institutions and tools for objectivizing and prioritizing public policies that respond to the current and future needs of the sector and the expectations of the population.

Directions for action and measures that can be taken at government level are designed to ensure the development of the public system through means such as: increased administrative capacity, partnerships between public authorities and private providers, adoption of a coherent and transparent public policy framework.

I believe that the principle of continuity should be ensured in line with the principle of adaptation of public services, which implies a dynamic approach to changing circumstances and situations.

Through the efficient use of government funds and those attracted through the EU-funded National Recovery and Resilience Plan 2021-2026, Romania has the opportunity to develop essential public services by modernizing and streamlining the activities providing essential public services. Their adequate funding will have the effect of attracting a well-trained and responsible human resource actively involved in change projects.

In this context, human resources policies need to be in line not only with public sector objectives, but also with citizens' expectations as beneficiaries of public services.

As far as the implementation of digital solutions in Romania is concerned, this is an ongoing process, but it still requires political will and flexibility because their development must support all citizens.

From this perspective, the implementation of digital solutions in the sphere of public services needs to be done with caution, taking into account the specific delivery of the service, as services such as transport or the supply of electricity, water or gas cannot be dematerialized and delivered online. It should also be kept in mind that continuity in a digital administration means ensuring the constant provision of services online, only when this is possible without human input.

In this context, the "digital revolution" must be and remain beneficiary-oriented, becoming a tool to improve people's lives.

Creating essential infrastructure by attracting new public and private investment is another viable tool to ensure the sustainable and durable development of all communities, thus reducing the major disparities.

Another remedy is the adoption of legal rules to effectively protect citizens, not only in situations where there are interruptions or discontinuities in service provision, but also in situations where the services provided are not of a quality that meets standards. In this respect, the normative regulation of the re-liability of authorities and private organizations providing public services will be an essential pillar in ensuring the principle of continuity.

Conclusions

Continuity is the ability of a public service provided by public or private entities to maintain its normal activity without compromise, regardless of external conditions.

The principle of continuity of public services, although legally enshrined in Romania, has proved insufficiently protected in practice,

with numerous situations where citizens have had no access or access has been interrupted.

In this period of rapid social and technological change, continuity requires public authorities and private entities to adapt their work to properly address any change and to become truly effective in serving the public interest.

References

Afeez, K. S. (2020). Public service and service delivery. *Global Encyclopedia of Public Administration, Public Policy, and Governance*, https://doi.org/10.1007/978-3-319-31816-5_4005-1

Baa, R., & Chattoraj, A. K. (2022). The Significance, Role, and Need for Public Sector Enterprises in Economic Growth. *Intern. Journal of Profess. Bus. Review.*, Miami, v. 7 n. 5.

Ciubotaru, B. M. (2009). Certain aspects regarding the right of public servants in the European Union to strike. Positive statutory regulation of the right to strike in Roma. *Scientific Bulletin of the "Mihail Kogalniceanu" University, 18*. Cugetarea.

Dincă. D, V. (2018). *Serviciile publice*. Economic.

Fina Ș., Heider B., & Rațț C. (2021). *România inegală. Disparităţile socio-economice regionale din România*. Friedrich-Ebert-Stiftung – Policy for Europe.

Iorgovan. A. (2005). *Tratat de drept administrativ*, 2nd Vol., 4th Edition. C.H. Beck.

Negruţ, V. (2008). Regimul juridic al serviciilor comunitare de utilităţi publice. *Revista Transilvană de Ştiinţe Administrative*, 1(21)

Preda, M. (1999). *Autoritățile administrației publice – sistemul constituțional român*, Lumina Lex.

Tanzi, V. (2000). The role of the State in the quality of the public sector. *CEPAL Rewiew*, 71.

Tarangul, E.D. (1944). Tratat de drept administrativ român Glasul Bucovinei, Cernăuţi, quoted in Iorgovan, A. (1996). *Tratat de drept administrative*. Nemira.

Vedinaș, V. (2018). *Tratat teoretic și practic de drept administrativ*, 2nd Vol. Universul Juridic.

Romanian Constitution, in its initial form, has been adopted during the meeting of the Constituant Meeting of 21 November 1991, has been published in the Official Gazette of Romania, Part 1, no 233/21 November 1991 and entered into forced after its approval through the national referendum of 8 December 1991 The Romanian Constitution Revision Law No 429/2003 was approved by the national referendum of October 18-19, 2003 and entered into force on October 29, 2003, the date of publication in the Official Journal of Romania, Part I, no 758 of October 29, 2003 of the Constitutional Court Decision no 3 of October 22, 2003 confirming the result of the national referendum of October 18-19, 2003 on the Romanian Constitution Revision Law

The Administrative Code adopted by the G.E.O no 57/3 July 2019, published in the Official Gazette no 555/5 July 2019

Law no 554/2 December 2004 on the administrative contentious published in the Official Gazette no 1154/7 December 2004 modified by Law no 262/19 July 2007, published in the Official Gazette no 510/30 July 2007

National Education Law no 1/2011 published in the Official Gazette, Part 1, no 18/10 January 2011, in force since February 9, 2011, replaced by the Law no 198/2023 – the Law of pre-university education, published in the Official Gazette, Part 1, no 613/5 July 2023, in force since September 3, 2023 and the Law no 199/2023 on superior education, published in the Official Gazette, Part 1, no 614/5 July 2023.

Raportul privind privind starea învățământului preuniversitar din România 2022-2023, available at: https://www.edu.ro/sites/default/files/_fi%C8%99iere/Minister/2023/Transparenta/Rapoarte_sistem/Raport-Starea-invatamantului-preuniversitar-2022-2023.pdf

Raportul privind privind starea învățământului preuniversitar din România 2023-2024, available at:

https://www.edu.ro/sites/default/files/_fi%C8%99iere/Minister/2024/div/Rapoarte_sistem/Raport_Stare_invatamant_preuniv-2023-2024.pdf

OECD 2024 Report is available at: https://www.oecd.org/en/publications/oecd-economic-surveys-romania-2024_106b32c4-en.html

Eurostat Statistics is available at: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Children_at_risk_of_poverty_or_social_exclusion

High Court of Cassation and Justice Decision no 28/24 April 2017, published in the Official Gazette, Part 1, no 378/22 May 2017

High Court of Cassation and Justice Decision no 20/29 September 2014, ruled by the Panel for solving certain matters of criminal law, published in the Official Gazette, Part 1, no 766/22 October 2014

Ilie, M. (2024), article available at: https://www.rfi.fr/ro/rom%C3%A2nia/20240605-un-an-de-la-greva-profesorilor-s-a-schimbat-a%C8%99teptarea-p%C4%83rin%C8%9Bilor-%C8%99i-a-societ%C4%83%C8%9Bii-fa%C8%9B%C4%83-de-profesori-interviu

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 530-538

PRESIDENT'S LIABILITY IN CENTRAL AND EASTERN EUROPEAN STATES. A COMPARATIVE STUDY OF THE CONSTITUTIONAL PROVISIONS

Rafał CZACHOR
ORCID ID: 0000-0002-5929-9719
E-mail: r.czachor@ujw.pl
Affiliation: Faculty of Social and Technical Sciences,
Jan Wyzykowski University Polkowice, Poland

Abstract: *Presidents, as heads of state, enjoy a special status and legal protection (immunities). Such protection is intended to ensure the full and independent exercise of presidential powers. However, the system of checks and balances provides legal instruments that may be applied when the President abuses their powers or seriously violates the Constitution. As a rule, these instruments of liability may lead to the president's impeachment. This paper focuses on the constitutional provisions governing presidential liability in Central and Eastern European states (Bulgaria, the Czech Republic, Hungary, Poland, Romania, and Slovakia). This paper examines the legal foundations, procedures, and consequences of holding presidents accountable in these countries, drawing relevant conclusions.*

Keywords: *comparative constitutional law of Central and Eastern European states; accountability of state organs; liability of the President; impeachment; constitutional torts.*

Introduction

The accountability and responsibility of public authorities are crucial issues in a democratic state governed by the rule of law. Without an effective mechanism for enforcing responsibility, the law loses its significance as a regulator of social relations. Constitutional liability is a specific form of responsibility applicable to subjects defined in the

Constitution or other legal acts. It aims to protect constitutional values and norms.

As heads of state, Presidents enjoy special legal protection. At the same time, they are liable for violations of the law. In the case of serious violations, this liability is enforced through impeachment proceedings (Berger, 1974). Presidents of modern states traditionally enjoy immunities that protect them from civil and criminal liability, both under domestic and international law. This reflects the traditional view of the inviolability and non-accountability of monarchs. Immunities should not serve to extend the privileges of the President but rather to safeguard the office from baseless accusations or potential blackmail (Mistygacz, 2021, p. 79). However, the constitutions of modern states provide mechanisms for holding presidents accountable in cases of serious law violations. Three legal approaches are possible: a) an absolute immunity of the President and the lack of any liability during the term of office; b) presidential liability for a precisely defined catalogue of criminal offences; c) full liability of the President for all prohibited acts. The subject of presidential liability may include acts such as: a) violation of constitutional provisions (constitutional tort); b) a common crime**.**

The legal provisions limiting the immunity of the head of state reflect an effort to maintain a balance between the independence of public authorities and the principles of a democratic state governed by the rule of law. In such cases, the primary sanction is removal from office (impeachment). A model solution, which has been adopted in various forms by other states, is the impeachment process established in the United States Constitution. This procedure is characteristic of Anglo-Saxon parliamentarism, in which the lower house of the Parliament formulates and votes on the impeachment, while the upper house acts as a court adjudicating the case. While in the United States, impeachment can be applied to the President, in England, it is used regarding members of the government, as the British monarch enjoys complete immunity from prosecution.

Another model, widely adopted in contemporary Europe, is one in which the Parliament formulates an indictment against the President,

while the final decision is made by a special judicial body, most commonly the Constitutional Court. This situation should be viewed as an exception to the general principle of equality before the law and the enforcement of responsibility by ordinary courts. The *privilegium fori* reflects the special role of the President as the highest-ranking state official (a head of state).

Constitutional liability differs from criminal or administrative liability not only in terms of the range of subjects it applies to, but also in its purpose. It is not solely intended to punish violations of the law but, above all, to protect the constitution as the supreme legal act and the basis of the state's political system. Therefore, the mechanisms of constitutional liability are of an exceptional nature. Their role is not only to impose sanctions on the incumbent but also to restore constitutional balance and reaffirm the primacy of the constitution as the basis for the functioning of all public authorities.

Overall, presidential liability constitutes a special form of responsibility borne by heads of state for violations of the constitution or statutory laws committed in connection with the exercise of their office. Other prohibited acts do not fall under a specific procedure for presidential accountability and are thus exempt from liability. This primarily means that the President does not bear responsibility for political activity, including decisions or public statements. In this regard, presidential immunity aligns with the immunity granted to members of parliament.

Moreover, the President, like members of parliament, holds a representational mandate and acts as an expression of popular sovereignty (van der Hulst, 2000, p. 6). Properly constructed provisions on presidential accountability serve to realise the principles of a democratic state governed by the rule of law. However, in authoritarian states, such mechanisms often function merely as a façade, concealing the true nature of a regime that violates the principle of the separation of powers (Grabowska, 2017, p. 154; Czachor, 2024, p. 14).

In the following text, attention will be focused on the constitutional provisions concerning the liability of Presidents in the countries of

Central and Eastern Europe (Bulgaria, the Czech Republic, Hungary, Poland, Romania, and Slovakia). The aim is to identify the similarities and differences in this regard. The paper is primarily based on the constitutions of these states (Constitution of Bulgaria, 1991; Constitution of the Czech Republic, 1993; Constitution of Hungary, 2011; Constitution of Poland, 1997; Constitution of Romania, 1991; Constitution of Slovakia, 1992).

Liability of the Presidents in Central and Eastern European states

In all the countries discussed, the presidents are the highest authority of state power, elected through universal, equal, direct, free, and secret ballot. The only exception is Hungary, where the unicameral parliament elects the President.

According to the Bulgarian Constitution, the President of Bulgaria is "the head of state, embodies the unity of the nation, and represents Bulgaria in international relations" (Art. 92.1 of the Constitution of Bulgaria). The President of the Czech Republic is briefly defined as "the head of state" (Art. 54.1 of the Constitution of the Czech Republic). The President of Hungary "expresses the unity of the Nation and safeguards the democratic functioning of the state system"; he is also the "Commander-in-Chief of the Hungarian Armed Forces" (Art. 9.1 and 9.2 of the Constitution of Hungary). The President of Poland is "the supreme representative of the Republic of Poland and the guarantor of the continuity of state authority. He ensures observance of the Constitution, safeguards the sovereignty and security of the state, as well as the inviolability and indivisibility of its territory" (Art. 126.1 and 126.2 of the Constitution of Poland). The President of Romania "represents the Romanian state, is the guarantor of national independence, unity, and territorial integrity." Additionally, "he ensures observance of the Constitution and the proper functioning of public authorities" (Art. 80.1 and 80.2 of the Constitution of Romania). The President of Slovakia "is the head of the republic, represents it both externally and internally, and

through his decisions guarantees the proper functioning of constitutional bodies" (Art. 101.1 of the Constitution of Slovakia).

The powers of the Presidents primarily concern foreign policy, security, and states of emergency (Art. 99, 101 of the Constitution of Bulgaria; Art. 62–63 of the Constitution of the Czech Republic; Art. 9 of the Constitution of Hungary; Art. 133–134 of the Constitution of Poland; Art. 91–93 of the Constitution of Romania; Art. 102.1 of the Constitution of Slovakia). In the case of Bulgaria, the President is supported in his activities by the Vice President (Art. 92 of the Constitution of Bulgaria). The Vice President is elected simultaneously and under the same conditions as the President of Bulgaria (Art. 94).

The legal basis for the liability of the President and Vice President of Bulgaria is provided in Article 103 of the 1991 Constitution. In the case of high treason or a violation of the Constitution, one-fourth of the members of the unicameral parliament may bring an indictment. If the indictment is supported by two-thirds of the members of the chamber, the Constitutional Court reviews the accusation within one month. If the Court determines that the President or Vice President has committed the alleged act, their mandate is terminated.

According to Article 65.2 of the Constitution of the Czech Republic, the President may be held accountable only for high treason. The Senate brings the indictment; the upper house of the Czech Parliament subsequently adjudicates the case, and the Constitutional Court reviews the decision. The Court may rule to remove the President from office and to disqualify them from running for office in the future.

The legal basis for the liability of the President of Hungary is provided in Article 13 of the 2011 Constitution. If the President deliberately violates the provisions of the Constitution or other legal acts in connection with the performance of his duties, or if he intentionally commits a criminal offence, a motion to remove him from office may be submitted by one-fifth of the total number of members of parliament. Proceedings are initiated if two-thirds of the voting members of parliament support the motion. The vote is conducted by secret ballot. From the moment the proceedings are initiated, the President is

suspended from performing his duties. The Constitutional Court conducts the proceedings. If the Court finds the President guilty, it may remove him from office.

The legal basis for the accountability of the President in Poland is provided in Article 145 of the 1997 Constitution. The President of Poland may be held accountable for violations of the Constitution and statutes committed in connection with the performance of official duties, as well as for ordinary criminal offences. The procedure for bringing charges against the President is initiated by at least 140 members of the National Assembly—that is, a joint session of both chambers of parliament. In order to bring the President before a tribunal, a two-thirds majority of the total number of National Assembly members is required.

The body authorised to conduct the proceedings is the State Tribunal (Trybunał Stanu). It is a unique institution in the Central and Eastern European region, established to judge the highest state officials. Besides Poland, similar institutions have existed in Greece and Denmark. The State Tribunal's existence is governed by the Polish Constitution and the Act on the State Tribunal of 1982 (Dz.U. 1982 nr 11 poz. 84, as amended).

The Tribunal consists of a chairperson, two deputy chairpersons, and 16 members. They are elected by the Sejm (the lower house of parliament) for the duration of its term, from outside the deputies of the Polish parliament. They are not required to hold judicial qualifications. In addition to the President of Poland, those subject to constitutional accountability before the State Tribunal include: the Prime Minister, members of the Council of Ministers, members of both houses of parliament, the President of the National Bank of Poland, the President of the Supreme Audit Office (Najwyższa Izba Kontroli), and other high-ranking officials.

Offences considered by the State Tribunal concerning the President of Poland include: violation of the Constitution, violation of statutes, and criminal offences (both those committed in connection with the office of the head of state and others). Scholars view the lack of judicial qualifications among members of the State Tribunal as a questionable

aspect that undermines the judicial nature of this body (Chodorowska, Kuczma, Michalska, 2024, p. 148). However, to date, no President of Poland or other official has been convicted by the State Tribunal.

The legal basis for the accountability of the President of Romania is provided in Articles 95 and 96 of the 1991 Constitution (as amended). The President of Romania may be held accountable for serious violations of the Constitution as well as for high treason.

In the first case, the impeachment procedure applies: the President is suspended from office by a majority vote of both chambers of parliament in a joint session. The vote is held at the request of one-third of the members of parliament. If the motion is adopted by parliament, a national referendum on the removal of the President must be held within 30 days. In the case of high treason, a motion may be submitted by a majority of parliamentarians and must be approved by a two-thirds majority of both chambers of parliament. From the moment of indictment, the President is suspended from office, and the proceedings are conducted before Romania's highest court—the High Court of Cassation and Justice (Înalta Curte de Casație și Justiție). The President is removed from office on the day the court's verdict becomes final and binding.

The Constitution of Slovakia provides for the possibility of removing the President for political reasons, as well as in cases of intentional violation of the Constitution or treason. In the first case, a national referendum is held upon a motion supported by three-fifths of the members of the unicameral parliament. If more than half of the eligible voters do not vote in favour of the President's removal, the parliament is dissolved, and its term begins anew (Articles 106.1–106.4 of the Constitution of Slovakia). The President bears constitutional responsibility as outlined in Article 107 of the Constitution. In the case of an intentional violation of the Constitution or treason, at least three-fifths of the deputies must vote in favour of initiating the removal procedure. In such a case, the parliament submits the motion to the Constitutional Court, which rules on the matter in a full session. If the President is

found guilty, they lose office and are barred from seeking it again in the future.

Conclusions

In conclusion, in all Central and Eastern European countries, the Presidents constitute executive authorities with limited powers. Above all, they serve as heads of state, embodying the unity of the nation and the authority of public institutions. Their powers in the areas of foreign policy and security are shared with the governments. They are afforded immunity, which applies to both civil and criminal matters.

In all Central and Eastern European states, presidential accountability mechanisms reflect commitments declared in their Constitutions to protect the rule of law and democratic principles of governance. Simultaneously, they provide for immunity protection granted to the Presidents. This raises questions about the balance between legal protection and accountability.

The immunity typically encompasses both civil and criminal liability. It is designed to ensure the stability of the office and protect it from potential misuse of legal mechanisms for political purposes. However, the immunity is not absolute—fundamental laws include provisions under which it may be lifted, allowing the president to be held accountable for their actions.

The constitutions of all countries in the region contain provisions regarding the lifting of presidential immunity and the possibility of holding the president accountable. This typically applies to the most serious offences, including violations of the Constitution and high treason. The procedure is initiated by groups of parliamentarians. Any other state authority cannot initiate it.

Decisions regarding the guilt or innocence of the President are made by a judicial body independent of the parliament. As a rule, this is the Constitutional Court, with two exceptions: in Poland, it is the State Tribunal, and in Romania, it is the High Court of Cassation and Justice. If a violation of the law is confirmed, the authorised body may remove

the president from office, thus shortening the term and triggering a new presidential election.

A notable concern is whether the existing procedures effectively discourage abuse of power, or merely serve a declaratory function. Procedural thresholds and the need for political support of the procedure of the President's removal from office condition the credibility of the whole procedure.

References

Berger, R. (1974). *Impeachment: The Constitutional Problems*. Harvard University Press.

Chodorowska A., Kuczma P., & Michalska J. (2024). *Organy ochrony prawnej*. Wolters Kluwer.

Constitution of Bulgaria (1991). www.parliament.bg/en/const

Constitution of the Czech Republic (1993). www.psp.cz/docs/laws/constitution.html

Constitution of Hungary (2011). https://njt.hu/jogszabaly/en/2011-4301-02-00

Constitution of Poland (1997). www.sejm.gov.pl/prawo/konst/angielski/kon1.htm

Constitution of Romania (1991). www.cdep.ro/pdfs/constitutie_en.pdf

Constitution of Slovakia (1992). https://www.prezident.sk/upload-files/46422.pdf

Czachor, R. (2024). Odpowiedzialność konstytucyjna prezydentów postradzieckich republik autorytarnych. *Przegląd Prawa Konstytucyjnego*, 1,13–23, https://doi.org/10.15804/ppk.2024.01.01

Dz.U. 1982 nr 11 poz. 84, https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19820110084

Grabowska, S. (2017). The Head of State's Constitutional Liability. *Polish Political Science Yearbook*, 46(1), 153-167. https://doi.org/10.15804/ppsy2017110

Mistygacz, M. (2021). The President of Poland's immunity in criminal matters. *Studia Politologiczne*, 61, 76-99. https://doi.org/10.33896/SPolit.2021.61.5

van der Hulst, M. (2000). *The Parliamentary mandate. A global comparative study*. Inter-Parliamentary Union.

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 539-549

THE MAIN INSTRUMENTS OF INTERNATIONAL HUMANITARIAN LAW

Anastasia CATAN
ORCID ID: 0000-0003-4389-2259
E-mail: catananastasia@gmail.com
Affiliation: University of European Studies of Moldova

Abstract: *International humanitarian law (IHL), also known as the "law of armed conflict" or "the law of war," is a key branch of international law that regulates conduct during armed conflict. The primary purpose of IHL is to limit the effects of armed conflict on persons and property, by protecting persons not directly participating in hostilities (such as civilians, medical personnel, and humanitarian personnel) and by restricting the means and methods of warfare. The principal instruments of IHL are international treaties, fundamental principles, and customary law. These instruments establish norms governing the conduct of belligerents and ensure respect for the fundamental rights of victims of armed conflict.*
Keywords: *armed conflict; law; convention; treaty.*

Introduction

The rigor of respecting fundamental rights and freedoms goes beyond the framework of the Communities, becoming a strong point in the external relations existing at the level of the Union. The existence of the multitude of agreements that have been concluded with numerous countries includes provisions that may go as far as to envisage the suspension of relations or the denunciation of agreements in the event of

a serious violation of fundamental human rights and freedoms by one of the contracting parties (Corsei, Zisu, & Țoncu, 2023, p. 55).

International humanitarian law (IHL) is a set of legal norms (Bădescu, 2008, p. 25) designed to protect persons not directly participating in hostilities (such as civilians, prisoners of war and the wounded), as well as to limit the methods and means of waging war. The origins of IHL can be found in the desire of the international community to humanize armed conflicts and reduce unnecessary suffering.

The main instruments of IHL constitute the legal basis for the application of these rules. These are international treaties and conventions that establish clear rules on the protection of persons and property during war. The Geneva Conventions and their Additional Protocols, the Hague Conventions and other specific treaties concerning the prohibition of certain weapons are essential for the implementation of and respect for IHL.

The adoption of these instruments is a manifestation of international solidarity and a shared commitment to respect fundamental human rights even in the most dire circumstances. They are applicable both in international armed conflicts and, to a certain extent, in non-international conflicts, reinforcing the principles of humanity, proportionality and distinction.

This section explores the most important instruments of IHL, their relevance in the contemporary context and their contribution to reducing the devastating impact of wars on humanity.

1. The Geneva Conventions and Additional Protocols

The Geneva Conventions and their Additional Protocols are the foundation of international humanitarian law (IHL). They regulate the protection of victims of armed conflict, establishing universal standards for humanitarian treatment and limiting the suffering caused by war. Adopted at various stages, they reflect the international community's efforts to humanize war. They provide a comprehensive and detailed framework for the protection of individuals and the regulation of

hostilities during armed conflict. They establish universal standards for the limitation of human suffering, with particular emphasis on the protection of civilians, prisoners of war and essential infrastructure. However, compliance with and effective application of the rules remains a challenge in the context of contemporary conflicts, underlining the importance of international commitment to uphold IHL.

The Geneva Conventions (1949) and their Additional Protocols (1977 and 2005) therefore represent the pillars of international humanitarian law (IHL). These legal instruments establish clear rules for the protection of persons affected by armed conflicts and regulate the methods and means of waging war.

Adopted after the Second World War, the four Geneva Conventions were designed to provide humanitarian protection during international armed conflicts. They have been ratified by almost all states in the world, making them instruments of universal application.

Thus:

1. First Convention

- Protects the wounded and sick of armed forces in land conflict.
- Regulates their treatment and establishes rights for medical personnel and medical units.

2. Second Convention

- Protects the wounded, sick and shipwrecked of armed forces at sea.
- Includes provisions for medical ships and the rescue of crews in maritime conflict zones.

3. Third Convention

- Regulates the treatment of prisoners of war.
- Provides standards for conditions of detention, prohibits torture and ill-treatment, and guarantees fundamental rights such as contact with families.

4. Fourth Convention

- Protects the civilian population under the control of a belligerent power, including in occupied territories.

- Prohibits reprisals against civilians, forcible transfer and collective punishment.

Additional Protocols (1977 and 2005)

The Additional Protocols supplement and expand the protections provided by the Geneva Conventions, adapting the rules to the new realities of armed conflict.

1. Additional Protocol I (1977)

- Applies to international armed conflicts.

- Provides for:

a. Enhanced protection for the civilian population, prohibiting attacks on civilians and civilian objects;

b. Extended protection for essential infrastructure and the environment;

c. Strict rules on methods and means of warfare;

d. Recognition of the rights of combatants in national liberation movements.

2. Additional Protocol II (1977)

- Regulates non-international armed conflicts (such as civil wars).

- Provides for:

a. Protection of the civilian population against acts of violence;

b. Prohibition of attacks on persons not taking a direct part in hostilities;

c. Standards for the treatment of persons deprived of their liberty.

3. Additional Protocol III (2005)

- Introduces the distinctive emblem of the Red Crystal, alongside the traditional symbols of the Red Cross and Red Crescent, to avoid religious or cultural associations.

The main aspects regulated by the Conventions and Protocols are:

1. Protection of persons

- Civilians, the wounded, sick, prisoners of war, medical and humanitarian personnel benefit from special protection.

- The use of violence, torture, collective punishment and reprisals against protected persons is prohibited.

2. Limitation of methods and means of warfare

- Methods that cause unnecessary suffering or that affect civilians indiscriminately are prohibited.

- Biological, chemical and other inhumane weapons are prohibited.

3. Obligation to respect and implement IHL

- States parties must respect and implement the provisions of the Conventions, including by adopting domestic legislation to sanction war crimes.

Importance of the Conventions and Protocols

• Universality: Almost all states in the world have ratified the Conventions, which gives them a universal character.

• Relevance: These instruments remain essential in contemporary conflicts, protecting victims regardless of the nature of the war.

• Evolution: The additional protocols demonstrate the ability of IHL to adapt to new forms of conflict and technologies of warfare.

The Geneva Conventions and their Additional Protocols constitute the backbone of international humanitarian law. They ensure a minimum of humanity in war (Pictet, 1952-1987, p. 55), protecting the most vulnerable and imposing restrictions on actors involved in conflicts. The importance of respecting and implementing these norms is crucial for limiting the suffering caused by wars and promoting international peace and security (Sassòli, Bouvier, & Quintin, 2011, p. 37).

2. Other relevant treaties and conventions

International Humanitarian Law (IHL) is a body of legal rules designed to protect persons affected by armed conflict and to limit the methods and means of waging war. While the Geneva Conventions and their Additional Protocols form the core of IHL, they are complemented by numerous other international treaties and conventions that respond to the specific challenges of modern conflicts.

In addition to the Geneva Conventions and their Additional Protocols, IHL is supported and expanded by a number of international

treaties and conventions that regulate specific aspects of armed conflict. These instruments complement the fundamental rules of IHL, addressing topics such as the prohibition of inhumane weapons, the protection of war victims and accountability for war crimes.

I. Conventions on the Prohibition and Limitation of the Use of Weapons

1. Chemical Weapons Convention (1993)

- Objective: Prohibits the development, production, stockpiling and use of chemical weapons.

- Key principles:

a. Obligation to destroy all existing stockpiles of chemical weapons.

b. Prohibition of the use of chemical weapons under all circumstances.

2. Biological and Toxin Weapons Convention (1972)

- Objective: Prohibits the development, production and stockpiling of biological and toxin weapons.

- Provisions:

a. States parties must destroy stockpiles of such weapons and refrain from their use.

3. Anti-Personnel Mine Ban Convention (Ottawa Treaty, 1997)

- Objective: Prohibits the use, stockpiling, production and transfer of anti-personnel mines.

- Additional provisions:

- Obligation to clear mined areas and assist victims.

4. Convention on Cluster Munitions (2008)

- Objective: Prohibits the use, production and transfer of cluster munitions, which have devastating effects on civilians.

- Features:

a. Obligation to destroy existing stockpiles.

b. Protection of civilians in affected areas.

5. Convention on Certain Conventional Weapons (1980)

- Objective: Regulates the use of weapons that cause unnecessary suffering or have indiscriminate effects.

- Additional Protocols:

a. Prohibition of incendiary weapons and anti-personnel mines.

b. Limitations on the use of weapons with undetectable fragments.

II. Treaties on the protection of the environment during armed conflict

1. Convention on the Prohibition of the Use of Environmental Modification Techniques for Military Purposes (1976)

- Objective: Prohibits the use of environmental modification technologies that can cause widespread destruction.

- Examples: Prohibition of the intentional triggering of earthquakes, floods or other natural phenomena.

2. Outer Space Treaty (1967)

- Objective: Prohibits the deployment of nuclear weapons or other types of weapons of mass destruction in outer space.

- Enforces the peaceful use of outer space.

III. Conventions relating to the protection of victims of armed conflicts

1. Convention relating to the status of refugees (1951)

- Objective: Protects persons who have been forced to leave their country due to armed conflicts.

- Provides for:

a. Fundamental rights for refugees, such as the right to asylum.

b. Prohibition of the forced return of refugees to countries where their lives would be in danger (the principle of non-refoulement).

2. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954)

- Objective: Protects cultural property (monuments, historic sites, works of art) during armed conflicts.

- Provisions:

a. Prohibition of the use of cultural property for military purposes.

b. Obligation to avoid its destruction.

3. Convention on the Rights of the Child (1989) – Optional Protocol on the Involvement of Children in Armed Conflict (2000)

- Objective: Protects children from recruitment and use in armed conflict.

- Provides for:

a. Prohibition of recruitment of children under the age of 18 into armed forces.

b. Reintegration measures for children affected by war.

IV. Instruments on individual criminal responsibility for war crimes

1. Rome Statute of the International Criminal Court (1998)

- Objective: Establishes a permanent court to try international crimes, including:

a. War crimes.
b. Crimes against humanity.
c. Genocide.

- Provides for:

a. Holding political and military leaders accountable for violations of IHL.
b. Criminalization of the use of prohibited weapons.

2. Convention against Torture (1984)

- Objective: Preventing torture and other cruel, inhuman or degrading treatment.

- Obligations:

a. States must investigate and punish acts of torture.
b. Torture is considered a crime under international law.

3. Genocide Convention (1948)

- Objective: To prevent and punish genocide.

- Definition: Genocide involves acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

V. Other regional treaties and conventions

1. Kampala Convention on the Protection of Internally Displaced Persons (2009)

- Mainly addressed to humanitarian crises in Africa, this convention regulates the protection of internally displaced persons due to armed conflict.

2. African Union and Organization of American States instruments:

- Regulates regional conflicts, refugee protection and compliance with IHL in local conflicts.

VI. Principles of Customary International Law

Many rules of IHL are recognized as customary international law, applying universally, regardless of whether a state is a party to the relevant treaties. For example:

- Prohibition of attacks against civilians.
- Protection of prisoners of war.
- Prohibition of the use of chemical and biological weapons.

The international treaties and conventions applicable to IHL form a complex and well-developed framework that regulates multiple aspects of armed conflict. From the protection of civilians and the environment to the prohibition of inhumane weapons and criminal liability, these legal instruments reflect the commitment of the international community to reduce human suffering and promote respect for the rules of war. However, compliance with these norms remains a major challenge, especially in contemporary conflicts.

Conclusions

This is why it is rightly stated that human rights issues are of international concern and do not fall under the domestic jurisdiction of states, which legitimizes not only the right of intervention of international bodies, but also their obligation to intervene whenever violations of human rights, which characterize any human community, are at issue (Corsei & Ștefănoaia, 2022, p. 73).

Therefore, the main instruments of International Humanitarian Law – such as the Geneva Conventions, the Additional Protocols, the Hague Conventions and the treaties prohibiting certain types of weapons – represent the fundamental pillars of the regulation of wars in the spirit of humanity. These instruments reflect the commitment of the international community to protect persons who do not take part in hostilities and to limit the suffering caused by armed conflicts.

Over time, they have evolved to respond to modern challenges, such as new types of conflicts and weapons. However, their practical

application faces numerous challenges, including lack of respect for the rules, non-state actors involved in conflicts, and the complexity of contemporary wars.

Compliance with and implementation of these instruments depend on the will of States, the action of international organizations, and collective efforts to build accountability. International tribunals, as well as humanitarian institutions, play a crucial role in ensuring respect for these rules and in punishing violations.

In conclusion, IHL instruments remain indispensable in protecting human dignity and limiting the atrocities of war. However, to maintain their relevance, they must be complemented by concerted action, adaptations to the new realities of conflict, and closer collaboration between States and international bodies. Only in this way will the fundamental principles of humanity and justice be respected even in the most difficult times.

References

Bădescu, G. (2008). *International Humanitarian Law.* Universul Juridic.

International Committee of the Red Cross (ICRC). Official Text of the Geneva Conventions of 1949 and the Additional Protocols of 1977 and 2005. Available online: www.icrc.org

Corsei, A, Zisu, M.A., & Țoncu, S. (2023). The European Union and Fundamental Human Rights. *AGIR Bulletin,* 4.

Corsei, A., & Ștefănoaia, M.A. (2022). Romania and Human Rights According to European Regulations. *Acta Universitatis Danubius Vol. 18*, 2.

International Criminal Court. *Rome Statute*. Available online: www.icc-cpi.int

Dinstein, Y. (2016). *The Conduct of Hostilities under the Law of International Armed Conflict*. Cambridge University Press.

Greenwood, C. (1996). Historical Development and Legal Basis of the Law of Armed Conflict. In *Fleck, D. (Ed.), The Handbook of International Humanitarian Law.* Oxford University Press.

OPCW (Organization for the Prohibition of Chemical Weapons). Chemical Weapons Convention (CWC). Available online: www.opcw.org

United Nations. Resolutions and reports on IUD enforcement. Available online: www.un.org

Pictet, J. (Ed.) (1952-1987). *The Geneva Conventions of 1949: Commentary*. International Committee of the Red Cross.

Sassòli, M., Bouvier, A. A., & Quintin, A. (2011). *How Does Law Protect in War?* International Committee of the Red Cross.

Shaw, M. N. (2021). *International Law.* Cambridge University Press.

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 550-581

CONSTITUTIONAL JUSTICE IN ROMANIA. REALITIES AND PERSPECTIVES

Marius ANDREESCU[1]
ORCID ID: 0000-0001-7424-0160
E-mail: andreescu_marius@yahoo.com
Andra PURAN[2]
ORCID ID: 0000-0002-8773-1548
E-mail: andra.puran@upb.ro
Afiliation: [1] "Acad. Andrei Rădulescu" Institute of Legal Research of the Romanian Academy
[2] Faculty of Economic Sciences and Law, National University of Science and Technology Politehnica Bucharest

Abstract: *The ideal of the constitution, but also of constitutionalism, is also expressed through the concept of the supremacy of the constitution. We say that the supremacy of fundamental law is a quality that places it at the top of the political and legal institutions in a society organized in the state and makes the constitution the source of all regulations in the economic, political, social and legal fields. The most important consequences of the supremacy of the constitution are the conformity of all law with constitutional norms and the fundamental obligation of state authorities to exercise their powers within the limits and spirit of the constitution.*

The supremacy of the Constitution would remain a mere theoretical matter if there were no adequate guarantees. In this sense, the term constitutional justice appears in the work of H. Kelsen, meaning "the constitutional guarantee of the Constitution" and in the work of Ch. Eissenniann, who defined it as: "that form of justice or more precisely of jurisdiction that concerns constitutional laws, without which the constitution is nothing more than a political program, binding only morally".

Constitutional justice is an essential component of the rule of law and the main guarantor of the supremacy of the Constitution.

In this study we analyze the most significant aspects regarding the role and functions of Constitutional justice in Romania. This study also includes an analysis of constitutional jurisprudence regarding the guarantee of the supremacy of the Constitution, including the relationship between constitutional norms and European Union law.

There are also proposals for lege ferenda regarding the completion of the powers of the Constitutional Court.

Keywords: *supremacy of the constitution; constitutional justice; guaranteeing the supremacy of the constitution; constitutional norms; rule of law; priority of European union law.*

Introduction. The notion of constitutional justice

Constitutional justice designates the set of institutions and procedures through which the supremacy of the Constitution is achieved.

The components of constitutional justice are:

a) a state body competent to carry it out with the powers provided by the Constitution and the law;

b) a set of technical means and forms of implementation that present specific and exclusive elements;

c) the purpose of constitutional justice is to ensure the supremacy of the Constitution.

In the specialized literature, the powers that fall to constitutional justice have been emphasized:

a) ensuring the authenticity of the manifestations of the will of the sovereign people;

b) vertical and horizontal compliance with the powers conferred by the Constitution on various public authorities;

c) protection of the fundamental rights and freedoms of citizens;

d) resolving some of the contentious issues given by the Constitution to the competence of constitutional justice (Deleanu, 2006, pp. 810-817).

There is no identity between the concepts of constitutional justice and, respectively, constitutional review of laws. The latter is only a component part of the former.

In the sense of the definition proposed above, the general features of constitutional justice can be identified:

- it is a genuine jurisdiction, however, having some particularities compared to other forms of jurisdiction considering its purpose;
- it can use common procedural rules but also its own procedural rules written in the Constitution, laws and regulations determined by the nature of the constitutional dispute;
- it can be carried out by a specialized state body (political, jurisdictional, or with a dual nature), or by common law courts;
- it is an exclusive justice because it has the monopoly of constitutional litigation.

It is not always focused because the common law courts may have perspectives in the field of constitutional litigation:

- the independence of constitutional justice consists in the existence of a "constitutional status" of the body that exercises this type of jurisdiction, consisting in statutory and administrative autonomy independent of any public authority; verification of its own competence, the preeminence of abuses of constitutional justice over any other jurisdictional decisions: the independence and irremovability of judges and, in some cases, their designation using criteria other than those regarding the recruitment, appointment and promotion of career magistrates;
- the constitutionality control of laws represents only one part of constitutional justice, the other component refers to the duties regarding ensuring the authenticity of the manifestations of the will of the sovereign people and the jurisdictional guarantee of compliance with the Constitution. Therefore, not all the duties belonging to the constitutional judge are carried out within jurisdictional procedures.

I. Contemporary realities of constitutional justice in Romania

The Romanian Constitution of 1991, which re-establishes the values of democracy and the rule of law, initially regulates the constitutionality review of laws in Articles 140-145, according to the

European model, the competence being vested in the Constitutional Court, which was established as an independent public authority.

There are several factors that explain the emergence and repeal of constitutional review of laws, including:

a) Inconsistency between the Constitution and laws. Of course, any Constitution is a law, but it differs from it by three factors: content, form and legal power. At the same time, the constitution has a much greater stability than the law, the latter being adopted, amended or repealed according to much simpler procedures than those followed for the adoption, amendment or repeal of the Constitution. The superior legal force of the Constitution is the expression of its quality of being supreme and implies as a consequence the conformity of all law with constitutional norms.

This conformity of the law with the constitution is not a given or an absolute presumption. Theory, but also practice, have demonstrated that given the dynamics and particularities of the legislative process, inconsistencies may arise between the law and the Constitution. Thus, by giving effect to group political interests, which, as a rule, belong to the majority, the parliament may adopt a law that contravenes constitutional norms. For the same reasons, the government could also adopt unconstitutional normative acts.

In other cases, the legislative technique regulated by the Constitution might not be respected by the parliament, which would lead to inconsistencies between the law and the Constitution.

b) The need to interpret the Constitution and laws in order to establish the conformity of the law with the constitutional norms.

The normative activity of drafting the law must be continued with the activity of applying the norms; in order to apply them, the first logical operation to be performed is their interpretation.

Both the Constitution and the law are presented 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, but the text of the law or the Constitution. A legal text may include several legal norms. A constitutional norm may 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 may 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, in the specialized literature it was stated: "The degree of determination of the constitutional norms by the text of the fundamental law may justify the need for interpretation. The norms of the Constitution lend themselves very well to an evolution of their course, because the text is by 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 social reality in constant change. 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, Constantinescu, Tănăsescu, Enache, & Iancu, 2002, p. 67)

The scientific justification of interpretation results from the need to ensure the effectiveness of the norms contained in both the Constitution and the laws, through institutions that mainly carry out the activity of interpreting the norms enacted by the author.

These institutions are primarily the courts and constitutional courts. The verification of the conformity of a normative act with constitutional norms, an institution that represents the constitutionality 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 and 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 power to interpret the constitution and thus examine the conformity

of the law with the Constitution. Within the European model of constitutional justice, these authorities are the Tribunals and Constitutional Courts.

c) Application of the principle of separation and balance of powers in the state. Avoiding abuse of parliamentary power.

The legislative function of the state is mainly the prerogative of Parliament. The exercise of the function also means the participation of several categories of authorities in accordance with the democratic principle of separation and balance of powers in the state.

The question arises whether there are limits to the power of Parliament to legislate and whether it is necessary to have a public authority to control the legislative activity of Parliament so that it does not become discretionary or abusive. In other words, within a democratic society there must be an institutional system that balances the power of Parliament to legislate and prevents it from becoming abusive.

The limits of Parliament's power to legislate are determined by the constitutional norms that determine legislative competence and procedure. Another limit is the need to respect the supremacy of the Constitution in terms of the content of the norms enacted by Parliament.

Therefore, the constitutional review of laws is the practical way of verifying the respect of the supremacy of the Constitution by the parliament and constitutes a counterweight to its powers in legislative matters. The doctrine stated that a constitutional court functions as a "negative legislator" because it eliminates the "poison of unconstitutionality" from the content of the law.

Constitutional courts and tribunals contribute to achieving the institutional and functional state balance in direct connection with the exercise of legislative power.

The constituent legislator, but also the ordinary legislator, must find the most appropriate procedures to respond to two major requirements: on the one hand, the need not to obstruct the exercise of the legislative function of parliament, by conferring exaggerated powers in the matter to other state authorities, and, on the other hand, the need to

ensure, within precisely determined limits, the binding nature of decisions of constitutional courts for parliament.

The need for constitutional review of laws is in fact the expression of the need to guarantee the supremacy of the Constitution in relation to the activity of parliament.

In Romania, constitutional justice is carried out concentratedly by the Constitutional Court. The seat of the matter is represented by the provisions contained in Articles 142-147 of the Constitution and those contained in Law no. 47/1992 on the organization and functioning of the Constitutional Court, republished (Official Gazette No. 807 of December 3, 2010).

The Constitutional Court is a guarantor of respect for fundamental rights and freedoms. In principle, there are three essential constitutional guarantees regarding the rights and freedoms of citizens established by the Constitution:

- the supremacy of the Constitution;
- the rigid nature of the Constitution;
- citizens' access to the control of the constitutionality of the law and to the control of the legality of acts subordinate to the law.

In Romania, the procedure of exception of unconstitutionality ensures indirect access of citizens to constitutional justice.

II. Aspects of the jurisprudence of the Constitutional Court of Romania regarding the guarantee of the supremacy of the Constitution

We consider that some examples of judicial practice from the activity of the Constitutional Court are welcome to illustrate the contribution of this judicial authority to guaranteeing the supremacy of the Constitution, fundamental rights and to censuring the abuse of power by the rulers.

The constitutional court interpreted the notion of “law” to establish the scope of competence of the constitutionality control over normative acts. In the case law it was mentioned that the term “law” provided for in

art.146 letter. b of the Constitution is not used in a broad sense encompassing all normative acts, but only in its strict sense, of law, which means the normative act adopted by the Parliament and promulgated by the President of Romania. At the same time, this sphere also includes ordinances that represent normative acts adopted by the Government on the basis of a legislative delegation. "The concept of law results from the combination of the formal and the material criteria, since the content of the law is determined by the importance given by the legislator to the regulated aspects... resolving the exception of unconstitutionality regarding other normative acts is not within the competence of the Constitutional Court, these acts being controlled in terms of legality by the administrative courts." (Decision no. 435 of September 13, 2005, published in the Official Gazette no. 924 of October 17, 2005)

This decision of the Constitutional Court is important, because it results that courts, especially those dealing with administrative disputes in relation to the legal norms of competence, can verify the legality of a normative act, including from the point of view of its constitutionality.

The Court established that its role is to establish that the criticized legal provisions are constitutional and, at the same time, whether the interpretations given to them comply with the requirements of the Constitution, so that, to the extent that the criticized legal text can be given a constitutional interpretation, the Court will find the constitutionality of the legal provision in this interpretation and will exclude from application any other possible interpretations. (Decision no. 223 of March 13, 2012, published in the Official Gazette no. 256 of April 18, 2012; Decision no. 448 of October 29, 2013, published in the Official Gazette no. 5 of January 7, 2014) This solution of our constitutional court is important because it legitimizes, from a constitutional point of view, the so-called interpretative decisions of the Court by which the legal text criticized for unconstitutionality is not removed, but interpreted in the sense of constitutional norms in order to produce legal effects.

Several decisions have been issued by our constitutional court in connection with the establishment of its competence to rule on the

constitutionality of Parliament's decisions. We refer in this regard to an important aspect resulting from the case law in connection with the scope of constitutional review in this matter. In this regard, the Constitutional Court has consistently ruled that only Parliament's decisions, adopted after the conferral of this competence by the legislator, which affect constitutional values, rules and principles or, as the case may be, the organization and functioning of authorities and institutions of constitutional rank, may be subject to constitutional review. (Decision no. 53 of January 25, 2011, published in the Official Gazette no. 90 of February 3, 2011. See also: Decision no. 54 of January 25, 2011, published in the Official Gazette no. 90 of February 3, 2011; Decision no. 307 of March 28, 2012, published in the Official Gazette no. 293 of May 4, 2012; Decision no. 783 of September 26, 2012, published in the Official Gazette no. 684 of October 3, 2012)

At the same time, the Constitutional Court showed that the power to control Parliament's decisions "constitutes an expression of the requirements of the rule of law and a guarantee of fundamental rights and freedoms... the lack of jurisdictional control is equivalent to a transformation of the parliamentary majority into judges of their own acts." (Decision no. 727 of 9 July 2012, published in the Official Gazette no. 477 of 12 July 2012; see also Decision no. 80 of 16 February 2014, published in the Official Gazette no. 246 of 7 April 2014)

In the same sense, it was stated that accepting the contrary thesis, with the consequence of excluding from the exercise of constitutionality control the decisions of Parliament given in violation of the express provisions of the law, would have as a consequence, placing the supreme representative body of the people – Parliament – above the law and accepting the idea that precisely the authority constitutionally legitimized to adopt laws can violate them without being sanctioned in any way. (Decision no. 251 of April 30, 2014, published in the Official Gazette no. 376 of May 21, 2014)

One of the important issues that formed the subject of the Constitutional Court's analysis refers to the competence of this court to rule on the conformity of a normative act with a legal act of the European

Union institutions. In this regard, it has been consistently shown in case law that the constitutional court does not have the competence to carry out a conformity check between a directive and the national normative act by which it is transposed. A possible non-conformity of the national act with the European one does not implicitly entail the unconstitutionality of the national transposition act. It is up to the legislator to confer greater protection in national law compared to the legal instruments of the European Union. (Decision no. 415 of April 7, 2011, published in the Official Gazette no. 471 of July 5, 2011)

The Constitutional Court identifies the fundamental feature of the rule of law, namely the supremacy of the Constitution, and the obligation to respect the law. (Decision no. 232 of July 5, 2001, published in the Official Gazette no. 727 of November 15, 2001, and Decision no. 53 of January 25, 2011, published in the Official Gazette no. 90 of February 3, 2011). At the same time, it was stated in the jurisprudence of the Constitutional Court that the rule of law, ensuring the supremacy of the Constitution, also achieves "the correlation of all laws and all normative acts with it" (Decision no. 22 of January 27, 2004, published in the Official Gazette no. 233 of March 17, 2004)).

Thus, a particularly eloquent synthesis of the doctrine regarding the notion and features of the rule of law is achieved through jurisprudence. Significant in this regard is Decision no. 17 of January 21, 2015. (Published in the Official Gazette no. 79 of January 30, 2015) by which the Constitutional Court provides a pertinent explanation of the character of the rule of law, enshrined in art. 1 para. (3) Thesis I of the Constitution: "The requirements of the rule of law concern the major goals of its activity, prefigured in what is generally called the rule of law, a phrase that implies the subordination of the state to the law, the provision of those means that allow the law to censor political options and, within this framework, to weigh up any abusive, discretionary tendencies of state structures. The rule of law ensures the supremacy of the Constitution, the correlation of laws and all normative acts with it, the existence of the regime of separation of public powers that must act within the limits of the law, namely within the limits of a law that

expresses the general will. The rule of law enshrines a series of guarantees, including jurisdictional ones, that ensure respect for the rights and freedoms of citizens through the self-limitation of the state, respectively the framing of public authorities within the coordinates of the law."

The principle of stability and security of legal relations is not expressly enshrined in the Constitution of Romania, but, like other constitutional principles, it is implied by the constitutional normative provisions, namely art. 1 para. (3), which enshrines the character of the rule of law. In this way, our constitutional court accepts the deduction, by way of interpretation, of some principles of law implied by the express norms of the Fundamental Law.

In this sense, by Decision no. 404 of April 10, 2008, (Published in the Official Journal no. 347 of May 6, 2008), the Constitutional Court ruled that: "The principle of stability and security of legal relations, although not expressly enshrined in the Constitution of Romania, this principle is deduced both from the provisions of art. 1 paragraph (3), according to which Romania is a state governed by law, democratic and social, and from the preamble to the Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights in its jurisprudence." (Decision no. 685 of 25 November 2014, published in the Official Gazette no. 68 of 27 January 2015. Furthermore, our constitutional court considered that the principle of security of civil legal relations constitutes a fundamental dimension of the rule of law. See Decision no. 570 of 29 May 2012, published in the Official Gazette no. 404 of 18 June 2012; Decision no. 615 of 12 June 2012, published in the Official Gazette no. 454 of 6 July 2012).

The Constitutional Court consistently rules in favor of the clarity and predictability of the law, which are requirements of the rule of law. Thus, “the existence of contradictory legislative solutions and the annulment of legal provisions by means of other provisions contained in the same normative act lead to the violation of the principle of legal relations security, as a result of the lack of clarity and predictability of

the norm, principles that constitute a fundamental dimension of the rule of law, as it is expressly enshrined in the provisions of art. 1 para. (3) of the Fundamental Law (Decision no. 26 of 18 January 2012, published in the Official Journal no. 116 of 15 February 2012).

Regarding the rule of law, the Constitutional Court has shown that justice and social democracy are supreme values. In this context, the militarized authorities, in this case the Romanian Gendarmerie, exercise, under the terms of the law, specific attributions regarding the defense of public order and peace, the fundamental rights and freedoms of citizens, public and private property, the prevention and detection of crimes and other violations of the laws in force, as well as the protection of the fundamental institutions of the state and the fight against acts of terrorism. Consequently, the constitutional court ruled: "The possibility of militarized authorities to ascertain the contraventions committed by civilians does not affect in any way art. 1 para. (3) of the Constitution, regarding the Romanian state, as a state of law, democratic and social" (Decision no. 1330 of 4 December 2008, published in the Official Gazette no. 873 of 23 December 2008).

Human dignity, together with the freedoms and rights of citizens, the free development of the human personality, justice and political pluralism, represent supreme values of the rule of law (art. 1 para. (3)). In light of these constitutional regulations, it has been stated in the jurisprudence of the Constitutional Court that the state is prohibited from adopting legislative solutions that may be interpreted as lacking respect for the religious or philosophical beliefs of parents, which is why the organization of school activity must achieve a fair balance between the process of education and teaching religion, and on the other hand with respect for the rights of parents to ensure education in accordance with their own religious beliefs. Activities and behaviors specific to a certain attitude of faith or philosophical beliefs, religious or non-religious, must not be subject to sanctions that the state provides for such behavior, regardless of the faith motivations of the person in question. "As part of the constitutional system of values, freedom of religious conscience is attributed the imperative of tolerance, especially with human dignity,

guaranteed by art. 1 paragraph (3) of the Fundamental Law, which dominates as the supreme value the entire system of values" (Decision no. 669 of November 12, 2014, published in the Official Gazette no. 59 of January 23, 2015).

It is also interesting to emphasize the fact that our constitutional court considers human dignity to be the supreme value of the entire system of constitutionally consecrated values, the value that is found in the content of all fundamental human rights and freedoms. At the same time, it is an important aspect that requires the state authorities to primarily consider respect for human dignity in all their activities.

We note that in its jurisprudence, the Constitutional Court also identifies the content components of human dignity, as a moral, but at the same time constitutional value, specific to the rule of law: "Human dignity, from a constitutional perspective, involves two inherent dimensions, namely the relationships between people, which concerns the right and obligation of people to be respected and, correlatively, to respect the fundamental rights and freedoms of their fellow men, as well as the relationship of man with the environment, including the animal world" (Decision no. 1 of 11 January 2012, published in the Official Gazette no. 53 of 23 January 2012. See also Decision no. 80 of 16 February 2014, published in the Official Gazette no. 246 of 7 February 2014).

The Constitutional Court emphasizes the indissoluble link that exists between freedom of conscience and freedom of expression, the latter making it possible to express thoughts, opinions, religious beliefs or spiritual creations of any kind by any means. In this context, the connection between the two fundamental rights is in the freedom of association. Moreover, the constitutional doctrine on the matter also groups these fundamental freedoms in the category of socio-political freedoms (Decision No. 485 of May 6, 2008, published in the Official Gazette No. 431 of 09.07.2008).

The exercise of nationalist-chauvinist propaganda represents an abusive manifestation of freedom of conscience and freedom of expression. Tolerating such acts clearly contravenes the constitutional

provisions that guarantee the two fundamental rights, but also the international legal instruments on the matter. In this context, the Court recalls that freedom, as an essential dimension of human existence, is at the same time a fundamental principle of the rule of law and represents the ontological basis of all moral and legal principles. Freedom involves the development of legal norms that guarantee all persons to manifest themselves according to their own options in their relations with other members of the community. The existence of these legal norms creates the legal order specific to the rule of law, in which freedom, but also constitutional freedoms, manifest themselves. The existence of this normative legal order represents the main guarantee of avoiding the abusive exercise of any fundamental right, including freedom of conscience (Decision no. 67 of February 3, 2005, published in the Official Gazette no. 146/18.02.2005).

The concept of "autonomy of religious denominations" is a consequence of the separation between the state and the church, each of these institutions having specific competences that do not interfere. In relation to international jurisprudence on the matter, the autonomous existence of religious communities is indispensable in a democratic society and constitutes an essential issue in the protection of religious freedom, as guaranteed by the provisions of art. 29 of the Romanian Constitution (Decision no. 448 of 7 April 2011, published in the Official Gazette no. 424/17.06.2011).

In electoral matters, the legislator takes into account the general interest of society and cannot legislate based on the religious choice of each citizen. Such a normative approach does not violate the provisions of art. 29 of the Constitution and cannot have the meaning of discrimination based on religious appearance, but "expresses the natural mechanism of a democratic and social state governed by law, in which the rights and freedoms of citizens are protected, so as to achieve a reasonable balance between the general interest of society, on the one hand, and individual rights and freedoms, on the other hand." (Decision no. 845 of June 3, 2009, published in the Official Gazette no. 524/30.07.2009)

It is noted that the constitutional court also uses a proportionality reasoning in this case to emphasize the idea of a reasonable balance that must be maintained in the exercise of fundamental rights and freedoms enshrined in the constitution. Freedom of conscience also implies the freedom to belong to or not to any religion, an aspect enshrined in the provisions of art. 29 para. (1), (2) and (6) of the Constitution. Regarding the exercise of this right, the Constitutional Court ruled that the legislator has an obligation of neutrality and impartiality. This obligation is fulfilled in the situation where the state ensures the respect of these freedoms, enshrining, among other things, the possibility of parents, legal representatives of minor students and, respectively, the possibility of adult students to request participation in religion classes. (Decision no. 669 of November 12, 2014, published in the Official Gazette no. 59 of January 23, 2015)

The obligation of neutrality and impartiality of the state does not equate to the non-involvement of state authorities or their passivity, in relation to the exercise of freedom of conscience, including in the form of freedom of religion. There is a positive obligation of the state to create an efficient legislative framework, in relation to which this freedom can be exercised in all its aspects.

This decision is important because our constitutional court clearly shows the obligation of the rulers, that is, the President, the Parliament, the Government, not to intervene in the exercise of freedom of conscience, especially in the form of freedom of communion of Orthodox believers, in the freedom of organization and functioning of the majority Orthodox Church but also of other religions through restrictive measures. At the same time, the Constitutional Court, interpreting the constitutional provisions enshrined in art. 29 of the Constitution also highlights the positive obligation of the rulers to guarantee freedom of religion and to support, including materially, the recognized cults and in particular the Orthodox Christian Cult and the Orthodox Church, the majority in Romania.

Unfortunately, the current rulers do not follow the decisions of the Constitutional Court. Recently, normative acts have been adopted that

include drastic restrictive measures and severe sanctions applicable, including to the exercise of freedom of belief by the Orthodox and the freedom to practice Orthodox worship. The actions and measures of the state to support, including materially, the Orthodox Church but also other cults are almost non-existent.

It has been emphasized in constitutional jurisprudence that there is no state of incompatibility between the quality of citizen, by virtue of which a person has the right to vote, and that of practitioner of a religious course recognized by the Romanian state. No legal provision, in accordance with the norms of the Constitution, can regulate a prohibition regarding the exercise of the right to vote, on grounds of a person's membership of a religious cult. The fact that, through the method of organizing and conducting the Referendum for the dismissal of the President of Romania, regulated by law, with general applicability to all citizens of the country, the followers of a religious minority in Romania were unable to effectively exercise their right to vote, choosing instead to fulfill their religious obligations and practices specific to their cult during the same oral interval designated for the ballot, is not a reason for unconstitutionality nor does it constitute a restriction, as the case may be, of the exercise of the right to free will or religious freedom. (Decision no. 845 of June 3, 2009, published in the Official Gazette no. 524 of July 30, 2009)

III. Aspects of case law regarding the relationship between European Union law and constitutional norms

The constitutional courts of some Member States, notably Germany, Italy and France, have consistently held that the principle of the priority of European Union law does not apply to the regulations contained in a constitution, since the fundamental law of a state expresses national identity and sovereignty. This solution has particularly concerned regulations on fundamental human rights and freedoms. Until 1 December 2009, when the Treaty of Lisbon and the Charter of Fundamental Rights of the European Union entered into force, European

Union law did not include a coherent normative system guaranteeing fundamental human rights. Consequently, the courts of the Member States have invoked domestic constitutional regulations in such situations.

Moreover, the practice of the courts of the Member States of the European Union does not provide many examples of conflict between the norms of European Union law on the one hand, and constitutional regulations on the other. This situation is explained by the fact that following the process of accession to the European Union, the Member States have adapted their constitutional regulations of a principled nature to the specific requirements of European Union law and have enshrined in one form or another the principle of the priority of this legal system over domestic law whenever there is a contradiction between the rules of the two categories of legal norms. Of course, this issue remains open and is far from being resolved. We note that, in the jurisprudence of recent years of the Constitutional Council and the Council of State of France, the concept of "constitutional national identity" has been developed. According to this principle, national courts will always apply domestic constitutional norms, but also the rules included in ordinary legislation whenever these do not have a counterpart in European Union law.

The Romanian Constitution distinguishes between the principle of the supremacy of the fundamental law, and on the other hand, the principle of the priority of European Union law over national law. Thus, the provisions of art. 1 paragraph (5) of the Constitution enshrine the principle of the supremacy of the fundamental law: "In Romania, compliance with the Constitution, its supremacy and the laws is mandatory". This principle cannot be confused with that of the priority of European Union law over contrary regulations in domestic laws, enshrined in art. 148 paragraph (2) of the Constitution.

The jurisprudence of the Constitutional Court of Romania reflects this difference.

By Decision of the Constitutional Court no. 148 of 16 April 2003 on the constitutionality of the legislative proposal to revise the Romanian Constitution, our constitutional court clearly distinguishes between the

supremacy of the Constitution and the principle of priority of European Union law, stating: "The consequence of accession is that the Member States of the European Union have understood to place the acquis communautaire, the constitutive treaties of the European Union and the regulations derived from them in an intermediate position between the Constitution and other laws when it comes to binding European normative acts". In the specialized legal literature, with reference to the provisions of art. 148 of the Constitution and in accordance with decision no. 148 of 16 April 2003, it was stated: "Therefore, it can be stated that in the internal legal order the legal act by which Romania accedes to the European Union has a legal force inferior to the Constitution and constitutional laws, but superior to organic and ordinary laws". (Constantinescu et al. 2004, p. 331)

In its subsequent jurisprudence, the Constitutional Court seems to have abandoned this distinction, basing its decisions solely on the principle of the priority of European Union law. (Decision no. 1042/2007 published in the Official Gazette no. 12 of 8 February 2008, Decision no. 1172/2007 published in the Official Gazette no. 54 of 23 January 2008)

However, by Decision no. 1258 of 8 October 2009 (published in the Official Gazette no. 798 of 23 November 2009), which we consider to be of historical importance in subsequent constitutional jurisprudence, the Court finds that a domestic law transposing a European Union directive into domestic law is unconstitutional. Such a solution, in our opinion, enshrines the principle of the supremacy of the Constitution and the obligation to respect it in relation to the principle of the priority of European Union law.

By the decision with the above number, the Constitutional Court found that the provisions of Law no. 298/2008 are unconstitutional. From the considerations of the decision it follows that Law no. 298/2008 was adopted in order to transpose into national legislation Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks. The Court refers to the legal regime

of such Community acts, emphasizing that: "(...) it imposes its obligation on the Member States of the European Union with regard to the regulated legal solution, not with regard to the concrete ways in which this result is reached, the States benefiting from a wide margin of appreciation for the purpose of adopting them to the specifics of national legislation and realities". Examining the content of Law no. 298/2008, the Court found that this normative act is likely to affect the exercise of fundamental rights or freedoms, namely the right to intimate, private and family life, the right to the secrecy of correspondence and freedom of expression. The constitutional court notes that the restriction of the exercise of these rights does not comply with the requirements established by art. 53 of the Constitution of Romania.[1]

For our research topic, Decision no. 80 of 16 February 2014 (published in the Official Gazette no. 246 of April 7, 2014), on the legislative proposal regarding the revision of the Romanian Constitution, is relevant. Regarding the interpretation of the provisions of art. 148 regarding integration into the European Union, the Court notes that: "constitutional provisions do not have a declarative character, but constitute mandatory constitutional norms, without which the existence of the rule of law, provided for in art. 1 paragraph (3) of the Constitution, cannot be conceived. At the same time, the Fundamental Law represents the framework and extent to which the legislator and other authorities can act; thus, the interpretations that can be made to the legal norm must also take into account this constitutional requirement, contained in art. 1 paragraph (4) of the Fundamental Law, according to which in Romania compliance with the Constitution and its supremacy is mandatory".

In the opinion of our constitutional court, considering that European Union law applies without any differentiation within the national legal order, not distinguishing between the Constitution and other domestic laws, is equivalent to placing the Fundamental Law on a secondary level

[1] In the same sense, see also Constitutional Court Decision no. 17 of January 21, 2015 (Official Gazette no. 79 of January 30, 2015), by which our constitutional court established the unconstitutionality of the law on cybersecurity of Romania.

compared to the legal order of the European Union. The legitimacy of the Constitution is the will of the people itself, which means that it cannot lose its binding force, even in the event of inconsistencies between its provisions and those of the European Union. Moreover, it was emphasized that Romania's accession to the European Union cannot affect the supremacy of the Constitution over the entire domestic legal order.

By Decision no. 157/2014 (Official Journal no. 296 of 23 April 2014), the Court established that it is necessary for the legal norm of European Union law to be limited to a certain level of constitutional relevance, so that its normative content supports the possible violation by the national law of the Constitution – "the only direct norm of reference within the framework of the constitutionality review". The constitutional court has enshrined, like the French Constitutional Council, the concept of "national constitutional identity", by which it understands the relevance of the supremacy of the constitution whenever the issue of compliance of domestic laws with European Union acts arises (Decision No. 64/2015 (Official Gazette No. 286 of 28 April 2015)).

Another aspect analyzed in constitutional jurisprudence refers to the application of the Charter of Fundamental Rights of the European Union in the context of constitutional review. Our constitutional court ruled that, in principle, it is applicable in the context of constitutional review "to the extent that it ensures, guarantees and develops the constitutional provisions in the field of fundamental rights, in other words, to the extent that their level of protection is at least at the level of constitutional norms in the field of human rights." [Decision No. 871/2010 (Official Gazette No. 433 of 28 June 2010)]

Regarding the cooperation between the Constitutional Court and the Court of Justice of the European Union, our constitutional court stated that it remains at its discretion, in the application of the decisions of the Court of Justice of the European Union within the framework of the constitutional review, or the formulation by the Court of preliminary questions in order to establish the content of the European norm. "Such an attitude is related to the cooperation between the national and

European constitutional courts, as well as to the judicial dialogue between them, without bringing into question aspects related to the establishment of a hierarchy between these courts" [CCD no. 668/2011 (Official Journal no. 487 of 8 July 2011)].

The Court of Justice of the European Union, in its recent case law, has a different opinion and has ruled on the supremacy of the legal order of European Union Law, over the domestic legal order and even over the constitutional order.

Thus, by the Judgment delivered on 18 May 2021 (Judgment in the joined cases C-83/19, Association of Judges of Romania v. Judicial Inspection, C-127/19, Association of Judges of Romania and Association of the Movement for the Defense of the Statute of Prosecutors v. Superior Council of Magistracy and C-195/19, PJ/QK and in cases C-291/19, SO/TP and others, C355/19, Association of Judges of Romania and Association of the Movement for the Defense of the Statute of Prosecutors and OL v. Prosecutor's Office attached to the High Court of Cassation and Justice - Prosecutor General of Romania and C-397/19, AX v. Romanian State - Ministry of Public Finance), the Court of Justice of the European Union rules on a series of reforms in Romania relating to to the judicial organization, to the disciplinary regime of magistrates, as well as to the patrimonial liability of the state and the personal liability of judges for judicial errors.

Six requests for preliminary rulings were made before the Romanian Court of Justice in disputes between legal entities or individuals, on the one hand, and authorities or bodies such as the Judicial Inspection, the Superior Council of Magistracy and the Prosecutor's Office attached to the High Court of Cassation and Justice, on the other hand. The main proceedings are set out in the context of a far-reaching reform of the judiciary and the fight against corruption in Romania, a reform which has been the subject of monitoring at European Union level since 2007, under the cooperation and verification mechanism established by Decision 2006/928 (Commission Decision 2006/928/EC of 13 December 2006 establishing a cooperation and verification mechanism to monitor progress made by Romania towards

achieving certain specific benchmarks in the field of judicial reform and the fight against corruption (OJ 2006 L 354, p. 56, Special Edition, 11/vol. 51, p. 55) on the occasion of Romania's accession to the European Union ('the CVM'). In that context, the referring courts raised the issue of the nature and legal effects of the CVM and the scope of the reports drawn up by the Commission under it. According to those courts, the content, legal nature and temporal scope of the said mechanism should be considered as being confined to the Accession Treaty and the requirements formulated in those reports should be binding on Romania. In that regard, however, those courts refer to national case-law according to which Union law does not prevail over the Romanian constitutional order and Decision 2006/928 cannot constitute a reference norm in the context of a review of constitutionality since that decision was adopted before Romania's accession to the Union and the question whether the content, nature and scope of Decision 2006/928/EC fall within the scope of the Accession Treaty has not been the subject of any interpretation by the Court.

As regards the legal effects of Decision 2006/928, the Court found that it is binding in its entirety on Romania from the date of its accession to the Union and obliges it to achieve the benchmarks, which are also binding, set out in the Annex to This. Those objectives, defined as a result of the deficiencies identified by the Commission before Romania's accession to the Union, aim, inter alia, to ensure that this Member State respects the value of the rule of law. Romania is therefore obliged to take appropriate measures to achieve those objectives and to refrain from implementing any measure which could jeopardise the achievement of those objectives.

The Court held that the principle of the primacy of EU law precludes national legislation of constitutional status which deprives a lower court of the right to disapply of its own motion a national provision falling within the scope of Decision 2006/928 and which is contrary to EU law. The Court recalls that, according to settled case-law, the effects associated with the principle of the primacy of EU law are binding on all the bodies of a Member State, without the internal provisions relating to

the distribution of judicial powers, including those of a constitutional nature, being able to prevent that from happening. Recalling also that national courts are required, as far as possible, to interpret domestic law in a manner consistent with the requirements of EU law or to disapply of their own motion any contrary provision of national law which cannot be the subject of such a consistent interpretation, the Court finds that, in the event of a proven breach of the EU Treaty or of Decision 2006/928, the principle of the primacy of EU law requires the referring court to disapply the provisions in question, regardless of whether they are of legislative or constitutional origin.

By the Judgment of 21 December 2022, (Judgment in the joined cases C-357/19 Euro Box Promotion and others, C379/19 DNA-Territorial Service Oradea, C-547/19 Asociaţia « Forumul Judecătorilor din România », C-811/19 FQ and others and C-840/19 N), the Court of Justice of the European Union ruled that Union law precludes the application of a case-law of the Constitutional Court to the extent that it, in conjunction with national provisions on limitation periods, creates a systemic risk of impunity.

The supremacy of Union law requires that national judges have the power to set aside a decision of a constitutional court that is contrary to this law, without being exposed to the risk of being held disciplinary liable.

The reasoning of the Judgment essentially states the following:

In these cases, the question arises whether the application of the case-law resulting from various decisions of the Constitutional Court of Romania (Romania), concerning the rules of criminal procedure applicable in matters of fraud and corruption, is liable to infringe Union law, in particular the provisions of that law which aim to protect the financial interests of the Union, the guarantee of the independence of judges and the value of the rule of law, as well as the principle of the primacy of Union law.

The Court, sitting in the Grand Chamber, confirmed its case-law resulting from a previous judgment, according to which the CVM is binding in its entirety for Romania. (See, Judgment of 18 May 2021,

Asociația „Forumul Judecătorilor din România” and Others, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 (see also CP no. 82/21)

Thus, acts adopted before accession by the institutions of the Union are binding on Romania from the date of its accession. This is the case of Decision 2006/928, which is binding in its entirety on Romania as long as it has not been repealed. The benchmarks aimed at ensuring respect for the rule of law are also binding. Romania is therefore required to take appropriate measures to achieve those objectives, taking into account the recommendations made in the reports drawn up by the Commission. (Pursuant to the principle of loyal cooperation, enshrined in Article 4(3) TEU)

Union law precludes the application of a case-law of the Constitutional Court which leads to the annulment of judgments delivered by panels of judges which were unlawfully composed, in so far as this, in conjunction with national provisions on limitation periods, creates a systemic risk of impunity for acts constituting serious offences of fraud affecting the financial interests of the Union or of corruption.

It was also noted that in the present case, the application of the case-law of the Constitutional Court in question has the consequence that the fraud and corruption cases in question must be re-examined, if necessary, several times, at first instance and/or on appeal. Given their complexity and duration, such a re-examination inevitably has the effect of prolonging the duration of the related criminal proceedings.

The Court recalls that, having regard to the specific obligations incumbent on Romania under Decision 2006/928, national legislation and practice in this area cannot have the effect of prolonging the duration of investigations into corruption offences or otherwise weakening the fight against corruption. On the other hand, having regard to national rules on limitation periods, retrying the cases in question could lead to the offences becoming time-barred and could prevent the effective and dissuasive punishment of persons occupying the most important positions in the Romanian State who have been convicted of serious fraud and/or serious corruption in the exercise of their functions. The risk of impunity

would therefore become systemic for that category of persons and would call into question the objective of combating high-level corruption.

The reasoning invokes the supremacy of European Union law and notes that the principle of supremacy of Union law prevents national courts from being able, at the risk of disciplinary sanctions, to disregard decisions of the Constitutional Court that are contrary to Union law.

The Court recalls that, in its case-law on the EEC Treaty, it has established the principle of the supremacy of Community law, understood as consecrating the prevalence of this law over the law of the Member States. In this regard, the Court has found that the establishment by the EEC Treaty of a legal order of its own, accepted by the Member States on a reciprocal basis, has as a corollary the impossibility for the said States to make a subsequent unilateral measure prevail against this legal order or to oppose the law arising from the EEC Treaty to national law, regardless of its nature, otherwise there is a risk that this law will lose its Community character and that the legal basis of the Community itself will be called into question.

Furthermore, the executive force of Community law cannot vary from one Member State to another depending on subsequent national laws, otherwise there is a risk that the achievement of the objectives of the EEC Treaty will be jeopardised, nor can it give rise to discrimination on grounds of nationality, prohibited by that Treaty. The Court thus considered that, although it was concluded in the form of an international agreement, the EEC Treaty constitutes the constitutional charter of a community based on the rule of law, and the essential characteristics of the Community legal order thus constituted are in particular its supremacy over the law of the Member States and the direct effect of a whole series of provisions applicable to the Member States and their nationals. According to the Court, the effects associated with the principle of the supremacy of Union law are imposed on all the organs of a Member State, without internal provisions, including constitutional provisions, being able to prevent this. National courts are required to disapply of their own motion any national rule or practice contrary to a provision of Union law which has direct effect, without having to request

or await the prior repeal of that national rule or practice by legislative or other constitutional means.

Furthermore, the fact that national judges are not subject to disciplinary proceedings or penalties for having exercised the option of bringing a case before the Court under Article 267 TFEU, which falls within their exclusive jurisdiction, constitutes an inherent guarantee of their independence. Thus, in the event that a national ordinary court were to consider, in the light of a judgment of the Court, that the case-law of the national constitutional court is contrary to Union law, the fact that that national judge were to disapply that case-law cannot render him liable to disciplinary action.

The Constitutional Court of Romania, in a press release dated December 23, 2021, stated the following, with reference to these Judgments of the Court of Justice of the European Union: ”According to art.147 paragraph (4) of the Constitution, the decisions of the Constitutional Court are and remain generally binding.

Moreover, the CJEU also recognizes, in its Judgment of December 21, 2021, the binding nature of the decisions of the Constitutional Court. However, the conclusions of the CJEU Judgment according to which the effects of the principle of the supremacy of EU law are imposed on all bodies of a Member State, without domestic provisions, including those of a constitutional nature, being able to prevent this, and according to which national courts are required to leave unapplied, ex officio, any national regulation or practice contrary to a provision of EU law, presuppose the revision of the Constitution in force.

In practical terms, the effects of this Decision can only occur after the revision of the Constitution in force, which, however, cannot be done by law, but exclusively at the initiative of certain legal subjects, in compliance with the procedure and under the conditions provided for in the Constitution of Romania itself."

We fully support the opinion expressed by the Constitutional Court. In relation to constitutional provisions, the supremacy of the Constitution and the principle of the priority of European Union law have different legal natures. The supremacy of the Constitution is a quality of it

determined by the social, economic and political realities of the Romanian people and their traditions. It expresses and substantiates at the same time the characters and attributes of the Romanian State, national sovereignty. The supremacy of the Constitution and the obligation to respect it is not exclusively the concretization of the will of the constituent legislator, but is determined objectively, historically.

In contrast, the principle of the priority of European Union law is derived from the supremacy of the Fundamental Law because it is established by the will of the constituent legislator and by the international treaties to which Romania is a party.

Contrary to this reality, the case law of the Court of Justice of the European Union establishes the principle of the supremacy of European Union law, and not only its priority, including with respect to the internal constitutional order.

These solutions of the case cannot be accepted because they seriously affect the national sovereignty, the legislative independence of the Romanian State. Therefore, in no case can the law of the European Union in relation to the internal constitutional order be supreme, and the generally binding legal force of the decisions of the Constitutional Court, including with respect to the legislation and jurisprudence that make up the law of the European Union, cease.

The provisions of art. 147 paragraph (4) of the Fundamental Law enshrine the generally binding nature of the decisions of the Constitutional Court, an aspect that results from the very supremacy of the Fundamental Law.

In accordance with the provisions of art. 142 paragraph (1), "The Constitutional Court is the guarantor of the supremacy of the Constitution". Accepting the possibility of non-compliance by the state authorities of the decisions of the Constitutional Court in relation to the alleged and assumed supremacy of the law of the European Union is equivalent to an act of violation of the Fundamental Law and the internal constitutional order, with a serious violation of the supremacy of the Constitution.

Therefore, the Constitutional Court correctly showed that these decisions of the Court of Justice of the European Union can produce legal effects in Romania only as a result of the amendment of the Fundamental Law through an internal constitutional procedure, but not through decisions of an international court.

Conclusions

The principles of the supremacy of the Constitution and of national sovereignty, normatively enshrined in the Fundamental Law are original, they are not the result of the will of the constituent legislator, they are based on the existential reality of the Romanian people and its state organization. Therefore, they are not normatively constructed principles and are naturally recognized and enshrined by the Constitution, which is the social, political and legal foundation of the Romanian people and the Romanian state. In contrast, the principle of the priority of European Union law is derived and constructed by the will of the rulers, of the constituent legislator, a consequence of the international treaties to which Romania is a party. In order to have legitimacy, this principle and its consequences must be in accordance with the principles of the supremacy of the Constitution and of national sovereignty. We consider it necessary, in order to guarantee the supremacy of the Constitution, in a future normative regulation, the powers of the Constitutional Court to be increased:

In this sense, we propose that the powers of the Constitutional Court include the power to rule on the constitutionality of administrative acts exempted from the control of legality by administrative courts, including normative acts adopted during an exceptional situation. This category of administrative acts, referred to in Article 126, paragraph 6 of the Constitution and the provisions of Law No. 554/2004 on administrative litigation, are particularly important for the entire social and state system, but especially for the exercise of fundamental human rights and freedoms. A constitutional review of these normative acts is

necessary, especially in exceptional situations such as the present one, because in its absence, the discretionary power of the issuing administrative authority is unlimited, with the consequence of the possibility of excessive restriction of the exercise of fundamental rights and freedoms or the violation of important constitutional values.

The excess of power of all state authorities is manifested, paradoxically within the limits of the law, whenever the normative acts recognize a margin of appreciation on the part of the decision-making body (Parliament, administrative authorities or courts) on the moment of the decision or regarding the measures ordered. State practice in Romania has shown that in many situations the content of the decision which can be materialized in: law, Government ordinance, acts of administrative authorities at all levels, judicial acts of prosecutors' offices or court decisions, exceed, through provisions of a particularly restrictive nature, what is necessary to achieve the purpose of the law or inadequate to the factual situation. Such manifestations of power can bring serious prejudice to fundamental human rights or the public interest, in a word, to the features of the rule of law. The criterion that allows the censure by the courts of these forms of abuse of power is, in our opinion, the principle of proportionality.

Proportionality is a fundamental principle of law explicitly enshrined in constitutional, legislative and international legal instruments. It is based on the rational law values of justice and equity and expresses the existence of a balanced or adequate relationship between actions, situations, phenomena, being a criterion for limiting the measures ordered by state authorities to what is necessary to achieve a legitimate aim, thus guaranteeing fundamental rights and avoiding excess power of state authorities. Proportionality is a basic principle of European Union law, being expressly enshrined in the provisions of art. 5 of the Treaty on European Union.

We consider that the express regulation of this principle only in the content of the provisions of art. 53 of the Constitution, with application in the field of restricting the exercise of certain rights, is

insufficient to highlight the full significance and importance of the principle for the rule of law.

It is useful to add a new paragraph to art. 1 of the Constitution to provide that "The exercise of state power must be proportional and non-discriminatory". This new constitutional regulation would constitute a genuine constitutional obligation for all state authorities to exercise their powers in such a way that the measures adopted fall within the limits of the discretionary power recognized by law. At the same time, it creates the possibility for the Constitutional Court to sanction, through the constitutionality control of laws and ordinances, the excess of power in the activity of the Parliament and the Government, using the principle of proportionality as a criterion.

Of course, the existence of a viable, qualitatively performing, well-structured and harmonized state institutional system, including in terms of the moral and professional quality of dignitaries, civil servants and magistrates, is obviously an ontological factor of substance to eliminate or at least diminish the excess of power of state authorities in all its forms, we would especially emphasize in situations where the measures ordered through manifestations of political and legal will take the form of legality but are in obvious contradiction with the requirements of the principle of legitimacy.

References

Deleanu, I. (2006). *Instituţii şi proceduri constituţionale* [Constitutional institutions and procedures]. C.H. Beck.

Iorgovan, A., Muraru, I., & Tănăsescu, E.S. (2004). *Constituţia României revizuită – comentarii şi explicaţii* [The revised Constitution of Romania – comments and explanations]. All Beck.

Muraru, I. et al. (2002). *Interpretarea constituţiei* [Interpretation of the constitution]. Lumina Lex.

Judgment delivered on 18 May 2021 by the Court of Justice of the European Union in joined cases C-83/19, Association of Judges of Romania v. Judicial Inspection, C-127/19, Association of Judges of

Romania and Association of the Movement for the Defence of the Statute of Prosecutors v. Superior Council of Magistracy and C-195/19, PJ v. QK and in cases C-291/19, SO v. TP and others, C355/19, Association of Judges of Romania and Association of the Movement for the Defence of the Statute of Prosecutors and OL v. Prosecutor's Office attached to the High Court of Cassation and Justice - Prosecutor General of Romania and C-397/19, AX v. Romanian State - Ministry of Public Finance

Judgment of 21 December 2022 of the Court of Justice of the European Union in joined cases C-357/19 Euro Box Promotion and others, C379/19 DNA- Territorial Service Oradea, C-547/19 Association «Forumul Judecatorilor din România», C-811/19 FQ and others and C-840/19 N

Constitutional Court of Romania case law:

Decision no. 435 of September 13, 2005, published in the Official Gazette no. 924 of October 17, 2005

Decision no. 223 of March 13, 2012, published in the Official Gazette no. 256 of April 18, 2012;

Decision no. 448 of October 29, 2013, published in the Official Gazette no. 5 of January 7, 2014

Decision no. 53 of January 25, 2011, published in the Official Gazette no. 90 of February 3, 2011

Decision no.727 of 9 July 2012, published in the Official Gazette no.477 of 12 July 2012

Decision no.251 of 30 April 2014, published in the Official Gazette no.376 of 21 May 2014

Decision no. 415 of April 7, 2011, published in the Official Gazette no. 471 of July 5, 2011

Decision no. 232 of July 5, 2001, published in the Official Gazette no. 727 of November 15, 2001

Decision no. 53 of January 25, 2011, published in the Official Gazette no. 90 of February 3, 2011

Decision no. 1 of January 11, 2012, published in the Official Gazette no. 53 of January 23, 2012

Decision no. 669 of November 12, 2014, published in the Official Gazette no. 59 of January 23, 2015

Decision No. 17 of January 21, 2015, published in Official Gazette No. 79 of January 30, 2015

Decision no. 157/2014 published in the Official Gazette no. 296 of 23 April 2014

Decision no. 64/2015 published in the Official Gazette no. 286 of 28 April 2015

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 582-591

THE ANALYSIS OF THE THEORETICAL BACKGROUND OF THE PEOPLE'S ADVOCATE INSTITUTION

Florina MITROFAN
ORCID ID: https://orcid.org/0009-0007-0701-3129
E-mail: florina.mitrofan@upb.ro
Afiliation: Faculty of Economic Sciences and Law, National University of Science and Technology POLITEHNICA Bucharest

Abstract: *This study examines on the one hand, the role and legal significance of this institution and, on the other hand, the procedural aspects of how it exercises its powers.*

Keywords: *People's Advocate institution; attributions; institution; fundamental rights and freedoms.*

Introduction

The People's Advocate Institution was enshrined for the first time in national legislation by Art 55 of the Romanian Constitution[1], which defined the role of this institution as the defender of citizens' rights and freedoms.

The Law revising the Constitution[2] broadened the scope of protected persons, in the sense that the new regulation, namely Art 58 of the republished Constitution of Romania[3], refers to the role of defender

[1] Published in the Official Gazette of Romania, Part 1, no. 233/21 November 1991
[2] Law no. 429/2003, published in the Official Gazette of Romania, Part 1, no. 758/29 October 2003
[3] Republished in the Official Gazette of Romania, Part 1, no. 767/31 October 2003

of the rights and freedoms of natural persons, a broader category than the previously regulated category of citizens, since by natural persons we mean not only Romanian citizens, but also foreigners or stateless persons.

Thus, a better correlation has been achieved with the provisions on fundamental rights and freedoms, in relation to Art 18 of the Romanian Constitution, which guarantees foreigners and stateless persons the general protection of persons and property.

In Romania's normative system, the legal sources of the People's Advocate Institution are the Constitution, the main source of constitutional law, the Law no. 35/1997 on the organization and functioning of the People's Advocate Institution[1], the Law no. 206/1998 approving the affiliation of the People's Advocate Institution to the International Ombudsman Institute and the European Ombudsman Institute[2], the Administrative Litigation Law no. 544/2004[3], the Regulation on the organization and functioning of the People's Advocate Institution of 18 December 2019[4].

The Organic Law on the Organization and Functioning of the Ombudsman provides detailed regulations on the role, powers, responsibility, immunities and incompatibilities of this institution.

Internationally, the concerns for the promotion and protection of human rights in the sense established by the United Nations (UN) General Assembly Resolution no. 48/134 of December 20, 1993, which adopted the Paris Principles, led to the regulation of the provisions of Art. 1 Para 2 of the Law no. 35/1997, according to which the People's Advocate Institution is a national institution whose purpose is to defend the rights and freedoms of individuals in their relations with public authorities.

---

[1] Published in the Official Gazette of Romania, Part 1, no. 48/20 March 1997, republished in the Official Gazette of Romania, Part 1, no. 181/27 February 2018

[2] Published in the Official Gazette of Romania, Part 1, no. 445/23 November 1998

[3] Published in the Official Gazette of Romania, Part 1, no. 1154/7 December 2004

[4] Published in the Official Gazette of Romania, Part 6, no. 938/21 November 2019

Defining elements

Systematic analysis of the legal norms that form the legal institution of the People's Advocate allows us to identify some of the features that underline this institution, as follows:

- It is an institution whose organization and functioning is established by Organic Law;
- The appointment of the People's Advocate is made in a joint session of the Chamber of Deputies and the Senate [Art 65 Para 2 Let i) of the Constitution];
- The People's Advocate is appointed for a 5-year term by the Chamber of Deputies and the Senate, in a joint session. The mandate of the People's Advocate may be renewed once;
- Any Romanian citizen who fulfills the conditions for appointment laid down for judges at the Constitutional Court may be appointed as an Ombudsman;
- The dismissal from office of the Ombudsman, following a violation of the Constitution and the laws, shall be decided by the Chamber of Deputies and the Senate, in a joint session, by a majority vote of the deputies and senators present, on a proposal of the permanent offices of the two Chambers of Parliament, on the basis of a joint report of the legal committees of the two Chambers of Parliament;
- Is an autonomous authority independent from any other public authority, it does not replace public authorities, it cannot be subject to any mandatory or representative mandate [Art 2 of Law no 35/1997];
- Its activity has a public feature;
- Shall exercise its powers *ex officio* or at the request of people aggrieved by a violation of their rights or freedoms by public administration authorities;
- While in office, the People's Advocate cannot be a member of a political party and cannot hold any other public or private office, with the exception of teaching activities and functions in representative higher education [Art 54 of Law no 35/1997];

- during the exercise of his/her mandate, the Ombudsman may be prosecuted and sent to criminal trial for acts other than those concerning the opinions expressed or the acts he/she performs in the exercise of his/her duties under Law no. 35/1997, but may not be detained, searched, placed under house arrest or placed under preventive arrest without the consent of the two Houses of Parliament; if arrested or sent to criminal trial, shall be suspended from office, as of right, until the final judgment of the representative court [Art 53 of Law no. 35/1997];

- The public authorities have the obligation to support the People's Advocate in the realization of his competences;

- Reports only to Parliament (Art 60 of the Constitution).

The competencies of the People's Advocate

The Romanian Constitution and the Law no. 35/1997 regulate the powers of the People's Advocate in defense of the rights and freedoms of individuals but also the limits of their exercise.

The Organic Law lays down the tasks of this institution in Art 15, and the powers of the head of the institution are set out in the Rules of Organization and Functioning.

Thus, according to Art 15 Para 1 of the Law no. 35/1997, "The People's Advocate has the following attributions:

a) Coordinates the activity of the People's Advocate Institution;

b) coordinates the work on the prevention of torture in places of detention carried out by the Prevention of Torture in Places of Detention Domain;

c) approves visit reports drawn up in the framework of torture prevention activities;

d) approves the recommendations accompanying the visit reports drawn up in cases where irregularities are detected following visits;

e) decide on petitions submitted by individuals who have had their rights or freedoms infringed by public administration authorities;

f) verifies the legal handling of petitions received and requests the authorities or public administration officials concerned to put an end to

the infringement of the rights and freedoms of individuals, to reinstate the petitioner's rights and to remedy the damage;

g) formulates views at the request of the Constitutional Court;

h) may refer the unconstitutionality of laws to the Constitutional Court before their promulgation;

i) may directly refer to the Constitutional Court the objection of unconstitutionality of laws and ordinances;

j) represents the People's Advocate Institution before the Chamber of Deputies, the Senate and other public authorities, as well as in relations with natural or legal persons;

k) employs the employees of the People's Advocate Institution and exercises disciplinary authority over them;

l) performs the duties of chief authorizing officer, which he/she may delegate in compliance with the legal provisions on public finance;

m) may refer the matter to the administrative court, under the terms of the law on administrative disputes;

n) can file a summons or criminal complaints and can represent the minor before the court, when he/she has been a victim of physical or psychological violence by parents, guardian or legal representative, sexual abuse, violence and exploitation, exploitation through labor, trafficking in human beings, neglect and exploitation, as well as any form of violence against the child, provided for and sanctioned by domestic and international legislation to which Romania is a party;

o) performs other duties as prescribed by law.

Expanding on the constitutional provisions, the law specifies that the People's Advocate shall exercise his powers *ex officio* or at the request of the injured parties.

Taking into account the common elements that define this institution, which has become traditional in countries other than the country of origin, we will note that the *raison d'être* of the People's Advocate is the fight against phenomena that lead to the violation of citizens' rights and freedoms, so that his activity is neither parallel nor contradictory to the work of the courts, the Public Ministry or other public authorities competent to settle a dispute concerning a right or a

legitimate interest of the citizen (Constantinescu, Muraru, Deleanu, Vasilescu, Iorgovan, & Vida, I., 1992, 131).

In 2003, through the revision of the Constitution, important additions were made to the scope of the subjects that may be referred to the Constitutional Court for constitutionality review, through the prerogative of the People's Advocate to refer to the Constitutional Court the unconstitutionality of laws before promulgation and the exception of unconstitutionality of laws or ordinances.

The scope of the subjects that can submit a matter to the Constitutional Court has thus been broadened, with the Ombudsman being mentioned among the subjects of the seisin alongside the other subjects entitled to exercise such powers.

In exercising the aforementioned attributions, in the light of the role of this institution, a role enshrined in Art 58 of the Constitution, it follows that the People's Advocate exercises its constitutional role, without substituting itself for individuals or the competent bodies whose activity it controls, but acts in order to defend and respect fundamental rights and freedoms.

The possibility for the People's Advocate to submit to the Constitutional Court an objection of unconstitutionality of laws or ordinances has some procedural particularities.

In the aforementioned sense, the People's Advocate formulates an action directly before the Constitutional Court, so he does not invoke the exception of unconstitutionality before the court together with the parties or in their place; the application will be made in writing and reasoned; the People's Advocate will be summoned to the judgment of the exception of unconstitutionality, being applicable in a corresponding manner the procedural rules on the constitutionality review.

A significant aspect to be mentioned is the regulation in Art 514 of the Code of Civil Procedure of the possibility given to the Ombudsman to request the High Court of Cassation and Justice to rule on questions of law that have been resolved differently by the courts.

At the same time, the provisions of Art 516 Para 10 of the Code of Civil Procedure regulate the legal representation of the People's

Advocate institution in the event that the appeal in the interest of the law was filed by this institution.

The limits of the Ombudsman's competence are given by Art 58 of the Constitution and by Law no. 35/1997 [Art 1, Art 17 Para 4-5, Art 21].

Jurisprudential aspects of the legal liability of the People's Advocate

The regulation of the People's Advocate Institution in Title II of the Constitution on fundamental rights and freedoms explains why the People's Advocate is answerable only to the Parliament, a responsibility materialized by the obligation under Art 60 of the Constitution to submit reports.

In other words, the activity of the Ombudsman is subject to parliamentary control.

In the area of legal liability, the Constitutional Court held in its Decision no. 455 of June 29, 2021[1], that "the law regulating the revocation, as a means of termination of a mandate, must establish with certainty the cases in which this sanction occurs, expressly mentioning the objective, determined or determinable hypotheses that may trigger the revocation procedure (for example, the incidence of criminal liability or disciplinary liability). The law must also lay down the procedure within the framework of which the request for dismissal is examined and after which the competent body may order dismissal. Last but not least, the law must regulate the right to appeal before an independent and impartial court, i.e. the possibility for the revoked person to challenge the revocation measure, in accordance with Art 21 of the Constitution on free access to justice. In order to be able to exercise its power of review of the legality and soundness of the revocation measure, the court must know the reasons for which the revocation was ordered, and these reasons must be intrinsic to the revocation measure. The obligation on the issuing authority to state the reasons for the act constitutes a safeguard against

[1] Published in the Official Gazette of Romania, Part 1, no. 666/6 July 2021

arbitrariness and is particularly necessary in the case of such an act which, by terminating an existing mandate, removes individual rights or legal situations.

Under these aspects, by Decision No. 732 of July 10, 2012[1], noting that "it is the only authority in a position to assess whether the activity carried out by the People's Advocate, in his capacity as head of the institution, was carried out within the limits set by the Constitution and the law or, on the contrary, in violation of them", the Constitutional Court ruled that the Parliament has the power to order legal measures, "through an objective assessment within the exclusively parliamentary ways and procedures". On the basis of the foregoing and reiterating the considerations of Decision no. 80 of 16 February 2014[2], according to which "the situations in which revocation may occur must be precisely individualized at the level of the law, and the procedure to be followed in this situation must also be established by rules free from any ambiguity, so as to avoid the risk of arbitrary revocation", the Court finds that the current regulatory framework does not establish the express cases in which the Ombudsman may be revoked, nor the procedure to be followed in cases where such a request is made. In view of the fact that the Parliament has the possibility to apply the legal sanction of dismissal following a finding of a breach of any legal rules, the Court finds that the current legislative framework under which such a decision is adopted is seriously deficient in terms of content, as it does not regulate distinctly and restrictively the circumstances in which the dismissal procedure may be triggered. The possibility of dismissing the People's Advocate "as a result of violation of the Constitution and laws" does not meet the conditions of clarity, predictability and reasonableness. This finding, in conjunction with the fact that neither the law nor the parliamentary regulations do not provide for the procedure on the basis of which the decision of dismissal is adopted, being limited to establishing the holder of the proposal of dismissal and the deciding body, nor guarantees

[1] Published in the Official Gazette of Romania, Part 1, no. 480/11 July 2012
[2] Published in the Official Gazette of Romania, Part 1, no. 246/7 April 2014

regarding the right to defense of the person dismissed, converges to the conclusion that the decision thus adopted is the result of an arbitrary act, devoid of constitutional basis, in opposition with the provisions of Art 1 Para 3 of the Constitution enshrining the principle of the rule of law.

Moreover, this conclusion is confirmed by the same public authority that ordered the dismissal, which took as grounds for the dismissal the fact that "the Ombudsman has defectively fulfilled his duties, either by his actions or by his failure to act within his area of competence". It is obvious that the "defective performance" of duties is not equivalent to "violating the Constitution and the laws". The Court observes that, even in the conditions of maximum generality of the phrase contained in Art 9 Para 2 of Law no. 35/1997, which by itself appears to be vitiated for unconstitutionality, the Parliament has given it an even broader meaning, extending the scope of cases of dismissal beyond the violation of the law, to its defective application. By basing the revocation decision on an interpretation of the legal norm that exceeds its own scope, the Parliament acted in violation of Art 9 Para 2 of the Law no. 35/1997 and, implicitly, of Art 1 Para 5 of the Constitution, which enshrines the principle of legality and supremacy of the fundamental law. The Court holds that the Parliament cannot have a discretionary right as regards the application of the penalty of dismissal, as it must itself comply with the legal and constitutional requirements in the exercise of its own powers".

Conclusions

The prerogatives conferred by the law lead to the conclusion that the activity of the People's Advocate is aimed not only at defending the fundamental rights and freedoms of individuals, but also at identifying and combating the phenomena that lead to their violation, these prerogatives being based on the principle of legality and the need to continuously improve the activity of state bodies which are obliged to guarantee the respect of fundamental rights and freedoms.

References

Constantinescu, M. et al. (1992). Constituția României – comentată și adnotată. "Official Gazette".

Romanian Constitution, published in the Official Gazette of Romania, Part 1, no. 233/21 November 1991, republished in the Official Gazette of Romania, Part 1, no. 767/31 October 2003.

Law no. 429/2003, published in the Official Gazette of Romania, Part 1, no. 758/29 October 2003.

Law no. 35/1997, published in the Official Gazette of Romania, Part 1, no. 48/20 March 1997, republished in the Official Gazette of Romania, Part 1, no. 181/27 February 2018.

Decision of the Constitutional Court of Romania, no. 732/10 July 2012, published in the Official Gazette of Romania, Part 1, no. 480/11 July 2012.

Decision of the Constitutional Court of Romania, no. 80/16 February 2014, published in the Official Gazette of Romania, Part 1, no. 246/7 April 2014.

Decision of the Constitutional Court of Romania, no. 455/29 June 2021, published in the Official Gazette of Romania, Part 1, no. 666/6 July 2021.

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp.592-606

REVIEW BASED ON A SPECIAL CASE OF A JUDGMENT (AND ADVISORY OPINION) OF THE EUROPEAN COURT OF HUMAN RIGHTS IN ROMANIAN CRIMINAL PROCEEDINGS. BRIEF CONSIDERATIONS ON THE CONDITIONS FOR EXERCISING IT

Versavia BRUTARU
ORCID [ID]: 0000-0002-3445-257X
E-mail: versavia.brutaru@ueb.education; versavia_brutaru@icj.ro
Afilliation:"Acad. Andrei Rădulescu" Institute Research,
Ecological University, Law Faculty Bucharest

Abstract: *The regulation of the review procedure in the case of decisions of the European Court of Human Rights is imposed by the need to eliminate the consequences of the violation of the provisions of the European Convention in criminal proceedings, when these consequences continue to occur even after a final decision of the European Court of Human Rights has found the violation. In this regard, the promotion of a request for review based on the existence of a final decision issued by the European Court of Human Rights is an admissible approach only to the extent that, by reference to the nature of the right whose violation the European court found, the cessation of the serious consequences of the violation of the Convention is possible only by re-examining the domestic case that was the basis for the referral.*

Keywords: *Judgement, decision of the European Court of Human Rights, review, criminal proceedings*

Introduction

1. In criminal proceedings, the trial constitutes one of the most important procedural activities because during the trial, the criminal law conflict submitted to judgment is resolved. The existence of the criminal act, the perpetrator's guilt, and the application of a sanction are determined.

The remedies against judicial decisions, both ordinary and extraordinary, have been established out of the necessity to control the activity carried out by the courts. Through the exercise of judicial review, possible errors made during the trial, whether regarding the establishment of facts or the application of the law, can be corrected (Lorincz, 2014, p. 7*)*. Doctrine (Dongoroz, 1943, p. 339) has pointed out that a judicial decision, despite all the guarantees provided by law and the Constitution, may contain errors in judgment and resolution (a presumption of error) (Theodoru, 2007, p. 1) and that during the new trial, these errors will be corrected (a presumption of rectification) (Dongoroz, 1943, p. 339). However, doctrine has also warned that the use of the term "presumption" might imply an *a priori* negative evaluation of the judicial activity, thus undermining the prestige of the judiciary (Theodoru, 2007, p. 2). In this context, it has been suggested that using the term "possibility" that a judicial decision might not be lawful and well-founded would be more appropriate and would not affect the prestige that the judiciary should enjoy, given that cases of unlawfulness or lack of sound reasoning are exceptions. Therefore, remedies are considered procedural instruments through which any potential errors contained in judicial decisions can be corrected (Theodoru, 2007, p. 2).

By exercising the remedies, a new criminal procedural relationship is not created; rather, the conduct of the original one is extended into a new phase of the criminal process. Similarly, by exercising the remedies, a new criminal action is not initiated; instead, it represents a way of pursuing the initial criminal action by moving into another procedural phase.

The extraordinary remedy of revision may be exercised against final judicial decisions, having the nature of a retractor remedy, allowing the criminal court to revisit its own decision, and at the same time, the nature of a factual remedy, through which judicial errors in the resolution of criminal cases are identified and corrected. Revision is filed against a decision that has acquired the authority of res judicata, based on facts or circumstances that were unknown to the court at the time of adjudication, discovered after the trial, and which demonstrate that the decision was based on a judicial error (Udroiu, 2019, p. 623).

2. Through Recommendation No. R (2000) 2 of the Committee of Ministers(Recommendation No. R (2000), member states were advised to review their national legal systems to ensure that adequate possibilities exist for the re-examination of a case when the Court has found a violation of the Convention, particularly where the injured party continues to suffer very serious negative consequences from the outcome of the national decision, which are not adequately remedied by the just satisfaction awarded and can only be rectified through re-examination or reopening (Ghenici, 2019, p. 98; Pușcă & Rus, 2020, p. 186).

The same solution must be offered if the Court's judgment leads to the conclusion that the contested national decision is essentially contrary to the Convention, or if the established violation is caused by procedural errors or deficiencies of such gravity that they raise serious doubts about the outcome of the contested national proceedings (Ghenici, 2019, p. 98; Pușcă & Rus, 2020, p. 186). Subsequently, through Resolution 1226 (2000) of 28 September 2000, the Parliamentary Assembly invited the states parties to the Convention to provide in their national legislation for the reopening of proceedings following judgments of the Court.

3. In Romania, this special case of re-examining a final judgment was introduced among the cases of annulment appeal through Emergency Ordinance No. 207/2000 (Official Gazette Part I nr. 594 din 22 November 2000) on the amendment and completion of the Criminal

Code and the Code of Criminal Procedure, under Article 410 paragraph 3 of the Code of Criminal Procedure, which provided: "decisions pronounced in cases where the ECHR has found a violation of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms may be challenged by an annulment appeal."

Later, through Law No. 576/2004 (Official Gazette Part I no. 1223 din 20 December 2000) for the amendment and completion of the Code of Criminal Procedure, the provisions regarding the annulment appeal were repealed, and Article 408¹ was introduced, regulating revision in the case of judgments of the European Court of Human Rights.

The current Code of Criminal Procedure regulates this procedure in Article 465 — *Revision in the case of judgments and opinions of the European Court of Human Rights*, which essentially represents the possibility granted to the party to exercise this extraordinary remedy. The European Court of Human Rights confirms that the right to a fair trial before a tribunal is guaranteed by Article 6 paragraph (1) of the Convention, and this right must be interpreted in light of the Convention's preamble, which proclaims the rule of law as part of the common heritage of the contracting states. Although one of the fundamental elements of the rule of law is the principle of legal certainty, which requires, among other things, that the solution definitively given by the courts to any dispute should not be called into question again (*Brumărescu v. Romania*, Official Gazette Part I no. 414 din 31 august 2000) because legal certainty implies respect for the principle of *res judicata*, that is, the finality of judicial decisions, when a violation of a right is established, the European Court of Human Rights imposes on the national courts the obligation to resume the proceedings from the stage in which the party found itself at the time of the rights violation (Pușcă & Rus, 2020, p. 187).

4. *Conditions of exercise.*

The revision request based on the existence of a conviction issued by the European Court or an advisory opinion of the ECtHR must be submitted to the court that issued the final judgment whose revision is being sought.

The determination of the competent court is based on the decision of the European Court specifying before which of these courts the fundamental right violation occurred. For the European Court to issue a judgment, it is necessary to exhaust domestic remedies (otherwise, the procedural inadmissibility ground provided by Article 35 paragraph 1 of the European Convention will apply) (Udroiu, 2023, p. 814).

The revision request based on this ground must, in principle, be addressed to the court of appeal. Thus, the filing of a revision request is conditional upon the existence of a final judgment of the ECtHR or an advisory opinion of the ECtHR, finding a violation of a right provided by the European Convention or its additional protocols, in a criminal trial conducted before Romanian judicial authorities, where the Romanian criminal courts ruled by final judgment (or in cases where the case was struck out following an amicable settlement between the state and the applicants). The doctrine has shown that one of the essential conditions for the admissibility of a request for review is not met, namely, the existence of a final judgment delivered by the Romanian courts, when the ECHR found a violation of Art. 3 and Art. 13 of the Convention in a case in which only resolutions not to initiate criminal prosecution had been issued, (Ghenici, 2019, p. 99).

This case of revision is subject to a double condition and requires both the existence of a judgment by the European Court finding a violation of fundamental rights or freedoms, and the persistence and impossibility of remedying the serious negative consequences of the violation of the Convention for the Protection of Human Rights and Fundamental Freedoms and its additional protocols, provided that the

established violation concerns a final judgment rendered by a Romanian court.

In situations where it has been established that, during the adjudication of the appeal, the Romanian court violated Article 6 paragraph 1 of the Convention, by convicting the defendant without the defendant having been heard by the appellate court, especially considering that the lower courts had ordered his acquittal, and Article 6 paragraph 3 letter d) of the Convention, by convicting the defendant without the whistleblower having been heard in court and without ensuring the defendant's opportunity to cross-examine him (Ghenici, 2019, p. 100).

It was also noted (ÎCCJ 2017), for example, that the conditions provided by Article 465 of the Code of Criminal Procedure are met when the ECtHR has found a violation of the right provided by Article 6 paragraph 1 of the Convention, following a conviction issued after the acquittal of the defendant by two lower courts, without the direct hearing of witnesses: "Following the prosecution's appeal, the High Court took advantage of the possibility offered by domestic law to re-examine the issue of the defendant's guilt. For this purpose, the High Court relied on the same evidence that had led the lower courts to order the acquittal, with no new evidence being presented before the court. The High Court concluded that it was certain from the evidence, and especially from the content of the witnesses' statements, that the claimant had committed the act he was accused of." It was established that the High Court interpreted the statements in the case file without directly hearing the witnesses. Thus, the High Court adopted a position contrary to that of the lower courts, which had acquitted the claimant, particularly based on the statements of the witnesses made during hearings before them (Potoroc vs. Romania). The High Court determined that the review request could only be conducted within the limits set by the European Court of Human Rights' judgment, specifically only concerning the party and the facts addressed by the Court, and only concerning the violation of the ne bis in

idem principle. As for the other findings, the decision of the appellate court remained unchanged. In this regard, the ECtHR noted the violation of Article 4 of Protocol No. 7 to the Convention and observed that "the claimant was prosecuted twice for the same acts of violence committed against the same person (...). Even though other acts, namely damage to D.M.M.'s property, were attributed to the individual in the second procedure, it remains true that the two proceedings coincided regarding the acts of violence."

The Court also noted that, although the claimant invoked *res judicata* in the second procedure, the domestic courts did not expressly establish within this procedure that there were factual circumstances distinguishing the charge of robbery from that of assault or other violence for which the individual had already been acquitted (Asadbeyli and others, para. 161). On the other hand, it pointed out that the appellate court ruled, in its decision of March 4, 2008, that there was identity of facts between the two proceedings in question (supra, para. 20), but that these findings could not, for procedural reasons, lead to the reopening of the procedure (supra, para. 21) (Butnaru and Bejan-Piser vs Romania).

A request for the revision of a final judgment cannot be made by invoking decisions issued by the ECtHR against other states in similar cases or as a result of the finding of a violation of the European Convention through a domestic regulation of the convicted state that is identical to the Romanian regulation, even if the victim's complaint against the Romanian state has been declared admissible but not definitively adjudicated. The ECtHR judgment must allow for the annulment of the final judgment, that is, it must examine the substance of the case in some way. For example, it was decided that the reexamination of the initial case is not possible in the context where the European Court found a violation of Article 6, paragraph 1 of the Convention, as evidenced by the excessive duration of the procedure (Ghenici, 2019, p. 100).

Also, in the jurisprudence of the High Court, it is stated that the conditions provided by Article 465 of the Code of Criminal Procedure are met even in situations where the defendant's rehabilitation has occurred by law (...) However, this circumstance does not constitute grounds for considering that the violation of the rights provided by the Convention, as found by the ECtHR judgment, ceases to occur. The effects of rehabilitation consist in the cessation of disqualifications, prohibitions, and incapacities arising from a conviction, but rehabilitation presupposes the very conviction that has established, with res judicata authority, the defendant's guilt for committing an act punishable by criminal law.

In this regard, it was noted that rehabilitation does not have the value of declaring the defendant's lack of criminal responsibility, and that in the case of revision, it is not a matter of forgiveness for future consequences but rather a determination of the person's innocence and the invalidity of the judgment in general, so that the consequences of the conviction are formally extinguished by rehabilitation (Pușcă, Rus, 2020, p. 191). Therefore, on one hand, it was decided that when the ECtHR found that the final conviction was pronounced in a case that was not resolved fairly, rehabilitation cannot constitute grounds for rejecting the revision request, with the reasoning that the serious consequences of the Convention violations no longer continue to occur (ICCJ, secția penală, decizia nr. 179/2016). On the other hand, it was decided that if the ECtHR found a violation of rights guaranteed by the Convention, but the conviction was pronounced following an uncontested procedure regarding fairness, and the consequences of the conviction ceased by operation of law through rehabilitation, the revision request is unfounded and must be rejected (Ghenici, 2019, p. 102).

Article 465, paragraph 1^1 of the Code of Criminal Procedure also provides for the case of an advisory opinion regarding a final judgment pronounced in a case by the ECtHR, which can be subject to the extraordinary appeal of revision under the following conditions:

a) the final judgment was pronounced before the communication by the Government Agent for the European Court of Human Rights of the advisory opinion, translated into Romanian; b) the contradiction between the interpretation in the final judgment and the one established by the advisory opinion generates a violation of fundamental rights or freedoms, and one of the serious consequences of the violation of the Convention for the Protection of Human Rights and Fundamental Freedoms and its additional protocols continues to occur and can only be remedied by the revision of the judgment. In this case, the revision request can be made no later than 3 months from the date of publication of the opinion issued by the European Court of Human Rights in the Official Gazette of Romania, Part I.

Regarding the condition of the continuity of the serious consequences caused by the violation found by the ECtHR and the impossibility of remedying them otherwise than by revising the final judgment, the promotion of a revision request based on the existence of a final judgment pronounced by the ECtHR is an admissible step only insofar as, concerning the nature of the right whose violation was found by the European court, the cessation of the serious consequences of the violation of the Convention can be achieved by retrying the domestic case that led to the referral.

In a case, the ECtHR found that the applicant's right to a fair trial, as provided by Article 6, paragraph 1 of the European Convention on Human Rights, and the right to freedom of expression through the right to communicate information, as provided by Article 10 of the European Convention on Human Rights, were violated. The violation occurred because the domestic courts had refused to examine whether the classification of "strictly secret" was justified in light of potential data collected by the SRI (Romanian Intelligence Service), and whether the interest in maintaining the confidentiality of the information outweighed the public interest in accessing the alleged unlawful interceptions. The domestic courts did not attempt to examine the case in all aspects,

limiting themselves to merely noting the existence of the legal authorization documents, even though this was a crucial argument in the applicant's defense, which the courts left unanswered (paragraph 131). These elements were sufficient for the Court to conclude that the case leading to the applicant's criminal conviction was not decided fairly, thus violating Article 6 § 1 of the Convention (paragraph 132). The Court concluded that the interference with the applicant's right to freedom of expression, particularly the right to communicate information, was not "necessary in a democratic society," and therefore Article 10 of the Convention was violated (paragraph 120) (Pușcă & Rus, 2020, p. 192).

Also, regarding the conditions for exercising the revision, legal doctrine (Ghenici, 2019, p. 191) has pointed out that the special procedure of revision constitutes a remedy for removing potential negative effects, and the phrase "serious consequences" covers a particularly wide range of rights or freedoms that the ECtHR may find to have been violated.

The High Court held that the second condition imposed by the provisions of Article 465 paragraph 1 of the Criminal Procedure Code is not fulfilled, as the serious consequences of the violation of the rights provided by the Convention, as found by the European Court of Human Rights, are no longer continuing to occur (Ghenici, 2019, p. 191). Therefore, the special procedure of revision does not constitute an effective remedy for eliminating potential negative effects, as long as the national courts did not pronounce the conviction based solely on the evidence consisting of intercepted telephone conversations. The conviction of the defendant was based on a set of consistent evidence, including relevant witness and defendant statements, fiscal documents, reception protocols, accounting documents, balance sheets, and trial balances. Contesting the legality of the evidence obtained through the aforementioned method cannot lead to an acquittal of the defendant (Pușcă & Rus, 2020, p. 194).

In another case, it was decided that the moral damage caused by the pronouncement of a final conviction, without giving the accused person the opportunity to present evidence in their defense and without the courts examining all defenses (Article 6 paragraph 1 of the Convention), as well as through the violation of freedom of expression (Article 10 of the Convention), is so significant that neither the judgment of the European Court of Human Rights nor rehabilitation stops the serious consequences of the violations of the Convention as found in the Court's judgment. The significant moral damage consists in the petitioner's dissatisfaction and frustration of not being tried fairly, resulting in the pronouncement of a conviction based on the acknowledgment of guilt. Therefore, the case must be retried with the assurance of a fair criminal trial (Ghenici, 2019, p. 101).

Similarly, both moral and material damage were considered a hindrance to accessing various positions or jobs due to the criminal record. It was decided that the serious consequences of the violation found by the European Court of Human Rights continue to occur, as the convicted person, due to the criminal record, is prevented from accessing public functions or certain jobs, and these consequences can only be remedied through the review of the conviction (Ghenici, 2019, p. 102).

At the same time, in many cases against Romania (Ghenici, 2019, p. 102), the European Court of Human Rights has found a violation of Article 3 of the Convention due to the material conditions of detention. Sometimes these relate either to the execution phase or the pretrial detention period. However, in none of these situations can the consequences of the violation of the right not to be subjected to inhuman or degrading treatment be removed through the review procedure, regardless of whether they continue to occur or not. Even if such violations continue to occur, they cannot be remedied through the special review procedure of the conviction, as the violations did not take place during a judicial procedure in which procedural guarantees were not

respected, but rather later, during the execution phase of the sentence, or earlier, in the case of pretrial detention.

However, if the applicant is in detention, serving the sentence imposed by the judgment reviewed by the Court, the continued existence of harm caused by the pronouncement of a conviction with disregard for the requirements of the right to a fair trial requires the annulment of the prison sentence execution warrant and immediate release (ICCJ, secția penală, decizia nr. 325/2018).

The High Court of Cassation and Justice ruled that the recognition of the violation of the rights provided by the Convention, as well as the sum awarded by the European Court for repairing the harm suffered by the claimant, fall within the meaning of the term "equitable satisfaction," and therefore, they are sufficient to remove the moral harm caused to the applicant (ICCJ, decizia nr. 140/2013). In another case, the Supreme Court considered the compensation represented by the very fact of the Government's acknowledgment of the violation of the applicant's rights, together with the value of the compensation proposed by the Government, to be sufficient (ICCJ, decizia nr. 121/2015).

In other situations, although the consequences of a flawed final criminal judgment continue to occur, revision is not a remedy. For example, it has been found that the violation of the rights of the applicant can only be remedied by initiating a criminal investigation *in rem*, in which the criminal investigation authorities establish the facts and identify the responsible persons (Ghenici, 2019, p. 104). Alternatively, although there was a right whose violation was found by the European Court of Human Rights in a civil case, the serious consequences of this violation cannot be remedied through the revision of a judgment issued by a criminal court.

Therefore, for the admissibility of the revision request, it is necessary that the only remedy capable of removing the consequences of the violation of the right to a fair trial, as found by the European Court of

Human Rights, is the annulment of the court's decision and the ordering of a retrial by the same court, with respect for the rights of the applicant.

Conclusions

The analysis of the fulfillment of the condition regarding the continuity and impossibility of remedying the serious negative consequences of the violation of the Convention remains the exclusive responsibility of the court seized with the review request in the procedure provided by Article 465 of the Criminal Procedure Code, concerning the specific factual situation established in the case. The presentation of this illustrative overview of the High Court's decisions in the field aims to highlight the arguments considered in the legal interpretation made regarding this condition. As evidenced by the jurisprudence of the Supreme Court mentioned earlier, the existence of an ECtHR judgment does not necessarily imply the continued occurrence of serious negative consequences regarding the claimant's situation. In some cases, the material compensation awarded by the European Court's judgment has been sufficient to cover the moral damage suffered, while in other cases, the consequences of the conviction have ceased as a result of legal rehabilitation, or the violation of the right under the Convention concerned only part of the evidence administered in the case, without playing a decisive role in shaping the conviction.

References

Criminal decision no. 852 of September 20, 2017 pronounced by the High Court of Cassation and Justice, Criminal section in file no. 2239/1/2017, www.scj.ro

C. App. Cluj, Criminal section, Decision no. 535/A/2016

Decision no. 179 of 11 February 2016 pronounced by the High Court of Cassation and Justice

Dongoroz, V. (1943). *Curs de procedură penală [Criminal procedure course]*. Litografiat.

Ghenici, O. (2019). Cazul special de revizuire întemeiat pe o hotărâre a Curții Europene a Drepturilor Omului în procesul penal. *Caiete de Drept penal, 3* [The special case of review based on a judgment of the European Court of Human Rights in criminal proceedings. *Criminal Law Notebooks, 3]*.

ICCJ, Decision no. 28/2013

ICCJ, Decision no. 1/2013

ICCJ, c5, Decision no. 118/2012

ICCJ, c9, Decision no. 420/2009 Case Bucur and Toma v. Romania published in the Official Gazette no. 350, Part I of 13 June 2013

ICCJ, Criminal Section, Decision no. 179/2016

ICCJ, Decision no. 544/2008

ICCJ, c9, Decision no. 367/2008, in *ICCJ, Buletinul Jurisprudenţei. Culegere de decizii pe anul 2008.*

Judgment of 14 February 2017, in the Potoroc Case against Romania, published in the Official Gazette no. 411 of 31 May 2017.

Judgment of 23 June 2015, which became final on 23.09.2015, in the Butnaru and Bejan-Piser Case against Romania, published in the Official Gazette no. 139 of 23 February 2017, in Pușcă, Manuela Maria, & Rus, Andrei Claudiu, p. 191.

Lorincz, A. L. (2014). *Recursul în casație în noul Cod de procedură penală [Appeal in cassation in the new Criminal Procedure Code]*. Universul Juridic.

Pop, T. (1948). *Drept procesual penal*, vol. IV [*Criminal procedural law*, vol. IV].

Pușcă, M. M., & Rus, A. C. Revizuirea în cazul hotărârilor Curții Europene a Drepturilor Omului. Consecințele încălcării drepturilor prevăzute de Convenție [Review of judgments of the European Court of Human Rights. Consequences of the violation of rights provided for by the Convention]. *Analele științifice ale*

Universității „Alexandru Ioan Cuza" din Iași, tomul LXVI/II, Științe juridice.

Recommendation No R 2 (2000) of the Committee of Ministers to member states concerning the re-examination or reopening of certain cases at the national level following judgments of the European Court of Human Rights, adopted by the Committee of Ministers of the Council of Europe on 19 January 2000 at the 694th meeting of the Ministers' Deputies.

Theodoru, G. G. (2007). *Teoria și practica recursului penal*, ed. a II-a revăzută și adăugită [*Theory and practice of criminal appeal,* 2nd revised and added ed.]. Hamangiu.

Udroiu, M. (2019). *Procedură penală, Partea specială [Criminal procedure, Special Part]*. C.H.Beck.

Udroiu, M. (2023). *Sinteze de Procedură penală [Criminal Procedure Summaries]*. CH Beck.

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 607 - 627

THE PRINCIPLES OF INTERNATIONAL JUDICIAL COOPERATION IN CRIMINAL MATTERS

Cătălin BUCUR
ORCID ID: 0000-0003-1606-1978
E-mail: bucurc2000@yahoo.com
Afiliation: [1] Faculty of Economic Sciences and Law
National University of Sciences and Technology Politechnica Bucharest
University Center Pitesti

Abstract: *In view of its importance, all international judicial cooperation in criminal matters is carried out in compliance with certain general principles, principles that must be considered and analyzed on two priority coordinates, namely, on the one hand from the perspective of respect for the independence and sovereignty of each State, and on the other hand from the perspective of respect for and consistent application of international legal instruments.*

Keywords: *international judicial cooperation; principles; criminal matters; judicial instruments; norms; criminal law.*

Introduction

The 20th century was a century of unprecedented development of civilization, progress in science, technology and biomedicine. It is a century that will undoubtedly also be associated with human rights, which have become a norm of universal culture and civilization. International society has turned them into a requirement of democracy, considering them to be the supreme values safeguarded by humanity.

Human rights have not only taken on constitutional dimensions but have also entered the catalog of internationally protected values. Yet,

paradoxically, although human rights have never been so strongly defended and guaranteed as in the century that has just ended, they have more than ever been drastically violated. The 20th century has seen the most horrific wars, genocides on an unimaginable scale. In the history of the century that has just ended, there have been total wars, massacres and slaughters, deportations, purges along racial, ethnic and class lines, discrimination against minorities, etc. (Neagu, & Dediu, 2021, p. 9).

The unprecedented development of international relations in contemporary society has been accompanied by an equally unprecedented increase in international crime through the proliferation of organized forms of crime on the territory of several states.

Scientific and technical progress and the spread of democratization at international level have made it possible for people and goods to move around easily, leading to the development of human society as a whole. The undeniably beneficial effect, for humanity as a whole, has also created the possibility of a wide proliferation of crime worldwide.

The increasing danger posed by the growth of transnational crime, the need to prevent and combat it more effectively in a globally organized framework, has led to the adoption of regional or global instruments to unify the efforts of the world's states in stopping the proliferation of transnational crime.

In view of its importance, all international judicial cooperation in criminal matters is carried out in compliance with certain general principles, principles that must be considered and analyzed on two priority coordinates.

Thus, a first category of principles concerns respect for the independence of the sovereignty of each state, which presupposes a set of rules ensuring, on the one hand, that the law of the State in whose territory the crime was committed is applied and, on the other hand, that the recognition and enforcement of a criminal sanction imposed by another state does not prejudice the general rules of public order and public safety in the territory of the state which recognized the judgment.

The second category refers to the respect and consistent application of the provisions of international legal instruments to which the state

concerned is party and ensuring that they take precedence over domestic criminal law rules.

The principles of international judicial cooperation in criminal matters

In this context, with reference to the provisions of Romania's domestic normative acts, as well as the conventions or other bilateral or multilateral international instruments of this kind, I consider that the general principles underlying the activity of international judicial cooperation in criminal matters are: - respect for Romania's fundamental interests, the pre-eminence of international law, international comity and reciprocity, the principle of confidentiality, recognition of foreign judgments and mutual trust, non bis in idem, the principle of immunity from jurisdiction, the principle of humanism, the principle of legality, aut dedere aut judicial, the principle of specialty, the principle of calculating the length of sentences and preventive measures depriving of liberty.

1. Principles

1.1. Respecting Romania’s fundamental interests

The legislator settles in Art 3 of the Law no 302/2004, under the marginal heading “The limits of judicial cooperation”, the principle of respect for Romania’s fundamental interests in the complex activity of international judicial cooperation in criminal matters. Thus, international cooperation is obligatory and necessary, under the international treaties and conventions concluded by our country, but it does not exclude certain particular cases in which the Romanian state has, in relation to a specific situation, its own interests stronger than those specific to the fight against crime.

From the interpretation of the legal provisions, it follows that the activity of international judicial cooperation in criminal matters will be carried out by the Romanian state, only under the conditions that ensure the protection of fundamental interests. In other words, the application of the provisions on international cooperation is subordinated to the

protection of Romania's sovereignty, public order, security and other interests, as defined by the Constitution.

Therefore, whenever, in the framework of international judicial cooperation in criminal matters, the aforementioned values will be jeopardized, the Romanian State, through the authorized institutions, will refuse cooperation. Thus, the cooperation itself will not be realized, even if all other conditions are fulfilled (Boroi, & Rusu, 2008, p. 19).

It should be noted that sovereignty, security and internal public order are fundamental values specific to each constitutional state, recognized as such in other international documents and applied in inter-state relations.

A relevant example of respecting Romania's fundamental interests in international judicial cooperation in criminal matters is the refusal to execute a European Arrest Warrant (EAW) or an extradition request under specific conditions.

This principle is explicitly stipulated in national legislation (e.g., Law no. 302/2004 regarding international judicial cooperation in criminal matters) and is essential for protecting sovereignty and public order.

Romanian law establishes mandatory or optional grounds for refusing extradition requests or European Arrest Warrants received from a foreign state.

1.2. Pre-eminence of international law

According to this principle, the provisions of the special law apply on the basis of and for the execution of the rules concerning judicial cooperation in criminal matters, mentioned in the legal instruments to which Romania is a party, which it supplements in non-regulated situations.

In other words, in the field of international cooperation, the rules derived from international legal instruments to which our country is a party take precedence over domestic normative acts, which are applied on the basis of and for the execution of international provisions, which they comply with in unregulated situations.

The analyzed principle is regulated by Law no. 302/2004, but it is also grounded in the provisions of the Constitution, in particular in the provisions of Art 11 Para 1-2, which states that "(1) The Romanian State undertakes to fulfill its obligations under the treaties to which it is a party, faithfully and in good faith; (2) Treaties ratified by the Parliament, according to the law, are part of the domestic law" and in the provisions of Article 148 Para 2, according to which: "As a result of accession, the provisions of the Treaties establishing the European Union and other binding Community rules shall take precedence over contrary provisions of national law, subject to the provisions of the Act of Accession"[1].

The principle of the pre-eminence of international law is also expressed in the provisions of the Code of Criminal Procedure, which provides that: "International judicial cooperation will be requested or granted in accordance with the provisions of the legal acts of the European Union, international treaties in the field of international judicial cooperation in criminal matters to which Romania is a party, as well as with the provisions contained in the special law (...), unless otherwise provided for in international treaties"[2].

An example in this respect is the rule stipulated by Art 19 Para 1 of the Romanian Constitution and Art 19 Para 1 letter a) of the Law no 302/2004, according to which extradition of Romanian citizens is not allowed. In view of this principle, however, the national normative provisions are subsidiary to the international treaties and conventions on extradition to which our country is a party. In concrete terms, in order to determine whether a Romanian citizen can be extradited from Romania, the international legal instrument must first be checked with the state requesting extradition. If, after consultation, it is established that the agreement, convention or treaty contains provisions which differ from the rule laid down in national law, the agreement, convention or treaty

[1] Art 11 and Art 148 of the Romanian Constitution
[2] Art 548 Para 1 of the Code of Criminal Procedure, (Bucharest: Rosetti International, 2008), 306

shall apply in priority. As a consequence, the application of national law is ruled out.

Thus, for example, if the extradition of a Romanian citizen is requested by Japan, the extradition treaty between Romania and Japan on extradition is checked. According to Art 3(a), the extradition request will not be accepted if the person concerned is a national of the requested party. In this case, the rule overlaps, in principle, with that laid down in national law. Therefore, the Romanian citizen cannot be extradited from Romania to Japan.

On the other hand, if the extradition of a Romanian citizen is requested by the United States of America, the extradition treaty between the two countries, ratified by the Law no 111/2008, will be checked. The provisions of Art 3 of these treaties indicate that the nationality of the person sought is not a ground for refusing extradition. In this case, it is obvious that the international rule contradicts the rule in domestic law. However, in accordance with the principle of pre-eminence of international law, the Romanian citizen may be extradited to the United States of America. By derogation from the provisions of Art 19 Para 1, the Romanian Constitution allows this legal mechanism, so that according to the provisions of Article 19(2), Romanian citizens may be extradited on the basis of international conventions to which Romania is a party, under the conditions of the law and on the basis of reciprocity.

1.3. The principle of confidentiality

This principle implies the obligation to ensure, as far as possible, the confidentiality of requests addressed to it in the areas of international judicial cooperation, at the request of the requesting state. The Romanian state, as the requested state, will inform the foreign state, if the condition of confidentiality cannot be ensured, which will decide accordingly.

The literature argues that this principle must be respected even when it is not requested, but operational interests require it, because the application of specific cooperation activities in this area (taking custodial measures, seizure of property, etc.) requires confidentiality in order to

achieve the objectives proposed in one case or another (Rusu, 2015, p. 32).

It is therefore necessary to respect this principle to ensure the effectiveness of international judicial cooperation in criminal matters.

Failure to comply with the principle of confidentiality can in many cases lead to particularly serious consequences, such as the disappearance of wanted persons, property or documents, etc.

An excellent example illustrating the principle of confidentiality in international judicial cooperation relates to situations where time and secrecy are critical to achieving the goal of the request, such as when dealing with financial crime or fugitive apprehension.

Here is an hypothetical example demonstrating how Romania, as the requested state, applies this principle:

Scenario:

The French Republic (applicant state) sends a request for mutual legal assistance to the Romanian Ministry of Justice (requested state). The request concerns a major money laundering investigation.

The Request

The french authorities ask Romania to perform two specific actions:

1. Simultaneously search the residence of a key suspect in Bucharest.
2. Immediately freeze bank accounts registered in that suspect's name in a Romanian bank.

Application of the principle of confidentiality

The French request explicitly asks for strict confidentiality because any prior leakage of information would allow the suspect to:

1. Transfer the funds from the accounts before the freezing order is executed.
2. Destroy evidence before the search is conducted.

Action by romanian authorities (adherence):

1. The romanian authorities, specifically the Prosecutor's Office, adhere rigorously to the principle:
2. They ensure the request is processed through secured channels and limit access to the information to the minimum number of necessary personnel (prosecutors and police officers).
3. They organize the search and the freezing order simultaneously and preemptively, ensuring the suspect is notified of the legal action *only at the exact moment* the police arrive at the residence and the bank executes the freezing order.
4. This operational confidentiality ensures the objectives of the French request (securing funds and evidence) are successfully achieved.

The notification obligation (The "If" condition):

If, hypothetically, romanian law required a public court hearing or a public decree to authorize the search (a condition that would inevitably break confidentiality), the Romanian State would be required to:

1. Inform the French Republic that the condition of confidentiality cannot be guaranteed under romanian procedure.
2. Wait for the french state to decide whether to proceed with the execution under the non-confidential terms or to withdraw the request.

This secondary step guarantees that Romania does not compromise the applicant state's operation without its consent, thereby fulfilling the core requirements of the principle of confidentiality.

1.4. International courtesy and reciprocity

Generally, cooperation takes place by virtue of a multilateral or bilateral convention or treaty. However, the absence of an international legal instrument is not an absolute bar to judicial cooperation.

This principle is also laid down in Art 5 Para 1 of the Law no. 302/2004, which stipulates that: “in the absence of an international convention, judicial cooperation may be carried out by virtue of

international comity, upon a request transmitted through diplomatic channels by the requesting state and with a written assurance of reciprocity given by the competent authority of that state".

Consequently, according to this principle, judicial cooperation in criminal matters can be achieved by virtue of international courtesy, which implies the transmission of a request through diplomatic channels by the requesting state, with a written assurance of reciprocity given by the competent authority of that state, in the absence of an international legal instrument.

Therefore, the provisions of the framework law constitute, in this case, the common law for the Romanian judicial authorities in the field of cooperation.

According to the special law, even in the absence of reciprocity, the Romanian State may comply with a request for international legal assistance in criminal matters, if one of the following situations applies[1]:

- the request is necessary due to the nature of the crime or the need to combat certain serious forms of crime;

- the request may contribute to improving the situation of the accused or convicted person or to his social integration;

- providing assistance may serve to clarify the judicial situation of a Romanian citizen.

When the Romanian State formulates a request under the above-mentioned conditions, on the basis of international courtesy, reciprocity will be granted, upon reasoned request of the Romanian judicial authorities, by the Ministry of Justice, whenever necessary, for each individual case[2].

Here is an hypothetical example of international courtesy and reciprocity:

Legal Context:

The principle states that, while cooperation is typically based on treaties, the absence of a treaty is not an absolute bar. Cooperation can

[1] Art 5 Para 3 of the Law no 302/2004 with subsequent modifications and amendments

[2] Art 6 of the Law no 302/2004 with subsequent modifications and amendments

still be granted based on the premise of reciprocity, which is the promise that the applicant state would provide similar assistance to Romania in a future case.

Practical situation:

Issuing State: Republic Alpha (a state with which Romania has no specific bilateral treaty for mutual legal assistance in criminal matters, and which is not part of the EU).

Requested State: Romania.

The Request: Republic Alpha requests that Romania identify and interview (take testimony from) a key witness (a romanian citizen) who holds vital information in a tax fraud case being investigated in Alpha.

Application of courtesy and reciprocity

1.Analysis (courtesy): The Romanian authorities (the Prosecutor General's Office) analyze the request and confirm that the requested action (witness testimony) does not contravene Romania's national security or public order and is not prohibited by the Constitution. They also verify that internal law permits the action.

2.Condition (reciprocity): Because a treaty is absent, Romania notifies Republic Alpha that it will execute the request on the basis of reciprocity. This means Romania imposes the condition that Republic Alpha must provide similar assistance (e.g., interviewing a Romanian witness on Alpha territory) should Romania request it in the future.

3.Execution: Republic Alpha confirms it will grant similar assistance. Romania proceeds to execute the request (the Romanian prosecutor interviews the witness), and the official report (proces-verbal) is transmitted to the state of Alpha.

This example demonstrates that the principle of courtesy is not a mere politeness, but a pragmatic mechanism that provides flexibility to the justice system. It ensures that critical criminal cases are not blocked solely by the formal lack of a legal instrument, but can be resolved based on trust and the promise of mutual aid.

1.5. Recognition of foreign judgments and mutual trust

Traditionally, international judicial cooperation in criminal matters has been based on the "principle of request", the essence of which is that any form of cooperation starts with a request from one state (the requesting state) to another state (the requested state), the latter having the possibility to decide whether or not to comply with the request (Barbe, 2007, p.7).

Subsequently, as a result of changes, the traditional principle of request was replaced by the principle of mutual recognition, which was to become the "cornerstone of international judicial cooperation in criminal matters" (Dediu, p. 633).

This principle entails, on the one hand, the recognition in one state of judgments and judicial acts adopted by the competent authorities of another State and, on the other hand, the enforcement of their provisions, subject to certain conditions, which generally concern the law of the state of enforcement.

Recognition of foreign judgments and mutual trust have over time become the most effective tools for preventing and combating cross-border crime. Moreover, against the background of the development of relations in this area, judicial cooperation is inconceivable without mutual trust in the legal systems of the participating states, in the cooperation mechanism and in the fundamental guarantees they offer in the criminal process.

There is a clear causal link between the recognition of judgments and mutual trust, so that in the judicial cooperation procedure mutual trust implicitly leads to the recognition of foreign judgments, thus contributing to the speed and efficiency of the criminal proceedings.

At EU level, the first concrete measure in the field of criminal law, with direct implications for international judicial cooperation in criminal matters, which implements this principle, is the Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States.

1.6. Non bis in idem

The principle mentioned by the provisions of Art 8 of the Law no 302/2004 stipulates that the international cooperation mechanism cannot be carried out if the person concerned has already been trialed in another state for the crime for which the request for cooperation is made.

In other words, international judicial cooperation is not admissible if a criminal trial for the same offense has been conducted in Romania or in any other state and if:

a) a final judgment has ordered acquittal or termination of the criminal proceedings;
b) the sentence imposed in a case by a final judgment has been served or has been the subject of a pardon or amnesty, either in its entirety or in respect of the part not served;
c) a final judgment has ordered a waiver or postponement of the enforcement of the sentence and the term provided for in Art 82 Para 3 of the Criminal Code and the 2-year term of supervision provided for in Art 84 of the Criminal Code have expired without revocation or annulment (Bucur, 2020, p. 94).

Criminal doctrine holds that the principle of non bis in idem means that no one can be trialed, convicted or sentenced twice for the same act (Crisu, 2020, p. 83).

Therefore, the possibility of refusal of international cooperation in criminal matters by Romanian judicial bodies is materialized by this rule in two situations:

- when a final judgment has ordered the acquittal or termination of criminal proceedings against the same persons for the same offense in criminal proceedings conducted in Romania or another state;
- where the sentence imposed by a final judgment has been served, or has been the subject of a pardon or amnesty, in full or in part.

By way of exception, even if one of the above-mentioned situations applies, judicial cooperation is admissible where assistance is sought for the purpose of reviewing the final judgment on one of the grounds justifying one of the extraordinary legal remedies available under

national law. According to the Romanian criminal doctrine, we consider the appeal for annulment, revision, appeal in cassation and reopening of the criminal trial in the absence of the convicted person (Udroiu, 2019, p. 584).

Also by way of exception, the *non bis in idem* principle does not operate when an international treaty to which Romania is a party contains more favorable provisions in terms of this rule.

Because of its importance and applicability, in particular with regard to respect for human rights, this principle is universally recognized, being mentioned in the normative acts of states with democratic regimes and expressly provided for in a number of documents relating to international judicial cooperation in criminal matters. These include the European Convention on Extradition, the Convention implementing the Schengen Agreement, the European Convention on the Transfer of Proceedings in Criminal Matters.

An excellent example demonstrating the application of the principle of non bis in idem in the context of international judicial cooperation is a scenario involving the refusal to prosecute or extradite a person because they have already been finally judged for the same facts by another state.

1.7. The principle of humanism

According to this principle, which is mentioned in most international legal instruments, as well as in Romania's domestic legislation, international judicial cooperation in criminal matters must be carried out with respect for fundamental human rights and freedoms, the principle of humanism being the foundation of all judicial activities that concern a series of measures ordered by competent bodies against a person.

It is inadmissible, in granting a request for extradition, to cause physical suffering or humiliation to the person of the offender or, worse still, to grant such a request in the clear situation of inhuman, degrading or lethal treatment in the requesting state (Cristiean, 2013, p. 169).

Under these circumstances, the Romanian State through the competent judicial bodies may refuse or postpone the execution of a request for international cooperation, when it finds a violation of this principle.

Specifically, according to the provisions of Article 21 Para 1, Romania will not grant extradition if there are serious grounds to believe that the person concerned has not been respected the right to an fair trial, within the meaning of the European Convention on Human Rights and Fundamental Freedoms or any relevant international instrument ratified by our country or when there are serious grounds to believe that extradition is requested for the purpose of pursuing or punishing a person on grounds of race, religion, nationality, sex, gender, language, political or ideological opinion or other discriminatory reason.

Article 22 Para 2 also mentions the possibility for the Romanian State to refuse or postpone the extradition of a person if the surrender of the person concerned is likely to have particularly serious consequences for him or her, in particular because of his or her age or state of health.

Here is an hypothetical example of the application of the principle of humanism:

The Scenario (The Request):

A Member State of the European Union (Issuing State) issues a European Arrest Warrant (EAW) requesting the surrender of a citizen currently located in Romania to serve a prison sentence.

The Analysis (The principle of humanism):

The Romanian judicial authorities (the Court of Appeal) conduct an analysis of the situation in the Issuing State, as required by the jurisprudence of the European Court of Human Rights (ECtHR) and national legislation (Law no. 302/2004).

The following is established:

1. There is clear and current evidence (e.g., ECtHR reports, reports by the European Committee for the Prevention of Torture – CPT, or previous court judgments) demonstrating that the penitentiary system in the Issuing State suffers from structural and systemic problems (for

example, chronic overcrowding, poor hygiene conditions, lack of minimum vital space per inmate).
2. These conditions are so severe that they would constitute a violation of Article 3 of the European Convention on Human Rights (the prohibition of torture and inhuman or degrading treatment).

The Decision (The Refusal)
1. Conditioning: The Court of Appeal does not automatically refuse the surrender, but instead requests individual and specific guarantees from the Issuing State that the person will be incarcerated under conditions that comply with ECtHR standards (e.g., guaranteeing a minimum space of 3-4 sqm per inmate).
2. Final Refusal: If the Issuing State cannot provide legally binding guarantees, or if the guarantees provided are deemed untrue or insufficient, the Court of Appeal refuses to execute the EAW.

This example demonstrates that the principle of humanism is not merely a statement of intent but a mandatory procedural legal norm. It guarantees that no form of judicial cooperation can take place if it would predictably lead to exposing an individual to inhuman or degrading treatment in the requesting country. Respect for the fundamental rights of the person (including the right to a fair trial or non-discrimination) is an inalienable foundation of all cooperation activities.

1.8. The principle of immunity from jurisdiction

This principle provides that persons enjoying immunity from jurisdiction may not be prosecuted or tried in the territory of the state in which they are accredited or in the territory of another state in which they are present in their capacity as official representatives of their states. Consequently, these categories of persons will not be subject to international judicial cooperation in criminal matters.

The rule is unanimously recognized by all states of the world and is regulated at international level in various documents such as the Convention on Diplomatic Relations, the Convention on Consular Relations. It is also mentioned, at national level, in the provisions of Art

122, suggestively entitled “Immunities and privileges”, as well as in Art 19 Para 1 letter c) of the Law no 302/2004.

The laws cover the hypothesis in which the person to whom the European arrest warrant refers enjoys immunity in Romania, in which case the executing judicial authority will immediately request the competent authority to waive this privilege, as well as the situation of foreign persons who enjoy immunity from jurisdiction in our country, under the conditions and within the limits set by conventions or other international agreements, and are exempt from extradition.

Here are some short examples of applying the principle of immunity from jurisdiction:

1.Diplomatic immunity:

-Situation: A foreign state requests that Romania extradite a diplomat accredited to its embassy in Bucharest, who is accused of tax fraud committed in the requesting state prior to his appointment.

-Application of Immunity: Romania refuses the extradition request because the diplomat benefits from absolute criminal immunity during his mandate, according to the Vienna Convention on Diplomatic Relations. The only action possible is to declare the person as *persona non grata* and expel them from the country.

2. Head of State immunity

-Situation: Romania receives a European Arrest Warrant (EAW) or an extradition request for a serving president or head of government of a foreign state, accused of a war crime committed in the past.

-Application of Immunity: Romania refuses to execute the request. Heads of State (and other high-ranking officials, such as foreign ministers) benefit from absolute immunity from criminal jurisdiction while in office. This immunity is recognized by customary international law.

3. Consular immunity (limited)

-Situation: A state requests that Romania compel the testimony of a Romanian consular officer in connection with a criminal offense.

-Application of immunity: The consular officer benefits from immunity only for acts performed in the exercise of official functions. If

the offense is outside their official duties (e.g., driving under the influence of alcohol), immunity does not apply, but Romanian authorities must still follow the specific procedure provided by the Vienna Convention on Consular Relations.

Conclusion: In all these cases, the obligation to cooperate ceases when confronted with Romania's obligation to respect the norms of public international law that grant immunity to certain individuals, regardless of the gravity of the offense.

1.9. The principle of legality

In the literature the laws were defined as "the conditions under which people – independent and isolated, tired of living in a constant state of war and enjoying a freedom rendered useless by the uncertainty of its preservation – united in society" (Beccaria, 1965, p. 12).

With regard to the importance and necessity of the application of the laws, it is held in the doctrine that "no magistrate (who is part of the society) may not apply, by right, punishments outside the law, against another member of the same society, and a punishment that exceeds the limit set by the laws means a just punishment plus another punishment; therefore a magistrate may not increase the punishment set by law for a citizen who has committed a crime, under the pretext of zeal in the performance of his duty or under that of the public good".

By analogy, the principle of legality lays down the rule that all proceedings carried out in the field of international judicial cooperation in criminal matters must be conducted in accordance with the provisions of the applicable international legal instruments and the domestic law of each state.

Ensuring respect for the principle of legality in all forms of international judicial cooperation in criminal matters entails, inter alia, ensuring the right of defense, where the situation so requires (David, 2014, p. 128).

An excellent example demonstrating the application of the principle of legality in international cooperation relates to the dual criminality requirement—the fundamental idea that cooperation can only

be granted for an act that constitutes a crime in both the Requesting State and the Requested State.

This principle is directly rooted in the core concept of *nullum crimen, nulla poena sine lege* (no crime, no punishment without law).

1.10. Aut dedere, aut judicare

This Latin adage – translated *either you surrender or you judge* – expresses the rule that refusal of international judicial cooperation in criminal matters imposes an obligation on the requested state to submit the case to the competent judicial authorities for prosecution and trial, at the request of the requesting state (Neagu, 2012, 12).

The principle of aut dedere, aut judicare (either extradite, or prosecute) is a cornerstone of international criminal law and cooperation. It means that a state must either surrender an alleged offender to a state that is willing and able to prosecute them, or, if the state refuses to surrender the offender (often due to legal or constitutional bars, such as the offender being a national), then the state must submit the case to its own competent authorities for the purpose of prosecution.

This principle ensures that there are no safe havens for perpetrators of serious international crimes (like terrorism, genocide, or serious offenses defined in multilateral treaties).

1.11. Calculation of the duration of custodial sentences and pre-trial detention measures

According to Art 15 Para 1 of Law no 302/2004, in the fulfillment of a request for cooperation made by the Romanian authorities, the duration of the sentences and custodial measures shall be taken into account and shall be computed from the duration of the sentence imposed by the Romanian courts.

For example, when the Romanian authorities issue a European Arrest Warrant with a view to surrender a person to be prosecuted or serve a sentence in Romania, the time the person concerned has been in custody in the executing State will be deducted from the length of the sentence that the Romanian court will impose, in case of conviction.

Here is an hypothetical example:

Scenario:

A Romanian citizen, Mr. A, commits a crime in Romania. The Romanian Prosecutor's Office issues a European Arrest Warrant (EAW) for Mr. A's surrender. Mr. A is later apprehended in Germany (Executing State).

The Sequence of Events

1.Arrest in Germany (Executing State): On January 1, 2025, german police arrest Mr. A based on the EAW issued by Romania.

2.Pre-trial detention: Mr. A is held in pre-trial detention in a german facility pending the decision on his surrender. This detention lasts exactly 90 days (until March 31, 2025).

3.Surrender: On April 1, 2025, Mr. A is surrendered to the romanian authorities.

4.Final conviction in Romania (Issuing State): The Romanian court eventually convicts Mr. A and imposes a final sentence of 3 years (1095 days) of imprisonment.

Application of the principle (Art. 15 Para 1, Law 302/2004)

-The Romanian court, in its final judgment, must apply Article 15 Para 1 of Law 302/2004, which mandates the deduction of time spent in custody abroad.

-Total sentence imposed: 1095 days

-Time deducted (custody in Germany): 90 days

-Net sentence remaining to serve: 1095-90 = 1005 days

The principle ensures that the 90 days Mr. A spent in the german prison waiting for the EAW to be executed are fully credited against his final sentence. This avoids double punishment for the pre-trial period and upholds the fairness and proportionality of the sentence. The Romanian court explicitly states in the judgment that the sentence shall be calculated starting from the date of the german arrest, acknowledging the cooperation period.

1.12. The principle of specialty

In the application of this principle, the person targeted by an international cooperation mechanism may not be prosecuted, trialed or deprived of liberty for another act committed prior to surrender. The rule is mainly relevant to extradition and the European Arrest Warrant, but also applies in other areas.

For example, requests for legal assistance to obtain evidence, which can be used only in the case giving rise to the request.

There are also exceptions to this principle, by virtue of which the person concerned may also be prosecuted, tried or punished in Romania for other acts committed prior to surrender. Thus, the following situations constitute exceptions to the principle of specialty:

- the executing state consents to it;
- the person concerned has expressly waived the specialty rule before the executing judicial authorities;
- the requested person has not left the territory of the Member State to which he or she has been surrendered within 45 days of his or her final discharge, although he or she had the opportunity to do so;
- if a custodial sentence is not imposed at the time of the judgment, or the offense is not punishable by a custodial sentence[1].

Conclusions

Scientific and technical progress and the expansion of the democratization process at international level have provided the opportunity for the easy movement of people and goods, leading to the development of human society as a whole. The undeniably beneficial effect for humanity as a whole has, however, also created the possibility of the diversification and development of crime of all kinds.

[1] Art 17 Para 4 of the Law no 302/2004 on international judicial cooperation in criminal matters

The growing danger posed by the proliferation of transnational crime, the need to prevent and combat crime more effectively, have required legislative developments.

International judicial cooperation in criminal matters should be seen as a set of rules under which the states of the world provide mutual support to each other with the aim of curbing cross-border crime.

In view of its importance, all international judicial cooperation in criminal matters is carried out in accordance with certain general principles, which have been briefly set out and analyzed above.

References

Beccaria, C. (1965). *Dei delitti e delle pene* [Despre infracțiuni și pedepse]. Scientific.

Boroi, A. (2014). *Drept penal, partea generală*. C.H. Beck.

Bucur, C. (2009). *Drept Penal Partea Generală*, 1st Vol., 6th Edition. Sitech.

Cristiean, V. (2013). *Principiul umanismului – principiu general al cooperării judiciare internaționale în materie penală* in *Exercitarea dreptului la nediscriminare și egalitate de șanse în societatea contemporană*. Pro Universitaria.

David, B. (2014). Natura juridică a dreptului la apărare în procesul penal in *Univers Strategic, 2*.

Neagu, N. (2012). *Cooperarea judiciară internațională în materie penală*. Universul Juridic.

Neagu, N., Dediu, D. (2021). *Cooperarea judiciară internațională în materie penală*. Universul Juridic.

Rusu, M.I. (2015). *Asistența judiciară în materie penală la nivel european*. Universul Juridic.

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 628-639

THE IMPACT OF THE ECHR JURISPRUDENCE ON THE ROMANIAN CRIMINAL PROCESS

Andreea CORSEI
ORCID ID: https://orcid.org/0000-0001-5688-3701
E-mail: office.corsei@yahoo.co.uk
Afiliation: University assistant at "Petre Andrei" University in Iasi, Vice-Dean of the "College of Legal Advisers Suceava" Association, general secretary of the "Order of Legal Advisers from Romania" Federation

Abstract: *The jurisprudence of the European Court of Human Rights (ECHR) has had a significant impact on the Romanian criminal process, bringing it into line with European standards in the protection of fundamental rights. The decisions of the ECHR have influenced multiple aspects of the judicial system, generating major legislative and procedural changes. This influence has led to the adoption of important reforms, such as the 2014 Code of Criminal Procedure, the empowerment of judicial authorities and the development of a domestic jurisprudence more aligned with the principles of the ECHR. Although progress is visible, the continued implementation of these standards remains a priority for strengthening the rule of law and protecting fundamental rights in Romania (Coman, 2017, p. 10).*

Keywords: *due process; case law; decisions.*

Introduction

The jurisprudence of the European Court of Human Rights (ECHR) has had a profound and transformative impact on criminal proceedings in Romania, significantly contributing to the alignment of this European standard in the protection of fundamental rights. As Romania became a party to the European Convention on Human Rights in 1994, the

domestic legal system has undergone a constant process of adaptation in order to comply with the requirements imposed by the ECHR. This influence has manifested itself both at the legislative level and in judicial practice, generating substantial changes in the way criminal proceedings are conceived and conducted.

One element of this impact is the Romanian orientation of the criminal procedure sector to guarantee fundamental rights, such as the right to a fair trial, protection against inhuman or degrading treatment, respect for liberty and security of persons, as well as the protection of private life. The ECHR decisions have identified numerous gaps and deficiencies in the Romanian judicial system, leading the authorities to implement significant reforms, including amendments to the Criminal Code and the Code of Criminal Procedure.

This paper analyses the impact of the ECHR jurisprudence on the Romanian criminal process, highlighting the main areas of influence and the changes generated by the Court's decisions. At the same time, it underlines the importance of integrating the principles of the ECHR into the national judicial system, as an essential part of consolidating democracy and the rule of law in Romania.

1. The notion of fair trial in the ECHR jurisprudence: implications for Romanian legislation

The notion of a fair trial is regulated in Article 6 of the European Convention on Human Rights (ECHR) and represents one of the most important rights guaranteed by the Convention. Through its judgments, the European Court of Human Rights has developed a complex corpus of principles and standards applicable to all signatory states, including Romania. This detailed analysis will explore the notion of a fair trial in the case law of the ECHR, highlighting the implications for Romanian legislation and judicial practice.

1. The components of fair trial in the case law of the ECHR

The changes produced domestically, following the entry into force of the new Codes, were based on the principle of the primacy of EU law in relation to domestic law, starting from the premise that the national legal order is subsumed by the European one, with which it must be harmonized in an efficient and constructive manner, in achieving the perpetual desideratum of protecting the supremacy of human rights, by adopting normative acts having supranational legal force, with unitary and coherent application in each Union state (Corsei & Stefănoaia, 2022, p. 98).

The case law of the ECHR defines a fair trial as one that respects a set of procedural guarantees, essential for ensuring individual rights and a correct administration of justice. Among these are:

a) Access to justice

The ECHR emphasizes that the right of access to justice is a fundamental element of a fair trial. In Romania, this principle has required adjustments in terms of eliminating financial or procedural barriers that could hinder citizens' effective access to the courts.

b) Independence and impartiality of the court

According to the case law of the ECHR, a fair trial implies the resolution of cases by an independent and impartial court. In Romania, the Court's decisions have led to the strengthening of guarantees of the independence of magistrates, including through legislative reforms in the field of judicial organization.

c) Adversarial and equality of arms

The ECHR has ruled that the parties must have the opportunity to present their case on an equal footing and to effectively participate in the trial. This principle has directly influenced Romanian legislation, leading to the introduction of rules to ensure correct information of the parties and equal access to evidence.

d) Reasoning of judicial decisions

A fair trial requires that court decisions be sufficiently motivated to allow the parties to understand the grounds for the solution. The case law of the ECHR has led to stricter requirements regarding the quality of reasoning in court decisions in Romania.

e) Right to defence

The ECHR has stressed the importance of ensuring an effective right to defence, including access to a lawyer, in particular for vulnerable defendants. Romania had to introduce clearer mechanisms to guarantee this right at all stages of the criminal process.

2. The impact of ECtHR case law on Romanian legislative reform

ECtHR case law has had a direct impact on Romanian legislation and judicial practice, forcing the state to adopt measures to remedy the deficiencies identified. Relevant examples include:

a) Amendment of the Code of Criminal Procedure (2014)

The adoption of a new Code of Criminal Procedure represented a crucial step in aligning the Romanian criminal process with ECHR standards. Among the significant changes inspired by ECtHR case law are:

Introduction of clear regulations on the right to a lawyer from the first moments of detention.

Additional guarantees to protect the right to silence and non-self-incrimination.

Stricter regulation of preventive measures to prevent arbitrary detention.

b) Reforms regarding the length of proceedings

The ECtHR has sanctioned Romania in numerous cases for the excessive length of criminal trials, which has led to the adoption of measures to speed up proceedings and sanction unjustified delays.

c) Regulation of the use of evidence

The ECHR has criticized the use of evidence obtained illegally or by methods that violate fundamental rights. As a result, Romanian legislation has included stricter rules on the exclusion of illegal evidence, in line with the principles of the ECHR.

The notion of a fair trial, as developed in the case law of the ECHR, has had a profound impact on Romanian legislation and judicial practice. Although notable progress has been made, the effective and consistent implementation of these standards remains a challenge. Reforms initiated under the influence of the ECHR have contributed to strengthening the rule of law in Romania, but their effectiveness depends to a large extent on the will of the authorities and the commitment of judicial institutions to fully respect the fundamental rights of citizens.

3. Respect for the right to a defence according to the ECHR judgments

The right to a defence is one of the fundamental pillars of a fair trial, enshrined in Article 6 of the European Convention on Human Rights (ECHR). The European Court of Human Rights has developed an extensive case law on this right, highlighting both theoretical aspects and practical application. Through its judgments, the ECHR has imposed strict standards on member states, including Romania, to effectively guarantee the right to a defence.

This detailed analysis explores the main requirements of the ECHR regarding respect for this right, their impact on Romanian legislation and the challenges encountered in their implementation.

The right to a defence in the ECHR jurisprudence

The right to a defence is defined by the ECHR as a set of guarantees that allow the accused person to defend his or her case effectively and to benefit from protection against abuses. The ECtHR case law has highlighted the following key issues:

a) Right to be informed promptly of the charges

The ECtHR emphasises that anyone accused of having committed a criminal offence must be informed, in clear and accessible language, of the nature and grounds of the charges (e.g. Pélissier and Sassi v. France).

• Impact on Romanian legislation: The Romanian Code of Criminal Procedure has been adjusted to ensure prompt and detailed communication of the charges from the stage of criminal investigation.

b) Access to a lawyer

The ECtHR considers access to a lawyer to be an essential component of the right to defence, in particular at critical stages of the proceedings, such as interrogations or detention.

• Relevant cases: In the case of Salduz v. Turkey, the Court established that any defendant has the right to legal assistance from the very first moments of detention. The lack of a lawyer may lead to a violation of the right to a fair trial.

• Application in Romania: ECHR decisions have led to the inclusion of the obligation to automatically appoint a lawyer for detained or arrested defendants.

c) Real possibility to prepare the defense

The ECHR has ruled that the defendant must have sufficient time and means to prepare his defense, including access to the file and evidence (e.g. Gregacevic v. Croatia).

• Reforms in Romania: The Criminal Procedure Code imposes the obligation to make available all relevant evidence, including that which could support the defense.

d) Right to choose a lawyer

The ECHR emphasizes that the defendant must be free to choose his lawyer. If he cannot afford a lawyer, the state must provide one ex officio, provided that the assistance provided is effective (e.g. Artico v. Italy).

• Implications for Romania: The Romanian state is obliged to provide free legal aid in cases provided for by law, but must also guarantee its quality.

e) Right to silence and non-self-incrimination

The ECHR has recognized this right as an integral part of the right to defence. In the case of Funke v. France, the Court showed that any pressure on the defendant to incriminate himself constitutes a violation of the Convention.

• Impact on Romania: The Code of Criminal Procedure provides for the defendant's right to remain silent and not to contribute to his own incrimination.

Respect for the right to defence, as enshrined in the ECHR jurisprudence, has led to significant changes in Romanian legislation, contributing to the consolidation of fundamental rights in criminal proceedings. However, the practical application of these standards remains a challenge, requiring constant attention from the judicial authorities. Effectively guaranteeing the right to defence does not only mean the existence of legal regulations, but also their implementation in the spirit and letter of the Convention.

4. Interceptions and audio/video recordings: applicable ECHR standards

Interceptions and audio/video recordings are essential tools for investigating and combating crime, but their use must respect the fundamental rights of the individual, in particular the right to privacy enshrined in Article 8 of the European Convention on Human Rights (ECHR). The European Court of Human Rights (ECHR) has developed strict standards to ensure that technical surveillance measures comply with the principles of proportionality, legality and necessity in a democratic society.

This detailed analysis explores the standards established by the ECHR in the field of interceptions and audio/video recordings, their implications for Romanian law and the practical challenges in their application.

1. Interceptions and recordings in the case law of the ECHR

The case law of the ECHR provides a detailed framework on the use of interceptions and audio/video recordings. In examining the compatibility with Article 8, the Court checks whether the interference with private life complies with the following principles:

a) Lawfulness of the interference

Any interception or recording measure must be provided for by law, and the law must be clear, accessible and foreseeable.

• Malone v. the United Kingdom (1984): The Court found that telephone interceptions were carried out without a clear legislative framework, in breach of Article 8.

• Application in Romania: Romanian law, through the Code of Criminal Procedure, provides for strict conditions for authorising interceptions, including the requirement of a reasoned judicial decision.

b) Necessity in a democratic society

Interceptions must be justified by an important public interest, such as the protection of national security, the prevention of serious crime or the protection of the rights of others. The measure must also be proportionate to the aim pursued.

• Klass and Others v. Germany (1978): The ECtHR stressed that surveillance must be justified only in situations where it is absolutely necessary to protect a public interest.

• Impact in Romania: Prosecutors must demonstrate the necessity of technical surveillance, and judges must assess the proportionality of the measure.

c) Judicial review

Any surveillance measure must be subject to effective and independent review. The lack of such review constitutes a violation of Article 8.

• Roman Zakharov v. Russia (2015): The ECtHR condemned Russia for its lack of effective mechanisms for monitoring interceptions.

• Application in Romania: Only courts can authorise surveillance measures, and these must be reasoned in detail to prevent abuse.

d) Duration of the measure

Interceptions and recordings must be limited in time and extensions must be justified. Indefinite or excessively long surveillance is considered abusive.

• Weber and Saravia v. Germany (2006): The ECtHR stressed the importance of strictly limiting the duration of surveillance measures.

• Impact in Romania: The legislation provides for a limited initial duration of surveillance, which can only be extended under strict and justified conditions.

e) Confidentiality of information obtained

Data collected through interceptions must be kept confidential and used exclusively for the purpose for which they were obtained. Any unauthorised disclosure constitutes a violation of fundamental rights.

• Dragojević v. Croatia (2015): The Court found that the failure to protect information obtained through interceptions constituted a violation of Article 8 (Council of Europe and European Union Agency for Fundamental Rights, 2016, p. 55).

• Application in Romania: The data obtained are strictly regulated, and their disclosure is subject to criminal penalties.

2. Impact of ECHR standards on Romanian legislation

The ECHR rulings have led to a series of important adjustments in Romanian legislation and judicial practice, in order to ensure compliance with European standards:

a) Code of Criminal Procedure (2014)

The new legislation introduced detailed regulations on interceptions and recordings, including:

• The need for an authorization issued by a judge.

• Limiting the duration of surveillance measures to 30 days, with the possibility of extension only under strict conditions.

• Destruction of information that is not relevant from an evidentiary point of view.

b) Decision of the Constitutional Court of Romania no. 51/2016

This decision of the Constitutional Court of Romania declared the use of the Romanian Intelligence Service (SRI) to execute interception warrants unconstitutional, strengthening judicial control over these measures.

c) Protection of data obtained

Romania has implemented strict regulations for the protection of data obtained through interceptions, including the obligation to destroy recordings that are not used as evidence in the trial.

Interceptions and audio/video recordings are important measures in the fight against crime, but their use must comply with ECHR standards on the right to privacy. ECHR case law has established clear requirements regarding the legality, necessity, proportionality and judicial review of such measures. Romania has implemented numerous legislative and institutional reforms to align with these standards, but practical challenges, such as effective monitoring and strict compliance with ECHR principles, remain a priority for ensuring the protection of fundamental rights.

Conclusions

The impact of the jurisprudence of the European Court of Human Rights (ECHR) on the Romanian criminal process has been profound, leading to a significant transformation of the legal system towards

compliance with European standards on fundamental rights. Through its judgments, the ECHR has identified numerous deficiencies and non-compliant practices in Romanian criminal proceedings, thus imposing legislative, institutional and procedural reforms.

One of the most important contributions of the ECHR jurisprudence is the strengthening of procedural rights, including the right to a fair trial, protection against arbitrary detention, effective investigation of inhuman or degrading treatment and guaranteeing respect for private life. In addition, the ECHR judgments have led to the adoption of concrete measures to combat prison overcrowding and to improve detention conditions, thus contributing to respect for human dignity.

The transformations generated by these decisions have not only been legislative, but also cultural in nature, stimulating a paradigm shift within the Romanian judicial system. Magistrates, lawyers and other judicial authorities have had to adjust their practices and apply ECHR standards in their daily work, contributing to the creation of a fairer and more transparent legal framework. In conclusion, the case law of the ECHR has played an essential role in the modernization of the Romanian criminal process, strengthening the protection of fundamental rights and contributing to Romania's alignment with European values regarding the rule of law. Although significant progress has been made, continuing efforts to implement ECHR standards remains a priority, thus ensuring a balance between the efficiency of the act of justice and respect for the fundamental rights of persons involved in the criminal process.

References

Berna, M.-B. (2019). *Theoretical benchmarks and jurisprudential analysis*. Romanian Institute for Human Rights.

Council of Europe and the European Union Agency for Fundamental Rights. (2016). Handbook of European law on access to justice.

Corsei, A. & Stefănoaia, M.-A. Yearbook of the "Petre Andrei" University of Iaşi Fascicula: Law, Economic Sciences, Political Sciences. 30. | doi: https://doi.org/10.18662/upalaw/92

Coman, R. M. (2017). *Effects of the Strasbourg Court's case law on Romanian criminal proceedings*. Universul Juridic.

European Institute of Romania. (2012). *Collection of ECHR case law* (recent cases against Romania) - vol. III.

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 640-651

LIABILITY OF MANAGEMENT, AUDITORS, AND OVERSIGHT PERSONNEL IN CREDIT INSTITUTIONS FACING INSOLVENCY

Florin-Georgian CREȚU
Orcid ID: 0009-0003-9999-2774
E-mail: florin.cretu@just.ro
Afiliation: Titu Maiorescu University, Bucharest

Abstract: *This article aims to analyze the liability of individuals holding management, control, or executive positions within credit institutions that have become insolvent, starting with the definition and characterization of these entities. It examines essential aspects regarding the active and passive procedural standing in liability actions, as well as the legal nature of the obligations incumbent upon these categories of persons. The study addresses the general conditions for the engagement of liability, the possibilities for exemption, and the necessary distinctions between applicable forms of liability. The approach highlights the complexity of the legal framework governing bank insolvency and proposes a balanced interpretation of the regulatory framework, aiming to ensure adequate protection for both creditors and the persons concerned.*

Keywords: *credit institution; legal liability; bank insolvency; executive management; exemption from liability.*

Introduction

As expected, due to the complexity and the multifaceted nature of the subject matter, insolvency proceedings generate *ex proceso* effects. This notion refers, in relation to the subject of the proceedings, to the possibility of vesting the insolvency judge with various incidental claims, which are not identical *mutatis mutandis* to those arising under general law but bear an indirect connection to the initial vesting. Among these

claims is the request to hold liable, under civil law, the persons responsible for the debtor's insolvency. Considering the multiple particularities governing the regime of credit institutions, the Romanian legislator has rightly opted to assign a special regime in this matter.

The Notion of Credit Institution

The core of the matter is represented by Article 3(1)(10) of Emergency Government Ordinance No. 99/2006 (Regarding credit institutions and capital adequacy (Official Gazette no. 1027 of December 27, 2006). The aforementioned normative act defines a credit institution as *"an entity whose activity consists of attracting deposits or other repayable funds from the public and granting credits on its own account."* This definition has been criticized (Postolache, 2012, p. 44), particularly with regard to the inappropriate use of the term *"entity"*, which could lead to confusion by suggesting that a natural person might qualify as a credit institution-an incompatible scenario considering the overall regulatory framework. Additionally, the definition has been criticized (Postolache, 2012, 44) for failing to specify the frequency with which the activities encompassed by the credit institutions' object should be conducted.

Overview of Liability. Active Procedural Standing

Traditionally (Cărpenaru, 2016, p. 813), it is noted that Law No. 85/2014 (Regarding the Procedures for the Prevention of Insolvency and Insolvency, Official Gazette no. 466 of June 25, 2014) does not regulate a punitive procedure; rather, this procedure aims either at safeguarding the debtor while simultaneously protecting the creditors, or exclusively at protecting the latter. However, as previously stated, the liability action constitutes a genuine incidental claim, founded on the rationale that certain persons "benefit" (Bufan, 2014, p. 807) from the possibility of being held liable for the debtor's insolvency, based on their status, level of experience, knowledge, and so forth.

It should be emphasized that the legal basis for the liability action is found in Articles 169-173 of Law No. 85/2014, Section 8, and more specifically, in the context of credit institutions, Articles 235-236 of the same normative act.

According to Article 169 of Law No. 85/2014, at the request of the judicial administrator or the judicial liquidator, the insolvency judge may order that part or all of the debtor's liabilities, where the debtor is a legal entity declared insolvent, be borne by members of the debtor's management and/or supervisory bodies, as well as any other persons who have contributed to the debtor's insolvency by committing one or more acts expressly provided by law, without exceeding the damage causally linked to such acts.

Thus, the jurisdiction to resolve the liability action lies with the insolvency judge, and the active procedural standing is expressly conferred by law upon the judicial administrator or judicial liquidator. It is important to highlight that this action is exercised within the insolvency procedure itself, constituting an incidental claim and not one filed after the procedure's closure (Cărpenaru, 2016, p. 814; in this regard, see Decision no. 126/2003 of the Bucharest Court of Appeal, 6th Commercial Division, cited in Neagu, 2011, p. 53, footnote 1).

The claim may also be filed by the chairman of the creditors' committee, based on the decision of the creditors' meeting, but subsidiarily, in cases where the judicial administrator or liquidator has not identified the culpable persons or has decided not to initiate the liability action (Neagu, 2011, p. 815). In accordance with Article 169(2) of Law No. 85/2014, the claim may also be submitted by a creditor holding more than 30% (Until the entry into force of Emergency Ordinance no. 88 of March 27, 2018, Official Gazette no. 840 of October 2, 2018), the threshold was 50%) of the total claims registered in the creditors' estate.

Regarding this latter aspect, earlier specialized literature questioned whether (Avram, 2007, pp. 8-9), pursuant to the provisions of Law No. 64/1995 (Regarding the procedure of judicial reorganization and bankruptcy, republished Official Gazette no. 130 of June 29, 1995,

republished under no. 1066 of November 17, 2004), the insolvency judge could act ex officio on a liability claim. It was considered that such an interpretation would be excluded, primarily due to the availability principle governing civil procedure.

During the period when Law No. 64/1995 was in force, the active procedural standing of the judicial administrator or liquidator was not recognized, on the grounds of their lack of interest, since they were *"not the injured parties, nor is there an express provision in this regard."* (Avram, 2007, p.9).

Attention must also be drawn to Article 235(2) of Law No. 85/2014, which contains derogatory provisions regarding active procedural standing: *"For the purpose of taking measures provided in Article 235, the insolvency judge may be notified by the judicial liquidator, a shareholder, any creditor, or the National Bank of Romania, based on data in the case file, and may order precautionary measures."*

Without delving too deeply into the discussion, during the period when Law No. 85/2006 was in force, doctrinal debate (Al Hajjar, 2012, pp. 204-205) arose regarding the impartiality of the insolvency judge in exercising the function stipulated in Article 11(1)(g), final phrase, concerning the notification of the criminal investigation authority when indications of offenses incriminated under Articles 143-145 of the normative act are found. Thus, the impartiality of the judge was called into question (Simona Al Hajjar, 2012, p. 205) when adjudicating the patrimonial action based on the illicit act identified with the criminal offense under investigation.

Passive Procedural Standing

Pursuant to the provisions of Article 36 of the Civil Procedure Code (Law no. 134/2010 on the Civil Procedure Code, republished, Official Gazette no. 247 of April 10, 2015), the passive procedural standing belongs to the person who committed the alleged unlawful act. In this context, reference is made to the members of the management

and/or supervisory bodies within the debtor legal entity, as well as any other persons who contributed to the debtor's insolvency through acts expressly regulated by law.

As is generally known, the administration of companies is not uniformly regulated across all forms of commercial companies (Al Hajjar, 2012, p. 221). Therefore, to determine the responsible persons, one must refer to the provisions of Law No. 31/1990 (hereinafter referred to as the Companies Law). In this regard, partnerships (general partnerships and limited partnerships) as well as limited liability companies may appoint multiple administrators through their associates (Cărpenaru, 2016, p.229). In the case of joint-stock companies, their administration and management present specific features. Thus, according to Article 137 of the Companies Law, a joint-stock company is administered by one or more administrators. When there are multiple administrators, they constitute a board of administrators, and according to Article 143 of the same normative act, the board of administrators may delegate the management of the company to one or more directors, appointing one of them as general director. This latter scenario concerns the unitary management system of joint-stock companies (Cărpenaru, 2016, p.341). Regarding the dualistic management system of joint-stock companies (Cărpenaru, 2016, p.349), the relevant concepts are the management board and the supervisory board, with the board of administrators being absent.

Moreover, in the matter of liability for the insolvency of credit institutions, it should be noted that the scope of persons liable, as provided by Article 235 of the Companies Law, is broader (Cărpenaru, 2016, p.834) than under "general law." Specifically, this scope includes: *"members of management bodies or directors/coordinators with internal control responsibilities of directorates, departments, or other similar structures; operational staff with internal control duties; auditors within the credit institution that has become insolvent."* Also relevant is the imperative condition laid down in Article 235, namely that these persons must have held such positions within the three years prior to the opening of insolvency proceedings.

Regarding passive procedural standing (*"In the case at hand, it can be found that the defendants J.D., J.J.Ş., and J.J.E. can be held liable in the legal relationship under trial, and that the creditors' interest can be achieved against them. Thus, according to articles 774 and 777 of the Civil Code, the heirs of the deceased contribute to the payment of the debts and burdens of the inheritance, in proportion to their share of the inheritance; by debts and burdens of the inheritance are understood the obligations of the deceased regardless of their origin..."*; Cluj Court of Appeal, Commercial, Administrative and Fiscal Litigation Section, Civil Decision no. 375/15.02.2010 apud Neagu, 2011, pp. 81-92), specialized literature unanimously accepts the possibility of civil liability also being engaged for the patrimonial responsibility of "de facto managers" (Luiza Neagu, 2011, p. 815, footnote 2, and the cited specialized literature). However, I consider it necessary to clarify certain aspects regarding this notion: first, by "de facto manager," we understand, preliminarily, persons exercising decision-making prerogatives in the company without having been formally appointed-even illegally-to any position specified by law (Even if the described situation acquires criminal connotations, it is necessary to take into account the provisions of Article 169, paragraph (8), which expressly provide for the possibility of cumulating criminal liability with civil liability). Secondly, this includes administrators who have been unlawfully invested with their position (Al Hajjar, 2012, pp. 225 et seq, with the specification that the author distinguishes between de facto administrators and apparent administrators).

Legal Nature of Liability

The legal nature of liability has raised numerous issues in the specialized literature (Avram, 2007, pp.30-31), which remain relevant to this day. In this regard, two main opinions have been highlighted: the first classifies the liability as tortious, while the second (Cărpenaru, 2016, p.814.) qualifies the liability, depending on its source, as either contractual or tortious. Without delving too deeply into details, we align with the opinion that this constitutes genuine tort liability (Avram, 2007,

p.31), since *"the capacity that the persons held in relation to the debtor, with respect to whom liability is invoked, is considered in the text of Article 138 solely for the purpose of delimiting the scope of persons to whom the regulated liability applies, and not as an element of the composition of such liability."*

Exoneration from Liability

In addition to the traditional grounds for exoneration from liability (Pop, Popa, & Vidu, 2012, pp. 428 et seq), Law No. 85/2014 introduces two special causes for exoneration. Thus, according to Article 169(5), liability shall not be incurred if, within the collegial governing bodies of the legal entity, the persons concerned opposed the acts or deeds that contributed to the state of insolvency or were absent from the decisions that contributed to the insolvency and subsequently recorded their opposition to those decisions. Therefore, this provision essentially materializes the absence of imputability, as there is no causal link between the unlawful act and the prejudice.

Similarly, according to paragraph (6), liability shall not be incurred if, during the month preceding the cessation of payments, payments were made in good faith in execution of an agreement with creditors, concluded following extrajudicial negotiations for the restructuring of the debtor's debts, provided that the agreement was likely to lead to the debtor's financial recovery and was not intended to harm and/or discriminate against the creditors. A particularly interesting aspect of this exoneration ground is the requirement that the agreement be capable of leading to the debtor's financial recovery; thus, it involves at least a prospective assessment by the insolvency judge regarding the imminent effects of the contract.

Conditions of Liability

Given the tortious nature of the liability, the conditions are those provided by Article 1357 of the Civil Code (Law no. 287/2009 regarding

the Civil Code, republished, Official Gazette no. 409 of June 11, 2011), namely the unlawful act, damage, causal link, and fault. Regarding the unlawful act, it should be noted that it is specifically circumscribed by the legal text, which enumerates eight general acts[1], to which three additional acts specific to credit institutions are added.

The first special unlawful act concerns the *"granting of loans in violation of prudential requirements approved by the applicable regulations, as well as non-compliance with the internal rules in force."* This category of civil wrongdoing addresses the specific principles applicable to credit institutions, from which negative result obligations derive in the field of credit granting. As noted, violation of the obligations imposed by the internal regulations as well as by Government Emergency Ordinance No. 99/2006 generates an "additional exposure of the institution to the intrinsic risk of any lending activity." (Bufan, 2014**,** p.879).

---

[1] These acts are:
a) They used the goods or credits of the legal entity for their own benefit or for the benefit of another person;
b) They carried out production, trade, or service activities in their personal interest, under the cover of the legal entity;
c) They, in their personal interest, ordered the continuation of an activity which obviously led the legal entity to insolvency;
d) They kept fictitious accounting records, caused some accounting documents to disappear, or did not keep accounting in accordance with the law. In the case of failure to hand over accounting documents to the judicial administrator or judicial liquidator, both fault and the causal link between the act and the prejudice are presumed. This presumption is relative;
e) They embezzled or concealed part of the legal entity's assets or fictitiously increased its liabilities;
f) They used ruinous means to procure funds for the legal entity, with the purpose of delaying insolvency;
g) In the month prior to insolvency, they paid or ordered preferential payment to one creditor to the detriment of the other creditors;
h) Any other intentional act that contributed to the debtor's state of insolvency, established according to the rules of the insolvency procedure.

The second unlawful act pertains to the "incorrect reflection" (Bufan, 2014, p.879) of the financial situation, other accounting situations, or reports in violation of legal provisions. It is worth noting that Article 152 of Government Emergency Ordinance No. 99/2006 imposes strict positive obligations on credit institutions regarding financial statements *("...with respect to the defendant's obligation to keep the registers required by law, the condition imposed by the legislator is that the failure to fulfill this obligation, namely not keeping accounting records in accordance with the law, must have contributed to the company's insolvency. Therefore, the mere fact that the defendant did not keep the accounting according to Romanian law is not sufficient to engage their liability in the absence of proof of a causal link..."* Bucharest Court of Appeal, 6th Commercial Section, Commercial Decision no. 249/R/12.02.2010 apud L. Neagu, 2011, pp. 103-106). These are subject to annual audit and publication (Neagu, 2011, pp. 103-106).

The last special manifestation of civil wrongdoing concerns a passive attitude (Neagu, 2011, pp. 103-106), consisting in the failure, within internal verification actions, to identify and report, by neglecting service duties, the acts that led to fraud and mismanagement of assets.

Regarding the other conditions for triggering tort liability, no further clarifications are deemed necessary, as they follow the common legal regime provided by the Civil Code. One clarification must be made with reference to Article 169 of Law No. 85/2014, indicating that the insolvency judge may order that part or all of the debtor's liabilities be borne as damages, but without exceeding the prejudice causally linked to the respective act.

Another substantive law issue is that, if multiple persons have contributed, concurrently or successively, to the unlawful activity, their liability is joint and several (Article 169, paragraph (4) of Law 85/2014).

Procedural Aspects

In this matter, certain special procedural rules apply. Primarily, the claim is adjudicated in accordance with the provisions of common law, namely the Civil Procedure Code. It has been judiciously noted (Cărpenaru, 2016, p.818) that given the purpose of the action, the claim can only be resolved after the debtor's liabilities are known, through the preparation of the final creditors' table, respectively the final consolidated creditors' table." The decision rendered is subject to appeal (Cărpenaru, 2016, p. 819) and shall be communicated to the National Trade Register Office.

Last but not least, the law provides for a special incapacity to exercise certain rights: Article 169 paragraph (10) states that *"a person against whom a final judgment imposing liability has been rendered may no longer be appointed as administrator or, if already serving as an administrator in other companies, shall be deprived of this right for a period of 10 years from the date the judgment becomes final."*

From a procedural standpoint, Law No. 85/2014 also grants the possibility to the insolvency judge to be seized with a request for precautionary measures. Such a request may constitute a main claim or an incidental claim. According to Article 172 of the aforementioned law, the posting of a bond amounting to 10% of the claim value is mandatory for the initiation of this procedure.

Enforcement will be carried out, according to Article 173 of the law, in accordance with the provisions of the Civil Procedure Code.

Finally, pursuant to Article 170 of the law, the liability action is subject to a statute of limitations of 3 years. This period begins from the date the person who contributed to the debtor's insolvency became known or should have become known, but no later than 2 years from the date of the opening of the insolvency proceedings[1].

[1] The legal text complies with the general rule on the matter set out in Article 2517 of the Civil Code. Furthermore, it is consistent with the general rules of civil law regarding the commencement of the limitation period, establishing both a subjective moment (the

Any funds recovered shall be included in the debtor's estate (Cărpenaru, 2016, p. 805) and will follow the legal regime provided by Law No. 85/2014.

Conclusions

The regulation concerning the liability of management bodies for the debtor's insolvency is welcome. I consider that it represents a genuine procedure aimed at safeguarding the debtor's situation while simultaneously providing protection for creditors. Additionally, the regulation is efficient due to the promptness that characterizes the procedure before the insolvency judge, with the claim essentially constituting either a principal or an incidental request.

The expansion of the scope of liable persons aligns with prudential rules in banking law, thereby establishing a standard of proof that is considerably easier to meet compared to general cases (particularly with respect to the notion of the de facto administrator, a concept that is difficult to apply in banking law).

References

Al Hajjar, S. (2012). *Civil Liability of Insolvent Debtors' Administrators. The Profile of Fraud. Management Risks. Asset Insufficiency*. Universul Juridic.

Avram, A. (2007). *Insolvency Procedure. Liability of Members of the Management Bodies*. Hamangiu.

Bufan, R. (2014). *Practical Treatise on Insolvency*, National Institute for Insolvency Practitioners Training. Hamangiu.

---

date on which the person became aware) and an objective moment (the date on which the person ought to have become aware). Finally, the law also establishes a *dies ad quo* (rather than a *dies ad quem*) of two years from the date on which the insolvency proceedings were opened, thus marking the starting point of the three-year limitation period.

Cărpenaru, S. D. (2016). *Treatise on Romanian Commercial Law*, 5th updated edition. Universul Juridic.
Neagu, L. (2011). *Insolvency Procedure. Liability of Members of the Management Bodies. Judicial Practice*. Hamangiu.
Pop, L., Popa, I.-F. & Stelian Ioan Vidu. (2012). *Elementary Treatise on Civil Law. Obligations*. Universul Juridic.
Postolache, R. (2012). *Banking Law*. C.H. Beck.

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp.652-661

TERRORISM – A DISRUPTIVE CULTURAL FACTOR IN CONTEMPORARY SOCIETY

Bogdan Nicolae ȚONEA
ORCID ID: 0009-0001-0256-1608
E-mail: bogdan.tonea@academiadepolitie.ro
Afiliation: Al. I. Cuza Police Academy, Bucharest

Abstract: *Terrorism is a tool used to inflict terror. Depending on the degree of civilization that humanity has reached, terrorism can range from cave terrorism to cyber terrorism and can thus be committed using any method and practically everywhere. Although the methods of the attackers have changed over time, their basic values – fear, destruction and murder – have not changed. Effectively combating terrorism is not a new security responsibility for the security forces in Romania. Cold War terrorism is different from 21st century terrorism. What changed after the fall of the Iron Curtain, and especially after the terrorist attacks in the United States (USA) on September 11, 2001 (9/11), was the lethality and virulence of the intentions and goals of the terrorists. The phenomenon is an asymmetric threat. Its evolution, from a sum of dispersed terrorist acts to a peak of cruelty, fanaticism and even violence, leading to a terrorist war capable of generating terror, is the object of analysis of this small study.*

Keywords: *Terrorism; terrorist war; asymmetric threat.*

Introduction

The word "terrorism" comes from the Latin term "terrere", which actually means "to frighten". The word was first used in France between 1793-1794. The country's leader specifically describes terror as "…nothing more than justice, prompt and severe and inflexible justice …" (Mannik, 2009). Researchers have identified four different waves of

terrorism, each wave having its own characteristics, modus operandi and supporters.

The first wave of terrorism began in the 1880s, and was called the Anarchist Wave, focused on the fight against totalitarian regimes such as the Russian one and spread rapidly throughout Europe, Asia and America (Roser, 2016, pp.1-6). It lasted almost 40 years and was a period in which violence and propaganda increased enormously due to the invention of bombs. Terrorists were inspired by the French Revolution, because their targets were political, and to shake public opinion (Roser, 2016).

The second wave called the Anticolonial Wave began in 1920 and was different from the first because terrorist attacks focused on eliminating political officers by assassination on the grounds that killing political figures was counterproductive.

The third wave began in 1960, was called the New Left Wave and gradually disappeared in the 90s, with only a few active groups in Spain, France, Peru and Colombia (Roser, 2016). In this case, radicalization was linked to nationalism.

The last wave was a religious one that began in 1979, and still exists today. In previous waves, religion was also an important factor, but the goal of terrorists was to create sovereign states. Instead, in the fourth wave religious identity had a different meaning, it was used, and is still used, to justify the terrorist attack as a tool used to create new principles for a new world to come (Roser, 2016).

The events of September 11 have put the emphasis on the concept of terrorism, giving institutions and governments the duty to better understand and predict this phenomenon in order to avoid tragedies such as those mentioned above (Mannik, 2009). The first task of Governments must be to correctly define what terrorism is. Today, legal and political doctrine shows that there are almost a hundred different definitions of the concept of terrorism, but the most common is the definition given by the United Kingdom Terrorism Act, created in 2000, which explicitly specifies the characteristics that an action must possess to be classified as a terrorist attack (Roser, 2016): “the use or threat of an action intended to influence the government or an international governmental organization

or to intimidate the public or a section of the public; done for the purposes of promoting a political, religious, racial or ideological cause and involving or having as causes:

1) Serious violence against a person;
2) Serious damage to property;
3) A threat to the life of a person;
4) A serious risk to the health and safety of the public; or
5) Serious interference or disruption of an electronic system (Roser, 2016)".

Islam is the most significant religion of this wave, but it is not the only religion that creates terrorists. This wave introduced a new and deadly tactical innovation called suicide bombing in which martyrdom is considered the highest form of faith for the religious cause.

Terrorist groups carried out much more massive attacks than other waves, against the military and government institutions, and hit Americans in particular, who became frequent targets. During this period, Al Qaeda was built under the leadership of Osama Bin Laden with the aim of creating a single state for all Muslims governed by Islamic Sharia Law (Roser, 2016) . In the end, the massive attack of September 11, coordinated by this organization, was a turning point in the war on terror; several changes and massive investments were made globally to avoid another similar catastrophe, in addition, military intervention became necessary especially in those countries where the most important terrorist groups were active. (Roser, 2016)

Types of terrorism: objectives and strategies

Over the past twenty years, terrorism has been studied in all its forms in order to have a better and more functional knowledge that can help governments and international institutions in preventing and mitigating this complex and dynamic phenomenon. From this analysis, several forms of terrorism have emerged, each with common and specific characteristics, with different modus operandi and with specific areas or countries where attacks take place. (Mahmood, 2002, pp. 1-29)

Ten types of terrorism have been identified:

State terrorism: the use of violence by states to achieve political goals and to repress their own citizens, used mainly by Israelis and Indians.

State-sponsored terrorism: acts of terrorism launched and sponsored by a country against another nation with the systematic use of violence and military forces with the ultimate goal of achieving long-term strategic or political objectives. Several countries such as Cuba, Libya, Iraq and North Korea have been accused of supporting terrorists;

Nationalist terrorism: a form of terrorism that attempts to create a separate state for their specific national group through the use of terrorist attacks, by drawing attention to the war for independence and national liberation;

Religious terrorism: is focused on the use of violence to serve distorted religious purposes, usually targeting people who are considered infidels and who are not members of the terrorist religion. The most important organization of this type of terrorism is Al Qaeda;

Left-wing terrorism: its goal is to destroy capitalism and replace it with a socialist or communist regime;

Right-wing terrorism: it is the opposite of left-wing terrorism, in fact, the actions of terrorists aim to eliminate and successively replace liberal-democratic with fascist states;

Anarchist terrorism: this type of terrorism aims to achieve consistent changes in government policies on certain issues or to overthrow established governments;

Suicide terrorism: defined as a politically motivated violent attack carried out by a single person who causes his own death in order to kill his chosen target;

Cyberterrorism: hacking activities and other computer resources to intimidate, damage and coerce other people or governments.

NBC terrorism: this is the most dangerous type of terrorist attack because it uses weapons of mass destruction, such as nuclear bombs,

chemical and biological weapons, to destabilize governments and gain more and more power and create fear among people. (Mahmood, 2002).

International entities have also deeply analyzed the main strategies applied by terrorists to achieve their objectives (Kydd & Walter, 2006).

Usually, they are too weak to impose their will directly, and for this, they use specific strategies based on persuading the target audience, the perception of fulfilling their desires by modifying their beliefs, giving a sense of legitimacy to their actions, imposing a degree of commitment to their cause, determination and are finally established with reasonable and precise objectives to achieve (Mannik, 2009). There are five main strategies implemented in terrorist campaigns (Kydd & Walter, 2006):

Attrition - is used to convince the enemy that the terrorists are powerful enough to damage them if they do not stop practicing a certain policy or activity (Kydd A. H., 2006)

Intimidation - is a strategy that attempts to convince the population that the terrorists are more powerful than the government, so they can punish disobedience and lack of institutions, stopping their actions.

Provocation - is an effort to induce the enemy to respond to terrorist actions with other violent initiatives and, by doing so, involuntarily move people to support terrorist causes (Kydd & Walter, 2006)

Alteration - The goal of the strategy is to avoid peace openings between the target government and the leaders of the moderate terrorist organizations. It is a strategy based on distrust between the two factions and it ultimately succeeds when the parties fail to implement a peace agreement (Kydd & Walter, 2006)

Overbidding - occurs only when there are two or more parties competing for control of an area at the same time. In this case, the strategy is successful only if the terrorists are able to convince the population that they possess a stronger ability to resolve conflicts and protect the interests of the people compared to other rival groups,

therefore, they deserve the support of the population (Kydd & Walter, 2006)

The analysis of terrorist strategies has been fundamental to creating a better model, you need to understand what type of strategy is implemented to achieve different objectives (Mannik, 2009). Researchers and government agencies have defined five different objectives according to the aforementioned strategies:

• Regime change aimed at overthrowing the previous government by replacing it with another one that is controlled by terrorists or at least that is more in line with the terrorist objectives.

• Territorial change means the complete elimination of the state's presence in a given territory by cutting off all economic and social relations with it, in order to create a new state or join another already existing state (Kydd & Walter, 2006)

• Policy change is a broad category made up of different strategies applied to change the policies implemented by a government in a given country and to force other states to reduce their support for the terrorist enemy. Particularly famous was Al Qaeda's demand that the United States cease supporting Israeli military actions (Kydd A. H., 2006).

• Social control is focused on the oppression and constant surveillance of the behavior of individuals, rather than government policies.

• Status quo maintenance specializes in providing strong support to already existing regimes (usually a totalitarian regime or dictatorship) in order to defeat political groups that want to change them (Mannik, 2009).

Global Terrorism Index: the deadliest terrorist attacks in history and the most important terrorist groups

The Global Terrorism Index (GTI) was developed through the collaboration of several government agencies from almost every country

in the world (Report, 2017). The Global Terrorism Index is a comprehensive analysis that considers the direct and indirect impact of terrorism in 162 countries in terms of material damage, the number of people killed, the number of injuries and the psychological effects that terrorism has on the population. This research covers 99.6% of the world's citizens (Report, 2017).

The regional overview of terrorist activities highlights that the vast majority of attacks occurred in the Middle East, North Africa, South Asia and sub-Saharan Africa (Report, 2017). These regions account for 84% of the total number of attacks that occurred in 2017 and 94% of the total deaths. On the other hand, the Caribbean and Central America are the safest regions in the world, considering the number of terrorist attacks, less than 0.05% of the total (Report, 2017). Ten countries were ranked as the most targeted and affected by terrorism in 2017 and, overall, in the last five years:

Irak	Yemen
Afganistan	Somalia
Nigeria	India
Siria	Turcia
Pakistan	Libia

In these nations, a wide range of terrorist groups are active, such as: ISIL, Boko Haram, Taliban and Al Qaeda (Report, 2017). ISIL, the Islamic State of Iraq and the Levant, is the most dangerous and active group in recent years. This group is active in several areas; therefore, the location of their attacks can vary from Europe, the Middle East, North Africa and South Asia (Report, 2017). The second group, Boko Haram, an Islamic group originating in northern Nigeria, but successively spread to neighboring countries such as Cameroon, Chad and Niger. In 2014 it was the most dangerous and deadly terrorist group, but in recent years it has suffered consistent defeats due to significant military actions implemented by the MultinationalJoint Task Force (Report, 2017). In 2016, Boko Haram split into three separate factions with different strategies; one of these factions is aligned with ISIL interests and therefore conducts terrorist attacks through suicide missions focused on

hitting civilians (Report, 2017). The Taliban organization emerged in Afghanistan in 1994 as a reactionary group with the aim of taking control of the country and successively declaring it an Islamic emirate guided by their leader as head of state (Institute for Economics and Peace Report, 2017). The last terrorist group, Al-Qaeda, was formed in 1988 by Osama bin Laden with the extreme goal of expelling all Western militaries from the Middle East. To achieve its goals, the organization coordinated large-scale terrorist actions that culminated in the attack of September 11, 2001. Al-Qaeda created a decentralized structure that allows regional affiliates to operate independently, without the group's leadership. Therefore, even though they are active in different fields, they implement the same method of attacks, primarily bombings and explosions.

Conclusions

Providing a single definition of terrorism is a great advantage for achieving a more functional definition between countries in order to have a faster response to terrorist attacks (M., 2002). Without this definition it is impossible to prepare lines of responsibility that can be attributed to states that support terrorism (Mannik, 2009). In addition, the strategies and motives behind major terrorist attacks are constantly changing, due to the dynamic and complex nature of the phenomenon, the organizational structure that is created specifically to avoid actions to combat terrorism (Woo, 2002).

Therefore, insuring the risk of terrorism results in a consistent problem for the insurer, mainly because it does not correspond to the insurance criteria and because of its specific characteristics (OECD, 2005). It is particularly unpredictable in terms of the severity of losses and the probability of occurrence and, in addition, historical data are almost useless for this prediction. All these aspects have made the risk of terrorism one of the main problems of the contemporary risk society (Amoore and De Goede, 2005).

Reactions to this threat have been particularly strengthened in the decades after the terrorist attack of September 11, which led to a turning

point in the history of counterterrorism (Beck, 2002). The result of that disastrous event was a great improvement in the tactics of reaction against terrorism. New and more sophisticated technologies were implemented, and countries' collaboration with global agencies relied more on them than on expert opinions. (Amoore, 2005)

The current terrorist phenomenon tends to no longer take the form of actions by scattered groups, but to increasingly transform into forms of military action by armed groups of similar size and structure to those of regular armies. The models of action have become much more sophisticated, they include hybrid actions, influencing public opinion, capturing the emotion of the adversary, in order to benefit from all the resources of the targeted societies. This pattern is particularly visible in the Middle East, (Gaza, Yemen) where terrorist forces invest large sums of money in propaganda actions in the free world, simultaneously with direct military action against the domestic and/or international legal order. Terrorism no longer targets small communities, for small objectives, but targets the free world in general with societal objectives, which call into question the meaning of the development of society. This combines major armed attacks in the Middle East with atypical individual attacks in the free world by the so-called lone wolves, well-trained and well-indoctrinated.

Therefore, the terrorism of the 20th century is an outdated model. In the new geopolitical contexts, the forms of manifestation of terror will increasingly move from small groups to state or pseudo-state actors (Yemen, Syria) that will disrupt the world we live in much more deeply and that will increasingly call into question the redefinition of the legal concepts that define the world constitutional order.

References

Amoore L., D. G. (2005). *Governance, risk and dataveillance in the war of terror*. Crime, Law & Social Chang. Springer.

Mannik, E. (2009). *Terrorism: its past, present and future prospects*. Tartu University.

Simus R. (2016). The Evolution of terrorism. *Acta Universitatis George Bacovia. Juridica*. Vol. 5. 2, 1-6.

Roser M., Nadgy M. & Ritchie H. (2016). Terrorism. *Our World in Data*, 1-15.

Mahmood M. (2002). Terrorism- Definition and Types. *Pakistan Army*, 1-29

Kydd A. H. & Walter B. (2006). The Strategies of Terrorism. *International Security*. Vol. 31, 1 pp. 49-79

Woo G. (2002). Quantitative Terrorism Risk Assessment. *The Journal of Risk Finance*. Vol. 4, 1, 7 – 14

Beck U. (2002). The Terrorist Threat: World Risk Society Revisted. *Theory, Culture& Society*. 19(4), 39–55.

Institute for economics and Peace Report (2017).*Global Terrorism Index: measuringthe impact of terrorism*, 1-120.

OECD (July 16, 2005). *Terrorism risk insurance in OECD countries*. Policy Issues in Insurance, 9, chapter one, two, three, seven and eight

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 662 - 672

THE EXERCISE AND RESOLUTION OF CIVIL ACTION IN CRIMINAL PROCEEDINGS

Camelia MORAREANU DRAGNEA
ORCID ID: https://orcid.org/0009-0000-2755-5709
E-mail: cameliamorareanu@yahoo.com
Afiliation: National University of Science and Technology Politehnica Bucharest, Pitesti University Center, Faculty of Economic Sciences and Law

Abstract*: Through legal action, a person is held accountable before the courts, in order to be obliged to bear the consequences arising from the violation of certain legal norms.*

Within a criminal trial, depending on the legal norms violated (criminal law and, in certain situations, civil law), the following may be encountered: criminal action, which is joined in certain circumstances by civil action. If criminal action is the means by which the criminal liability and punishment of the person guilty of committing a crime are achieved, civil action exercised within the same trial is the legal instrument by which the defendant and the civilly liable party are held civilly liable, because the crime committed by the defendant also violated the norms of civil law. Given the particularities of a civil action exercised within a criminal trial, its resolution within such a trial involves the analysis of the manner of resolving the criminal action in that trial, an analysis that we propose in this material.

Keywords*: criminal trial, civil action, damage compensation*

Introduction

To begin with, we mention that in order for a civil action to be able to be exercised in a criminal trial, alongside a criminal action that seeks to hold the person guilty of the crime criminally liable, the following conditions must be met (Neagu, & Damaschin, 2015, p. 303):

- The crime committed must have caused damage (material or non-material) (Volonciu, 1996, p. 258). A civil action can only be exercised if the crime committed is a "result" crime, not in the case of a "dangerous" crime. For example, driving a vehicle on public roads without a driver's license is a dangerous crime that excludes the occurrence of any damage.
- There must be a causal link between the crime committed and the damage. Without this link, the person who committed the act could not be required to pay compensation, lacking the basis for holding that person legally liable (Stătescu, 1984, p. 21).
- The damage must be certain, that is, certain both in terms of its existence and in terms of the possibilities of evaluation. Certain damage can be both current and future. A certain and future damage is, for example, that resulting from the loss of a person's working capacity. Possible damage cannot be covered because there is a lack of certainty regarding its occurrence in the future.
- The damage must not have been repaired. In principle, covering the damage will prevent the exercise of the civil action, but it must be taken into account whether the damage was covered in full or only in part, in which case the civil action is exercisable. It is also necessary to establish whether the covering of the damage was made by third parties who contributed to it out of the desire to help the victims of the crime and not to relieve the defendant of this obligation (for example, the case of work colleagues who hand the victim of the crime a sum of money to help her) (Neagu, & Damaschin, 2015, p. 311).
- Reparation of the damage must be claimed by the entitled natural or legal person. In order to obtain the recovery of the damage, the injured person must manifest his will in this regard by becoming a civil party. In the case of persons lacking legal capacity or with limited legal capacity, there is no need for their manifestation of will, the civil action being exercised ex officio by the prosecutor or the legal representative, even if the injured person is not made a civil party.

1. The object of the civil action the features of the civil action

The civil action represents the legal instrument by which the defendant and the civilly liable party are held civilly liable in order to cover the damage suffered by the injured person. In this way, the act committed by the author will attract both his criminal liability and his civil liability. Therefore, the object of the civil action is represented by the tortious civil liability of the defendant (Volonciu, 1996, p. 256) and possibly, of the civilly liable party, according to civil law, for the damage caused by the commission of the act that is the object of the criminal action.

According to the provisions of civil law (Art.1386 of the Civil Code), the reparation of the damage is made in two forms: in kind and, if this is not possible or if the victim is not interested in the reparation in kind, by paying a monetary equivalent.

When in-kind reparation of damage is made (a solution with priority over reparation in monetary equivalent), this can be achieved through one of the following methods:

- *Restitution of the thing;* As the first method of in-kind reparation of damage, restitution of the thing is possible whenever the property belonging to the civil party was seized during the criminal trial, from the defendant. This measure can be ordered by the prosecutor or by the judge, depending on the procedural phase of the case. The restitution of the thing is made only if it does not hinder the discovery of the truth in the criminal trial and always with the obligation for the person who received it to keep it until the final settlement of the case. If the restitution of the thing does not completely cover the damage caused, the defendant will be obliged to pay compensation in addition to achieve a fair reparation of the damage caused (for example, when the stolen goods were damaged).
- *Restoration of the previous situation;* This method of in-kind compensation for damage is used whenever it is possible to return to the situation prior to the commission of the crime (for example, the eviction of the defendant from the building he occupied by committing the crime

of failure to comply with court decisions provided for in art. 287 paragraph 1 letter g of the Criminal Code). This measure can only be ordered by the court during the trial.

- *Total or partial destruction of a document;* This method of in-kind compensation for damage is usually used in the case of forgery crimes, when the court must order the destruction of falsified documents.

As previously shown, whenever it is not possible to repair the damage in kind, or if the victim is not interested in this form of repair, the damage is covered by a monetary equivalent, that is, by obliging the defendant and the civilly liable party to pay a sum of money.

According to art. 1386 paragraph 2 of the Civil Code, when determining the compensation, the date of occurrence of the damage will be taken into account, unless otherwise provided by law.

Monetary compensation includes both the actual damage *(damnum emergens)* and the unrealized benefit *(lucrum cessans)* (Volonciu, 1996, p. 264) - for example, the legal interest due from the commission of the act until the payment of the amount, but also the expenses that the party made to avoid or limit the damage (Neagu, & Damaschin, 2015, p. 314).

In judicial practice, this method of recovering damages has been adopted when the goods were stolen or obtained through fraud, breach of trust, etc., when the goods are no longer found, or are destroyed, or when medical expenses were incurred (in crimes against the person) or when the victim (deceased as a result of the crime) contributed to the maintenance of another person.

Compensation may be awarded both for the actual damage caused and for future damage, if its occurrence is beyond doubt. In the case of future damage, the compensation - regardless of the form in which it was awarded - may be increased, reduced or abolished, if, after its establishment, the damage has increased, decreased or ceased (Art. 1386 para. 4 of the Civil Code).

The granting of monetary compensation can be done both by granting a global amount and by granting periodic benefits, if the damage has a continuous character (Art. 1386 paragraph 3 of the Civil Code).

By monetary equivalent, both patrimonial and non-patrimonial damages can be covered. The legal basis for the compensation of non-patrimonial damages is art. 1391 of the Civil Code. Characteristic of these damages is that they do not have an economic value that can be precisely assessed in money, remaining at the discretion of the court, the assessment of its quantum.

In judicial practice, compensation has been granted for non-patrimonial damages consisting of mental suffering caused by the death of a loved one, disfigurement or serious illness, physical pain caused by injuries, blows, bodily harm. In relation to the latter, art. 1391 paragraph 1 of the Civil Code shows that in case of injury to bodily integrity or health, compensation may also be granted for the restriction of family and social life possibilities. The beneficiary of this compensation, in a criminal case involving a crime of negligent bodily harm, can only be the victim of the crime - interpretation given by the High Court of Cassation and Justice through a prior decision published in 2016.[1] However, by Decision of the Constitutional Court no. 342 of July 9, 2024 (published in the Official Gazette no. 1000 of October 7, 2024), the constitutional court admitted the exception of unconstitutionality and found that the provisions of art. 1391 paragraph 1 of the Civil Code are unconstitutional, to the extent that they restrict the possibility of indirect victims to be compensated for the restriction of their life possibilities. family and social as a result of the injury to the bodily integrity or health of the direct victim.

According to art. 1391 paragraph 2 of the Civil Code, the court will also be able to award compensation to the ascendants, descendants, brothers, sisters and spouse, for the pain experienced by the death of the victim, as well as to any other person who, in turn, could prove the existence of such damage.

[1] According to Decision of the High Court of Cassation and Justice no. 12 of May 16, 2016, published in the Official Gazette no. 498 of July 4, 2016.

2. Features of civil action

Unlike criminal action, civil action is initiated and exercised only to the extent that the injured party or his/her successors intend to be compensated for the damage caused (except in cases where the civil action is exercised ex officio by the prosecutor). As such, civil action is in principle available in nature, although in certain cases mentioned above, it is exercised ex officio (Volonciu, 1996, p. 254).

This nature gives the possibility that the civil party can waive, in whole or in part, the civil claims formulated, however, until the end of the appeal debates. Upon this waiver, the civil party cannot return and does not have the right to file a separate action in the civil court for the same claims.

A second feature of civil action is that it is accessory to criminal action (Volonciu, 1996, p. 255). This means that it can be exercised during the criminal trial only when the criminal action is initiated (Udroiu, 2015, p. 128). Therefore, no other legal relationships than those arising from the damage caused by the crime can be inferred through a civil action.

A civil action is initiated by the injured party being established as a civil party against the defendant or the civilly liable party. The establishment of a civil party is made by a written or oral declaration before the criminal investigation body (during the entire criminal investigation) or the court (but only until the start of the judicial investigation). When the declaration of establishment as a civil party is made orally, the judicial body is obliged to record it in a report or in the conclusion, as the case may be (Art. 20 para. 3 of the Code of Criminal Procedure). Along with the declaration of establishment as a civil party, the injured party must indicate the nature and extent of the claims, the reasons and evidence on which the establishment of the civil party is based (Art. 20 para. 2 of the Code of Criminal Procedure). Until the end of the judicial investigation, the civil party may correct the material errors in the application for the establishment of a civil party, may increase the scope of the claims or may reduce the scope of the claims or

may request the reparation of the material damage by paying a monetary compensation, if the reparation in kind is not possible (Art. 20 para. 5 of the Code of Criminal Procedure). Breach in the criminal proceedings of these rules regarding the moment of establishment as a civil party and the content of the declaration will entail the impossibility of the injured person or his successors to establish themselves as a civil party in the criminal proceedings, however, they retain the right to address a separate action to the civil court (Art. 20 para. 4 of the Code of Criminal Procedure).

3. Resolving the civil action in the criminal trial

Resolving the civil action in the criminal trial involves analyzing the way in which the criminal action is resolved, of which the civil action is an accessory. Therefore, once the criminal side of the case is resolved, the court will also rule on the civil side, having the following three possibilities (According to art. 25 of the Code of Criminal Procedure):

- *to dismiss the civil action*; This way of resolving the civil action is adopted by the court, if the criminal side of the case orders the acquittal of the defendant pursuant to art. 16 paragraph 1 letter a) or pursuant to art. 16 paragraph 1 letter c) of the Code of Criminal Procedure.[1] The explanations for such a way of resolving the case are: either the legal basis for the action is missing, or there is no civil fault, or there is no damage or there is no causal link between the crime for which the defendant was brought to trial and the damage caused.
- *to admit the civil action in whole or in part;* This way of resolving the civil action is adopted by the court when it is found that a criminal act has been committed and, as a result of this act, material or moral damage has occurred, regardless of whether or not the defendant is convicted.

[1] The court orders the acquittal pursuant to art. 16 letter a) of the Code of Criminal Procedure, when it finds that the act does not exist, and pursuant to art. 16 letter c of the Code of Criminal Procedure when there is no evidence that a person committed the crime.

Also, in cases of acquittal of the defendant based on art. 16 paragraph 1 letter b) sentence II or letter d) of the Code of Criminal Procedure[1] , or in the case of termination of the criminal proceedings based on art. 16 paragraph 1 letter h) of the Code of Criminal Procedure[2] , if the committed act caused damage, the court will admit the civil action and will grant civil compensation to the injured party.

- *to leave the civil action unresolved*; This option is adopted by the criminal court when pronouncing the acquittal of the defendant based on art. 16 letter b) sentence I and letter e) of the Code of Criminal Procedure, as well as when ordering the termination of the criminal proceedings pursuant to art. 16 letter f) (except for the statute of limitations), letter i) and letter j) of the Code of Criminal Procedure, as well as in the case of termination of the criminal proceedings as a result of the withdrawal of the preliminary complaint or when the court accepts the plea agreement and no settlement or mediation agreement has been concluded between the parties regarding the civil action. In these cases, the interested party may file an action with the civil court.

This last method adopted on the civil side of the case is also applied by the criminal court if the heirs or, as the case may be, the legal successors or liquidators of the civil party do not express their option to continue the civil action or, as the case may be, the civil party does not indicate the heirs, legal successors or liquidators of the civilly liable party within a maximum period of two months from the date of death or reorganization, dissolution or dissolution (Art. 24 of the Code of Criminal Procedure).

---

[1] The court orders the acquittal according to art. 16 paragraph 1 letter b sentence II of the Code of Criminal Procedure when the act was not committed with the guilt provided for by law and according to art. 16 paragraph 1 letter d of the Code of Criminal Procedure when there is a justifiable cause or non-imputability.

[2] The court orders the termination of the criminal proceedings based on art. 16 paragraph 1 letter h) of the Code of Criminal Procedure when there is a cause of non-punishment provided for by law.

4. Cases of settling civil action in civil court

If they have not been established as a civil party in the criminal proceedings, the injured person or his/her successors may file an action in civil court for the compensation of the damage caused by the crime.

If they have been established as a civil party in the criminal proceedings, the injured person or his/her successors may file an action in civil court if, by a final decision, the criminal court has left the civil action unresolved (in which case the evidence administered during the criminal proceedings may be used before the civil court) or if the criminal proceedings have been suspended. In the event of resumption of the criminal proceedings, the action filed in civil court is suspended after the criminal action is initiated and until the criminal case is resolved in first instance, but not more than one year. An action may also be filed in civil court for the compensation of the damage arising or discovered after the establishment as a civil party.

The injured party or his/her successors, who initiated the action before the civil court, may leave the civil court and address the criminal investigation body, the judge or the criminal court, if the initiation of the criminal action took place after the initiation of the civil action in the civil court or when the criminal trial was resumed after suspension - in which case the civil action is suspended, but not for more than one year.

Leaving the civil court cannot take place if it has issued a decision, even a non-final one according to the principle of *"electa una via"*.

If the civil action was exercised by the prosecutor, if it is established from new evidence that the damage was not fully covered by the final decision of the criminal court, the difference may be requested through a new action in the civil court (the basis for this action is art. 27 paragraph 6 of the Code of Criminal Procedure - Udroiu, 2015, p. 139).

5. The relationship between civil and criminal proceedings in criminal proceedings

As we have previously shown, criminal proceedings and civil

proceedings are brought together in criminal proceedings because they originate from the same act. When the two proceedings are brought together in criminal proceedings, the solution adopted on the criminal side of the case will also determine the solution adopted on the civil side.

However, if the civil action is brought separately, the law prohibits the simultaneous carrying out of the two proceedings, respectively both before a criminal court and before a civil court. In such cases, after the criminal action is initiated, the settlement of the civil proceedings is suspended until the settlement of the criminal proceedings, according to the principle *"the criminal case takes the place of the civil case"*, but not more than one year. When the prosecutor has ordered a decision not to prosecute, the party may address the civil court with a civil action in order to recover the damage.

On the other hand, if the two actions (criminal and civil) are resolved separately, the final decision of the criminal court has the authority of res judicata before the court that judges the civil action with regard to the existence of the act and the identity of the person who committed it (Art. 28 para. 1 of the Code of Criminal Procedure). But the civil court is not obliged to take into account the final decision of acquittal or termination of the criminal trial with regard to the existence of the damage and the guilt of the author of the unlawful act. The final decision of the civil court by which the civil action was resolved does not have the authority of res judicata before the criminal judicial bodies with regard to the existence of the criminal act, the identity of the person who committed it and the form of his guilt (Art. 28 para. 2 of the Code of Criminal Procedure).

The application of these rules will avoid the issuance of two judgments (one civil and the other criminal) that may be contrary against the same person, regarding the repair of a single damage.

Conclusions

The Code of Criminal Procedure in force provides a series of rules that offer various solutions for resolving civil actions, either by the

criminal court (when the civil action is joined to the criminal action), or, separately, by the civil court. Through this analysis, we wanted to analyze these possibilities available to the victim of a crime

References

Civil Code adopted by Law No. 287 of 17 July 2009 republished in the OFFICIAL GAZETTE no. 505 of 15 July 2011, with subsequent amendments and supplements.

Criminal Code adopted by LAW No. 286 of 2009 published in the OFFICIAL GAZETTE no. 510 of 24 July 2009, with subsequent amendments and supplements.

Criminal Procedure Code adopted by Law No. 135 of 2010 published in the OFFICIAL GAZETTE no. 486 of 15 July 2010, with subsequent amendments and supplements.

Neagu, Ion, & Damaschin, Mircea. (2015). *Treatise on Criminal Procedure. General Part*, 2nd Edition. Universul Juridic.

Stătescu, Constantin. (1984). *Civil Liability in Torts against Another Person*. Scientific and Encyclopedic Publishing House.

Volonciu, Nicolae. (1996). *Treatise on Criminal Procedure. General Part*, Vol.I, 2nd Edition. Paideia.

Udroiu, Mihail (coordinator). (2015). C*ode of Criminal Procedure. Commentary on Articles.* CH Beck.

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 673-682

THE CONCEPTUAL APPROACHING CONCERNING THE ACCUSATION IN THE CRIMINAL PROCESS

Elena MORARU
ORCID ID: https://orcid.org/0009-0003-0009-4991
E-mail: lenamoraru@mail.ru , elena.moraru@idei.utm.md
Afiliation: TUM, Republic of Moldova

Abstract: *The realization of accusation in criminal process is, in more situations accompanied of difficulties of objective and subjective nature. The difficulties with objective nature complicate the realization of the accusation function assigning itself in this group, firstly the gaps and contradictories admitted by the legislator in the process of normative regulation of this activity. To the difficulties of subjective order is being attributed the insufficient preparation of the state accusatory that must be perfectly acquainted with the shades foreseen of criminal processual law as well as to be make evident so-called degree of permanent assimilation of the psychological and criminalistic methods of achievement and supporting of accusation.*

The complex research of the problems of accusing institution in the criminal process has a major theoretical and practical importance. To these basic problems one attributes the given research study in which the theoretical suggestion and practical recommendations in the process of processual criminal norms and modifying proposals of legislation criminal process are oriented towards the optimization of activities in this domain and the fortifications of processual guarantees for persons brought to responsibility within the limits of the criminal procedure

Keywords*: accusation; criminal process; accusatory; legislation.*

Introduction

The passage of certain criminal case from the processual phase to the next on (farther) depends of the success of conclusion of the circle of

problems and of clarified solutions per case in the legal frame. At the positioning on the processual functions practiced during the criminal process we ascertain that the function of criminal pursuit and the function of disposal on the rights and basic liberties of the person is being exerted in the phase of criminal pursuit while the verifying function of the legality of sending or not sending to the trial is achieved in the during the judgment phase. As a complex of criminal judicial institution in the criminal process the accusation has the goal to hold responsible that one who committed an offence. And here the majority of the authors interpret the function of accusing as a category that determines the entire going of the criminal process.

1. In the author opinion M.P. Bobiliov the accusation represents the statement directed towards the realization of criminal liability reflected in the procedural act of the criminal investigation body, the prosecutor or the victim regarding the commission of the crime by a specific person, submitted in the order established by the criminal procedural law (Bobiliov, 2004, p.13). I.A.Foinitchi was telling that by accusation, in the criminal process is implied an application of recognition in court the right of the state to punish. The author E.B. Mizulina has the opinion that the accusation is present as a modality of the action of harmed part (of the accusatory) (Mizulina, 1991, p.14).

Therefore, the accusation represents the right that certain specialized organs of the state have, with the participation, in some cases, of the injured party, to start the criminal investigation regarding some people who have violated the criminal law, to collect the evidence necessary to prove the accusation, to order the prosecution of the guilty, to participate in the trial to ensure the criminal liability of the guilty.

At the same time, other authors of criminal procedural law understand by accusation not only the procedural act, which contains the confirmation of the commission of the illegal act by the concrete person, but also the activity that creates the possibility of formulating the thesis of accusation. Thus, A.V. Goreanov states, for example, that the accusation, in the narrow sense, represents the sum of the procedural

actions of the accusing party regarding the formulation of the arguments of the accusation (Goreanov, 2004, p.17).

T. Vizdoaga presented two sides that the accusation involves. The first is being reported on the legal-material description of the offence and the second one supposes the corresponding juridical framing which during the unfolding of the activity of juridical organs at once with the discovery of some new facts may be changed. Also, this author includes in the wide sphere of accusing the following elements: the description of the offence committed by the accused and the processual activity of the juridical bodies by which is being pursuit to hold criminal responsible of the criminal actor (Vizdoaga, 2002, pp. 317-318).

A particular importance at the current stage is the attempt to determine and delimit the notion of „criminal prosecution" and „accusation". Even if we take into account the exposing of these notions in the law of penal procedure the discussions regarding them remain topical because the legislator utilizes these terms with absence of consecutively. As such, criminal prosecution and accusation are mentioned in several norms of the CPC of the Republic of Moldova (art. 51, 52, 53, art. 55), but the definition of the notion of „criminal prosecution" can only be identified in art. 252 of the CPC of the Republic of Moldova where it is mentioned that „criminal prosecution" has as its object the collection of the necessary evidence regarding the existence of the crime in identifying the perpetrator in order to ascertain whether or not it is a question of submitting the criminal case to court under the law and to establish his liability".

We also note that the criminal procedural law does not contain any definition regarding the notion of „accusation", and in Art. 24 paragraph 1 of the CPC of the Republic of Moldova the legislator generally omitted it, it being identified as criminal prosecution, which is targeted as a separate function of the criminal process, as well as the defense and trial of the case.

As a result, it is easily to observe that the position of the legislator in the matter of exposing of the concept of „penal pursuit" and „accusing" is not unitary. Moreover, the legislator certainly has not a

well determined position regarding this subject, does not expose ideas surely and clear expressions concerning the delimitation of the notions „accusing" and „criminal pursuit". This stare of things can be accepted if we take action of the fact that the task of the legislator does not directly consist of formulation of some surely theoretical concept. This objective is exclusively pursuit by the doctrine.

Thus, we are unable to shed more clarity on the relationship between the notion of „accusation" and „criminal prosecution" through the prism of the regulations of the Criminal Procedure Code of the Republic of Moldova, we are forced to present the opinions of several scholars in the field, who have researched this subject.

The doctrine has elaborated several concepts regarding the notions of „criminal prosecution" and „accusation" being in some places controversial. Thus, some scientists perceive the accusation only as a processual activity. The author A.A. Tusev, for example, defines the accusation as "the totality of procedural activity oriented to the identification of the person submitted to penal responsibility for committing of the infraction with a view to applied an adequate punishment". This author also was naming the activity oriented to the identification and to accusing of a concrete person being only a function of criminal pursuit. Researchers A.M. Larin, V.M. Savitschi were defining the accusing as being the formulation, argumentation and supporting by the criminal investigator and the prosecutor of the conclusions referring to the committing of the infraction by a certain person (Larin, 1997, p.156).

Another group of authors understand by accusation the procedural activity aimed at identifying the person who committed the crime and justifying their criminal liability. In the opinion of the author E.Z. Mizulina, accusation represents the activity achieved out by persons specified by law in order to argue in court the guilt of the defendant. By accusation in the procedural sense, E.Z. Mizulina understood "the procedural activity based on the law, exercised by the competent bodies and persons regarding the identification of the person in the commission of the incriminated offense and the justification of his criminal liability in

order to obtain his public conviction, and by accusation in the legal-material sense is understood the totality of illegal and socially dangerous acts that form the composition of a crime, established and incriminated to a specific person (Mizulina, 1991, p.4)

In another opinion is being considered that in the criminal process the accusation must be examined in a wide and narrow sense. In a narrow sense the accusation represents the activity of formation of conviction concerning the guiltiness of concrete person in the commission of the offence and the justification of this thesis in the court. The accusation in a wide sense, includes every activity, oriented to the identification of the person that committed the offence, including the starting of the penal pursuit concerning to concrete person, its detention and the application of preventive measures regarding it, the administration of evidence that proves the person's guilt, its indictment, the drawing up of the indictment, the presentation and support of the accusation in court (Zinatullin, 1997, p.16).

The accusation in the legal-material sense was expanded by N.M. Petrova as „the totality of illegal and socially dangerous acts established in the criminal case and incriminated to the accused, which constitute the essence of a concrete component of the crime, for which he is to be held criminally liable and convicted". The author F.M. Iagofarov does not do reference to the sense juridico-material of the accusing but he speaks about the object of accusing and of the content of accusing or in o ther way said about the concept, the thesis of accusing as an assertion on the guiltness of accusing in perpetrating of the offence. In this sense, in the criminal process, expressions such as „putting under accusation", „sustaining the accusation" and „giving up the accusation" are applied (Iagofarov, 2003, pp.35-36).

The author F.M. Iagofarov believes that, if in accordance with art.5 p.22 of the Criminal Procedure Code of the Russian Federation, the accusation represents the statement regarding the commission by a certain person of an act prohibited by criminal law, then it can be concluded that the accusation is perceived by the legislator of the Russian Federation only in a legal-material sense. The stipulations p.45 art.5

Criminal Procedure Code of the Russian Federation on which basis the parties can exerciced the accusing function (penal pursuit) represents more an exception, than a rule. These provisions cannot be accepted because the prosecution, as a procedural function, includes only the activity of accusing (Iagofarov, 2003, p.36).

In this way, probably the legislator of Russian Federation tried to solve the long scientifical dispute determining the accusation as an affirmation of the person guiltiness, the criminal pursuit – as a processual activity oriented to the identification of the person that committed the criminal act (Iagofarov, 2003, pp.36-37).

To this subject they are exposed other point of view too. Some authors were examining as being identical. The others in their turn considering that the notion „criminal pursuit" is more widely that the notion „accusation". It is shown that in addition to the accusation there is another activity, from which it is possible and necessary to defend yourself.

Thus, this defending activity of the suspected person is accomplished not regarding the accusation, because it does not exist else. But such a concept of the defense is to correspond to something broader than the accusation. Such a notion, proportional to the defense, appears to be criminal pursuit. In the given manner, the penal pursuit includes in itself also the accusing and the processual activity of the state body previously putting under accusation. So, the accusation represents one of the forms of the criminal pursuit (Larin, 1997, p.158).

In the definition Gr. Teodoru maintains that in the object of the penal pursuit are there included also are being included the papers of disposal of the prosecutor, by which the accused or the defendant are hold responsible, and send to the trial acts of pursuit determining, the denomination of preliminary entire activity to the judgment. In natural manner if is ascertained the absence of the offense or a cause that would remove the penal responsibility, is being included in this processual phase and the corresponding documents of drawing out of pursuit or of criminal pursuit (Teodoru, 2013, p.452).

Concerning to the activities achieving in the penal pursuit, these ones have a complex content determined by the specific of problems that are being imposed to be solved in every penal cause. In this sense, for achieving of the object of the penal pursuit, the bodies of the penal researching and the prosecutor concentrates his activity in the papers of criminal pursuit, that may be processual acts or disposals ones and procedural acts through which are brought to the fulfilling the disposals included in the processual acts (Neagu, I., Damaschin M., 2015, pp.16-18).

In the doctrine they were given more definitions to penal pursuit. The author Iu. Sedletschi rightly believes that criminal pursuit is a mandatory activity of preliminary preparation of the materials of the criminal case, its purpose is to send the case to trial for the criminal liability of the perpetrator or, as the case may be, for the application of medical coercive measures (Dolea & Roman, 2005, p.510).

On the other hand P.A.Lupinskaia defines the penal pursuit as an processual activity achieved by the accusing part for the identification of the suspect person, in committing of the infraction (Lupinskaia, 2003,p. 78)

The fact is that, in M. Udroiu view, „criminal prosecution has three procedural stages: the stage of investigating the act, which occurs with the start of the criminal prosecution in rem until the continuation of the criminal prosecution against the suspect and the initiation of the criminal action, the stage of investigating the person, after the continuation of the criminal prosecution against the suspect and the resolution of the case by the prosecutor" (Udroiu, 2014, p.10).

For the authors Z.Z. Zinatullin and T.Z. Zinatullin, the penal pursuit is presented to be the penal processual activity with official character of the state bodies and of the persons with responsible function oriented to the establishing and identification of the suspect and accused persons.

The interpretation of the criminal pursuit by these ones does not break out difficulties. The confused appear only at determination by them of the moment of finishing of the penal pursuit, where is being affirmed:

„The criminal pursuit begins from the moment the criminal case is filed and is carried out throughout the criminal process, in all phases of the criminal process, that is, until there are grounds to consider a certain person guilty of committing a crime and to apply a custodial sentence or another measure of criminal punishment to him". Some authors include in this notion the actual execution of the sentence imposed by the court, as well as other coercive measures of a medical and educational nature (Zinatullin, 1997, pp. 7-8).

Conclusions

Consequently, the accusation represents the statement, the thesis submitted in the order provided by the law, by the state bodies (persons with responsible functions), which carry out the criminal investigation regarding the crime committed by a certain person and, respectively, about the presence of the grounds for holding him/her to criminal responsibility. Once filed, the accusing established more exact boundaries of the penal pursuit. The change of these boundaries can take place only with taking into account the modifying of the accusing in the limits and in the established order by the processual – penal law. Consequently, the accusing is called upon to ensure the legality and soundness of the criminal investigation, determining the bodies and persons carrying out the criminal investigation and its measures to substantiate and justify it. Eventually regarding to the terminological dispute referring to the subject of the research we mention:

1. More authors assign to the notions „accusing", „charging", „the function of accusing", „the function charging", „penal pursuit" a different sense, which is not justified from the point of view legislative.

2. The majority generally agree with the position that public criminal prosecution (the state's prosecutorial function) is carried out at different phases of the criminal process, and have not developed uniquely applicable delimiting terms.

The most frequently, for the defining the accusing activity in the stage of penal accusing is utilized the term criminal pursuit but for the

activity of accusing exercised in the trial is utilized the expression „accusing of state".

These varieties, in fact, represent the distinct stages of the general realization of the function of blaming the state, divided depending on the criteria of the subjects who carry it out, as well as the specifics of the blaming activity.

If we are to pronounce on the distinct properties and particularities of the notions of „accusation" and „criminal prosecution" in the criminal process of the Republic of Moldova, we conclude that the same state of affairs that we described above is present, this fact being generated by the inspiration of the criminal procedure law of the Republic of Moldova, largely from Eastern sources, and to a lesser extent, from Western ones.

References

Bobylev, M. P. (2004). *Обвинение как предмет уголовного правосудия в современной России.* Автореферат диссертации кандидата юридических наук. Уфа. [*Accusation as a Subject of Criminal Justice in Modern Russia*. Abstract of a Candidate of Laws Dissertation. Ufa].

Codul de procedură penală a Republicii Moldova nr.122-XV din 14.03.2003 În: Monitorul Oficial al Republicii Moldova nr.104-110/447 din 07.06.2003. art. Nr. 447 [*Criminal Procedure Code of the Republic of Moldova No. 122-XV of 14.03.2003 In: Official Gazette of the Republic of Moldova No. 104-110/447 of 07.06.2003. art. No. 447*]

Dolea, I., Roman, D., & Sedlețchi, Iu. (2005). *Drept procesual penal.* [*Criminal Procedal Law*]. Cartier Juridic.

Goryanov, A.V. (2004). *Порядок подготовки к судебному заседанию в уголовном процессе России.* Автореферат диссертации кандидата юридических наук. Челябинск. [*Procedure for preparing for a court hearing in criminal proceedings in Russia*. Abstract of a candidate's dissertation in law. Chelyabinsk].

Larin, A. M., & Melnikova, E. B., & Savitsky, V. M. (1997). *Уголовный процесс России. Лекции-очерки.* БЕК. [*Criminal Procedure in Russia. Lectures and Essays*. BEK].

Lupinskaya, P. A. (2003). *Уголовно-процессуальное право Российской Федерации*. Учебник. ЮРИСТЪ. [*Criminal Procedure Law of the Russian Federation. Textbook*. YURIST].

Mizulina, E. B. (1991). *Уголовный процесс: концепция самоограничения государства*. Тарту. [*Criminal procedure: the concept of self-restraint of the state*. Tartu].

Neagu, I., & Damaschin, M. (2015). *Tratat de procedură penală. Partea specială. În lumina noului Cod de procedură penală.* [*Criminal Procedure Treaty. Special Part. In the light of the new Criminal Procedure Code]*. Universul Juridic.

Theodoru, Gr. (2013). *Tratat de drept procesual penal*. [*Criminal Procedure Law Treaty]*. Hamangiu.

Udroiu, M. (2014). *Procedură penală. Partea specială. Noul Cod de procedură penală.* Sinteze și grile. [*Criminal procedure. Special part. New Code of Criminal Procedure. Summaries and grids*]. C. H. Beck.

Vîzdoagă, T. (2002). Esenţa, structura şi importanţa acuzării. [The essence, structure and importance of the accusation]. *Analele Ştiinţifice ale Universităţii de Stat din Moldova*, 6.

Yagofarov, F. M. (2003). *Механизм реализации функции обвинения при рассмотрении дела судом первой инстанции.* Диссертация на соискание степени кандидата юридических наук. Оренбург. [*The mechanism for implementing the prosecution function during the consideration of a case by the court of first instance*. Dissertation for the degree of Candidate of Legal Sciences. Orenburg].

Zinatullin, Z. Z., & Zinatullin, T. Z. (1997). *Общие проблемы обвинения и защиты по уголовным делам.* Ижевск. [*General Problems of Prosecution and Defense in Criminal Case*s. Izhevsk].

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 683-690

GUARANTEEING THE INDEPENDENCE OF THE JUDGE IN CRIMINAL PROCEEDINGS

Liliana CATAN
ORCID ID: 0009-0009-0095-1408
E-mail: lcatan555@gmail.com
Afiliation: Supreme Court of Justice
of the Republic of Moldova (resigning)

Abstract: *The changes that have occurred domestically have mainly taken into account the changes that have occurred in EU law regarding the applicable domestic law, starting from the idea that the legal order applicable in each EU Member State is subsumed under the legal order at European level (Corsei & Ștefănoaia, 2022, p. 98).*

Guaranteeing the independence of the judge in criminal proceedings is the foundation of a fair and equitable judicial system. By ensuring this independence, the fundamental rights of the parties involved are protected and it is guaranteed that judicial decisions are taken exclusively on the basis of the law and evidence, without being influenced by external factors. This contributes to maintaining a fair trial, thus protecting the principles of the rule of law and democracy. In conclusion, the independence of the judge is essential for ensuring a trustworthy judicial system, which guarantees justice for all citizens, without discrimination or external interference.

Keywords: *independence; law, principle; judicial system.*

Introduction

The independence of the judge is one of the fundamental principles of a fair and equitable justice system, essential for ensuring a transparent, impartial and just criminal trial. In the context of criminal proceedings, this means that judges must be able to make decisions based solely on the law and the facts, without being influenced by external

factors such as political, economic or social pressures. Guaranteeing this independence is crucial for protecting the fundamental rights of citizens, as well as for maintaining public confidence in the judiciary.

Without such a guarantee, criminal proceedings risk becoming unfair and trust in the rule of law could be eroded. Therefore, the international legal order and the constitutions of democratic states place particular emphasis on protecting the independence of judges. In Romania, for example, this independence is guaranteed by the country's Constitution, criminal legislation and various international mechanisms, such as the European Convention on Human Rights. This principle is based on the idea that justice must be free from any external influence, thus ensuring that decisions are made objectively and fairly, in the interest of all parties involved in the process.

1. Protection of the status of judges

The protection of the status of judges is an essential concept within a democratic and fair justice system. It refers to the set of rights and guarantees that ensure the autonomy, independence and impartiality of judges, allowing them to exercise their function without being subject to external pressure or undue influence. The protection of the status of judges is fundamental to guaranteeing a fair trial and maintaining public confidence in the judicial system. The protection of the status of judges is essential to ensuring an independent, impartial and fair justice system that protects the fundamental rights of citizens and contributes to the functioning of the rule of law.

Therefore, the protection of the status of judges is a fundamental principle of the rule of law and represents an essential guarantee for the functioning of a fair, impartial and independent judicial system. Judges must have a status that protects their freedom to take decisions without being influenced by external factors, so as to ensure a fair trial for all parties involved. In this sense, the protection of the status of judges is achieved through a set of legal and institutional mechanisms aimed at their independence and integrity.

Independence of the judge (Pop, 2021, p. 10) is a fundamental principle of a fair, equitable and functional judicial system. In criminal proceedings, the independence of judges is essential for ensuring a fair trial and for protecting the fundamental rights of the parties involved. Guaranteeing the independence of judges involves a complex set of mechanisms and principles that protect judges from external influences, allowing them to make decisions based solely on the law and evidence. In the detailed analysis of guaranteeing the independence of judges in criminal proceedings, several essential aspects are addressed.

2. Independence of judges in criminal proceedings

In criminal proceedings, the independence of judges refers to their ability to make decisions objectively, without being influenced by external factors, such as political, economic or social authorities. This principle is regulated by the Constitutions of most democratic states and by international conventions, being a pillar of the rule of law.

The independence of the judge in criminal proceedings involves two important dimensions:

• Decisional independence: The judge must be free to make a decision based exclusively on the law and the objective assessment of the evidence, without external influences.

• Personal independence: Judges must be protected from any personal or external pressure that could affect their ability to issue an impartial decision.

3. Mechanisms for protecting the independence of the judge

The protection mechanisms are:

A. Irremovability of the judge

Irremovability is one of the fundamental guarantees of the independence of the judge, which prevents him from being changed or

removed from office without a well-founded reason, such as a conviction or a disciplinary sanction. The irremovability of the judge ensures that he cannot be subjected to political or economic pressure to make decisions favorable to a party or an authority. Also, the transfer of judges to another court must be carried out in a transparent and motivated manner, according to legal procedures.

B. Ensuring the protection of the status of judges through higher courts

Higher courts and independent judicial institutions, such as the Superior Council of Magistracy (CSM) in Romania, play a crucial role in protecting the status of judges. These institutions are responsible for protecting the independence of judges, monitoring compliance with legal procedures and managing the career of judges, such as promoting, sanctioning and guaranteeing their fair status. The CSM has the role of intervening when there are external pressures that may influence the work of judges.

C. Protection from external influences (political, economic, media)

Judges must be protected from external pressures, including political or economic influences that may seek to influence their decisions. Protection against such pressures is achieved through regulations that establish the prohibition of influencing judges or interfering in their decision-making process. Protection from media and public pressure is also essential for judges to be able to make decisions based on evidence and not on pressures from the public business.

D. Ensuring a stable financial and professional status

A stable and fair financial status is essential for the independence of judges. If judges are not paid sufficient salaries, this could open the way for external economic pressures (Roxin, 2021, p. 42).

Working conditions, such as adequate resources for the performance of the activity, continuous training and ensuring a fair working environment, are also vital for the protection of the independence of the judge.

4. Establishing a legal framework conducive to the independence of judges in criminal proceedings

A. Constitutional and international regulations

The constitutions of most democratic states include the guarantee of the independence of judges as a fundamental principle. Also in international law, treaties such as the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union protect the right to a fair trial, which also includes the protection of the independence of judges. Article 6 of the ECHR provides for the right to a fair trial, and Article 3 of Protocol No. 1 adds a commitment to protect the independence of courts.

B. The role of international courts in protecting the independence of judges

The European Court of Human Rights plays a key role in protecting the independence of judges through its case-law. In criminal proceedings, the Court has established, through various decisions, legal standards regarding the protection of judges from any form of external influence.

5. Challenges to the protection of judicial independence in criminal proceedings

A. Political interference and external pressures

One of the greatest dangers to the independence of judges in criminal proceedings is political interference or external pressures, which may come from political authorities or from economic or social interest groups. In this sense, real judicial independence presupposes that judges have protection against any political, economic or other pressures (Mureșan, 2019, p. 25).

B. Economic and social instability environment

Economic or social instability can affect the independence of judges, especially in the context of an underfunded judicial system or where judges are under financial pressure. Underfunding of courts and

other judicial authorities can also lead to caseload overload and professional fatigue, which can reduce the capacity to ensure a fair trial. Furthermore, in a society, legal provisions are considered the foundation on which a true rule of law can be built. Thus, legal norms will establish, through their coercive and regulatory character, a framework that governs human behavior, maintaining order and ensuring justice. The purpose of establishing these rules is essentially to guide individuals, businesses and state bodies in their interactions and decision-making processes (Zisu, 2023, p. 189).

C. The impact of the media on judicial independence

The media plays an important role in shaping public opinion, and in high-profile cases, public pressure can indirectly influence judges' decisions. In this context, it is crucial that judges have the freedom to make decisions without being influenced by public opinion or media pressure.

6. Measures to strengthen judicial independence in criminal proceedings

To ensure real and effective independence, the state must adopt additional measures, such as:

• Continuous training programs for judges: Ensuring adequate and up-to-date training is essential for judges to be able to perform their role fairly and impartially.

• Reforming the judicial system: Creating a robust legal and institutional framework that protects judges from external influences and supports the process of appointment and promotion based on merit.

• Creating an effective mechanism for the protection of judicial independence: It is essential to have institutions and procedures in place to protect judges from any external or internal pressure.

Guaranteeing the independence of the judge in criminal proceedings is a fundamental element of the rule of law, essential for protecting the fundamental rights of citizens and ensuring a fair trial (Constantin, 2018, p. 37).

Mechanisms to protect the status of judges, such as irremovability, protection from external pressures and adequate working conditions, ensure that judges can make decisions based on law and facts, without external influences. At the same time, these protections need to be supported by an adequate legislative framework and by independent institutions that monitor their application, in order to prevent any form of abuse and maintain public confidence in the judicial system. For example, it is necessary, following the model offered by comparative law, to enhance the role of courts, which should analyse, on the occasion of each labour dispute, relative to the termination of an individual employment contract, the extent to which such termination could have been avoided by the employer, through various preventive methods (Corsei & Zisu, 2022, p. 152).

Conclusions

Ensuring the independence of judges in criminal proceedings is essential for the functioning of a fair and equitable justice system. The independence of judges not only protects the fundamental rights of persons involved in criminal proceedings, but also contributes to strengthening public confidence in the institutions of the rule of law. By ensuring mechanisms that prevent any form of external pressure or influence on judges, it is guaranteed that decisions are taken on the basis of evidence and the law, without being distorted by political or economic interests (Călin, 2020, p. 55).

In this sense, the protection of the independence of judges is not only a legal requirement, but also a pillar of democracy and the rule of law, which ensures respect for the principle of a fair trial for all citizens. Only by maintaining this independence can an impartial, transparent and accountable justice, essential for the proper functioning of society, be ensured.

References

Călin, C. (2020). *Criminal Procedural Law.* Universul Juridic.

Constantin, M. (2018).*Constitutional Law and Political Institutions*. C.H. Beck.

Corsei, A. and Ștefănoaia, M.A. (2022). Respect for the Right to a Fair Trial in the Light of the Case Law of the Court of Justice of the European Union. *Yearbook of the "Petre Andrei" University of Iași Fascicula: Law, Economic Sciences, Political Sciences*. 30. doi: https://doi.org/10.18662/upalaw/92.

Corsei, A. and Zisu, M.A. (2022). Abuse of rights committed on the occasion of the execution, modification and suspension of the individual employment contract. *COLLECTION OF WORKS Young researchers Volume 2 International Scientific Conference PROMOTION OF SOCIAL-ECONOMIC VALUES IN THE CONTEXT OF EUROPEAN INTEGRATION, 6th Edition*. Chisinau, Republic of Moldova.

European Commission for Democracy through Law (Venice Commission) – Opinion on the Statute of Judges, 2010.

European Court of Human Rights (European Court of Human Rights) – Relevant case law on the independence of judges and the protection of the right to a fair trial, various decisions of the Court.

Munteanu, D. (2019). *Fundamental rights in the criminal process*. C.H. Beck.

Mureșan, D. (2019). *Criminal procedural law. General part*. C.H. Beck

Pop, L., (2021) *Criminal procedural law. General Theory of Criminal Procedure.* Hamangiu.

Roxin, C. (2021). *Criminal Procedure Law. General Part*. All Beck.

Zisu, M.A. & Corsei, A. (2023). Technique of preparation of normative acts. *Legal and Administrative Studies*. 2 (29).

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 691-708

ENHANCING LEGAL STATUS OF THE INJURED PERSONS BY MEANS OF CRIMINAL PROCEDURE

Delia MAGHERESCU
ORCID ID: https://orcid.org/0000-0003-0939-1549
E-mail: delia_magherescu@yahoo.com
Afiliation: Gorj Bar Association, Târgu Jiu, Romania

Abstract: *Preventing criminal phenomena is viewed at the moment by the judicial authorities as one of the most important challenges in the field of assuring a fair society. Equally, the activity of combating serious crimes is also of high interest for the judicial authorities in criminal cases they are invested with. The main interest is, thus, focused on respecting the injured persons' rights during the criminal proceedings, especially in those criminal cases in which they are victims of serious crimes. In this matter, the legislative tools are adopted in purpose to maintain an equilibrium between the issue of punishing perpetrators, as part of the criminal justice's goal of finding truth, and enhancing the victims' legal status during the criminal proceedings, as part of avoiding revictimization. The current paper aims at providing useful mechanism of improving the injured persons' legal status during the judicial activities in criminal cases in such a manner to outline a legal framework to support victims during the criminal proceedings. In the matter of practice, it has been observed that improving legal status of the crime victims is an activity of high importance due to the fact that, during a long and unspecific criminal procedure, the risk of revictimization is, in several cases, unavoidable. In this regard, any activity of the judiciary, carried out in this context, means a useful instrument the crime victims really need. The results of the current study have emphasized that the judicial activities in criminal matters could create a new context of supporting victims in those criminal cases in which the judicial authorities agree to use their duties in order to achieve best results in the field of preventing and combating crimes, on the one hand, and reducing degree of revictimization, on the other hand.*

Keywords: *injured persons; criminal procedure; processual rights; criminal proceedings; jurisprudence in criminal matters*

Introduction

The issue of crime victims has for a long time been in the doctrine's attention in its effort to establish a connection between the legal provisions of criminal procedure law, on the one hand, and the case-law solutions pronounced by the courts of law, on the other hand. This interest has particularly been viewed in those criminal cases which involve victims of crimes under two perspectives – injured persons and civil parties. The legal situation of the crime victims is still considered a vulnerable in the entire world (Asquith & Bartkowiak-Théron, 2021). Taking into account the dangerous situation they face on the issues of revictimization during the criminal proceedings. This is because of several reasons. One of them refers to the issue of the criminal procedure which involves crime victims in their procedure of becoming injured persons during the criminal proceedings. Another one refers to the issue of how the courts of law resolve these persons' complaints regarding the compensations. The jurisprudence in criminal matters is a useful processual instrument came to emphasize the injured persons' needs to be part of a judicial context, a more strengthened one.

This is only one step provided by the justice in criminal matters which involves the legal status of the injured persons and how much the courts of law should advance efficient tools in finding appropriate solutions to enhance their judicial status by means of criminal procedure. This is because, in front of the judicial bodies, the crime victims appear as concerned persons (Chornous & Dulskyi, 2024). As a general remark, their status is primarily discussed in accordance with the feature of the damage they suffer as a consequence of the crime committed. Equally, the issue of damage should be considered in no less than three directions.

Firstly, the damage is a form of physical harm, secondly, it is also a psychological harm (Loza, 2024), and last but not least it is a form of

material prejudice the crime victims suffer because of the crime committed (Aromaa, 2012). All of them formalize the entire context of criminal proceedings, when it is about the crime victim which becomes injured person in criminal proceedings. In fact, this is the natural process of accommodating victims of crimes and integrate them into the criminal proceedings. Although the victim becomes injured person during the investigation stage, taking into consideration the specific rules and principles expressly stipulated by the Code of criminal procedure of Romania (Law no. 135 of 2010 on the Code of Criminal procedure of Romania), this processual status is consequently achieved till the final act of criminal proceedings.

Equally, it does not entirely depend of the solution pronounced by the court of law. This means that it is indifferent if the court of law pronounces the solution of acquittal of defendant, the solution of finalizing criminal proceedings, or the solution of condemnation of defendant. The last solution could only be decided in those criminal cases in which it is proved, beyond reasonable doubt, as a standard in the matter (Banet-Weiser & Higgins, 2023), based on pertinent, conclusive and genuine evidence, that the crime exists, it was committed by the defendant with the appropriate form of guilt provided by the criminal law. No other reasons could be retained by the court of law.

Moreover, the issue of compensations claimed by the injured person from defendant is also part of the criminal proceedings which should be clarified by the court of law at the end of criminal proceedings. This aspect will be carried out under the principles and rules provided in criminal matters, including those related to the principle of due process and solving the criminal case in reasonable time (Bălan, 2021). More particularly, the courts of law have to resolve the injured persons' claims, once they become civil parties. Thus, it is obvious that the crime victims should pass some compulsory stages the criminal proceedings provide them with. The first stage refers to the procedure of changing the status of victim in that of injured person. This is possible through lodging a complaint in front of the judicial bodies. By law, the prosecutor is the judicial body entitled to be invested by the crime victims with the

criminal complaint regarding the crime committed. Then, once the prosecutor has been noticed with the information on the perpetrator of having committed a crime, it is thus entitled to begin the criminal procedure, exercise the criminal action, and, consequently, the criminal case will be investigated accordingly (Kremens, 2020).

The means of criminal investigation are part of the judicial bodies' strategies used during the criminal investigation through finding a comprehensive tool of finding truth in criminal cases they investigate. One of these means of investigation refers to the procedure of hearing participants in criminal case, but the processual activity will not be possible to be achieved in missing the injured persons' testimony (McGarry & Walklate, 2015).

1. Current legal status of the injured persons in criminal proceedings

The Code of criminal procedure of Romania regulates certain means of criminal procedure of enhancing the injured persons' legal status. This aspect is currently of high importance, due to the fact that the injured persons has equally processual rights and obligations to be exercised, on the one hand, and respected during the criminal proceedings, on the other hand. In this processual context, created by the injured person with the criminal complaint submitted to the judicial bodies, the subsequent judicial actions and activities could and must be pursued. In fact, it is useful for the theoreticians to know if the initial judicial status of the injured person will effectively be achieved by this person during the entire judicial procedure developed in front of the judicial bodies, as a form of managing the issue of due process (Signorelli, 2023). On the one hand, this aspect refers to the investigative bodies whose activities are carried out in the investigation stage. On the other hand, the issue of fair process also refers to the courts of law able to achieve the judicial activities during the judgment stage (Summers, 2024).

In the beginning of criminal proceedings, when the victim of crime lodges the complaint to the investigative bodies in order to assure that

this person want to initiate and develop the criminal action which will be carried out by the prosecutor, the processual rights and obligations provided by the law of criminal procedure and exercised and respected by the injured persons are definitively in achieving the fundamental goals of criminal process. No action taken by the judicial bodies, either in the investigation stage or in the judgment stage, will be allowed in purpose to infringe the injured persons' legal status. Moreover, their rights assure a processual status well-defined in terms and conditions stipulated by the Code of criminal procedure. This status is equally viewed in the next context created as a consequence of the injured person's action to become a civil party in criminal procedure.

Speaking about the legal status of the civil parties, although they have a series of processual rights and equally obligations during the criminal proceedings, their processual status is more focused on the issues related to the civil context of the criminal law conflict. It is determined by the Code of criminal procedure and expressly provided therein. Concomitantly, the civil party and injured person have to exercise their processual rights in order to delimit competences each other during the criminal proceedings. From a chronology of criminal process, the first status achieved by the victims of crime is that of injured person. then, once this judicial status is well-defined, that person is entitled to declare in front of the investigative bodies if the injured person agrees to pass its judicial status in the next level. This means that the injured person can agree to add another legal status to the injured person, referring to the legal status of civil party.

From a jurisprudential perspective, the interest is equally expressed in the criminal cases in which the attention is paid on both injured person and civil party as well. This is because the case-law solutions delivered by the courts of law in criminal matters are significant judicial instruments of finding an equilibrium between the general interest of society to punish the defendant (Dearing & Huxtable, 2021), on the one hand, and the interest of the persons involved in criminal proceedings, on the other hand, – this issue is about the injured person and civil party. Such context provides a real guarantee that the judicial bodies have to

respect both the injures persons' processual rights and the civil parties' rights and no infringements are allowed to be happened in those criminal cases in which the injured person agreed to become civil party.

In this regard, a pertinent analysis has been caried out during the research activity on the topic of enhancing the injured person's legal status by means of criminal procedure, as it will be highlighted during the next chapter. It provides a useful overview upon the jurisprudence in criminal matters stated by the courts of law in those criminal cases in which the crime victims agreed to achieve the processual status of civil party or they are simply injured persons having appropriate rights and obligations during the criminal proceedings. For this reason, it is very important for the theorists to emphasise their points of view in relation to the criminal cases examined, on the one hand, and to the judicial solutions pronounced by the courts of law, on the other hand.

2. Case-law solutions on injured persons

2.1. Legal entities as injured person

Some pertinent aspects should be asked in those criminal cases in which the injured persons who lodged a complaint is a legal entity. Both jurisprudence and doctrine in criminal matters was usually asking if a legal entity could appear in front of the court of law having the judicial status of injured person. This is because certain forms of doubts claimed by the defence party invoke that there is no possible for the legal entities to achieve the status of injured person during the criminal proceedings (Criminal Decision no. 428/RC/2024 of the High Court of Cassation and Justice of Romania). From this point of view, the jurisprudence has observed the defence lawyer's position which emphasized that, as a general rule, the main question is that to know if the legal entity might be passive subject of the crime of imposition. The main argument was related to the fact that deceit must be perceived through the person's own feeling by the injured person. In these circumstances, it is obvious that the legal entity can however be misled only through its representatives.

Moreover, the defence party has pointed out that, both doctrine and case-law solutions in the matter have admitted that the passive subject of the crime of imposition may be any natural person or legal entity. Despite this remark, the criminal law is in a dynamic evolution and, for this reason, a judicial precedent has already been established by the upper court of justice (Criminal Decision no. 402/2019 of the High Court of Cassation and Justice of Romania) which stated that in cases of establishing a legal relationship of authority, a discussion on deceit cannot be advanced, and consequently the constitutive elements of the crime of imposition are not achieved in accordance with the *de facto* situation, as it was provided by the indictment act (Criminal Decision no. 428/RC/2024 of the High Court of Cassation and Justice of Romania). Moreover, the conclusions advanced both by the public prosecutor and the defence lawyer were analysed by the court of law and taken into consideration in pronouncing decision.

In this regard, the court of law has convicted defendant for the crime of imposition. The upper court of law has rejected the appeal submitted by the defendant and stated that, taking into account the evidence administered, the defendant, under the same unitary criminal resolution, has incorrectly reported a series of medical services as being executed. However, although this activity was not actually happened, the defendant has misled the injured person because of the subsequent discount of fictitious medical services. At the same time, the upper court has stated that, during a period of two years, through repeated criminal actions, under the same criminal resolution, the defendant has retained and illegally used health cards of patients in purpose to discount unexecuted medical services. Consequently, it is obvious that the court of law will take into consideration all circumstances in which the crime was committed, on the one hand, and the jurisprudence in the matter, on the other hand. No subjective solution is allowed in this context.

2.2. Injured person unacquiring status of civil party

As a general remark, it could be pointed out that the injured person could be considered as the victim of crime who lodges a complaint to the

public prosecutor and is interested in achieving the processual status of civil party. However, in practice, there are several situations in which the injured persons do not consent to acquire the processual status of civil party. This is from several reasons belonging to these persons' own wish.

The court of law invested by the indictment act of the public prosecutor with a criminal case will notice the decision of injured person not to become civil party. The reason of choosing so exclusively belongs to the injured party which is thus entitled to appreciate if the damage exists and it should be reclaimed from the defendant. The court of law has stated, under the entire evidence administered, that the defendants have stolen different quantities of benzine from fuel stations. The criminal actions have consisted in illegal use of fuel cards belonging to the injured parties (Criminal Decision no. 335/RC/2024 of the High Court of Cassation and Justice of Romania). The *modus operandi* was taken into account by the defendants in order for them to sell the benzine at a lower price and consequently gain a huge amount of money. Although the damage is a real and serious one, the injured person did not agree to achieve the judicial status of civil party and acted further on in the criminal proceedings as an injured person exclusively. This means that, by lodging a complaint in front of the judicial bodies, the injured person is not obliged to require from them to appoint it as a civil party.

The legal consequences resulting from this status did not detain it from fully exercising the processual rights during the criminal proceedings. This means that, although the injured person refuses to appear in front of the judicial bodies as a civil party through exercising the entire processual rights the criminal procedure Code provides it with, the injured person cannot be infringed to pursue all procedural acts as they are regulated by the processual legal provisions. This is because the injured person is equally responsible for proposing evidence which will be analysed both by the public prosecutor during the investigation stage and by the court of law during the judgment stage of criminal proceedings. By doing so, the judicial bodies will assure themselves that the injured person has submitted pertinent, conclusive and genuine evidence and there are no impediments to reject them from criminal case.

Equally, in cases of serious crimes, such as attempt of murder, the injured person is less possible to agree not to achieve the processual status of civil party. However, in practice, the jurisprudence has provided that the situation could be different and the injured person chooses to prevail on the right not to become civil party (Criminal Decision no. 226/RC/2024 of the High Court of Cassation and Justice of Romania). On the contrary, to see the situation in which the injured person did agree to achieve the processual status of civil party. It is about the criminal case of accessing illegally an information system (Criminal Decision no. 189/RC/2024 of the High Court of Cassation and Justice of Romania).

3. Vulnerable injured persons in criminal proceedings

3.1. Theoretical background

Discussing legal status of the injured persons in criminal proceedings, it could be pointed out that they usually pass a specific context, being characterised by the main issue of being vulnerable persons. Their vulnerability is often appreciated by the doctrine in criminal matters as an antagonistic feature along with the defendant one. This balance is a real mechanism of analysing the consequences of victimization (Wallengren & Mellgren, 2021) and preventing revictimization as well. Equally, the dual character of injured person – defendant necessitates a special approach from theoreticians taking into account the theory of criminal context, on the one hand, and the crime prevention policy (Berg & Schreck, 2022), on the other hand.

Moreover, doctrine has during the years interested in finding answers in the matter of how public authorities are involved in developing programs for the crime victims and the services providers (Gillespie et al., 2021). Although a serious activity was carried out by the public authorities, there are no reasons to believe that the number of vulnerable victims is currently decreasing comparing the phenomenon with the previous periods of time. Actually, the underage victims seem to be more vulnerable and their vulnerability should be analysed through the general mechanisms of training minors and drawing them up into

some actions of victimization (Cuciurca & Frunze, 2023). This is specific to serious crimes committed against underage persons and focuses especially on the in cases of sexual violence (Muratore, 2023) or other forms of violent crimes. Nevertheless, the underage persons are not the only one category of vulnerable victims of this kind of crimes. Women and elderly persons could equally become victims of serious crimes.

The criminal behaviour countered by the underage crime victims could generate other forms of violence (Aromaa, 2012) or specifically could be developed in other criminal environments, also involving vulnerable victims (Magherescu, 2023b).

3.2. Injured person in cases of serious crimes

An essential element of the serious crimes consists in committing the crime of trafficking in persons. The court of law will always retain the circumstances in which these crimes are committed and punish defendants in accordance with the form of guilt they acted with. In the matter of fact, the court of law has to state the defendant's criminal behaviour consisting in recruiting injured person in order to exploit it sexually, especially in those criminal cases in which the injured person is an underage person. Usually, the *modus operandi* consists in misleading victim through using the *"Loverboy"* method (Magherescu, 2023a), and also impressing her through romantic signs, expensive gifts and money, and also through promising an intimate relationship (Criminal Decision no. 231/RC/2024 of the High Court of Cassation and Justice of Romania). By doing so, the injured person has considered defendant as her protector both in front of her family and the teachers as well.

Analysing the evidence administered, the court of law has stated that the defendant's criminal conduct bring together the constitutive elements of the crime of trafficking in minors. By law, this crime follows the same criminal action as in cases of trafficking in persons, with the different passive subject which in the first case is an underage person. From the point of view of the material element of the objective side, it presents an alternative content and consists in recruiting, transporting, transferring, hosting or receiving underage persons in purpose to exploit

them. Other circumstantial elements are not compulsory to be met. They refer to acts of coercion over the injured person, kidnapping, misleading, abuse of power or any other conditions, as provided by the criminal law provisions. Doctrine in criminal matters has emphasized that the underage persons sometimes suffer serious damages through unlawful conducts of the perpetrators through abuse, poverty, and involve the issues of the rights of the children (Carvalho et al., 2024). Exploitation is also a very serious situation which involves circumstantial situations the vulnerable persons could be victim of (Loyens & Paraciani, 2021; Davies, 2019).

Taking into considerations the relevant aspects provided with a substantial theoretical support, the upper court of law has stated that the defendant has taken the opportunity the injured person's financial and emotional addiction to convince her that he loves her along with providing the intention to get married with her, a criminal conduct also specific to *"Loverboy"* method. During the processual activity of hearing injured person, the victim of crime has recognized that the defendant has physically assaulted when the injured person refused to consume drugs. Moreover, for the injured person the main scope of defendant was to create an addiction estate to victim (Criminal Decision no. 231/RC/2024 of the High Court of Cassation and Justice of Romania). According to the evidence administered, the court of law has stated that the defendant's intention was to exploit the injured person. From a theoretical perspective, it should be pointed out that the activity of hearing crime victims must be organized in a coherent manner in order to understand the injured persons' statement as a narrative which could influence the criminal sentencing procedure (Bandes, 2021).

Taking into account the circumstances the crime of underage trafficking was committed in, although the defendant has declared that a normal relationship was established with the underage injured person, the court of law definitely stated that any motives of cassation recourse as an extraordinary criminal procedure target more the substantial feature of the definitive criminal decision pronounced by the lower court of law and less its legality. Consequently, reestablishing the *de facto* situation of the

crime committed and its conformity with the evidence administered cannot *de plano* be subject of censor from the upper court of law during the extraordinary criminal procedure. This is because, from a jurisprudential perspective, the legislative provisions of criminal procedure law do not allow participants in criminal cases to submit extraordinary judicial instrument of the cassation recourse based on the evidence which conduct to a re-examination of the *de facto* situation.

4. Means of criminal procedure of enhancing the injured persons' legal status

The criminal procedure law is, in this judicial context, a useful tool of enhancing the injured persons' legal status during the criminal proceedings. Actually, by using some specific means of criminal procedure, the injured persons are always faced with significant challenges in their processual actions of gathering evidence in order to prove the truth (Ingram, 2021). The true situation suffered as a consequence of committing crime is also in the entire participants' interest or it could be so. First of all, the defendants should be interested in truth finding process in the criminal cases they are party of. This is because an unlawful status could be achieved by them, as a very dangerous one, of being convicted by mistake, for example. Secondly, the public prosecutor is equally interested in finding the truth in order to prove the crime committed, if the evidence administered confirm that the crime was committed by the defendant. Otherwise, the defendant should imperatively be acquitted.

Moreover, the court of law is the judicial body interested in pronouncing the legal decision either of condemnation or acquittal, pronounced in accordance with the entire *de facto* situation, based on the pertinent, conclusive and genuine evidence administered in the criminal case. The court of law should also state, beyond reasonable doubt, that the unlawful action was committed, it is a crime and was committed by the defendant with the appropriate form of guilt provided by the substantive criminal law. These aspects constitute arguments in admitting

that, generally speaking, all participants in criminal proceedings are looking for the same goal – that of finding the truth in criminal case (Summers, 2023).

In these circumstances, the legislator has provided a series of means of investigation and judgment in order for the court of law to enhance the legal status of injured person, as the victim of crime (Joyce & Laverick, 2022), on the one hand, and the other participants in criminal proceedings, on the other hand. This is possible through respecting the rights of injured persons and no infringement in achieving their goals of processual interests should be allowed. Moreover, their rights are fully respected being indifferent if they acquire the status of civil party or not. Discussing the first situation, it is relevant for the current topic to be pointed out that the injured persons' processual rights do not depend on the process of unacquiring status of civil party. Actually, unacquiring status of civil party is a right of the injured persons, but not an obligation and, for this reason, their legal status cannot suffer modification.

The processual instruments recognised to the injured persons as means of enhancing their legal status refer to the right to propose evidence, right to defence, right to appeal de solutions pronounced by the courts of first instance or even to promote extraordinary procedures in cases of definitive decisions pronounced by the upper courts of law. Moreover, assuring the injured persons that these processual instruments are enhanced by the judicial bodies, some pertinent solutions are guaranteed through processual activities pursued in this context.

Such legal instruments are completed by a series of actions disposed by the law of criminal procedure in the injured persons' capacity. They also refer to the issue of claiming compensations for the damages suffered by them as a consequence of the crime committed. It also can be achieved at the supranational level, as a relevant instrument that their rights are fully guaranteed (Bălan, 2018), although the home courts of law provided differently. In this matter, the European Court of Human Rights is a relevant supranational court of justice provided for those citizens of the Council of Europe member states as a pertinent processual instrument of achieving their rights in those cases in which a

European Convention on Human Rights' provision was infringed by the national authorities (Case of Panayotopoulos and others v. Greece, 2025). The compensations have, in this context, a significant role in gathering an equilibrium between the damage and the consequence of crime meaning for the future.

The same situation could be seen in those cases in which the injured persons are not allowed to participate at the moment of signing guilt agreement in the special procedure, in accordance with the Code of criminal procedure of Romania, although, as victims of crimes, their interest is evident in the matter of speeding up the criminal proceedings (Budaházi & Fantoly, 2024). As a *de lege ferenda* proposal, the legal provisions of criminal procedure law should not deny the injured persons from the procedure of signing the guilt agreement. Consequently, their presence could be allowed during the entire procedure of "negotiation" between the defendant and the case prosecutor, in the respect of the injured persons, as participants in criminal proceedings along with defendants and their defence lawyers. In this manner, they can contribute to a better procedure of resolving the criminal cases through the special procedure of guilt agreement. This perspective is also a useful instrument of criminal procedure law to assure victims of crimes, either as injured persons or civil persons, that their processual rights are fully respected during the entire simplifying criminal procedure and no infringements in their processual positions could be permitted by the judicial bodies, in particular by the case prosecutor who is the entitled judicial body to sign the guilt agreement with the defendant.

Conclusions

Analysing the legal status of the injured persons in criminal proceedings, it is obvious that the general theory of processual rights of the participants require some pertinent solutions to be taken into consideration by the judicial bodies. Both the investigative bodies and the courts of law should be involved in respecting the injured persons' legal status during the criminal proceedings. No restrictive processual

measured could be ordered by them in purpose to infringe the injured persons' processual rights. Otherwise, an illegal solution will be pronounced by the court of law which will be appealed by the injured persons accordingly.

Speaking about the process of enhancing legal status of the injured persons, it should be emphasized that it is also in the judicial bodies' interest and the law of criminal procedure obliges them to pursue the entire legal instruments in order to achieve these goals along with the significant goal of finding the truth in criminal cases and pronounce legal decisions based on legal evidence. This is firstly because the judicial bodies have to respect the procedural rules and activities in such a manner to facilitate all the participants involved, including the injured persons, the access to the case file, to propose evidence and combat those which are not legal administered in criminal cases.

Moreover, the injured persons play a significant role in the architecture of criminal proceedings, being an important instrument of due process, especially in those criminal cases in which they need to promote the principle of solving criminal cases in reasonable time. This principle is equally applied to all participants, but it is more visible in the defendants and injured persons' processual interests.

Finally, the issue of enhancing legal status of the injured persons should be discussed from different points of view, in accordance with their interest in acquiring status of civil party. This is because, in practice, there are several criminal cases in which the injured persons do not agree to acquiring status of civil party and, despite this inconvenience, their processual rights should be fully respected.

References

Aromaa, K. (2012). Victimisation surveys: What are they good for?. *Temida,* 15(2), 85–93. https://doi.org/10.2298/TEM1202085A

Asquith, N. L., & Bartkowiak-Théron, I. (2021). *Policing practices and vulnerable people*. Palgrave Macmillan.

Bandes, S. A. (2021). Empathy, narrative, and victim impact statements (1996). In: *Research Handbook on Law and Emotion* (pp. 514–533). Edward Elgar.

Banet-Weiser, S., & Higgins, K. C. (2023). *Believability: Sexual violence, media, and the politics of doubt*. Polity Press.

Bălan, C. (2018). Cauza Brudan contra României. Un nou început în materia remediilor compensatorii disponibile în cazul încălcării termenului rezonabil de soluționare a cauzelor civile și penale. *Pandectele Române*, 2, 53–70.

Bălan, C. (2021). *Termenul rezonabil în procesul penal român* [Reasonable time in the Romanian criminal proceedings] Hamangiu.

Berg, M. T., & Schreck, C. J. (2022). The meaning of the victim–offender overlap for criminological theory and crime prevention policy. *Annual Review of Criminology, 5(1),* 277–297. https://doi.org/10.1146/annurev-criminol-030920-120724

Budaházi, Á., & Fantoly, Z. (2024). Negotiated agreements as an alternative to criminal trials: Policy lessons from the Hungarian example. *European Journal of Crime, Criminal Law and Criminal Justice, 32(2),* 105–125. https://doi.org/10.1163/15718174-bja10053

Carvalho, O., Borges, A. & Galinha, S. (2024). The rights of the child: Knowledge and compliance. *Revista Jurídica Portucalense*, 35, 670–686. https://doi.org/10.34625/issn.2183-2705(35)2024.ic-31

Case of Panayotopoulos and others v. Greece, 2025. European Court of Human Rights, Decision on 21 January 2025.

Chornous, Y. & Dulskyi, O. (2024). International and European forensic support standards for criminal proceedings. *Law Journal of the National Academy of Internal Affairs, 1(14)*, 9-18. https://doi.org/10.56215/naia-chasopis/1.2024.09

Criminal Decision no. 428/RC/2024 of the High Court of Cassation and Justice of Romania, available online at https://www.scj.ro/

Criminal Decision no. 335/RC/2024 of the High Court of Cassation and Justice of Romania, available online at https://www.scj.ro/

Criminal Decision no. 231/RC/2024 of the High Court of Cassation and Justice of Romania, available online at https://www.scj.ro/
Criminal Decision no. 226/RC/2024 of the High Court of Cassation and Justice of Romania, available online at https://www.scj.ro/
Criminal Decision no. 189/RC/2024 of the High Court of Cassation and Justice of Romania, available online at https://www.scj.ro/
Criminal Decision no. 402/2019 of the High Court of Cassation and Justice of Romania, available online at https://www.scj.ro/
Cuciurcă, A., & Frunze, I. (2023). Standarde internaționale și naționale privind protecția minorilor împotriva violenței sexuale. In: *Promotion of Social and Economic Values in the Context of European Integration*,174–181.
Davies, J. (2019). Market dynamics of harm and labour exploitation. In: P. C. Van Duyne, A. Serdyuk, G. A. Antonopoulos, J. H. Harvey, & K. von Lampe (Eds.). *Constructing and Organising Crime in Europe* Eleven International, 123–147.
Dearing, A., & Huxtable, H. (2021). Doing justice for victims of violent crime in the European Union-Reflections on findings from a research project conducted by the European Union Agency for Fundamental Rights. *International journal of comparative and applied criminal justice, 45(1),* 39–66.
Gillespie, L. K., King, L. L., Bostaph, L. G., & Goodson, A. (2021). Crime victim service providers' needs and barriers: Rurality and "High Need". *Journal of Interpersonal Violence*, 36(15-16), 7274–7297. https://doi.org/10.1177/0886260519834100
Ingram, J. L. (2021). *Criminal evidence*, (14th ed.). New York: Routledge. https://doi.org/10.4324/9781003092360
Joyce, P., & Laverick, W. (2022). *Criminal Justice: An Introduction* (4th ed.). Routledge. https://doi.org/10.4324/9780429330537
Kremens, K. (2020). *Powers of the prosecutor in criminal investigation: A comparative perspective*. Routledge.
Law no. 135 of 2010 on the Code of Criminal Procedure of Romania, published in the Official Journal no. 486 of 15 July 2010.
Loyens, K., & Paraciani, R. (2021). Who is the ("Ideal") victim of labor

exploitation? Two qualitative vignette studies on labor inspectors' discretion. *The Sociological Quarterly, 64(1),* 27–45. https://doi.org/10.1080/00380253.2021.1974321

Loza, Y. (2024). Discrimination in the paradigm of crime: A sociolegal approach. *Revista Jurídica Portucalense*, 35, 642–669. https://doi.org/10.34625/issn.2183-2705(35)2024.ic-30

Magherescu, D. (2023a). The risk of revictimization for the young victims of crimes. *International Journal of Social Quality, 13(1),* 73–92. https://doi.org/10.3167/IJSQ.2023.130106

Magherescu, D. (2023b). Violența în familie asupra minorului și impactul acesteia în diverse medii infracționale. In: *Prevenirea și combaterea violenței în familie* (pp. 281–291). Chișinău: Centrul Editorial-Poligrafic USM. https://doi.org/10.5281/zenodo.8229102

McGarry, R., & Walklate, S. (2015). *Victims: Trauma, testimony and justice*. Routledge. https://doi.org/10.4324/9780203727379

Muratore, M. G. (2023). Victimization. In: F. Maggino (Ed.) *Encyclopedia of Quality of Life and Well-Being Research* (pp. 7500–7504). Springer. https://doi.org/10.1007/978-3-031-17299-1_3156

Signorelli, W.P. (2023). *Criminal Law, Procedure, and Evidence*, (2nd ed.). Routledge.

Summers, S. J. (2023). The epistemic ambitions of the criminal trial: Truth, proof, and rights. *Quaestio Facti. Revista internacional sobre razonamiento probatorio,* 4, 249–272. https://doi.org/10.33115/udg_bib/qf.i1.22809

Summers, S. J. (2024). Reply to the comments on epistemic ambitions of the criminal trial: Truth, proof and rights. *Quaestio facti. Revista internacional sobre razonamiento probatorio,* 6, 1–11, doi:10.33115/udg_bib/qf.i6.22992.

Wallengren, S., & Mellgren, C. (2021). Silent victims in the public eye: Socially vulnerable EU citizens' exposure to crime and its consequences. *Journal of interpersonal violence*, 36(3-4). https://doi.org/10.1177/0886260518754872

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 709- 715

STANDARDIZATION OF SOCIAL SERVICES AND CONTROL OF RESPECT FOR BENEFICIARIES' RIGHTS

Răducu Răzvan DOBRE
ORCID ID: 0000-0001-6640-9093
E-mail: raducu_razvan.dobre@upb.ro
Afiliation: Faculty of Educational Sciences, Social Sciences and Psychology, National University of Science and Technology Politehnica Bucharest, Pitești University Center

Abstract: *Social services are undoubtedly the eloquent expression of how the Romanian state succeeds or fails to fulfill that attribute defined by the fundamental law, namely that of being a social state. The transfer of responsibility from the state to the private sector is more recently achieved not only by accrediting some providers in this area, but also by co-opting them and an important part of civil society in controlling how the minimum standards are respected in the provision of various types of social services. The digitalization of national registers that contribute to the functioning of the social assistance system is also a novelty that attempts to eliminate the risk of beneficiaries or their legal representatives interacting with entities not authorized to operate.*
Keywords: *social services; minimum standards; control.*

Introduction

Law 100/2024 attempts to eliminate any doubt regarding the functionality of the social work system. The priority of establishing and delivering social services dedicated to various vulnerable persons constitutes the premise, but not the guarantee, that the respective beneficiaries will enjoy the support necessary to identify and manage the various types of needs. Reality has shown that even in the public sector,

the minimum standards are not always respected by social assistance units, and on the other hand, the identification in practice of situations in which the non-profit sector has generated devastating consequences for the respective clients has led to the taking of urgent administrative measures. However, the need for legislative intervention was found, by adopting the aforementioned normative act, noting that until that moment there were no necessary levers to eliminate the harmful effects produced and, respectively, to verify the fulfillment of certain conditions regarding the optimal functioning of the organizations providing social services.

Standardization of social services and control of respect for beneficiaries' rights

The new regulation given by law no. 100/2024 ensures a more secure intervention of the state through the following means: securing the social services offered through effective means of control regarding compliance with standards, defining certain concepts specific to the social work system, increased sanctions for the volunteer status that does not actually reflect such an activity, explicit support for the situation of elderly people in terms of care. We are in fact in the presence of a reform of several levels related to the efficiency of the effects produced for the clients of the social assistance system. Over time, it has been found that the quality standard is only a principle and not a certainty, that certain areas of social work do not function well because they are not regulated, that under the prerogative of social responsibility, not exactly licit activities can be developed. represents an integrative solution in terms of ensuring the quality of social services, regardless of the form of organization or the legal regime governing the provider.

The normative act under analysis modifies several normative acts in order to achieve the proposed purpose, namely guaranteeing the exercise of the rights of beneficiaries of social services and increasing the quality of the way in which they are provided. The role of the social worker must be represented in concrete terms - the one through which the social service provided involves establishing objectives by placing the

person in need at the center, or respectively that of an agent of change, through the mediation of the intervention project. (Apăteanu, 2018, p.28).

A priority element in achieving transparency in the implementation of activities specific to social services is represented by the co-optation in the teams that monitor them of specialists who come not from the level of public state structures, but from private entities that have a declared purpose specific to social assistance, or non-profit structures that aim to guarantee respect for human rights in general. The existence of a wide range of such private structures compared to what was happening in this sector a few years ago is also a consequence of the use of the European social entrepreneurship fund, which were also dedicated to enterprises that try to have a positive social impact. (Dobrescu, 2018, p. 144). It is assumed that social management is characterized, among others, by cyclicity, in the sense that each act ends with the transition of the system to a new state, a new purpose appears, and correction or completion will be achieved through various forms of influence (Petrescu, 2004, p. 134).

The involvement of these socio-professional categories that constitute an interdisciplinary structure (doctor, psychologist, social worker, lawyer) will be carried out in concrete terms through field visits to various establishments that deal with people in need. The principle of proportionality in the implementation of this monitoring operation translates into the fact that the presence of these teams in the field will have to be indispensable in order to protect the interest of the beneficiary, without, however, being able to be classified as an interference in the continuity of the activity of the service provider concerned.

The social work system has become increasingly complex, given the fact that there are extremely many categories of vulnerable people. At the same time, the lack of genuine means of control over organizations that carry out specific activities in the field has led to the implementation of electronic registers designed to detect possible clandestine services in the private sector. The correlation between the single register of social service providers and the national register of beneficiaries of such services will minimize the risk of identifying, even after this amendment,

situations in which social service clients (predominantly the elderly or those with communication problems due to a certain disability) end up having their lives in danger, instead of being guaranteed specific rights directly related to the social problem they face. It is a certainty that vulnerable groups are predisposed to unequal treatment and do not have equal chances of integration into society. (Dicu, 2018, p. 91).

Another new provision is the one that establishes that the value of minimal social assistance services will be budgeted at the level of each community. Here, a real problem will be encountered by rural communities that do not have access to generous budgets. Supplementing these resources through projects from European funds or through partnerships with county authorities will probably really change the data of the problem. The emergency social assistance intervention is established at a declarative level also through the new norms governing the framework law, but its operationalization will constitute a real challenge, especially since the activity requires human resources to ensure permanence outside regular office hours and especially on weekly rest days. The importance of the social worker profession is different with the express stipulation in the law that it proposes the start of community programs to prevent the risk of social marginalization and the services necessary in this regard at the level of each public social assistance service. The annual action plan for social services, which is developed by local authorities, will be of overwhelming importance here (Pătrașcu, 2014, p. 178).

Social assistance also involves the use of professionals in the field. The professional training of social workers is on the same level as that existing at the level of other liberal professions. (Sălăjeanu, 2010, p.77). In addition to the social worker profession, which is managed by the professional body of the National College of Social Workers, an extremely important clarification appears in the updated form of the law text regarding the status of the social worker technician. This professional category could be found at the level of public social assistance services in rural areas. Although it may have seemed up to a certain point a superior solution to the pre-existing one - persons with

delegated social assistance responsibilities, the lack of a clear definition of the activities carried out and the skills recognized by this category of personnel has generated controversy. By corroborating all these mentions, it results that the efforts of local communities, even rural ones, to co-opt social workers within the mayor's working apparatus will become vital. The current legislative change is not beyond criticism either, as although it requires following a course to acquire certain limited skills, it does not guarantee predictability regarding the provider of such a qualification.

A practical hypothesis similar to that of the nurse appears. Can the skills of a professional who follows higher education be compared with those of a person professionally certified through a short course? Although the remuneration of the two categories of people differs, it is clear that in practice there will be situations in which the lack of skills will generate considerable disadvantages for the beneficiaries. In the same vein, the status of personnel serving the public social assistance system will from now on be predominantly contractual. The exceptional nature of the status of civil servant in the area of social assistance somewhat limits better remuneration and, moreover, affects the stability of such a position.

In addition to this new approach to the functioning of social services, we also mention the establishment of the obligation of the staff on duty to prove that they do not have a potentially harmful behavior for the beneficiaries. The compliant behavior of social assistance professionals will also be achieved as a result of the practical implementation of the obligation of social service providers to ensure their participation in training courses aimed at assimilating concepts related to human rights, neglect, discrimination, etc. The minimum quality standards will be analyzed extremely rigorously at the time of the field inspection, such that any deviation exceeding a percentage of 10% compared to the entire set of requested conditions will lead to the withdrawal of the provisional license and at the same time the mentions from the single register regarding the social services concerned will be removed.

On the other hand, serious efforts are being made to ensure the structure of the control personnel within social inspections, with an annual estimate of the increase in the number of positions to be provided by the state in this regard. Not without importance is the fact that the social inspector who carries out social investigation is recognized with a series of attributes necessary for carrying out an unannounced control. Unrestricted access to any space that is supposed to host beneficiaries or to any administrative headquarters where assessments are carried out to generate a certificate of classification in disability, state of dependency or other similar situation. In other words, the discovery of serious negligence or actions carried out with intent that involve fraud or that generate damage to the state will be able to be caught in such an action that is close to the flagrante procedure in criminal law.

Conclusions

Since social assistance is a field that eminently involves an applied activity, the interaction between the specialist and the beneficiary being essential, the control of how the acquired skills of the social worker will be used will undergo a radical change. The recognition of the role of the social worker in the community, complemented by the assurance of sufficient budgeting to be able to manage the various problems of the client within reasonable limits, ensures expectations that are difficult to estimate in recent times. The statistical data that will be reported at the level of the institutions involved in the functioning of this system will demonstrate whether the changes ordered by the analyzed normative act were sufficient or were just a starting point.

References

Apăteanu, D.(2018). Asistența socială [Social work]. In Goudenhooft, G., Brihan, A.-C.& Horga, I.. *Europa socială în 100 de termini* [*Social Europe in 100 terms*]. Tritonic.

Dicu, S. (2018). *Dimensiuni ale discriminării în plan socio-profesional a persoanelor cu dizabilități din România* [*Dimensions of socio-professional discrimination of people with disabilities in Romania*]. Tritonic.

Dobrescu, E., M. (2018) *Noile sisteme economice și sociale* [*New economic and social systems*]. Sitech.

Legea nr. 100/2024 [Law no. 100/2024]. https://legislatie.just.ro/Public/DetaliiDocumentAfis/281934

Pătrașcu, D. O. (2014). *Drept social* [*Social Law*]. Legal Universe.

Petrescu, I. (2004) *Management social* [*Social management*]. Expert.

Sălăjeanu, F. (2010).Despre reglementarea profesiei de asistent social în România[About the regulation of the social worker profession in Romania]. In Buzducea Doru, *Asistența socială a grupurilor de risc* [*Social work to risk groups*]. Polirom.

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 716- 731

THE CHALLENGES OF THE EUROPEAN UNION REGARDIND ASYLUM PROCEDURES

Doina POPESCU LJUNGHOLM
ORCID [ID]: 0000-0001-5648-8162
E-mail: doina.popescu0602@upb.ro
*Afiliation:*National University of Science and Technology Politehnica Bucharest, Faculty of Economic Sciences and Law, Romania

Abstract: *The European Union had been working on implementing various policies and agreements to manage the flow of refugees and migrants, improve border control, and address the root causes of migration.Integration of refugees into European societies remained a significant challenge, with issues related to housing, language barriers, employment, and social inclusion. Different countries had different approaches to integration, leading to disparities în outcomes for refugees. Asylum procedures varied across European countries, leading to differences in the recognition rates of asylum claims and the treatment of asylum seekers.Some European countries experienced a rise in anti-immigrant sentiment and populist movements, leading to political tensions and debates over immigration policies.*

It's important to note that asylum procedures can vary significantly from country to country, and each country has its own laws, policies, and practices regarding asylum.Asylum procedures refer to the legal processes that a person must go through to seek asylum in a particular country and to have their claim for refugee status assessed. These procedures are put in place to determine whether an individual meets the criteria for refugee status under international and national laws.

Moreover, the rise of anti-immigrant sentiment and populist movements in certain European countries has added a layer of complexity to the refugee debate. Political tensions over immigration policies, concerns about national identity, and fears of cultural change have fueled debates about the rights and responsibilities of both refugees and host communities.

Keywords: *European Union; refugees; asylum procedures; immigration policies; social inclusion.*

Introduction

The issue of asylum has become one of the most pressing challenges for the European Union in the last decades. Migration flows, triggered by armed conflicts, political instability, economic inequalities, and climate change, have placed continuous pressure on the EU's capacity to respond in a coordinated and humane manner. While the European Union has established a legal and institutional framework for asylum through the Common European Asylum System (CEAS), the reality on the ground shows significant discrepancies between member states in terms of implementation, resources, and political willingness.

The "refugee crisis" of 2015 revealed both the strengths and weaknesses of the EU's approach. On one hand, it demonstrated the Union's commitment to human rights and international protection standards. On the other hand, it exposed systemic flaws: lack of solidarity, unequal distribution of responsibilities, and deep political divisions between Western, Southern, and Eastern member states.

Asylum procedures are at the intersection of humanitarian obligations and national sovereignty, which makes their management particularly complex. The EU must balance the principle of solidarity with the need for security and border control, while also addressing the legitimate concerns of host societies. This balancing act raises fundamental questions about the future of European integration, the credibility of the EU as a global actor, and its ability to uphold the values enshrined in the Geneva Convention and the Charter of Fundamental Rights of the European Union.

The present research paper aims to examine the main challenges faced by the EU in the field of asylum procedures, analyzing both the legal framework and the practical difficulties encountered by member states. It will also explore the consequences of these challenges for the cohesion of the Union and propose potential directions for reform ,also my paper argues that the European Union's asylum procedures remain ineffective primarily due to unequal burden-sharing, political

fragmentation, and insufficient harmonization of legal standards, and that addressing these weaknesses is crucial for safeguarding both human rights and the credibility of the EU as a political and humanitarian actor.

1. Legal and Institutional Framework

1.1 The Common European Asylum System (CEAS)

The Common European Asylum System (CEAS) represents the cornerstone of the European Union's attempt to harmonize asylum policies across member states. It was created with the aim of ensuring that asylum seekers receive equal treatment and protection, regardless of the country in which they submit their application. The CEAS is built on a series of legislative instruments, including the Asylum Procedures Directive, the Qualification Directive, the Reception Conditions Directive, and the Dublin III Regulation, which establishes criteria and mechanisms for determining the member state responsible for examining an asylum claim (European Union, 2016, pp.29).

Despite its comprehensive legal structure, the CEAS has faced significant criticism. One major challenge lies in the unequal implementation of its provisions among EU member states, leading to divergent standards of protection and reception conditions (Thielemann, & Zaun, 2021, pp 34-41). For instance, asylum seekers may experience markedly different living conditions in Greece compared to Germany, which undermines the principle of solidarity and mutual trust that the EU strives to promote.

Another structural weakness is related to the Dublin Regulation, which places a disproportionate responsibility on border states such as Italy, Greece, or Spain (Guild, Costello, & Moreno-Lax, 2017, pp.102).. This system has been criticized for generating systemic imbalances and for failing to distribute asylum responsibilities equitably among all member states. Consequently, it has fueled political tensions and contributed to the lack of consensus on asylum reform.

In addition, the CEAS has struggled to balance the need for effective border control with the obligation to respect fundamental human rights. This tension has been particularly evident during crises,

such as the 2015 refugee influx, when some countries adopted restrictive measures that conflicted with the humanitarian principles enshrined in EU law (Peers, & Garlick, 2016, pp.37).Overall, while the CEAS provides a strong legal foundation for asylum procedures, its practical shortcomings have revealed the limits of harmonization in the face of political, economic, and social diversity among EU member states.

2.2 The Role of EU Institutions and Agencies

The implementation and supervision of the European Union's asylum policies involve a complex interaction among several institutions and agencies. The European Commission plays a central role in proposing legislation, monitoring compliance, and initiating infringement procedures against member states that fail to apply asylum law correctly (European Commission, 2020, pp.19). By acting as the guardian of the treaties, the Commission ensures that the fundamental rights of asylum seekers are respected across the Union.

The European Parliament also contributes by participating in the legislative process and providing democratic oversight. Its debates often highlight the tension between security concerns and humanitarian obligations, reflecting the diverse political and social perspectives within the Union (Lavenex, 2018, pp.63). Together with the Council of the European Union, the Parliament co-decides on asylum-related legislation, though reaching consensus in the Council is often difficult due to diverging national interests.

Beyond the legislative institutions, the Court of Justice of the European Union (CJEU) plays a vital role in interpreting asylum law and ensuring its uniform application. Through landmark rulings, the CJEU has clarified member states' obligations under EU law, including the prohibition of returning asylum seekers to countries where they face inhuman or degrading treatment (Court of Justice of the European Union, 2011, pp.211-218). These judgments strengthen the legal protection of asylum seekers and promote consistency in the implementation of the CEAS.

A particularly important specialized body is the European Union Agency for Asylum (EUAA), formerly known as the European Asylum Support Office (EASO). Established in 2010, the agency provides operational support to member states under pressure, conducts training for asylum officers, and collects reliable data on asylum trends (European Union Agency for Asylum, 2022). The transformation of EASO into the EUAA in 2022 has expanded its mandate, enabling it to play a more proactive role in ensuring harmonization and solidarity.

Nevertheless, despite these institutional efforts, challenges persist. Disagreements between the Council and Parliament, combined with limited enforcement powers for the EUAA, hinder the creation of a fully effective and cohesive asylum system. The institutional architecture provides valuable tools, but political will remains the decisive factor for reform and success

2. Main Challenges in Asylum Procedures

2.1 Uneven Implementation across Member States

One of the most persistent challenges faced by the European Union in the field of asylum is the uneven implementation of the Common European Asylum System (CEAS) across its member states. Although the CEAS was designed to harmonize asylum standards, in practice, asylum seekers encounter very different realities depending on the country in which they apply for protection (European Commission,2019,pp. 35).

Differences are particularly visible in the quality of reception conditions. In some member states, asylum seekers are provided with adequate housing, healthcare, and access to education, while in others, reception centers are overcrowded and basic services are lacking (European Union Agency for Asylum, 2021, pp.48).Such discrepancies undermine the principle of equal treatment, generating what scholars have called a “protection lottery,” where the fate of asylum seekers depends more on geography than on law.

The unequal distribution of asylum applications further exacerbates this issue. Countries such as Germany, France, and Sweden have

consistently received higher numbers of applications, while several Central and Eastern European states have accepted very few(Eurostat 2022, pp.28). This imbalance is largely due to political unwillingness, resource disparities, and in some cases, public opposition to migration. As a result, the principle of solidarity enshrined in EU treaties has remained largely aspirational rather than operational.

Additionally, the inconsistent application of asylum procedures leads to legal uncertainty. For example, recognition rates for applicants from the same country of origin can vary significantly between member states. While one country may grant refugee status to the majority of Syrian applicants, another may classify them only as beneficiaries of subsidiary protection or reject their claims altogether (Eule, 2017, pp.161).Such divergences weaken mutual trust among member states and put additional strain on the EU's asylum system.

Ultimately, uneven implementation not only undermines the effectiveness of the CEAS but also threatens the credibility of the European Union as a whole. Without greater convergence in standards and practices, the EU risks perpetuating systemic inequalities and fueling political divisions among its members.

2.2 Overburdened Systems and Lack of Resources

Another major challenge of the EU asylum framework is the overburdening of national asylum systems, particularly in frontline states such as Greece, Italy, and Spain. These countries, due to their geographical location, are often the first points of entry for asylum seekers arriving via the Mediterranean or land borders. Consequently, their administrative and humanitarian capacities have been stretched far beyond sustainable levels (European Union Agency for Asylum, 2016, pp.39).

The 2015 refugee crisis highlighted these systemic weaknesses. As hundreds of thousands of asylum seekers arrived within a short period, national authorities struggled to process applications in a timely manner. This resulted in long waiting periods, inadequate living conditions, and violations of basic rights (UNHCR, 2015, pp.59). Even years later, some

member states continue to face significant backlogs of asylum applications, demonstrating that the system remains vulnerable to sudden increases in migration flows.

Limited financial and human resources further compound the problem. National asylum offices are often understaffed, leading to procedural delays and inconsistent decision-making (Carrera, & Cortinovis, 2019, pp.95).In many cases, reception centers lack sufficient capacity to accommodate the influx of migrants, resulting in overcrowding and deteriorating conditions. These shortcomings not only harm asylum seekers but also erode public confidence in the EU's ability to manage migration effectively.

The European Union Agency for Asylum (EUAA) has attempted to alleviate these pressures by deploying asylum support teams and providing funding through mechanisms such as the Asylum, Migration and Integration .Fund (AMIF). However, the reliance on ad hoc assistance rather than a permanent redistribution mechanism has limited (European Commission, 2020, pp.37).Moreover, frontline states have repeatedly called for greater solidarity from their northern and eastern counterparts, many of whom remain reluctant to share responsibility.

The persistence of overburdened systems underscores the structural imbalance within the EU asylum regime. Unless resources and responsibilities are more equitably distributed, the Union will continue to face recurring humanitarian crises and political disputes that undermine its cohesion.

2.3 Security Concerns vs. Human Rights Obligations

A recurring dilemma in the European Union's asylum policy is the tension between ensuring security and upholding human rights. Member states often perceive migration as a potential security risk, associating it with terrorism, organized crime, or social instability (Bigo, 2014, pp176). This perception has led to the adoption of restrictive border management practices and increased reliance on surveillance technologies.

The terrorist attacks in Paris (2015) and Brussels (2016) intensified these concerns, fueling political narratives that portrayed asylum seekers

as potential threats (Huysmans, 2020, pp.69). As a result, several member states introduced stricter border controls and accelerated procedures for rejecting asylum claims. While these measures were justified on grounds of national security, they frequently conflicted with the humanitarian obligations enshrined in the Geneva Convention (1951) and the Charter of Fundamental Rights of the European Union.

Another manifestation of this tension is the use of detention centers for asylum seekers, often justified by governments as necessary for identification and security screening. However, international organizations such as UNHCR and the European Court of Human Rights (ECtHR) have repeatedly criticized these practices, arguing that they may amount to inhuman or degrading treatment(European Court of Human Rights, 2011, pp.231)..

Moreover, the externalization of asylum procedures—through agreements such as the EU–Turkey Statement of 2016—has raised serious ethical questions. By outsourcing migration control to third countries, the EU has attempted to reduce arrivals but at the cost of potentially exposing asylum seekers to unsafe environments(Carrera, & Guild, 2016, pp.136). Such practices highlight the EU's struggle to balance internal security imperatives with its international legal commitments.

In the long run, prioritizing security over rights risks undermining the EU's credibility as a normative power. A sustainable asylum policy must therefore reconcile the legitimate need for border management with the protection of fundamental human rights. Failure to strike this balance may not only harm vulnerable individuals but also erode trust in the European project itself.

2.4 Political Disagreements and Solidarity Deficits

One of the most persistent challenges facing the European Union in the asylum domain is the lack of political consensus among member states. National interests often diverge, resulting in solidarity deficits that undermine the functioning of the Common European Asylum System (CEAS). Countries on the EU's external borders, such as Greece, Italy,

and Spain, argue that they bear a disproportionate responsibility for asylum seekers, while many Central and Eastern European states have resisted relocation quotas(Carrera, & Stefan, 2018, pp.152).

Disagreements are particularly pronounced over the mandatory relocation of asylum seekers. In 2015 and 2016, the European Commission proposed binding quotas to redistribute refugees across member states. While some countries, like Germany and France, accepted these measures, others, including Hungary, Poland, and the Czech Republic, refused, citing concerns over sovereignty, cultural integration, and public opinion (Klekowski von Koppenfels, & Okólski, 2017, pp.131).These disputes slowed down EU-level decision-making and highlighted the difficulty of reconciling national priorities with collective obligations.

Political fragmentation also affects the adoption of new asylum legislation. The proposed reforms under the EU's New Pact on Migration and Asylum (2020) have faced significant debate in both the Council and the European Parliament, demonstrating how member states' differing political agendas can hinder meaningful policy change (European Commission, 2020, pp.31).This lack of consensus not only prolongs the operational inefficiency of the asylum system but also weakens the EU's credibility internationally.

Moreover, solidarity deficits have a humanitarian dimension. Countries unwilling to participate in relocation schemes often leave frontline states to manage overcrowded reception centers and stretched resources, resulting in deteriorating conditions for asylum seekers and increased social tensions. Without stronger mechanisms for equitable burden-sharing, the EU risks repeating cycles of crisis response rather than achieving a sustainable, rights-based asylum policy.

In conclusion, political disagreements and the absence of robust solidarity mechanisms remain key obstacles to a cohesive and effective EU asylum framework. Addressing these challenges is essential for both protecting asylum seekers and maintaining the legitimacy of the Union.

3. Case Studies and Illustrations

3.1 The 2015 Refugee Crisis

The 2015 refugee crisis represents one of the most significant tests of the European Union's asylum system. Triggered primarily by the civil war in Syria, but also by conflicts in Afghanistan, Iraq, and parts of Africa, the crisis led to an unprecedented influx of asylum seekers into the EU. More than 1 million people arrived in a single year, placing extreme pressure on the capacities of member states (UNHCR, 2016, pp.38).

Frontline states such as Greece, Italy, and Hungary faced acute challenges in processing applications, providing adequate reception conditions, and ensuring the safety of migrants(European Union Agency for Asylum, 2016, pp.36). The crisis exposed severe structural weaknesses in the Common European Asylum System (CEAS), including insufficient harmonization of procedures, limited relocation mechanisms, and delayed decision-making.

The political response within the EU was highly fragmented. While Germany and Sweden adopted relatively open policies, including temporary suspension of the Dublin Regulation for Syrian refugees, other countries—particularly in Central and Eastern Europe—resisted relocation plans and tightened border controls (Carrera, & Guild, 2017, pp.115).This divergence revealed deep divisions among member states regarding solidarity, responsibility-sharing, and the political acceptability of hosting asylum seekers.

Humanitarian organizations and the European Union Agency for Asylum (EUAA) played critical roles during the crisis, providing operational support, emergency funding, and coordination for reception centers (European Union Agency for Asylum, 2016, pp.89). However, despite these interventions, the crisis highlighted the limitations of EU institutions in enforcing equitable burden-sharing and ensuring uniform protection standards.

The 2015 refugee crisis thus serves as a stark illustration of the challenges discussed in previous chapters: uneven implementation of

asylum procedures, overburdened systems, security-human rights tensions, and political disagreements among member states. Lessons from this period continue to inform debates on asylum reform and the design of sustainable migration policies within the EU.

3.2 Recent Developments (Ukraine, Middle East, Africa)

In recent years, the European Union has faced new challenges in managing asylum flows originating from different regions, notably Ukraine, the Middle East, and Africa. The 2022 Russian invasion of Ukraine triggered a massive displacement crisis, with millions of Ukrainians seeking refuge in EU member states. Unlike previous crises, the EU implemented the Temporary Protection Directive to provide immediate protection, residence rights, access to work, and social services (European Commission, 2022, pp.69).This rapid response demonstrated the Union's capacity for coordinated action in cases of sudden mass displacement.

However, asylum seekers from other regions—such as Syria, Afghanistan, and sub-Saharan Africa—continue to encounter delays and inconsistent treatment across member states(UNHCR.2023,pp.74). Global Trends: Forced Displacement in 2022. While some countries have streamlined procedures for Ukrainian refugees, applicants from other conflict zones often face prolonged processing times, limited reception conditions, and stricter eligibility criteria. This differentiation has raised concerns about selective solidarity and the equitable application of asylum rights within the EU.

In addition, migration routes from North Africa and the Middle East remain highly precarious. Asylum seekers often undertake dangerous journeys across the Mediterranean, facing risks of exploitation, human trafficking, and drowning(International Organization for Migration (IOM, 2022, pp.121). Despite EU initiatives to strengthen border management and cooperate with transit countries, these flows continue to strain frontline states and highlight the structural limitations of the asylum system.

The recent developments illustrate both progress and persistent challenges. While mechanisms such as the Temporary Protection Directive provide rapid responses to specific crises, broader systemic issues—including uneven implementation, overburdened systems, and political disagreements—remain unresolved. Lessons from Ukraine and ongoing crises in the Middle East and Africa underscore the need for long-term, cohesive, and rights-based solutions that can ensure equitable protection for all asylum seekers.

4. Discussion and Analysis

The European Union's asylum system faces a complex interplay of legal, political, and humanitarian challenges, which collectively shape its effectiveness and credibility. The previous chapters highlighted four key areas of concern: uneven implementation, overburdened systems, security-human rights tensions, and political disagreements among member states. This chapter analyzes the broader implications of these challenges and explores potential avenues for reform.

4.1 Impact on EU Unity and Credibility

The uneven implementation of the Common European Asylum System (CEAS) and the lack of solidarity among member states have eroded the trust and cohesion that underpin European integration(Thielemann, E., & Zaun, N.2021,pp.142).Frontline states often perceive the system as unfair, bearing disproportionate responsibility for asylum seekers, while other countries resist relocation mechanisms or enforce restrictive measures(Carrera, S., & Guild, E. 2017,pp.103).This situation has fueled political polarization within the EU and raised questions about its capacity to act as a unified actor on migration and asylum policy.

Furthermore, selective treatment of asylum seekers, as observed during the Ukrainian crisis versus other refugee flows, risks undermining the EU's normative credibility. The perception that protection is granted unevenly can weaken the Union's standing in global migration

governance and its ability to advocate for human rights internationally(European Commission,2022,pp.69).

4.2 Humanitarian Implications

The structural weaknesses of the EU asylum system have direct consequences for the well-being of asylum seekers. Overcrowded reception centers, long processing times, and inconsistent protection standards contribute to physical, psychological, and social hardships(European Union Agency for Asylum,2021,pp.96).Vulnerable groups, such as unaccompanied minors and victims of trafficking, are disproportionately affected.

The tension between security concerns and human rights obligations further complicates humanitarian outcomes. Practices such as detention or externalization of asylum procedures, while intended to enhance security, may violate international law and endanger vulnerable populations(UNHCR,2016,pp.211).Addressing these humanitarian implications requires a careful balance between effective border management and the protection of fundamental rights.

4.3 Potential Reforms and Future Directions

To improve the EU asylum system, several reforms have been proposed:

1.Stronger solidarity and responsibility-sharing mechanisms, including permanent relocation schemes and financial support for frontline states(UNHCR.2016,pp.171).

2.Harmonization of asylum procedures, ensuring consistent reception conditions and recognition rates across member states(Lavenex, S. 2018,pp.95).

3.Enhanced operational capacity of EU institutions, particularly the European Union Agency for Asylum (EUAA), to provide rapid support and monitor compliance(European Union Agency for Asylum,2022,pp.131).

4.Balanced security-humanitarian approaches, integrating risk management without compromising human rights protections.

These reforms require not only legislative changes but also political will. Without the active commitment of all member states, structural disparities and political disagreements are likely to persist, perpetuating crises rather than achieving sustainable solutions

Conclusions

The European Union's asylum system faces significant and interconnected challenges that affect both its effectiveness and credibility. Uneven implementation of the Common European Asylum System (CEAS), overburdened national systems, tensions between security and human rights, and political disagreements among member states have all contributed to systemic weaknesses.

Case studies such as the 2015 refugee crisis and the recent Ukrainian displacement illustrate both the EU's capacity for rapid response and the persistent structural deficiencies that hinder equitable protection. While mechanisms like the Temporary Protection Directive provide immediate solutions in emergencies, long-term reforms are necessary to ensure fairness, efficiency, and solidarity across all member states.

Ultimately, the effectiveness of the EU asylum system depends not only on legal instruments but also on political will and mutual trust. Addressing structural imbalances and fostering genuine solidarity are crucial to creating a sustainable, rights-based asylum regime capable of responding to current and future migration challenges.

References

Bigo, D. (2014). The (in)securitization practices of the three universes of EU border control: Military/navy – border guards/police – database analysts. *Security Dialogue*, 45(3), 209–225. https://doi.org/10.1177/0967010614530459

Carrera, S., & Guild, E. (2016). EU–Turkey deal: A short-term solution with long-term consequences. *CEPS Commentary*.

Carrera, S., & Guild, E. (2017). The 2015 refugee crisis in the EU: Solidarity, security, and responsibility-sharing. CEPS Paper in *Liberty and Security in Europe*.

Carrera, S., & Cortinovis, R. (2019). The EU's role in implementing the Global Compact on Refugees. CEPS Paper in *Liberty and Security in Europe.*

Carrera, S., & Stefan, M. (2018). From solidarity to division: The politics of EU relocation schemes. CEPS *Policy Brief*.

Court of Justice of the European Union. (2011). N.S. v. Secretary of State for the Home Department (C-411/10).

Eule, T. G. (2017). *Inside immigration law: Migration management and policy application in Germany. Routledge*.

European Commission. (2016). Common European Asylum System. Publications Office of the European Union. https://doi.org/10.2837/40995

European Commission. (2019). Communication on the implementation of the European Agenda on Migration. COM(2019) 481 final. Brussels: European Commission.

European Commission. (2020). Asylum, Migration and Integration Fund (AMIF) 2014–2020. Brussels: European Commission.

European Commission. (2020). A New Pact on Migration and Asylum. COM(2020) 609 final. Brussels: European Commission.

European Commission. (2022). Migration and Asylum: Annual Policy Report. Brussels: European Commission.

European Commission. (2022). Temporary Protection Directive activated for Ukrainian refugees. Brussels: European Commission.

European Court of Human Rights. (2011). M.S.S. v. Belgium and Greece (Application No. 30696/09). Strasbourg: ECtHR.

.European Union Agency for Asylum. (2016). Annual Report on the Situation of Asylum in the European Union 2015. Luxembourg: Publications Office of the European Union.

.European Union Agency for Asylum. (2016). Emergency Response and Operational Support in the 2015 Refugee Crisis. Luxembourg: Publications Office of the European Union.

European Union Agency for Asylum. (2021). Annual Report on the Situation of Asylum in the EU 2020. Luxembourg: Publications Office of the European Union.
European Union Agency for Asylum. (2022). Annual Report on EUAA Operations. Luxembourg: Publications Office of the European Union.
Eurostat.(2022). Asylum statistics. https://ec.europa.eu/eurostat/statistics-explained
Guild, E., Costello, C., & Moreno-Lax, V. (2017). The 2015 refugee crisis in the European Union. *Centre for European Policy Studies*.
Huysmans, J. (2020). *Security unbound: Enacting democratic limits*. Routledge.
Klekowski von Koppenfels, A., & Okólski, M. (2017). Refugee politics in Central and Eastern Europe: Challenges for EU solidarity. *MigrationStudies*,*5(3)*,397–417. https://doi.org/10.1093/migration/mnx025
Lavenex, S. (2018). 'Failing forward' towards which Europe? Organized hypocrisy in the Common European Asylum System. *Journal of Common Market Studies, 56(5),* 1195–1212. https://doi.org/10.1111/jcms.12739
Peers, S., & Garlick, M. (2016). *Asylum in the European Union. EU Law Analysis*. Retrieved from https://eulawanalysis.blogspot.com
Thielemann, E., & Zaun, N. (2021). EU asylum politics in crisis. *Journal of European Public Policy, 28(10),* 1580–1599. https://doi.org/10.1080/13501763.2021.1936127
UNHCR. (2015). *Europe's Refugee Emergency Response Update*. https://www.unhcr.org
UNHCR. (2016). Global Trends: Forced Displacement in 2015. United Nations High Commissioner for Refugees.
UNHCR. (2016). Handbook on Procedures and Criteria for Determining Refugee Status. UNHCR.
UNHCR. (2023). Global Trends: Forced Displacement in 2022. United Nations High Commissioner for Refugees.
International Organization for Migration (IOM). (2022). Mediterranean Migration Monitoring Report. IOM.

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 732- 743

LEGAL AND ETHICAL INTERSECTIONS IN PROJECT MANAGEMENT: A STRATEGIC PERSPECTIVE

Nicoleta DASCĂLU
ORCID ID: 0009-0004-3408-3059
E-mail: maria.dascalu2801@upb.ro
Afiliation: Faculty of Economic Sciences and Law, The National University of Science and Technology POLITEHNICA Bucharest, Pitești University Centre, Romania

Abstract: *In the current context of globalization and accelerated digitalization, organizations are increasingly required to ensure both legal compliance and ethical integrity. The interplay between law and business ethics has become strategically relevant within the framework of project management, where projects face both legal and reputational risks. From the perspective of commercial and civil law, a well-structured project must comply with contractual norms, labor regulations, data protection, and fiscal legislation. On the other hand, business ethics implies accountability to stakeholders and decision-making that is both transparent and fair.*

Integrating these two dimensions into project practices leads to clear benefits: reduced litigation, stronger stakeholder relationships, and improved project sustainability. For example, in the project planning phase, legal risk analysis should be complemented by ethical evaluations—especially in sensitive industries such as pharmaceuticals, energy, or technology. Law provides the protective framework, while ethics serves as the compass for responsible decision-making. This integrated approach is also increasingly encouraged by international bodies, which recommend the implementation of codes of conduct, ethics committees, and compliance audits in strategic project environments.

Keywords: *Business ethics; legal compliance; project management; corporate governance; stakeholder responsibility.*

Introduction

In recent decades, project management has evolved from a set of technical tools to a multidisciplinary field that integrates law, ethics, strategy, and governance. Projects no longer operate in isolated environments; they are embedded in highly regulated contexts where contractual obligations, data protection laws, labor regulations, and fiscal compliance are unavoidable. At the same time, stakeholders increasingly demand transparency, fairness, and social responsibility from organizations. As a result, legal compliance and ethical responsibility have become interdependent dimensions that shape both the success and sustainability of projects.

The legal framework establishes the minimum standards required for organizational conduct. It defines the "rules of the game" by which contracts are enforced, liabilities are assigned, and rights are protected. However, compliance alone does not guarantee legitimacy or trust. Ethical responsibility extends beyond the law by providing guidance on what is fair, transparent, and socially acceptable. In project management, this dual requirement ensures not only risk avoidance but also long-term value creation.

This intersection of law and ethics is particularly relevant in the current context of globalization and digital transformation. Industries such as healthcare, energy, and information technology illustrate the challenges of managing complex projects under strict regulatory regimes while responding to societal expectations of responsibility and integrity. Consequently, understanding the strategic interplay between legal obligations and ethical values becomes essential for project managers, policymakers, and corporate leaders alike.

The purpose of this article is to analyze the intersections between legal compliance and ethical integrity in project management, highlighting their strategic importance. By integrating insights from both commercial and civil law, as well as contemporary approaches to business ethics and corporate governance, the article argues that a dual

perspective is critical for reducing litigation, strengthening stakeholder trust, and promoting sustainable project outcomes.

1. Literature Review

The relationship between law, ethics, and project management has been extensively discussed in recent scholarship, especially in the context of digital transformation and globalization. Researchers emphasize that legal compliance provides the structural foundation for project execution, while ethics ensures legitimacy, trust, and stakeholder engagement (Johnson, 2021; Nguyen & Carter, 2022).

1.1 Legal Compliance in Project Management

Legal compliance in projects generally refers to adherence to contractual obligations, labor law, data protection, and fiscal regulations. According to Brown and Patel (2023), neglecting these areas often results in increased litigation costs, delays, and reputational risks.

In addition, the rise of digital technologies has intensified the importance of compliance with international data privacy standards such as the General Data Protection Regulation (GDPR) in Europe (Kowalski, 2021). Project managers are therefore required not only to understand contractual and statutory requirements but also to implement compliance monitoring mechanisms throughout the project lifecycle.

1.2 Business Ethics and Corporate Governance

While compliance defines what organizations *must* do, ethics reflects what they *should* do. Ethical practices in project management are closely linked to corporate governance, stakeholder theory, and sustainable development.

Research by Silva and Hernandez (2022) highlights that ethical project leadership contributes to enhanced trust and collaboration across teams.

Similarly, the Project Management Institute (PMI) Code of Ethics and Professional Conduct stresses responsibility, fairness, respect, and honesty as fundamental values guiding project professionals. These

principles, when combined with effective governance structures, foster accountability and transparency in decision-making (Lee, 2024).

1.3 Strategic Integration of Law and Ethics

Recent studies suggest that projects that integrate both legal and ethical considerations achieve higher long-term success rates (Miller, 2020; Zhang & Li, 2025).

For example, in the pharmaceutical and energy industries, projects that comply with regulatory requirements but also address ethical issues—such as environmental responsibility and equitable access—tend to gain stronger public support and stakeholder trust.

Scholars argue that such integration transforms project management from a purely operational process into a strategic discipline aligned with global sustainability agendas (UN Global Compact, 2023).

In summary, the literature highlights a growing consensus: legal compliance provides the protective framework, while ethics acts as the compass. Together, they ensure that project management is not only efficient but also socially responsible and strategically relevant.

2. Methodology

This article adopts a **conceptual-analytical methodology** combined with a **comparative perspective** in order to examine the intersections of legal compliance and ethical responsibility in project management. Unlike purely empirical approaches, the present study develops a framework that integrates both normative and value-based dimensions, reflecting the dual nature of contemporary project practices.

The methodology is structured around three original components:

1. **Normative Mapping** – an analytical grid was developed to map the main legal domains relevant to project management:

- ✓ Contract law (e.g., negotiation, execution, and liability)
- ✓ Labor law (employment rights, workplace safety, equality)
- ✓ Data protection and privacy regulations (with emphasis on GDPR compliance in digital projects)

- ✓ Fiscal and financial legislation (taxation, reporting, anti-money laundering)

This mapping establishes the legal boundaries within which projects must operate.

2. **Ethical Compass Model** – inspired by stakeholder theory and corporate governance literature, the article introduces an Ethical Compass that evaluates projects according to four principles:

- ✓ Transparency (clarity in communication and reporting)
- ✓ Fairness (equity in decision-making and resource allocation)
- ✓ Responsibility (accountability towards stakeholders and society)
- ✓ Sustainability (long-term value creation beyond short-term profit)

This model is applied as a decision-making tool that complements legal risk assessment with ethical evaluation.

3. **Comparative Case Referencing** – instead of detailed case studies, the methodology employs illustrative examples drawn from sectors where legal and ethical tensions are most evident:

- ✓ Pharmaceutical projects, where compliance with drug approval regulations must align with ethical concerns regarding patient access.
- ✓ Energy projects, where environmental law intersects with community ethics and sustainability goals.
- ✓ Technology projects, where data privacy laws are complemented by ethical debates on artificial intelligence and algorithmic bias**.**

Through this three-step methodology, the article aims to provide both theoretical depth and practical applicability. The originality lies in combining normative mapping with an ethical compass, creating a strategic framework that project managers can adopt when navigating legal-ethical intersections.

LEGAL–ETHICAL STRATEGIC FRAMEWORK (LESF Model)

Structure of the LESF Model

◈ Step 1. Legal Compliance Baseline (LCB)

- Map all legal requirements relevant to the project (contractual, labor, data protection, fiscal, environmental).

- Identify *mandatory obligations* → "red lines" that must not be crossed.
- Deliverable: Legal Risk Matrix (probability × impact of non-compliance).

🔷 Step 2. Ethical Compass Evaluation (ECE)

- Apply four guiding principles: Transparency, Fairness, Responsibility, Sustainability.
- Use a scoring rubric (1–5) for each principle → assess whether project decisions go beyond minimal legal compliance.
- Deliverable: Ethical Scorecard.

🔷 Step 3. Intersection Mapping (IM)

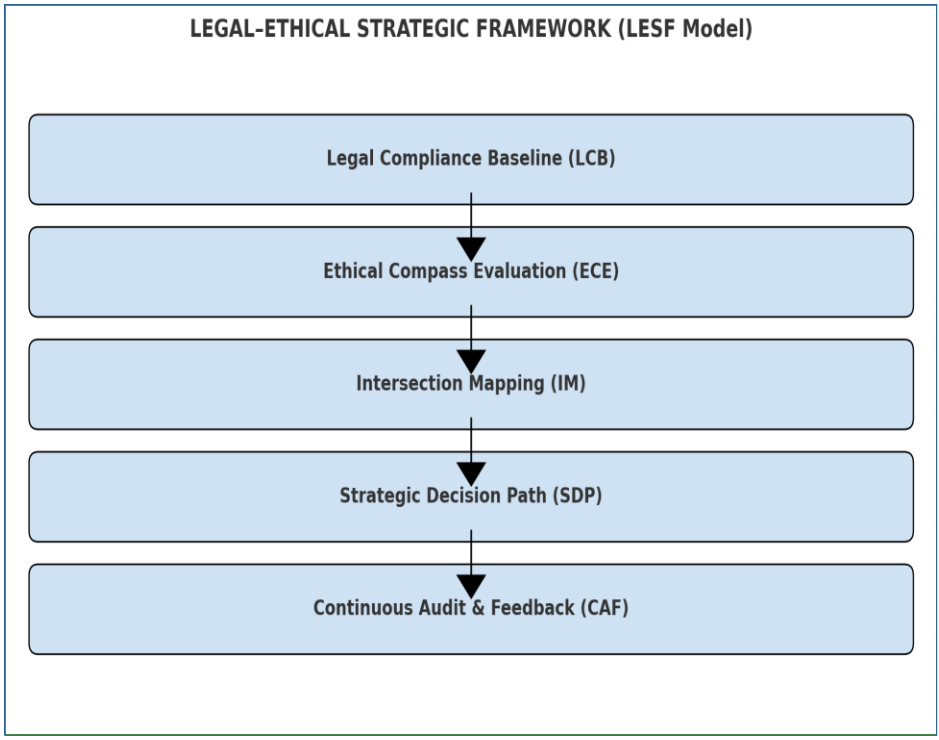
- Overlay legal risks with ethical gaps → identify "critical intersections" (areas where both law and ethics converge, e.g., GDPR + AI fairness).
- Deliverable: Intersection Map (visual chart showing overlaps and blind spots).

🔷 Step 4. Strategic Decision Path (SDP)

- For each intersection, define strategic actions:
    - *Preventive* (e.g., compliance training, ethics committees).
    - *Corrective* (e.g., policy adjustments, stakeholder consultations).
    - *Innovative* (e.g., AI transparency tools, green procurement).
- Deliverable: Decision Matrix aligned with project goals.

🔷 Step 5. Continuous Audit and Feedback (CAF)

- Integrate compliance audits (legal perspective) with ethics audits (stakeholder perspective).
- Feedback loops ensure learning, adaptation, and governance improvement.
- Deliverable: Dual Audit Report included in project closure.



Application Example

- **Pharma Project**:

LCB: Compliance with FDA/EMA approvals.
ECE: Fair pricing & patient access.
IM: Overlap between clinical trial law & ethical principle of transparency.
SDP: Develop patient disclosure protocols + access programs.
CAF: Annual review of access equity reports.

- **Energy Project**:

LCB: Environmental law compliance.
ECE: Community responsibility & sustainability.
IM: Overlap between environmental permits & ethical sustainability goals.

SDP: Community consultations, green reinvestment.
CAF: Dual environmental–social audits.

LESF Step	Legal Focus	Ethical Focus	Strategic Outcome
1.Legal Compliance Baseline (LCB)	Contract law, labor law, GDPR, fiscal obligations	Not applicable (focus is legal foundation)	Risk identification and boundary setting
2. Ethical Compass Evaluation (ECE)	Not applicable (legal already mapped)	Transparency, Fairness, Responsibility, Sustainability	Ethical maturity scoring and evaluation
3. Intersection Mapping (IM)	Identify overlaps between legal risks	Highlight ethical blind spots linked to legal areas	Critical intersections for strategic prioritization
4. Strategic Decision Path (SDP)	Define corrective/preventive legal actions	Ethical innovations: stakeholder engagement, CSR, ESG	Balanced decision-making (compliance + ethics)
5. Continuous Audit & Feedback (CAF)	Legal compliance audits and regulatory reporting	Ethics audits, stakeholder feedback loops	Sustained legitimacy and adaptive governance

Table 1. LESF Comparative Framework

3. Findings and Discussion

The application of the proposed methodology highlights the fact that legal frameworks and ethical principles, while conceptually distinct, are most effective when treated as mutually reinforcing dimensions of project management. The findings are presented through the three analytical lenses introduced earlier: normative mapping, the Ethical Compass Model, and comparative case referencing.

3.1 Legal Boundaries: Insights from Normative Mapping

The analysis confirms that projects cannot be strategically sustainable without meeting fundamental legal obligations.

Contract law ensures predictability in project execution, labor law safeguards the rights of employees, data protection regulation (notably GDPR) preserves trust in digital environments, and fiscal legislation secures financial transparency. However, treating these domains as

isolated checklists leads to a minimalist "box-ticking" culture. This insight demonstrates that legal compliance, though necessary, is not sufficient for strategic legitimacy.

3.2 Ethical Compass as a Strategic Differentiator

When applied to the case references, the Ethical Compass reveals that projects achieving the highest levels of stakeholder trust are those that embed transparency, fairness, responsibility, and sustainability into their decision-making.

For example, in pharmaceutical projects, legal compliance with drug approval standards may allow a product to enter the market. Yet only when companies address ethical concerns—such as equitable pricing and global access—do they secure public legitimacy. Similarly, energy projects that comply with environmental regulations gain broader acceptance when they proactively engage communities and invest in local sustainability programs.

3.3 Convergence of Law and Ethics in Technology Projects

Technology provides the most vivid example of law–ethics convergence. While data privacy laws create a protective baseline, ethical principles push organizations to address emerging issues such as algorithmic bias, digital exclusion, and AI transparency. Findings show that companies that integrate ethical audits alongside compliance assessments achieve not only lower reputational risks but also stronger innovation outcomes.

This suggests that ethics, when operationalized through structured models, becomes a strategic driver rather than a mere reputational safeguard.

3.4 Strategic Implications

The discussion demonstrates that integrating law and ethics transforms project management into a dual-framework discipline. Projects managed exclusively through compliance mechanisms tend to focus on risk avoidance, while those incorporating ethical evaluation shift toward long-term value creation and stakeholder engagement.

The findings reinforce the argument that the intersection of legal compliance and ethical integrity is not simply a matter of risk

management—it is a strategic choice that positions organizations as leaders in governance, responsibility, and sustainable innovation.

Conclusions

This article has argued that the integration of legal compliance and ethical responsibility in project management is not merely desirable but strategically essential. Legal frameworks provide the necessary structure for predictability, accountability, and protection of rights, while ethical principles guide organizations toward transparency, fairness, responsibility, and sustainability.

The findings demonstrate that projects relying exclusively on compliance risk falling into a minimalist, reactive mindset, whereas those embedding ethics into decision-making gain legitimacy, resilience, and long-term stakeholder trust. Sectors such as pharmaceuticals, energy, and technology illustrate how ethical considerations often determine the difference between formal success and genuine societal acceptance.

The proposed Ethical Compass Model, combined with normative mapping, provides a practical framework for integrating these two dimensions. By complementing legal risk assessments with ethical evaluations, project managers can transform compliance into a strategic advantage.

Ultimately, the convergence of law and ethics strengthens project sustainability, reduces litigation risks, and enhances corporate governance. In an era defined by globalization and digital transformation, this dual approach positions organizations not only as legally compliant but also as socially responsible leaders capable of delivering long-term value.

Recommendations

Based on the analysis, several recommendations can be formulated to strengthen the integration of legal and ethical perspectives in project management:

1. **Adopt the LESF Model as a Standard Framework**

Organizations should formally integrate the Legal–Ethical Strategic Framework (LESF) into their project management processes. This ensures that legal compliance is systematically complemented by ethical evaluation at every project stage.

2. **Implement Dual Auditing Mechanisms**

Compliance audits should be combined with ethics audits, enabling organizations to identify both legal risks and ethical blind spots. This dual approach enhances resilience and legitimacy.

3. **Develop Ethical Training for Project Managers**

Professional certification bodies (e.g., PMI, IPMA) should expand curricula to include ethics-driven decision-making, not only legal risk assessment. This will strengthen leadership capacity in managing complex projects.

4. **Establish Ethics Committees within Project Governance**

For large-scale and high-risk projects, ethics committees should function alongside legal departments. These committees can provide rapid ethical evaluations and stakeholder perspectives.

5. **Leverage Technology for Transparency**

Digital tools such as AI-based compliance monitoring, blockchain-enabled contract management, and data dashboards can increase transparency and accountability, supporting both legal and ethical obligations.

6. **Encourage Stakeholder Engagement Beyond Legal Minimums**

Projects should proactively involve communities, employees, and customers, moving beyond formal consultations to genuine co-creation. This approach enhances trust and reduces resistance.

7. **Align Projects with Global Sustainability Agendas**

Legal compliance should be framed within international commitments such as the UN Sustainable Development Goals (SDGs). Ethical responsibility then becomes not only a value choice but a strategic advantage.

References

Brown, T., & Patel, S. (2023). Compliance and risk management in project-based organizations: A global perspective. *Journal of Business Law and Governance, 28(2),* 145–162. https://doi.org/10.1080/xxxx

Johnson, R. (2021). The evolving role of ethics in project management: From compliance to strategic leadership. *International Journal of Project Management, 39(7),* 890–902. https://doi.org/10.1016/ijproman.2021.03.007

Kowalski, M. (2021). Data protection and project governance: Implications of GDPR for digital transformation projects. *European Journal of Information Systems, 30(5),* 481–497. https://doi.org/10.1057/s41303-021-00105-8

Lee, H. (2024). Corporate governance and ethical leadership in complex projects. *Journal of Business Ethics, 189(3),* 555–572. https://doi.org/10.1007/s10551-024-05123-6

Miller, J. (2020). Law, ethics, and the sustainability of global projects. *Project Management Review, 15(4),* 201–218. https://doi.org/10.1177/xxxx

Nguyen, A., & Carter, L. (2022). Ethical accountability and stakeholder engagement in large-scale infrastructure projects. *Business & Society Review, 127(1),* 89–110. https://doi.org/10.1111/basr.12245

Silva, M., & Hernandez, P. (2022). Corporate social responsibility and project ethics: A comparative analysis. *Sustainability, 14(22),* 14891. https://doi.org/10.3390/su142214891

UN Global Compact. (2023). *Corporate sustainability in project management: Law, ethics, and governance*. United Nations Global Compact Report. Retrieved from https://www.unglobalcompact.org

Zhang, Y., & Li, W. (2025). *Strategic integration of legal compliance and ethical responsibility in project management*. Journal of Sustainable Business Strategy, 12(1), 33–50. https://doi.org/10.1080/

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 744-757

FIGHTING CRIMINALITY AND SUPPORTING ACTIVITIES WITHIN THE RISK - BASED SOCIAL GROUPS

Daniel ASSAD MAGHERESCU
ORCID [ID]: https://orcid.org/0009-0003-8959-895X
E-mail: daniel.assad01@gmail.com
Afiliation: MSc. Programme, University of Bucharest, Romania

Abstract: *The issue of criminality is currently one of the most dangerous phenomena and stringent concerns of the local authorities, both from legal and sociological perspectives. The criminality phenomena cover several forms, but a common feature is characterized by the fact that they impact over the broad individual groups. In this regard, from a social point of view, the actions of combating criminal phenomena is an aim very difficult to be achieved. The current paper focuses on identification of the risk-based social groups which could be involved in criminal activities or reintegrated in the criminal conduct. Equally, the paper tries to clarify the issues regarding the vulnerable persons' involvement is some specific categories of crimes or even serious crimes. Moreover, the main aim of the current paper is to discuss the manner in which the social services of support contribute to identifying these persons' issues and to diminishing the risk of developing criminality among the vulnerable social groups. In order to achieve the proposed goals, the main methodological tool was referred to analysing doctrinal references. They are organized within an ample doctrinal framework along with personal argumentative hypotheses and ideas, based on theoretical suppositions, in purpose to observe modalities in which the criminal phenomena could be controlled by the authorities when they are developed within risk-based social groups.*

Keywords: *fighting criminality; risk-based social groups; vulnerable persons; supporting programmes; sociological approach.*

Introduction

As a general theory of doctrine, the criminal phenomenon is a category of issues frequently discussed by the theorists of several social sciences. It is focused on the two sides – legal element and social element. The aspects regarding the issue of criminality cannot divide the two sections due to the fact that both of them concern the social phenomenon, on the one hand, and suppose connected interactions, on the other hand. These aspects are relevant ones, even if the notion of criminality is not yet standardized. This is because the criminality could be highlighted under diverse forms and phenomena, as the traffic and illicit consumption of drugs are (Franț, 2021; Crețu, 2021). Moreover, it could also be developed as occasional crimes, in missing specific character of the phenomenon, often discussed by the specialists in the field of criminology (Mihaiu, 2021).

Thus, combining the two above-discussed elements – legal and social – is a real challenge due to the fact that it generates a complex doctrinal approach on the criminal phenomenon. This is, however, the major interest in specialized studies, carried out on the criminal phenomenon, as general one, which is focused on the idea of criminality meets in social environment (Tomiță & Ungureanu, 2023) as well as on the diverse forms it is featured with.

One of the most frequent approaches of criminality, both from a legal and social points of view, involves the issue of combatting criminal phenomenon. The complex instruments of combatting criminality are the responsibility of both legislative and administrative fields, due to the fact that the legal provisions regarding the issue of combatting criminality must be transposed in practice and carried out by means of administrative tools. For these reasons, it is emphasized that, in order to carry out securely the activities which refer to combatting criminality, a strengthened connection between the two fields is necessary. Equally, the issue of preventing criminality is an essential activity in the fight against criminal phenomenon (Fennelly & Perry, 2024). Nevertheless, in cases in which the legal and social instruments are not implemented enough in the

matter of preventing criminality, other mechanisms of the law enforcement agencies are provided in purpose to combat the phenomenon of criminality (Sîrbu, 2023).

Thus, from the point of view of passing time, the activity of preventing criminality is placed before committing crimes, but, once they are present in society, then the mechanisms of combating criminality are identified and implemented in practice. In fact, these mechanisms are carried out through both legal and social instruments provided by the legislation in the field. The diversity of working instruments in the field of combatting criminality makes us understand the efforts made by the authorities in diverse areas of social matters, as the situation of the institutionalized young people, incarcerated convicts or disadvantaged people is, for example (Banciu & Rotariu, 2021).

Categories of risk-based groups

The criminality is a wavering phenomenon which can develop itself within diverse criminal environments (Behl & Steverson, 2022), according to several factors and circumstances which influence the process of developing criminality. The criminality often rises as a consequence of the individual's response to certain personal feelings, but equally it can appear as a consequence of the group's social impulsion. A significant part of this phenomenon supposes the action of spreading criminality within vulnerable groups. From them, the most frequent ones are those related to the institutionalised young people, incarcerated convicts and rural population. In the next section of the current paper, some pertinent ideas based on these categories of vulnerable people will be discussed.

Institutionalized young people

From the point of view of the social integration, the institutionalized young people shouldn't rise any difficulty when analysing criminality and the manner in which it appeared and was speat within this kind of social group. Nevertheless, the studies carried out in

the last period of time have identified some criminal phenomena which are also committed especially within the young people. It is firstly about the illegal consumption of drugs, the phenomenon which has been developed unprecedently. For this reason, the national authorities have been focused on this kind of crimes in order to identify solutions of combatting the phenomenon. From the point of view of the consequences produced, the solutions are not enough at the moment in purpose to control such a developed phenomenon among the young people. This fact is also observed in the field of institutionalised young people.

In this context, it could be pointed out that, referring to the efforts made in the matter of combatting the phenomenon of illegal consumption of drugs among the young people, the authorities have permanently fought along with the other judicial authorities and other public institutions as well (Anti-Drug National Agency, Ministry of Education), and NGOs with competences in the field (Șuteu, 2020). They together have drawn up certain programmes and submitted endeavours within the schools, having as purpose the awareness, among the scholars, on the issue that the drugs mean toxic and damaging substances for the human body which create addiction and generate other forms of criminality, usually committed by violence, including the bullying in schools.

Incarcerated persons

As a general theory of risk-based groups, the persons who executed deprived of liberty punishment belong to the vulnerable people. Their vulnerability is not generated only by their legal status, namely of deprived of liberty persons, but also by the fact that, at the time of their incarceration or even after liberation, it is possible for them to commit other forms of criminality or simply continue their previous behaviour in committing the same kind of crimes. These persons' situation should carefully be surveyed due to the fact that the main scope of executing punishments in detention is that of re-education of convicted persons (Magherescu, 2024).

Thus, if the society could not enhance in these persons' mind a good behaviour in accordance with the rules of social life, then the time

spent in detention facilities should be devoted to improve the convicts' behaviour in such a manner, after liberation from detention, they would not be able to commit other crimes. Taking into consideration these arguments, it is obvious that the main responsibility in re-education of the convicted persons belongs to the employers from detention facilities (Basilisco, 2024; Nichols, 2021). They are also involved in changing their perception about the society and life, generally speaking. Only by a qualified team, specialized in the areas of the involved topic, including sociological perspectives, it is possible for the incarcerated persons to be re-educated and gave them to society in good behaviour conditions (Flynn, & Higdon, 2022), beyond any doubt that they would be involved in committing crimes for the future.

Vulnerabilities of the incarcerated persons are also related to their social and legal status (Vanliefde, 2024; Goossens, 2024) as well as their familial situation. Firstly, it could be taken into account that, after liberation, along with the social reintegration, these persons should imperatively be supported in order to be professionally reintegrated as well. This issue must be achieved through finding a job (Durnescu & Istrate, 2020), adequate to their needs and professional qualification which could guarantee a sure income, came from legal activities. In this manner, they will not be tempted to commit other crimes. Moreover, the social services in detention have a determinant role in finding solutions in the matter of professional reintegration of convicted persons, once they will be liberated from prisons.

Rural population

The rural communities are, to some extent, a criminogenic potential. The phenomenon of criminality does not have borders and is not present only in the urban area, as long as it does not depend on this issue. However, taking into consideration the degree of vulnerability of the people who live in the rural communities, it could be expressed that some of these persons could be more involved in committing criminal activities, either as perpetrators or victims (Puigvert et al., 2021). From petty thefts to trafficking in persons, all of them are committed in small

communities from rural areas. the most frequent phenomenon is currently called as *"Loverboy"* (Heinrichs, 2023) and is frequently meet in Romania.

In these circumstances, the authorities have to establish and identify the vulnerabilities existed within the rural communities in order to remove the dangerous situations and threats, knowing the fact that often these persons are missing material support, but missing jobs is reflected on developing criminal phenomena. These persons are thus characterized through difficulties in their action of finding jobs, a poor level of education, missing familial support, missing a professional perspective a.s.o. All of them create a more vulnerable situation for these persons which finally chose the way of criminality, on the one hand, or they are victims of crimes, on the other hand (Tompea, 2023). They could be victims of serious crimes, as trafficking in persons for a sexual exploitation purpose is (Becucci, 2024), especially in cases in which the girls are victims of the *"Loverboy"* phenomenon.

Acting in identifying the vulnerabilities of this kind of persons, the authorities will be able to initiate supporting programmes adequate to each category of person, which conducts not only to reducing these vulnerabilities, but to reducing crime rate in rural area as well.

Forms of criminality within the risk-based groups

Taking into account the above-stated remarks, the pre-eminence of the individuals' behaviour to the illicit consumption of drugs cannot be disregarded. This is because, during a period of five years, the phenomenon of consumption of drugs has led an alarming size at the national level. Thus, statistically speaking, at the moment the age of consumers is very much reduced, being even of thirteen years old, as declared age of beginning the consumption of cannabis (Anti-Drug National Agency, 2022).

It is considered that this phenomenon is as uncontrollable as many illegal transactions on drugs are committed in online environment, a situation which infringes the judicial bodies in their action of discovering

these crimes and prosecuting perpetrators. Doctrine has discussed about the preponderance of the crimes of illicit consumption of drugs and on the process of ”digitalization” of some categories of crimes, as the case of sexual exploitation in a virtual environment is (Vesmaș, 2023). Some crimes are considered real dangers for teenagers, along to other vulnerabilities of the young people in online context (Micle et al., 2023).

All these aspects are serious premises for achieving the quality of crime victim for the persons who belong to vulnerable groups, being situated in front of the serious criminal phenomena. For this reason, it is very important the manner in which the authorities choose to adopt certain relevant efficient social policies of fighting criminality, on the one hand, and to remove the risk of victimization (Magherescu, 2023) of these vulnerable categories of people, on the other hand (Banciu & Rotariu, 2020). The role of the judicial bodies is also a useful one, taking into account their involvement in achieving the criminal justice’s goals by means of criminal proceedings. One of them is related to the manner in which the judicial bodies proceed in solving the criminal cases in a shorter period of time. Doctrine has emphasized the concept of reasonable time of criminal justice (Bălan, 2021) as a multifactorial premises in the respect of the victims’ rights during the criminal proceedings. Thus, it is well-known that the issue of reasonable time is not just in the perpetrators’ processual interest, but in the victims’ interest as well. The victims’ processual interest could also be viewed from the perspective of their involvement in the procedures of claiming compensations in those criminal cases in which the right to a reasonable time was infringed by the competent courts (Bălan, 2018).

Last but not least, the activities of bullying make teenagers to be real targets for their colleagues in the upper degree of school. From this point of view, it could be concluded that the scholar environment becomes, in this context, an occasion of expanding vulnerabilities the young scholars pass through. For this reason, doctrine has highlighted that the issue of bullying is a very spread phenomenon (Grădinariu, 2021), whose control needed the legislator intervention which succeeded in assuring an effective control upon the phenomenon through adopting

an adequate legal framework in the matter. Taking into consideration the consequences produced because of several cases of bullying, the legal sanctions came in accordance with the authorities' involvement in the process of maintaining a low level of risk among teenagers.

Supporting activities in the field of social services

The activities carried out within the social services have as the main objective providing speciality support to vulnerable persons. Mainly, they are referring to social life (Vârlan & Dița, 2019), familial and professional ones, being featured by certain specific characters for each other. For example, in cases of incarcerated persons, the supporting activities have as final result the social reintegration of convicted persons. From this point of view, the supporting activities provided to the vulnerable persons are complex and, at the same time, diversified ones.

During the supporting activities, the main role of the social officer is a determinant one, due to the fact that it must identify the premises which determine a deviant behaviour, in cases in which they are produced. At the same time, the social officer must find appropriate solutions under the case-by-case principle. Within the meeting organized in this scope, the social officer is entitled to analyse the issues the vulnerable persons are faced with, on the one hand, and the factors which act as aggravating circumstances in their own behaviour and which could constitute impediments in achieving objectives of social services entirely, on the other hand. By doing so, the social officer could contribute to removing any form of deviant behaviour or a social exclusion behaviour. The activities of social services are firstly processes of knowing pertinent needs of the risk-based groups which should imperatively be brought within their social life in purpose to solve the existed issues and remove any difficulties.

An essential character of the activities carried out by the social officer is that regarding the social relationships of individuals, and the vulnerable persons need as much as possible these relationships. If an example is required, then it refers to the incarcerated persons convicted

for their criminal conduct of committing crimes. In this context, they need to maintain relations with the society. The achievement of this aim is in the social officer's duty, which plays a significant role in this field, taking into account the fact that the relationships between the incarcerated persons and the society is mostly carried out by the social officers. Among other activities carried out by the social officers, calling for social partners either public or private bodies interested in workforce from the convicted persons is emphasized. Doctrine does consider that the convicted persons belong to vulnerable group which necessitate specializing social services in order to hurdle difficult situations, prevent and control renewing criminal behaviour and the risk of social exclusion, increasing life quality, and promoting their social inclusion (Tomiță, 2015).

The activities carried out by the social officer suppose covering some relevant stages. They begin with the activity of carrying out a social inquiry (Țurcan & Țurcan, 2013) in order to identify issues that the person concerned is faced with. On that occasion, the level of graduation, professional qualification, marital status, housing possibilities, finding a job, all of them should be established. Equally, the psychological assistance of vulnerable persons is of high interest, especially when speaking about the issue of illegal consumption of drugs among teenagers. In this regard, doctrine has pointed out several aspects regarding the psychological factors and their connection with the social ones, which are directly involved in the drug consumption in the teenage stage (Stanciu, & Cotruș, 2014). Referring to the last aspect, it is obvious that the context could be expanded and associate the first two factors – psychological and social – with another one which refers to the legal factors. This is because the last ones also play a significant role in the architecture of establishing the context in which the social services for the vulnerable persons will be developed in order for the authorities to avoid as much as possible the risk-based criminality.

Taking into account the above-discussed aspects, they are considered as necessities of social services which impose connecting social services and concrete supporting activities within the vulnerable

groups. Regarding the issues involved, it should be pointed out that the problems arisen in the vulnerable persons' condition are impossible to be solved by themselves in missing a consistent and useful help of the specializing services, as the social services are.

Conclusions

The current study carried out on the topic of the risk-based social groups has identified certain aspects which has the merit of clarifying issues both from society, viewed as a specific environment, and from the social groups, generally speaking, and particularly from vulnerable groups. These categories of persons present a higher risk of criminality regarding their criminal conduct, on the one hand, and the status of victims of crimes as well, on the other hand. Being indifferent from which categories they are belonging to these persons should be qualified as social risk-based ones which supposes several aspects to be concluded in this context.

First of all, the authorities involved in the process of managing their situation should pay a special attention on establishing a pertinent strategy of identifying real problems these persons are confronted with, and secondly, they should find efficient solutions in purpose to diminish the risk of these persons to become both criminals or victims of crimes. Thus, if discussing the incarcerated persons, during the executing deprived of liberty punishments, they are integrated in special programmes of surveillance of social issues managed by the social officers, in such a manner that, after their liberation, they need a social integration which assure avoiding any criminal behaviour for the future.

Moreover, discussing the institutionalised persons with a particular focus on the young persons, thus the situation must imperatively be into the authorities' attention, due to the fact that these persons are more prone to commit criminal activities because of the multiple factors, including those related to the previous criminal behaviour and the risk of developing their criminal conduct.

Taking into account all these aspects, it should be concluded that the supporting programmes for persons who belong to the risk-based groups need to be accustomed to the real needs they are confronted with. This is because these persons should be protected from the social exclusion which is currently one of the most serious dangers. By doing so, an efficient mechanism of preventing crimes is assured, and the vulnerable persons will be directed to the specialised social services, to finding a job, and, finally, to living a better social life in accordance with the legal and social rules they have to respect.

References

Anti-Drug National Agency. (2022). Raport național privind situația drogurilor 2022. Romania. New evolutions and trends. REITOX. Available online at: https://ana.gov.ro/wp-content/uploads/2023/02/RN_2022.pdf

Banciu, D. & Rotariu, L. (2020). Politici sociale de protecție a populației față de riscul victimizării. *Sociologie Românească, 1*, 89–114.

Banciu, D. & Rotariu, L. (2021). Devianță, criminalitate și control social în comunitățile rurale din România în perioada anilor 1980 și cea postdecembristă. *Revista Română de Sociologie, 3-4*, 215–238.

Basilisco, S. (2024). Re-education treatment in prison and adult education: From mission to theoretical models for the educational function. *Form@re - Open Journal Per La Formazione in Rete*, *24(2)*, 92–104. https://doi.org/10.36253/form-15978

Bălan, C. (2018). Cauza Brudan contra României. Un nou început în materia remediilor compensatorii disponibile în cazul încălcării termenului rezonabil de soluționare a cauzelor civile și penale. *Pandectele Române, 2*, 53–70.

Bălan, C. (2021). *Termenul rezonabil în procesul penal român* [Reasonable time in the Romanian criminal proceedings] Hamangiu.

Becucci, S. (2024). Trafficking of migrants for sexual and labour exploitation. In: *Smuggling and Trafficking of Migrants in Southern Europe*, pp. 84–130. Bristol University Press. https://doi.org/10.46692/9781529222555.004

Behl, J. D. & Steverson, L. A. (2022). *Criminal theory profiles. Inside the minds of theorists of crime and deviance*. Routledge.

Crețu, A. M. (2021). Influenţa legalizării drogurilor ilicite asupra cererii de consum în rândul tinerilor. *Revista de Asistenţă Socială, 3*, 89–97.

Durnescu, I. & Istrate, A. (2020). Former prisoners between non-category and invisibility: The Romanian experience. *Probation Journal, 67(4)*, 427–446.

Fennelly, L. J. & Perry, M. A. (2024). Prevention of Crime. In: *Security Officers and Supervisors. 150 Things You Should Know*. Boca Raton: CRC Press. https://doi.org/10.4324/9781003402718

Flynn, N. & Higdon, R. (2022). Prison education: Beyond review and evaluation. *The Prison Journal, 102(2),* 196–216. https://doi.org/10.1177/00328855221079276

Franț, A. E. (2021). The necessity of a new strategy to fight against drug trafficking. *Journal of Public Administration, Finance and Law, 20,* 303–307. https://doi.org/10.47743/jopafl-2021-20-20

Goossens, E. (2024). Methodological challenges in victimisation studies. In: Daems, T., Goossens, E. (eds.). *Understanding Prisoner Victimisation. Palgrave Studies in Victims and Victimology*, pp. 143–173. Palgrave Macmillan. https://doi.org/10.1007/978-3-031-54350-0_6

Grădinariu, T. (2021). Legal and psycho-educational considerations of bullying behavior. *Stientific Annals of Alexandru Ioan Cuza University of Iași, 1*, 131–140. http://doi.org/10.47743/jss-2021-6

Heinrichs, N. C. (2023). *Human trafficking and the effectiveness of the European Union's Anti-Trafficking Policies*. University of North Carolina, Chapel Hill.

Magherescu, D. (2023). The risk of revictimization for the young victims of crimes. *International Journal of Social Quality, 13(1)*, 73–92.

https://doi.org/10.3167/IJSQ.2023.130106
Magherescu, D. (2024). Measuring standards on incarceration in cases of economic crimes. In: *Competitiveness and Innovation in the Knowledge Economy*, pp. 99–109. SEP ASEM.
Micle, M.I., Oancea, G., Popescu, A. & Preda, G. (2023). Vulnerabilități ale tinerilor în mediul virtual. *Revista de Psihologie, 69(1),* 71–90.
Mihaiu, S. (2021). *Criminalitatea violentă: Semnificaţii şi implicaţii sociale* [Violent criminality: Significations and implications]. Pro Universitaria.
Nichols, H. (2021). *Understanding the educational experiences of imprisoned men: (Re)education*. Routledge.
Puigvert, L., Duque, E., Merodio, G. & Melgar, P. (2021). A systematic review of family and social relationships: Implications for sex trafficking recruitment and victimisation. *Families, Relationships and Societies, 11(4),* 534–550. https://doi.org/10.1332/204674321X16358719475186
Sîrbu, U. (2023). Sisteme inovative pentru prevenirea și combaterea criminalității. In: *Omul, Criminologia, Ştiinţa*, pp. 146–151.
Stanciu, C. & Cotruș, A. (2014). Factori psihologici şi sociali implicaţi în consumul de droguri la adolescenţi. *Revista de Neurologie şi Psihiatrie a Copilului şi Adolescentului din România, 17(1),* 21–31.
Șuteu, D. (2020). Securitate urbană și consumul de droguri. O comparație România – Portugalia. *Sfera Publică, 1,* 5–25.
Tomiță, M. (2015). Probațiunea și asistența socială pentru justiție. In: *Asistența socială în România după 25 de ani: Răspuns la problemele tranziției*. EIKON.
Tomiță, M. & Ungureanu, R. (2023). Faţete ale rezilienţei din perspectiva ştiinţelor sociale. *Revista de Asistență Socială, 2,* 25–37.
Tompea, R. C. (2023). Europe's migrant human trafficking – A case study of Romania's sexually exploited women. *Journal of Modern Slavery, 8(1),* 21–44.
Țurcan, S. & Țurcan, C. (2013). Servicii sociale și psihologice acordate deținuților în penitenciar. *Psihologie, 2,* 52–58.
Vanliefde, A. (2024). Vulnerability and victimhood in prison: Reflecting

on the concept of vulnerability in prisoner victimisation research. In: Daems, T., Goossens, E. (eds.). *Understanding Prisoner Victimisation. Palgrave Studies in Victims and Victimology*, pp. 115–142. Palgrave Macmillan. https://doi.org/10.1007/978-3-031-54350-0_5

Vesmaș, D. M. (2023). Combaterea exploatării sexuale a copiilor în era digitală. Reglementări europene și eforturi internaționale. *Revista de Științe Juridice, 43(2)*, 11–22.

Vîrlan, M. & Dița, M. (2019). Rolul asistentului social în procesul de reintegrare social a persoanelor deținute. In: *Probleme ale ştiinţelor socioumanistice şi modernizării învăţământului*, pp.176–188.

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 758 - 773

COMPARATIVE OVERVIEW OF THE PATRIMONIAL LIABILITY OF EMPLOYEES AND THE CIVIL LIABILITY OF PUBLIC SERVANTS

Elena GĂMAN
ORCID [ID]: 0009-0001-0928-3217
E-mail: elena.gaman@ase.ro
Afilliation: Doctoral School of Law,
Bucharest University of Economic
Studies

Abstract: *Legal liability is a fundamental institution of law, intended to ensure the compensation of damages caused by unlawful acts. The patrimonial liability of employees and the civil liability of public officials differ through specific characteristics determined by their distinct regulatory domains: labor law and administrative law. Liability for damages caused within employment or service relationships is essential for maintaining discipline and legality in professional activity. Although both employees and public officials can be held responsible for compensating damages caused to the employer or public institution, the applicable legal framework differs, reflecting the distinct nature of employment relationships compared to public service positions.*

Keywords**:** *social responsibility, legal liability, public officials, employees, patrimonial liability of employees, civil liability,*

Introduction

Responsibility, as a general concept, represents the awareness and acceptance of one's own actions and the bearing of their consequences. It involves fulfilling one's obligations, regardless of their nature: moral, social, professional, or legal. Responsibility is not always imposed by law, as is legal liability; it may also be of an ethical or personal nature.

It can remain at the level of individual conscience or may involve the externalization of this assumption within society, a community, or a group, which may or may not lead to the application of sanctions, even if such sanctions are not established by law, but rather agreed upon and accepted by the members through customary practices.

Although the two concepts are closely connected, the difference between them lies in the fact that social responsibility refers to the individual's relation to society, while legal liability reflects society's reaction toward the individual, giving rise to liability through the framework of social responsibility (Pătulea, Stelu, & Marconescu, 1988).

Legal liability implies a societal reaction to the individual's conduct, arising in situations where the person has violated the social values of the society or community to which they belong (Vedinaș, 2018). Legal liability materializes as the obligation of a person to bear a sanction prescribed by law, as a result of an action or inaction that breached a legal norm. It consists of the obligation of the individual to compensate for the damage caused by committing an unlawful act, under the conditions provided by law.

Legal liability, depending on the branch of law governing it, may take various forms: criminal liability, contraventional (administrative offense) liability, civil liability (contractual or tort), disciplinary liability, patrimonial liability, material liability, etc.

From the perspective of this analysis, patrimonial liability is particularly relevant, as it refers to the obligation of a person to compensate for a damage caused to another person through an unlawful act.

Patrimonial liability plays a key role in employment and public service legal relations, serving as the mechanism through which the employer or public authority can recover damages caused by employees or public officials, respectively. Although the objective is the same — compensating the damage — the applicable legal framework differs significantly between private sector employees and public servants.

This article aims to conduct a comparative analysis of the two forms of liability, highlighting similarities, differences, and practical and legal implications.

In labor law, patrimonial liability is defined in Article 254 of Law no. 53/2003 regarding the Labor Code, which states:"(1) Employees are patrimonially liable, under the rules and principles of contractual civil liability, for material damages caused to the employer through their fault and in connection with their work. (2) Employees are not liable for damages caused by force majeure or other unforeseen causes that could not have been prevented, nor for damages that fall within the normal risk of the job."

Thus, patrimonial liability is defined, through the provisions of the Labor Code, as the obligation of the employee, based on the rules applicable to contractual liability, to compensate for material damages caused to the employer by fault or in connection with their work (Ţiclea 2016).

Government Emergency Ordinance No. 57/2019 on the Administrative Code regulates several forms of patrimonial liability, namely:

a) administrative-patrimonial liability for service limits,
b) administrative-patrimonial liability for damages caused by administrative acts,
c) joint administrative-patrimonial liability for damages related to the exploitation of assets and services, and
d) patrimonial liability of the staff of public authorities or institutions in connection with delegated responsibilities.

From the perspective of this scientific analysis, the relevant form is patrimonial liability, more specifically the *"civil liability of the public servant"*, as defined in Article 499 of the Administrative Code.

According to Article 499 of the Administrative Code, civil liability refers to the liability of a public servant for damages caused, with guilt, to the patrimony of the authority or public institution where they work, for failure to return within the legal term the amounts granted unjustified to them, or for damages paid by the public authority or institution, as principal, to third parties, based on a final court decision.

A. Common Elements

The civil liability of public servants represents a form of legal liability arising from a legal obligations relationship in which the liable person must repair the unjust damage suffered by another person. Through the provisions of the Administrative Code (Article 499), this form of liability is specifically established for this category of personnel. The legislator uses the general term civil liability, without specifying whether it refers to tort liability (Article 1349 of the Civil Code) or contractual liability (Article 1350 of the Civil Code) (Salavastru, 2020).

Although not explicitly defined by law, the service relationships of public servants have a contractual origin, contract that has been defined in case law. Through Decision No. 14/2008, the High Court of Cassation and Justice held and stated that public servants "do not carry out their activity based on an individual employment contract," but "the appointment act issued by the public authority, together with the application or acceptance of the position by the future public servant, constitutes an agreement of will — the administrative contract" (Ţiclea, 2020).

Similarly, it is asserted that the patrimonial liability regulated by the Labor Code represents, in its legal nature, a form of contractual civil liability, with particular characteristics derived from the specific nature of labor law relationships (Georgescu, 2011, p.67).

Therefore, the patrimonial liability of the employee is considered a special form of contractual civil liability.

Liability Conditions

According to Article 499 of the Administrative Code, the civil liability of the public servant is triggered in the following situations:

a) for damages caused with guilt to the patrimony of the authority or public institution where the official operates;
b) for failure to return, within the legal time limit, amounts that were unduly granted;

c) for damages paid by the authority or public institution, as principal, to third parties, on the basis of a final court decision.

Article 499, letter a) of the Administrative Code regulates the typical form of civil liability of public servants. In order for this liability to be engaged, two main conditions must be met:

- a damage must have been caused to the patrimony of the authority/public institution;
- the damage must have been caused with guilt.

To these are added two additional conditions derived from the Civil Code norms:

- the unlawful act;
- the causal link between the act and the damage (see Article 1357 para. (1); Articles 1358–1359 of the Civil Code) (Țiclea, 2020).

According to the principles established by labor law, patrimonial liability exists only if the following cumulative conditions are met:

- the person who caused the damage must have the status of employee of the employer whose patrimony was affected;
- the act must be unlawful and personal, committed in connection with their work duties;
- there must be actual damage caused to the employer's patrimony;
- there must be a causal link between the unlawful act and the damage;
- the existence of guilt (intent or negligence).

The absence of even a single condition from those listed above excludes the patrimonial liability of the employee.

As can be observed, the conditions for engaging the civil liability of public servants and the conditions for engaging the patrimonial liability of employees are common.

Thus, the act of the employee or public servant by which a material damage is caused to the employer or public authority must be deemed unlawful in relation to their service obligations, as stipulated by law, the collective labor agreement, the internal regulations, the individual employment contract, the lawful orders and directives of

hierarchical superiors, and the job description. Furthermore, the existence of fault must be proven by the employer.

An essential document in this context is the job description (fișa postului).

However, the absence of a job description or the absence of certain duties from it does not automatically lead to the exoneration of patrimonial liability of the employee concerned. This is because the job description is supplemented by other obligations of the employee arising from legal provisions, internal labor law sources, and the employer's orders and instructions which were brought to the attention of the employee (Ștefănescu, 2007).

In the case of the civil liability of public servants, the damage is the most important element — the essential and necessary condition of civil liability. This damage must be patrimonial, meaning that it concerns material goods with economic value that can be assessed in monetary terms, and that belong to the respective public institution.

Such damage constitutes a negative modification of patrimony, which may occur through a reduction in assets as a result of unlawful acts (e.g., degradation, loss, defects, excessive use of raw materials, supplies, spare parts, etc.), through the failure to collect payment for delivered products or provided services, or through an increase in liabilities (e.g., payment of fines or penalties for which certain employees are at fault). In its content enters both the actual loss (*damnum emergens*) and the loss of expected benefit (*lucrum cessans*).

The existence of damage is a necessary and essential condition, but not sufficient for the creation of an obligation to repair it. In addition, the damage must cumulatively meet the following characteristics: it must be certain, direct, personal, and must result from the violation or attaining of a right or a legitimate interest (Țiclea, 2020).

The direct nature of the damage is expressly established in Article 499 letter a) of the Administrative Code, which states that the civil liability of the public servant is engaged for damages caused with guilt to the patrimony of the authority or public institution. However, damage may also be produced indirectly, in cases where, as principal (*comitent*),

the employer is required to compensate a third party for harm caused by the employee during the performance of their job duties (Salavastru, 2020).

This indirect mode of damage production is provided for in Article 499 letter c) of the Administrative Code, which states that the civil liability of the public servant is also engaged for damages paid by the public authority or institution, in its capacity as principal, to third parties, based on a final court decision.

Similarly, in the case of patrimonial liability of the employee, such liability cannot exist in the absence of damage. The damage represents a modification of patrimony due to an unlawful act committed by the employee, which results either in a reduction of assets or an increase in liabilities (Georgescu, 2011).

In order for an employee to be held patrimonially liable, the damage must be:

- real and certain,
- direct,
- material, and
- not yet repaired.

The damage is certain when it is definite both in terms of its existence and its ability to be evaluated. The condition of determinability is also fulfilled even when the damage is not mathematically calculated, as long as it can be reasonably determined.

In contrast, if the damage is future and hypothetical, it does not meet the requirement of certainty, as its occurrence is uncertain.

The damage must be directly caused to the employer's patrimony through an unlawful act connected to the employee's work duties, or indirectly to a third party's patrimony, in which case the employer becomes directly liable as principal (*comitent*) for the actions of their subordinate (*prepus*) committed during the execution of job-related tasks (Georgescu, 2011, p. 73).

The damage must be material, resulting from the infringement of a patrimonial interest. Within the framework of patrimonial liability, moral damages cannot be claimed.

Moreover, the damage must not have been previously compensated at the time the employer requests reparation; otherwise, liability ceases. Reparation of the damage must be made by the person who committed the unlawful act.

The unlawful act is an essential condition for liability to exist, whether we refer to the public servant's or the employee's liability. Such an act may be an action or omission contrary to the law, resulting in the violation of subjective rights or legitimate interests of a person (Ștefănescu, 2007).

The act must be deemed unlawful in light of the service obligations arising from law, the collective labor contract, internal regulations, the individual labor contract, and lawful orders or instructions from hierarchical superiors (Georgescu, 2011, p. 58).

In situations where the act does not have an illicit character, even if damage has resulted from its commission, it is not sufficient to trigger civil or patrimonial liability. The liability of the public servant is also excluded in cases where there is a legal cause that removes the illicit nature of the harmful act, specifically:

- self-defense (Art. 1360 Civil Code; Art. 19 Criminal Code);
- state of necessity (Art. 1361–1362 Civil Code; Art. 20 Criminal Code);
- fulfillment of an activity imposed or permitted by law, or execution of a superior's order (Art. 1364 Civil Code; Art. 21 Criminal Code);
- consent of the victim (Art. 1355 Civil Code; Art. 22 Criminal Code);
- lawful and normal exercise of a subjective right (Art. 1353 Civil Code).

Regarding the exclusion of liability in the case of executing a superior's order, it should be noted that the public servant has the right to refuse, in writing and with justification, to carry out orders received from the hierarchical superior, if he or she considers them to be illegal (according to the provisions of Art. 437 of the Administrative Code), provided that such situations are brought to the attention of the

hierarchical superior of the person who issued the order. However, the public servant will be held liable under the law if the order is found to be legal.

As for the cases that remove the illicit nature of the act in labor law, according to Article 270, paragraph 2 of the Labor Code, employees are not liable for damages caused by force majeure, or by other unforeseen causes that could not have been avoided, nor for damages that fall within the normal risk of the job.

The parties to the individual employment contract may also agree on an exoneration clause. Thus, if by means of an agreement concluded upon the termination of the employment relationship the employer waives any patrimonial or non-patrimonial claims arising from the employee's contractual civil liability, any subsequent civil claims will be unfounded (Georgescu, 2011, p. 81).

The existence of a causal link between the illicit act and the damage caused

In order to trigger civil or patrimonial liability, the material damage incurred by the employer must be the result of an illicit act committed by the public servant or employee in connection with their work. When establishing the causal link, it is necessary to consider not only the illicit act as a positive action, but also the illicit act as an omission (failure to act) (Țiclea, 2020).

Guilt is a *sine qua non* condition for incurring civil or patrimonial liability. Its absence eliminates the liability of the person who committed the harmful act. Guilt has been defined as *"the psychological attitude of the perpetrator towards the illicit and harmful act and its consequences."* It is *"seen as a process of conscience composed of two factors: an intellectual process and a volitional process."* (Ștefănescu, 2007, p. 892).

In the context of civil liability, guilt can take two forms: intent and negligence.

With regard to patrimonial liability, since the employee undertakes an obligation *to do* (of means) through the individual

employment contract, the patrimonial liability governed by the Labour Code—a variation with specific characteristics of contractual civil liability—represents a form of subjective liability. Therefore, without establishing the employee's guilt in causing the damage, patrimonial liability is inadmissible (Ștefănescu, 2007, p. 892).

Guilt constitutes the subjective element of patrimonial liability, in contrast to the other conditions which belong to the objective side of the illicit act. It is defined as the person's psychological attitude towards the act and its consequences at the time the illicit act was committed.

The forms of guilt are not relevant, either in labor legislation or in administrative law. Patrimonial liability may be triggered even for the slightest form of fault (imprudence, negligence), and regardless of its nature—whether intent or negligence.

When establishing fault, several criteria are considered, including the employee's position/post, the degree of subordination between employees (in cases of joint participation in the illicit act), the actual contribution of each co-participant to the damage, the extent to which the employee took steps to avoid the damage, and the existence of bad faith in committing the act.

In the case of public servants, when determining fault, it is necessary to consider the position held by the author of the act within the hierarchy of the public authority or institution, the role played in the breach of service duties—for example, the person who gave the order to issue the administrative act or to carry out the task, who signed the damaging administrative act, and so on.

Further clarification regarding how the legal liability of the public servant is engaged is provided by the provisions of Article 565 paragraph (2) of the Administrative Code, which states: *"Liability is determined based on the form of guilt and the effective participation in the breach of the law."*

In matters of patrimonial liability, there is a presumption of innocence, as established by Article 272 of the Labour Code, which also applies to the patrimonial liability of public servants.

The burden of proving fault in committing the illicit act lies with the employer, who must demonstrate this by explicitly indicating the employee's breached duties, as outlined in the job description.

B. Key differences between the patrimonial liability of employees and public servants

The determination and recovery of damages under the civil liability of public servants are carried out unilaterally by the injured employer, following a special procedure that involves issuing an *order for recovery* or the signing of a *payment commitment* by the liable person. These documents serve as enforceable titles.

This procedure is excluded, as principle, to cases of patrimonial liability under the Labour Code.

According to Article 500 of the Administrative Code, for the recovery of damages caused—with guilt—to the property of the authority/public institution, or for failure to return unduly received amounts within the legal term, an *order or decision for recovery* must be issued within 30 days from the date the damage was discovered, or a *payment commitment* may be signed by the public servant.

Thus, damages caused to the public authority/institution may also be recovered through a payment commitment, voluntarily assumed by the public servant. This constitutes an alternative legal mechanism for determining and recovering damages. It is a unilateral legal act through which the responsible individual acknowledges having caused the damage and agrees to cover it.

The payment commitment includes specific clauses regarding the conditions for recovering the damage. The public servant assumes the obligation to cover the damage caused in connection with their work, or to return unduly received sums, or the equivalent value of unlawfully received goods that can no longer be returned in kind, or for services not entitled.

By virtue of the law, this document has the legal force of an enforceable title, and no further formalities—such as legalization, investing with an enforceable formula, or official communication—are

required in order to initiate enforcement proceedings (Georgescu, 2020, p.133).

The legislator does not regulate a specific deadline for assuming a payment commitment. However, it is considered that such a commitment should be made within the same timeframe in which an order for recovery may be issued, namely 30 days from the date the damage was established.

As observed, under the civil liability of public servants, there is no explicit limitation on the amount of damage that can be recovered through a payment commitment—the public servant may be held fully liable for the damage caused.

However, according to Article 254 of the Labour Code, if the employer determines that an employee has caused damage through fault and in connection with their work, they may request the employee—through a report of findings and damage evaluation—to repay its value by mutual agreement, within a period not shorter than 30 days from the date of communication. The amount recovered by mutual agreement cannot exceed the equivalent of 5 gross minimum wages per economy.

An agreement concluded under these conditions does not constitute an enforceable title. The actual recovery of material damage is carried out either:

- by applying Labour Code provisions (through salary deductions, respecting Article 257),
- or, if mutually agreed, under common law (through full payment or payment in installments).

If the value of the damage exceeds five gross minimum wages per economy, the employer has the following options:

- to forgo the attempt to reach a written agreement and directly file a claim in court for the entire amount considered as damage.
- to conclude a written agreement with the employee for the portion of the damage equal to 5 gross minimum wages, and take legal action for the amount exceeding that legal threshold (Ștefănescu, 2007, p.911).

As previously mentioned, for the recovery of damages caused—with guilt—to the property of a public authority/institution, or for the non-return of unduly received amounts within the legal term, an order or decision for recovery must be issued within 30 days from the discovery of the damage, or a payment commitment may be signed by the public servant.

The order or decision for recovery is a unilateral act issued by the head of the public authority/institution, based on documentation provided by the human resources and/or financial-accounting departments. This act identifies:

- the person responsible (the public servant),
- the damage or the unjust benefits received (amounts, goods, services),
- the amount to be recovered, thus compelling the person at fault to repay it.

The order or decision for recovery may be challenged in the administrative litigation court. If no action is filed or the claim is rejected, the final recovery order becomes an enforceable title.

The right of the authority's head to issue the recovery order is subject to a statute of limitations of three years, starting from the date the damage occurred.

In cases where damages are paid by the public authority/institution, as the principal, to third parties, recovery is based on a final court judgment.

In labor law, damage recovery is done by mutual agreement, up to a limit not exceeding five gross minimum wages per economy. If the damage exceeds this amount or if the employee disagrees—based on the assessment and evaluation report—with the value of the damage established by the employer, the matter must be referred to the court, according to Article 254 of the Labour Code.

Possibility of Joint Liability

Material damages caused to the employer may result from actions committed by multiple employees, regardless of whether they have similar job responsibilities or hold the same position.

Generally, the contractual civil liability of employees who have caused actual damage to the employer is not joint, unlike tortious civil liability. The liability provided by the Labour Code is contractual, similar to common law contractual civil liability, where the rule is divisibility. Thus, the provisions regarding joint liability do not apply by default (Predut, 2022).

In labor law, joint patrimonial liability is an exception, provided explicitly and restrictively by law. For instance, Article 28 of Law no. 22/1969 on the employment of custodians, the constitution of guarantees, and liability related to the management of goods of economic agents, public authorities, or institutions states:

"A manager or any other employee responsible for hiring, transferring, or maintaining a person in a custodian position without respecting the legal requirements regarding age, education, or legal status, as stipulated in Articles 3 and 38, as well as the criminal record conditions in Article 4, shall be jointly and fully liable for the damages caused by the custodian."

Also, Article 34 of the same law provides:

"Any person who, through a court decision, has been found to have obtained goods embezzled by a custodian from public property, and who obtained them outside the custodian's job duties, knowing that the custodian was managing such goods, shall be jointly liable with the custodian for covering the damage, up to the value of the acquired goods."

Being of strict interpretation, the application of solidarity in matters of patrimonial liability cannot be extended to situations other than those expressly and limitatively stipulated by law. Moreover, it does not apply automatically, but only if it is proven that the employee violated specific job duties.

In administrative law, joint liability of the public authority and the public servant or contract staff for damages caused by administrative acts—typical or equivalent—is regulated by Law no. 554/2004 on administrative litigation, Article 16, which refers to cases where compensation is sought for the illicit action of a person:
"...who contributed to the drafting, issuance, adoption, or conclusion of the act or, as applicable, is found guilty of refusing to resolve a request concerning a subjective right or a legitimate interest."

Conclusions

The comparative analysis between the patrimonial liability of employees, regulated by the Labour Code, and the civil liability of public servants, as provided by the Administrative Code, highlights two distinct models of legal regulation, tailored to the specific nature of each type of legal relationship—employment or public service.
In labor law, the employee's patrimonial liability reflects the legislator's intention to protect the employee. This is evident through the limitation of financial liability, the strict requirement to prove fault, and the rigorous procedures for determining the damage. These measures aim to ensure a fair balance of power between employer and employee, preventing potential abuses.

In administrative law, the patrimonial liability of public servants is considerably stricter, being based on the principle of responsibility toward the public interest and the proper management of public assets. The public servant is fully liable for damages caused and is therefore under greater pressure regarding the professionalism and diligence of their activity.

From a practical perspective, both types of liability present significant challenges:

- In the case of employee liability, the main difficulties lie in proving both the damage and the guilt .

- In the case of public servant liability, the issue lies in the potential chilling effect, where the fear of disproportionate liability may discourage initiative or efficiency.

In conclusion, although patrimonial liability for both professional categories shares a common foundation—the idea of material damage reparation—the method of application differs substantially, depending on whether the legal relationship is contractual or statutory. This differentiation is justified by the nature of each sector, but it also raises the question of whether public servants require stronger legal protection, potentially through future legislative adjustments.

References

Georgescu, L. (2011). *Patrimonial Liability of Workers. Contractual Civil Liability.* Universul Juridic.

Pătulea, V., Stelu, Ş., & Marconescu, G.I. (1988). *Liability and Social and Legal Responsibility*. Scientific and Encyclopedic.

Predut, M. C. (2022). *The Labour Code Annotated. The New Organisation of Labour*, 3rd completed and revised edition. Universul Juridic.

Salavastru, V. (2020). Civil Liability of Public Servants. *Romanian Labour Law Review, 5*.

Ștefănescu, I. T. (2007). *Theoretical Labour Law Treatise*, 4th revised and expanded edition. Universul Juridic.

Ţiclea, Al. (2016). *Labour Law Treatise. Legislation. Doctrine. Jurisprudence*, 10th updated edition. Universul Juridic.

Ţiclea, A. (2020). Civil Liability of Public Servants. Legislative and Jurisprudential Inconsistencies and Omissions. *Dreptul Journal, 11*. https://sintact.ro/#/publication/151019014?keyword=raspunderea%20civila%20a%20functionarului%20public&cm=SREST

Vedinaş, V. (2018). *Theoretical and Practical Treatise of Administrative Law*, Vol. II.

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 774 - 793

REFLECTIONS ON ECONOMIC CRIME IN THE DIGITAL AGE: TRENDS, CHALLENGES AND THE IMPACT OF ARTIFICIAL INTELLIGENCE

Carmina-Elena TOLBARU[1]
ORCID ID: https://orcid.org/0000-0002-1854-8352
E-mail: carmina.tolbaru@upb.ro
Raimundas KALESNYKAS[2]
ORCID ID: https://orcid.org/0009-0007-5643-2952
E-mail: raimundas.kalesnykas@turiba.lv
Afiliation:[1]National University of Science and Technology Politehnica Bucharest, Faculty of Economic Sciences and Law, Romania
Affiliation:[2] Faculty of Law, Turiba University, Latvia

Abstract: *Economic crime is undergoing a profound structural transformation, accelerated by both digitalization and the emergence of modern artificial intelligence (AI) systems. While for criminals AI represents a tool through which they can automate social engineering, create false identities through deepfakes and multiply financial fraud, for financial institutions it constitutes a means of defense, by integrating advanced machine learning techniques, graph analysis and anomaly detection into anti-money laundering (AML) mechanisms. However, the application of these solutions raises significant challenges related to the explainability of algorithms, data quality and legal compliance. This paper aims to map the main trends, risks and controversies and to propose a conceptual framework for understanding the impact of AI on economic crime.*

Keywords: *economic crime; money laundering; artificial intelligence; deepfakes; explainability.*

Introduction

The last two decades have been marked by an acceleration of digitalization and the unprecedented expansion of the global technology-based economy. The transformations produced by the digital revolution have led to a structural change in both the way economic transactions are carried out and the typology of risks associated with them (Brynjolfsson & McAfee, 2017, pp. 21–24). The emergence of financial technologies (fintech), the expansion of digital payments, and the development of cryptocurrencies have generated new vulnerabilities exploited by criminals (Atlam et al., 2024, pp. 2–3; Tolbaru, 2023, pp. 151-156).

The phenomenon of digital economic crime has experienced a constant growth, driven by the globalization of financial flows, the anonymization offered by the online space, and the increasingly sophisticated tools at the disposal of criminals (Lord & Levi, 2023, pp. 1–3). Currently, frauds such as business email compromise (BEC) attacks, money laundering through blockchain or „pig butchering" schemes represent serious challenges both for financial institutions, but especially for regulatory authorities and for states in general (Europol, 2024, pp. 5–7).

In this study, we propose to address the following directions of action: - analysis of major trends in economic crime in the digital age; - identification of legal, institutional and technological challenges in combating the phenomenon; - assessment of the impact of artificial intelligence (AI) as a dual factor – both a facilitator of economic crime and a tool for prevention and control; The research methodology is based on a doctrinal and comparative analysis of the specialized literature, complemented by the examination of relevant jurisprudence and reports issued by international reference organizations, such as Europol, the Financial Action Task Force (FATF) or the UN. In addition, the study integrates the analysis of representative cases of digital economic fraud, in order to highlight both emerging criminal typologies and institutional reactions. The present study adopts an interdisciplinary approach – legal, economic and technological – and predominantly uses qualitative

methods, aiming to correlate the regulatory and institutional framework with empirical data and recent practices in preventing and combating digital economic crime.

1. Economic crime in the digital age – conceptual landmarks

1.1. Definitions and characteristics of economic crime

Economic crime is a multifaceted concept, used to describe all crimes that aim to obtain financial gains through illegal means. However, the specialized literature emphasizes that the notion does not have a unitary definition, being interpreted according to the legal, economic and criminological context (Lord & Levi, 2023, pp. 1–3). It includes crimes such as fraud, corruption, money laundering, market abuse or tax evasion, characterized by patrimonial purpose; use of financial or commercial mechanisms; high complexity and difficulties of investigation; negative effects on trust in institutions and markets (Albrecht et al., 2020, pp. 12–15).

In the digital age, transnationality and online anonymity become defining elements, generating major challenges for judicial bodies (Europol, 2024, pp. 5–7).

1.2. The digital dimension of contemporary economic crime

The accelerated process of digitalization has led to a significant migration of economic crime to the online space, where traditional barriers – jurisdictional or physical – are greatly diminished. The emergence of instant financial transactions, virtual assets and digital platforms has multiplied the opportunities for fraud and money laundering (Atlam et al., 2024, pp. 2–3).

According to a Europol report (2024, pp. 9–11), digitalization has generated:

- a substantial increase in online payment fraud, through the compromise of cards and the fraudulent use of electronic wallets;
- the emergence and development of illicit markets on the dark web, dedicated to the trade in stolen data and identities;

- the consolidation of digital organized crime networks, capable of operating transnationally through sophisticated technological infrastructures.

In this context, economic crime is acquiring new characteristics: it is becoming more scalable, more automated and considerably more difficult to attribute to the perpetrators, which requires innovative measures to prevent and combat it.

1.3. New forms of economic crime

In the digital environment, economic crime takes on innovative forms, reflecting a hybridization between economic and cybercrime. Among these, online frauds, materialized in phishing attacks, business email compromise (BEC) or fictitious investment schemes, intensified by the use of artificial intelligence tools, stand out first and foremost (Schmitt & Flechais, 2024, pp. 2–5). Another major manifestation is money laundering through cryptocurrencies, where the relatively anonymous nature of transactions and mixing services complicate the detection of illicit flows and require the development of advanced blockchain forensic methodologies (Atlam et al., 2024, pp. 4–6; Tolbaru, 2023, pp. 151-156). The phenomenon of ransomware represents a particular form of dual crime – cyber and economic – as attacks on financial or corporate institutions are followed by requests for payment in cryptocurrencies (Europol, 2024, pp. 12–14). In the same vein, digitalized insider trading is based on illegally accessing databases and exploiting trading algorithms to obtain confidential advantages, constituting a modern type of market abuse (Garno, 2025, p. 2).

These typologies demonstrate that technological innovation reconfigures the mechanisms of economic crime, generating a hybridization between economic and cybercrime; consequently, the analysis of the phenomenon requires an integrated and interdisciplinary framework, combining the legal and technological dimensions.

1.4. Differences between traditional and digital economic crime

Although they share the same fundamental objective – obtaining illicit financial gains – traditional economic crime and digital economic crime differ significantly in their means of manifestation and operational context. In its classic form, the phenomenon was confined to physical spaces and local or national networks, being carried out through tools such as document falsification, manipulation of accounting records or embezzlement of funds through conventional banking transactions. Investigations were mainly based on material and documentary evidence, being easier to fit into a well-defined legal framework (Albrecht et al., 2020, pp. 12–15).

By contrast, with the digitalization of the global economy, economic crime has acquired a transnational dimension, rapidly transcending state borders and capitalizing on digital tools such as cryptocurrencies, artificial intelligence, social networks or dark web infrastructures (Atlam et al., 2024, pp. 4–6). This new form of crime is defined by a high degree of anonymity, exponential scalability and low costs, which allows criminals to target thousands of victims simultaneously (Europol, 2024, pp. 27–30).

Thus, while traditional forms were limited by resources and physical infrastructure, digital crime exploits the speed, accessibility, and opacity of modern technologies, transforming itself into a phenomenon that is much more difficult to detect and counter. The fundamental difference lies in the fact that the digital environment not only reproduces established criminal mechanisms, but also amplifies them through automation and the elimination of space-time barriers (Lord & Levi, 2023, pp. 6–7).

2. Current trends in economic crime in the digital age

2.1. Dynamics of digital markets and criminal vulnerabilities

The rapid development of e-commerce, fintech platforms and instant payment services has created new economic opportunities, but has also increased the vulnerabilities that criminals can exploit. Digital media are now being used to carry out fraud on a global scale, characterized by

unprecedented speed of execution and coordination (Lord & Levi, 2023, pp. 6–7).

Among the most common manifestations are business email compromise (BEC) fraud or fictitious investment schemes, both of which are intensified by the use of social media platforms and instant messaging applications. It is precisely this diversification of attack vectors that significantly differentiates digital crime from traditional forms of economics (Schmitt & Flechais, 2024, pp. 2–5).

Moreover, according to Europol, the automation of fraud through digital tools and the integration of artificial intelligence allow for highly personalized and credible phishing campaigns, which significantly increases the efficiency of these criminal activities (Europol, 2024, pp. 27–30).

2.2. Blockchain and cryptocurrencies: challenges for regulation and investigation

Cryptocurrencies have become a preferred tool for money laundering, terrorist financing, and illicit transactions. Their characteristics—relative anonymity, rapidity of transfers, and lack of uniform global regulation—give them a high potential for criminal exploitation (Atlam et al., 2024, pp. 2–4).

At the same time, the field of blockchain forensics has made considerable progress, enabling investigators to trace transaction paths and identify suspicious financial flows (Tolbaru, 2023, pp. 151-156). However, the use of techniques such as mixing services and chain-hopping significantly complicates investigative work. Mixing services (or tumblers) are platforms that mix cryptocurrencies from different sources to hide their origin, generating a “mixture” of funds that makes it difficult to trace the original trail.

Chain-hopping, in turn, involves the repeated conversion of cryptocurrencies from one blockchain to another (e.g., from Bitcoin to Monero and then to Ethereum), fragmenting the trail and multiplying the levels of opacity. These practices significantly reduce the possibility of reconstructing the actual flow of illicit funds and pose major technical

challenges to investigators, even when they have advanced blockchain forensic tools (Europol, 2024, pp. 12–14). Cryptocurrencies therefore constitute a battleground between innovation and crime, where regulation and control tools are constantly trying to catch up with the rapid pace of technological innovation (FATF, 2025, pp. 3–6).

2.3. The digital underground economy and the role of the dark web in facilitating crime

The dark web functions as a parallel infrastructure of the digital space, providing an anonymous framework for the trade of personal data, hacking tools, malware or services intended for money laundering. According to recent studies, the digital underground market is closely interconnected with the legitimate one, as stolen data and illicitly obtained cryptocurrencies are often transformed into real goods and services (Europol, 2024, pp. 9–11).

A defining element of this ecosystem is the emergence of the "crime-as-a-service" phenomenon, through which sophisticated tools – from ransomware and botnets to phishing kits – are sold at affordable prices. This model facilitates the participation of even actors with limited technical skills in criminal activities, significantly reducing traditional barriers to entry into the criminal sphere (Ibrar et al., 2025, p. 285). Consequently, we are witnessing a true „democratization of digital economic crime", through which technological accessibility favors an exponential expansion of the number and diversity of participants in the global underground economy (Ganguli, 2024, pp.1–2).

3. Legal and institutional challenges

3.1. International and European legal framework on digital economic crime

In recent years, the European and international regulatory framework on digital economic crime has been rapidly strengthened, targeting both cross-border judicial cooperation and the regulation of critical digital sectors. The current rules constitute a complex architecture, covering key areas such as electronic evidence, network

security, crypto-asset markets, financial resilience, anti-money laundering and the protection of personal data.

A central pillar is Regulation (EU) 2023/1543 on electronic evidence, which introduces European production and preservation orders for digital evidence. These can be addressed directly to service providers in the EU, regardless of where the data is stored, thus facilitating rapid access to digital evidence in criminal cases[1].

On the security and resilience dimension, Directive (EU) 2022/2555 (NIS2 Directive) expands the list of critical sectors – including banks, financial market infrastructures and digital service providers – and imposes strict risk management and incident reporting obligations.[2] In the same time, Regulation (EU) 2022/2554 on Digital Operational Resilience (DORA) harmonises requirements for the financial sector, targeting ICT risk management, major incident reporting, resilience testing and monitoring of critical third-party providers[3].

Regarding cryptoassets, the European Markets in Cryptoassets Regulation (MiCA) establishes a single regime for issuers and service providers, including clarifications on NFTs and payment tokens[4]. In

---

[1] Regulation (EU) 2023/1543 of the European Parliament and of the Council of 12 july 2023 on European production orders and European preservation orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings, art. 1–2, *OJ l 191/118–120*.

[2] Directive (EU) 2022/2555 of the European Parliament and of the Council of 14 December 2022 on measures for a high common level of cybersecurity across the Union, amending Regulation (EU) no 910/2014 and Directive (EU) 2018/1972, and repealing Directive (EU) 2016/1148 (NIS 2 Directive), art. 5, 15–23, *OJ l 333/22–23*; Anexa I, *OJ l 333/143–149*.

[3] Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 december 2022 on digital operational resilience for the financial sector and amending Regulations (EC) no 1060/2009, (EU) no 648/2012, (EU) no 600/2014, (EU) no 909/2014 and (EU) 2016/1011

[4] Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending regulations (EU) no 1093/2010 and (EU) no 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937. Recitals 4–11, *OJ l 150/40–42)*.

addition, Regulation (EU) 2023/1113 on information accompanying transfers of funds and certain crypto-assets (TFR) extends the transparency rule (travel rule) to transfers of crypto-assets, requiring the identification of both the initiator and the beneficiary of the transaction[1].

In the AML/CFT dimension, the Anti-Money Laundering Authority (AMLA) was created in 2024, with supervisory and coordination powers at European level, in accordance with Regulation (EU) 2024/1620 establishing the Authority for Combating Money Laundering and the Financing of Terrorism[2]. The European standards are aligned with the FATF guidance on virtual assets and related service providers (FATF, 2021; FATF 2025).

Last but not least, Regulation (EU) 2016/679 (GDPR Regulation) enshrines essential guarantees for fundamental rights, limiting exclusively automated decisions that produce legal or similar effects[3]. This aspect is crucial in the context of using artificial intelligence for transaction monitoring or risk scoring.

Overall, European rules cover the entire intervention chain: prevention (NIS2 Directive, DORA Regulation), market regulation (MiCA and TFR Regulations), investigation and evidence (e-evidence), as well as data protection and data subjects' rights (GDPR).

---

[1] Regulation (EU) 2023/1113 of the European Parliament and of the Council of 31 May 2023 on information accompanying transfers of funds and certain crypto-assets and amending Directive (EU) 2015/849, *OJ l 150/1.*

[2] Regulation (EU) 2024/1620 of the European Parliament and of the Council of 31 May 2024 establishing the authority for anti-money laundering and countering the financing of terrorism and amending Regulations (EU) no 1093/2010, (EU) no 1094/2010 and (EU) no 1095/2010, *JO l, 2024/1620, 19.6.2024.*

[3] 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 Data Protection Regulation), art. 22, *OJ l 119/45.*

3.2. Law enforcement challenges: jurisdiction, cross-border cooperation and digital evidence

Law enforcement in the field of digital economic crime poses a number of complex challenges, stemming from the transnational nature of the phenomenon and the technological specificity of digital evidence.

A first major obstacle is the conflict of jurisdictions and data localization. Global service providers store and distribute data in multiple jurisdictions, which complicates the determination of the competent authority. To address this difficulty, the European Union established, through Regulation (EU) 2023/1543, European orders for the production and preservation of electronic evidence, directly addressable to providers operating in the EU. However, the execution and challenge of these orders involve a delicate balance between the efficiency of access to data and the respect of procedural guarantees[1]. In the same time, in the United States, the CLOUD Act allows authorities to access data hosted by American providers, regardless of their physical storage location, based on warrants and reciprocal executive agreements, with the possibility for providers to challenge abusive requests[2] .

A second problematic aspect concerns the length of traditional international cooperation procedures. The classic Mutual Legal Assistance Treaty mechanisms are proving slow and inefficient in the context of instantaneous digital transactions. In this regard, the e-evidence instrument aims to impose short deadlines and uniform data format standards, but its effectiveness will depend on the degree of technical interoperability, the resources allocated and the existence of effective remedies for both providers and data subjects (Regulation 2023/1543, OJ L 191/118–120).

---

[1] Regulation (EU) 2023/1543 of the European Parliament and of the Council of 12 july 2023 on European production orders and European preservation orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings, *OJ l 191/118–180.*

[2] Clarifying Lawful Overseas Use of Data Act (CLOUD Act, 2018, SUA). https://www.eurojust.europa.eu/sites/default/files/assets/the-cloud-act.pdf

A third major challenge concerns the management of digital evidence. Issues of data integrity, chain of custody, and metadata preservation are essential for the validity of evidence in court. The ephemeral nature of data, advanced encryption, the use of cryptocurrencies, and the pseudo-anonymity of transactions require the development of sophisticated analytical tools and the adoption of uniform collection and preservation standards. In this context, the FATF has emphasized the importance of on-chain transaction traceability, through the involvement of virtual asset service providers (VASPs) and the application of the travel rule, as a central element in the investigation of money laundering and terrorist financing cases in the crypto area (FATF, 2021, pp. 9–12; FATF, 2025, pp. 6–9).

Overall, these challenges demonstrate that the effectiveness of law enforcement in the digital space depends on harmonizing jurisdictional rules, accelerating cross-border cooperation, and strengthening digital evidence infrastructures, while respecting fundamental rights.

3.3. International institutions and cooperation in combating digital economic crime

The fight against digital economic crime cannot be carried out exclusively at national level, as the phenomenon is by its nature cross-border. International institutions therefore play a key role, both by providing analytical and operational tools and by harmonizing legal standards.

Europol highlights, in its IOCTA 2024 report, that elements such as crypto-assets and the dark web are real “enablers” of digital economic crime. The report highlights the growth of online fraud (including phishing, smishing, account takeovers and BEC fraud), the fragmentation of the ransomware ecosystem and the integration of artificial intelligence into the arsenal of criminals. In this context, Europol supports investigations through cryptocurrency analysis, information exchange and the coordination of joint operations between Member States (Europol, 2024, pp. 5, 17, 27–29, 32).

INTERPOL, through its 2024 global assessment, draws attention to the expansion of investment fraud and BEC schemes, as well as the use of deepfakes and the phenomenon of "scam centres", where trafficked persons are exploited for online fraud. The report highlights the convergence between fraud, the use of cryptocurrencies and crime-as-a-service, confirming the transnational and hybrid nature of these activities (INTERPOL, 2024, pp. 4–11, 18–19).

The FATF provides the global regulatory framework, through Recommendation 15 and its 2021 and 2024 updates, which detail the regime applicable to virtual assets and related service providers (VASPs). These include aspects regarding stablecoins, P2P transactions, licensing requirements and the application of the transparency rule (travel rule). In the European Union, FATF standards are transposed and complemented by regulations such as MiCA and TFR, which aim to ensure the traceability of transactions and the accountability of actors in the crypto market (FATF, 2021; FATF, 2025).

The UN, through the UN Convention against Corruption (UNCAC) and international criminal cooperation instruments, provides the general principles on criminalisation, recovery of proceeds of crime and mutual legal assistance. However, in recent practice, specialised regional instruments – such as the e-evidence Regulation or the Budapest Convention and its additional protocols – as well as operational agencies such as Europol and INTERPOL, provide the fastest and most effective response mechanisms in the digital space.

3.4. Ethical and fundamental rights challenges

The intensification of digital investigations and the use of emerging technologies in the fight against economic crime raise a number of ethical and legal issues, in particular regarding the respect of fundamental rights (Popescu-Ljungholm & Tolbaru, 2025, pp. 48-60).

A first aspect is privacy and data protection. Financial surveillance activities and AI-based analytics can lead to excessive data processing, their retention for unjustified periods or their use for secondary purposes. The General Data Protection Regulation (GDPR) enshrines the principles

of legality, proportionality and transparency, and for exclusively automated decisions with legal or similar impact (such as account blocking or automated de-risking procedures) Article 22 imposes additional safeguards: human intervention and the possibility of contesting (GDPR, Art. 22, OJ L 119/45).

A second challenge is algorithmic fairness and the risk of bias. Fraud detection models can be influenced by poor data quality or proxy variables, which leads to a high number of false positives and can lead to financial exclusion. Recent assessments confirm both the use of AI (including deepfakes) by criminals and the need for explainability of algorithms, auditing and regular validation of AML and anti-fraud models (Europol, 2024, pp. 5, 32; INTERPOL, 2024, pp. 10–11).

The right to defence and an effective remedy must also be guaranteed. New mechanisms for direct access to data (such as orders addressed to service providers, under Regulation 2023/1543) must be accompanied by safeguards such as notification of the parties concerned, the possibility of challenge and judicial review, in order to avoid the risk of a „privatisation" of law enforcement and non-transparent restriction of content or services (Reg. 2023/1543, OJ L 191/118–120).

Finally, the principle of proportionality and necessity remains essential. The balance between security and fundamental rights requires ex-ante assessments of the impact on privacy, minimization of data collection and limitation of the retention period.

4. Artificial Intelligence and its Impact on Economic Crime

4.1. Exploitation of artificial intelligence in economic crime

Artificial intelligence (AI) is increasingly being exploited by criminals as an offensive tool, capable of automating, amplifying and personalizing economic fraud. A first manifestation is represented by deepfakes and identity manipulation, facilitated by technologies such as generative adversarial networks (GANs). These allow the falsification of a person's face, voice or behavior, and are used for sophisticated frauds, such as impersonating CEOs who authorize large financial transfers (Schmitt & Flechais, 2024, pp. 3–5).

A second area is automated fraud, where AI-powered chatbots can simultaneously conduct thousands of interactions with potential victims. This automation exponentially increases the success rate of phishing scams or investment scams (Ibrar et al., 2025, pp. 286-288).

AI is also used to attack financial infrastructures, by identifying vulnerabilities in banking systems, generating high-speed fake transactions, or manipulating financial markets through algorithmic trading (Oztas et al., 2024, pp. 163–165).

Through these mechanisms, AI considerably reduces the costs of criminal activities and increases their efficiency, becoming a power multiplier for groups involved in digital economic crime.

4.2. Applications of artificial intelligence in preventing and combating economic crime

In contrast to illicit uses, artificial intelligence (AI) offers significant opportunities for strengthening defense and prevention capabilities (Tolbaru, 2025, pp. 11-12).

A first area of application is the detection of suspicious transactions, where machine learning algorithms are integrated into banking monitoring systems to reduce the number of false alerts and identify emerging patterns of money laundering (Oztas et al., 2024, pp. 166–169).

AI also contributes to improving Anti-Money Laundering (AML) processes through hybrid models (combination of traditional rules and intelligent algorithms), capable of detecting abnormal transactions in complex financial networks and mapping connections between suspicious accounts through graph analysis (Turksen, Benson, & Adamyk, 2024, pp. 366–370).

Another area of application is predictive policing, where AI is used to anticipate criminal behaviors by analyzing massive volumes of data. Although promising, this practice raises major ethical concerns, related to the risk of discrimination, algorithmic bias, and the need to respect fundamental rights (Završnik, 2020, pp. 570–572).

In conclusion, AI can become an essential tool for preventing and combating economic crime, but its effectiveness depends on careful governance, transparency and robust human verification mechanisms to prevent abuses and systemic errors.

4.3. Ethical and legal challenges of artificial intelligence in criminal justice

The integration of artificial intelligence (AI) into the criminal justice system raises numerous ethical and legal dilemmas, which call into question the compatibility of these technologies with the principles of the rule of law (Tolbaru, 2025, pp. 13-15).

A first aspect is algorithmic bias, generated by training models on incomplete or unbalanced data sets. This can lead to discriminatory results in risk assessment or in making decisions regarding the monitoring or surveillance of individuals (Barfield, 2021, pp. 44–46).

The issue of transparency and explainability is also crucial. Opaque, "black box" AI systems are difficult to audit, which can undermine both the principle of legality and the fundamental right to defense. The lack of the possibility of understanding how a decision was generated affects public trust in justice and the legitimacy of the decision-making act (Turksen, Benson & Adamyk, 2024, pp. 371–373).

A third critical point concerns legal liability. The central question remains open: who is responsible for errors produced by algorithms? The developers of the system, the institutions that implement it, or the operators who rely on technological recommendations? (Hacker et al., 2020, pp. 9–11).

These challenges demonstrate the need for clear regulatory frameworks on accountability and oversight mechanisms, which ensure that the use of AI in criminal justice is carried out in compliance with the principles of fairness, transparency, and protection of fundamental rights.

Conclusions

Economic crime in the digital age is a complex and dynamic phenomenon, amplified by the expansion of online markets, the use of cryptocurrencies and the emergence of hidden infrastructures such as the dark web. The case studies analyzed demonstrate that the impact of these crimes is not only virtual, but also produces tangible effects on the stability of financial markets, investor confidence and global economic security.

Artificial intelligence plays an ambivalent role in this equation. On the one hand, it facilitates new types of fraud – from deepfakes and automated fraud to sophisticated attacks on financial infrastructures. On the other hand, AI offers innovative tools for prevention and countermeasures, through the detection of suspicious transactions, graph analysis and the application of hybrid AML models. However, this "dual use" of technology requires careful regulation, ensuring transparency, accountability and respect for fundamental rights.

From a regulatory perspective, the European Union has built a solid framework – from the NIS2 Directive and the DORA Regulation for security and resilience, to the MiCA and TFR Regulations for regulating the crypto market, and to the e-evidence Regulation for rapid access to electronic evidence. However, these instruments need to be correlated with international standards (FATF, United Nations Convention against Corruption - UNCAC) and institutional mechanisms (Europol, INTERPOL, UN), to ensure effective cross-border cooperation.

At the same time, the future of combating digital economic crime depends not only on legislation and technology, but also on the digital education of the public, the responsibility of private actors and the strengthening of ethical governance of artificial intelligence. Only through an integrated approach – legal, technological and societal – can a balance between innovation and security be built, capable of protecting both markets and the fundamental rights of the individual.

Beyond its dual nature, artificial intelligence introduces systemic risks that may outpace current legal and institutional safeguards. The

automation and scalability of AI-driven tools mean that once a criminal model or fraud script is created, it can be replicated indefinitely and at negligible cost. This exponential capacity amplifies traditional economic crimes and undermines the deterrent effect of national borders, regulatory oversight, or conventional investigation methods. Moreover, the democratization of generative AI lowers the technical threshold for criminal participation, enabling individuals without expertise to engage in financial fraud, deepfake extortion, or identity theft. Such developments risk producing a self-reinforcing cycle in which criminal innovation continuously exceeds institutional adaptation.

Equally concerning is the risk of over-reliance on algorithmic tools within the compliance and investigative domains. The increasing dependence of financial institutions and law-enforcement agencies on opaque or proprietary AI systems may create a new "technological asymmetry," where errors, biases, or data manipulation compromise due process and the presumption of innocence. Excessive automation in risk scoring or transaction monitoring could reproduce discriminatory outcomes, exclude legitimate users, or obscure human accountability. Consequently, the technological solutionism that dominates current discourses on AI-based security must be critically reassessed.

To counter these vulnerabilities, part of the solution must come from non-AI-dependent mechanisms that reinforce institutional resilience and human oversight. First, financial literacy and public digital education remain essential. Citizens and corporate actors alike should understand the logic of fraud schemes, the operation of deepfakes, and the importance of verifying digital identities before transferring funds or data. Second, strengthening human compliance teams, supported by continuous professional training in forensic accounting and cyber law, ensures that machine outputs are interpreted through an ethical and contextual lens. Third, international cooperation and real-time data-sharing frameworks—such as joint investigation teams or harmonized reporting channels under Europol and FATF coordination—can offer faster responses to AI-enabled crimes without depending exclusively on algorithmic detection. Finally, ethical governance frameworks should

prioritize transparency, algorithmic auditing, and the right to human review as structural safeguards against automation bias and system errors

In conclusion, while AI has become an indispensable component of modern financial regulation and crime prevention, the sustainability of this framework depends on complementing it with human judgment, ethical reflexivity, and transnational legal cooperation. A resilient society will not be defined by how much technology it uses, but by how wisely it integrates and limits that technology in protecting human rights and economic integrity.

References

Albrecht, W. S., Albrecht, C. O., Albrecht, C. C., & Zimbelman, M. F. (2020). *Fraud examination* (6th ed.). Cengage Learning.

Atlam, H. F., Deya, H., Alenezi, A., Wills, G., & Al-Barakati, A. (2024). Blockchain forensics: A systematic literature review of digital forensic frameworks and methodologies. *Electronics, 13*(17), 3568. https://doi.org/10.3390/electronics13173568

Barfield, W. (2021). *The law of artificial intelligence and smart machines*. Wolters Kluwer.

Brynjolfsson, E., & McAfee, A. (2017). *Machine, platform, crowd: Harnessing our digital future*. W.W. Norton & Company.

Dowling, M. (2022). Is non-fungible token pricing driven by cryptocurrencies? *Finance Research Letters, 44*, 102097. https://doi.org/10.1016/j.frl.2021.102097

Ibrar, W., Mahmood, D., Al-Shamayleh, A.S. *et al.* Generative AI: a double-edged sword in the cyber threat landscape. *Artif Intell Rev* 58, 285 (2025). https://doi.org/10.1007/s10462-025-11285-9

Europol. (2024). *Internet Organised Crime Threat Assessment (IOCTA)*. Publications Office of the European Union. Luxembourg. https://www.europol.europa.eu/publication-events/main-reports/internet-organised-crime-threat-assessment-iocta-2024

Europol. (2024). *Full-scale action against money laundering network at Lithuanian financial institution for over EUR 2 billion*. Europol Newsroom. https://www.europol.europa.eu/media-press/newsroom/news/full-scale-action-against-money-laundering-network-lithuanian-financial-institution-for-over-eur-2-billion

FATF. (2021). *Updated Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers.* Paris: FATF/OECD. https://www.fatf-gafi.org/content/dam/fatf-gafi/guidance/Updated-Guidance-VA-VASP.pdf

FATF. (2025). *Targeted Update on Implementation of the FATF Standards on Virtual Assets/VASPs, and Virtual Asset Service Providers*. Paris: FATF/OECD. https://www.fatf-gafi.org/content/dam/fatf-gafi/recommendations/2025-Targeted-Upate-VA-VASPs.pdf.coredownload.pdf

Ganguli, P. (2024). *The rise of cybercrime-as-a-service: Implications and countermeasures. SSRN. https://doi.org/10.2139/ssrn.4959188*

Garno, Z. (2025). *Insider trading challenges in the digital era: Legal and ethical considerations for U.S. financial market regulation*. Journal of Next-Generation Research 5.0, 1(3). https://doi.org/10.70792/jngr5.0.v1i3.75

Hacker, P., Krestel, R., Grundmann, S., & Naumann, F. (2020). Explainable AI under contract and tort law: Legal incentives and technical challenges. *Artificial Intelligence and Law, 28*(4), 415–439. https://doi.org/10.1007/s10506-020-09260-6

INTERPOL. (2024). *Global Financial Fraud Assessment (Public version)*. Interpol.

Lord, N., & Levi, M. (2023). Economic crime, economic criminology, and serious crimes for economic gain: On the conceptual and disciplinary (dis)order of the object of study. *Journal of Economic Criminology, 1*, 100014. https://doi.org/10.1016/j.jeconc.2023.100014

Oztas, B., Cetinkaya, D., Adedoyin, F., Budka, M., Aksu, G., & Dogan, H. (2024). Transaction monitoring in anti-money laundering: A qualitative analysis and points of view from industry. *Future*

Generation Computer Systems, 159, 161–171. https://doi.org/10.1016/j.future.2024.05.027

Popescu Ljungholm, D., & Tolbaru, C.-E. (2025). The impact of artificial intelligence on fundamental human rights in EU countries: Examination of academic studies and the positions of non-governmental organizations regarding the ethical and legal risks of AI. *Lex et Scientia International Journal, 32*(1), 47–62. https://lexetscientia.univnt.ro/numbers/current-numbe

Schmitt, M., & Flechais, I. (2024). Digital deception: Generative artificial intelligence in social engineering and phishing. *Artificial Intelligence Review, 57*, 324. https://doi.org/10.1007/s10462-024-10973-2

Tolbaru, C.-E. (2023). Considerations on combating money laundry in the field of crypto-assets, at European Union level. In *Proceedings of the 33th International RAIS Conference on Social Sciences and Humanities* (pp. 151–156). The Scientific Press. https://doi.org/10.5281/zenodo.8310135

Tolbaru, C.-E. (2025). Artificial intelligence – a vector for crime and a tool for carrying out criminal justice. *Athens Journal of Law, 12*, 1–20. https://doi.org/10.30958/ajl.X-Y-Z

Turksen, U., Benson, V. & Adamyk, B. Legal implications of automated suspicious transaction monitoring: enhancing integrity of AI. *J Bank Regul* **25**, 359–377 (2024). https://doi.org/10.1057/s41261-024-00233-2

Završnik, A. Criminal justice, artificial intelligence systems, and human rights. *ERA Forum* **20**, 567–583 (2020). https://doi.org/10.1007/s12027-020-00602-0

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 794-805

THE THREAT OF CYBERATTACKS IN BUSINESS

Irina BENIA [1]
ORCID ID: https://orcid.org/0009-0005-3783-7255
E-mail: irinabenia1984@gmail.com
Tamara Sajaia[2]
ORCID ID: https://orcid.org/0009-0006-7851-3422
E-mail: tamirisaj@gmail.com
Afiliation: [1,2] Faculty of Law, Business, Humanities and Social Sciences X Tbilisi Humanitarian Teaching University

Abstract: *This article examines the exposure of private businesses, particularly small and medium-sized enterprises (SMEs) to cyberattacks and the organizational measures that mitigate risk. A cross-sector survey of Georgian SMEs was conducted to assess awareness of cyber hygiene and the adoption of preventive controls during ongoing digital transformation. Results indicate strong recognition of the importance of cyber hygiene (100%) but limited competence in the field (66.7% report insufficient expertise) and low incident-reporting intent among employees. Managers (83.3%) view training as a decisive factor, yet two-thirds (66.7%) lack dedicated cybersecurity officers. Situating these findings within Georgia's National Cybersecurity Strategy (Resolution No. 482) and international indices such as the NCSI, the study argues for integrated programs that combine technical controls - access management, phishing simulations, and secure off-boarding with cultural initiatives focused on awareness and incentives. The paper concludes with policy and managerial recommendations tailored to SMEs. Global statistics further reveal that most cybercrimes target private businesses, which, on average, allocate less than $500 annually for cybersecurity measures, making them highly profitable targets for cybercriminals.*

Keywords: *cyberattack; cyber culture; cyber hygiene; cyber protection.*

Introduction

Although cyberattacks can serve various purposes—such as financial fraud, data breaches, or information manipulation—private businesses remain among the most at-risk targets. Small and medium-sized enterprises (SMEs) receive particular attention, as they are often the most vulnerable segment due to limited financial and technical resources. Research demonstrates that a significant proportion of cyberattacks stem from human error. Consequently, the human factor is widely regarded as the weakest link in cybersecurity. This vulnerability often manifests through phishing attempts, weak or reused passwords, and the use of unsecured networks and personal devices. Therefore, raising employee awareness and promoting a culture of cybersecurity are essential for strengthening an organization's overall defense posture. The aim of this study is to examine how Georgian companies ensure cybersecurity, to identify the preventive measures they employ, and to assess employees' awareness of such concepts as cyber culture and cyber hygiene. The intersection of digital transformation (DT) and cybersecurity has become a focal point for both researchers and practitioners. Saeed et al. (2023) argue that as organizations adopt new technologies, they inadvertently increase their vulnerability to cyber threats. The authors propose a staged cybersecurity readiness framework, which serves as a proactive approach for businesses to anticipate and mitigate potential threats during digital transformation initiatives. This framework emphasizes integrating robust cybersecurity measures from the outset, thereby safeguarding operations against disruption and data breaches (Saeed et al., 2023).

The threat of cyberattacks in business

As of December 15, 2024, Georgia holds the following positions in international cybersecurity and digital readiness rankings: 30th in the National Cybersecurity Index (NCSI), having previously ranked 44th between 2016 and 2023; 58th in the Global Cybersecurity Index (compared to 55th from 2016 to 2023); 68th in the E-Government

Development Index; and 67th in the Network Readiness Index. The country received its highest ratings in areas such as cybersecurity policy, personal data protection, and efforts to combat cybercrime. However, the lowest score was recorded in crisis management, with only 22% out of a possible 100%[1].

The necessity of merging cybersecurity with digital transformation is further supported by the findings of Browne et al. (2015), who emphasize the importance of Cyber Threat Intelligence (CTI) in enhancing organizational resilience. Their proposed framework encompasses a knowledge base, detection models, and visualization dashboards, equipping businesses to identify and respond to potential security breaches effectively. This integrated approach is crucial as organizations increasingly rely on digital solutions, creating new avenues for cyber threats (Browne et al., 2015).

The goals and objectives of national cybersecurity can be found in Resolution of the Government of Georgia No. 482 on the approval of the National Cybersecurity Strategy of Georgia for 2021-2024 and its action plan[2].

The main directions for protection and prevention from cyber attacks are clearly visible here. The main aim of cybersecurity is to build a strong cyber culture within our society and organizations, and to enhance our ability to tackle cyber threats effectively. This includes educating schoolchildren and students about safe online practices, raising awareness among society and organizations about cyber risks, and ensuring safe and reliable functioning in cyberspace.

Second goal emphasizes the importance of enhancing collaboration between the public and private sectors. This involves using communication platforms to share information about current trends, best

---

[1] NCSI (E-Governance Academy), "Georgia – National Cybersecurity Index Profile," *National Cyber Security Index* (2024), https://ncsi.ega.ee/country/ge/1011/#details

[2] Government of Georgia, "Resolution No. 482: National Cybersecurity Strategy of Georgia 2021–2024 and Action Plan," *Matsne.gov.ge* (2021), https://matsne.gov.ge/ka/document/view/5263611?publication=0

practices, and cyber threats. Additionally, it aims to encourage the adoption of international standards and to support research activities in the field of cybersecurity.

Third goal highlights the need for robust human resources and technical support to develop cyber capabilities. This includes enhancing the knowledge and skills of specialists in the field and bolstering national cyber capabilities through adequate technical support.

Fourth goal focuses on enhancing Georgia's role as a secure player in the global cybersecurity landscape. This involves improving access to information about cyber threats, increasing international support and cooperation, and participating in cyber trainings and exercises. Additionally, it aims to strengthen partnerships through bilateral and multilateral exchanges of knowledge and experience.

Understanding the primary areas of national cybersecurity, along with its aims and purposes, should be considered within the business sector. This includes every organization, irrespective of its scale, be it small, medium, or large.

According to Cybersecurity Ventures, global cybercrime expenses for companies are projected to reach approximately $10.5 trillion annually by 2025, rising from $3 trillion in 2015. This represents a year-over-year growth rate of 15 percent (Embroker, 2024).

With more of the workforce working remotely during the pandemic, more people are connected to the internet than ever before. This has created an ideal environment for cybersecurity threats to grow[1].

Industry 4.0, characterized by the integration of IoT and cloud computing, has transformed manufacturing processes but also expanded the attack surface for cybercriminals (Wang et al., 2021). The vulnerabilities present in factory environments necessitate the establishment of effective cybersecurity guidelines tailored to this new

[1] PA Consulting, "What Is Cyber Security Culture and Why Does It Matter for Your Organisation?" *PA Consulting Insights* (2023), https://www.paconsulting.com/insights/what-is-cyber-security-culture-and-why-does-it-matter-for-your-organisation

industrial landscape. By addressing the specific challenges faced by Industry 4.0, businesses can proactively implement strategies to safeguard their operations against evolving cyber threats (Wang, Zhu, and Sun, 2021, pp. 11895–11910).

Cybercrime, which includes everything from theft or embezzlement to data hacking and destruction, is up 600% because of the COVID-19 pandemic. Nearly every industry has had to embrace new solutions and it forced companies to adapt quickly.

Cyber-attacks on all businesses are becoming more frequent, targeted, and complex. According to Accenture's Cost of Cybercrime Study, 43% of cyber-attacks are aimed at small businesses, but only 14% are prepared to defend themselves.

According to data from the Ministry of Internal Affairs of Georgia, between January 1 and March 31, 2024, a total of 169 incidents involving unauthorized access to computer data and/or systems for financial purposes were recorded. Of these, 57 cases (44.77%) were resolved, while the remaining 112 remain under investigation.

It is noteworthy that the number of registered cybercrime cases has declined by 29.3% compared to the same period in 2023. According to the Ministry of Internal Affairs, 239 cases were recorded in the first quarter of 2023, with 107 of them (44.77%) successfully resolved).[1]

Not only does a cyber-attack disrupt normal operations, but it may cause damage to important IT assets and infrastructure that can be impossible to recover from without the budget or resources to do so. Addressing these cybersecurity challenges requires a combination of user awareness, security practices, and technology solutions. Organizations and individuals must remain vigilant and actively protect themselves from evolving cyber threats.

Organizations face the challenge of personal data, financial data, proprietary information, and intellectual property being compromised

[1] https://www.bpn.ge/article/126634-rogoria-kiberdanashaulis-statistika-sakartveloshi/

when cybercriminals launch cyberattacks, leaving them vulnerable to exploitation by fraudsters.

Cybercriminals launch frequent and vigorous attacks against small businesses, as well as medium and large enterprises. These hackers focus on exploiting hundreds, if not thousands of small businesses at once. Because small businesses typically have less robust technology security, lower threat awareness, and limited time and resources to maintain cybersecurity, they are especially vulnerable. The size of the business does not deter hackers because they will win anyway. Even the smallest businesses may conduct significant financial transactions or have extensive customer data that regulations such as the General Data Protection Regulation (GDPR) require protection. In addition, small businesses often partner with larger corporations, providing hackers with an opportunity to attack these larger organizations.

The most common types of attacks on small businesses include:

- Phishing/Social Engineering: 57%
- Compromised/Stolen Devices: 33%
- Credential Theft: 30%

Some industries face a higher vulnerability to cyberattacks, especially those that are closely integrated into people's daily lives. Companies that store confidential or personal information are prime targets for hackers. For example, banks and financial institutions that store credit card information, bank account information, and customer data are particularly vulnerable. Similarly, medical facilities with medical records, clinical trial data, and information about patients such as Social Security numbers and billing information are being targeted. In addition, corporations that contain product concepts, intellectual property, marketing strategies, customer and employee databases, and contract deals are at risk. Institutions of higher education that contain enrollment data, academic records, financial records, and personal data such as names, addresses and payment information also attract cyber threats.

A recent Global Application and Network Security report found that the average cost for organizations to recover from a major cyberattack has surpassed $1 million.

To protect itself, a company needs to create a cybersecurity strategy, and this strategy must be built into the company's overall risk management plan, which considers all possible business risks, which is associated with significant costs. Statista Market Report's revenue in the Cybersecurity market is projected to reach $162 billion in 2023. It is expected to show an annual growth rate from 2023 to 2028 of 9.63%, resulting in a market volume of $256.50 billion by 2028.

Given the statistics and the looming threat of cyber-attacks on private businesses, it makes sense that there should be systems in place to protect against such attacks and minimize the damage they cause. Since the private sector often owns critical infrastructure, it's crucial for them to be actively involved in detecting, preventing, investigating cybercrimes.

United Nations Security Council Resolution 2341 (2017) states that each country should identify its critical infrastructure within its borders. Many critical infrastructure sites, like those supporting industrial processes, use off-the-shelf software. This choice brings cost savings, ease of use, and enables remote control and monitoring from various locations. However, it also opens them up to greater risks of computer network-based attacks when connected to intranets and communication networks.

As mentioned, there are both internal threats, like cybercrimes by employees or managers, and external threats, like suppliers or customers. Surprisingly, when cybercrimes happen, businesses and organizations often hesitate to involve law enforcement.

One example of non-disclosure of information about a data leak is the case of Yahoo Inc. Yahoo Inc. faced a significant data breach incident, leading to a 3% drop in its share price and a loss of about US$1.3 billion in market value. Moreover, during negotiations to sell its business to Verizon, Yahoo had to accept a 7.25% discount on the deal, amounting to a reduction of $350 million. Additionally, due to delayed disclosure of the breach, Yahoo was fined $35 million by the US Securities and Exchange Commission.

The private sector has the manpower, money, and tech know-how to investigate cybercrimes, and they can lend a hand to national security,

law enforcement, and other government bodies in cybercrime cases. To boost countries' ability to tackle cybercrimes, numerous international public-private partnership projects have been launched. For instance, INTERPOL's Cyber Fusion Centre collaborates with both law enforcement and industry cybersecurity experts to gather and share important intelligence with key players. At the national level, mechanisms for public-private partnerships are also emerging. In the US, the National Cyber Forensics and Training Alliance (NCFTA) unites cybercrime specialists from government, academia, and private sectors to detect, minimize, and fight cybercrime. In Japan, they established a structure like NCFTA called the Center for Combating Cybercrime, as part of a public-private partnership. In Europe, the 2Centre project involves cooperation between law enforcement, education, and private businesses. It began with national centers in Ireland and France and later expanded to other countries like Greece, Spain, Belgium, Estonia, Lithuania, Bulgaria, and England. In Georgia Cyber-crimes are usually investigated by the Cyber Crime Unit of the Home Office. This unit is responsible for handling various cyber-crimes including hacking, identity theft, online fraud, and other cyber-crimes. In addition, the State Security Service of Georgia may also be involved in the investigation of cybersecurity threats that pose a threat to national security.

Let's go back to companies dealing with cyber-attacks and cybersecurity. It's crucial for them to develop a strong risk management culture. Business leaders must prioritize building awareness about cybersecurity among their teams to ensure that any risk management plan stands a chance of success and remains effective in the long run.

The relationship between corporate social responsibility (CSR) actions and cybersecurity vulnerabilities has emerged as a significant theme in the literature. Talesh (2018) highlights how superficial CSR initiatives can unintentionally attract cybercriminals, particularly when companies face pressing social issues. This relationship underscores the importance of aligning social performance with genuine operational integrity, as a tarnished public image can exacerbate a firm's vulnerability to cyberattacks (Talesh, 2018, pp. 417–440).

The effectiveness of cybersecurity and the strength of security measures heavily rely on the awareness and actions of all employees within a company. Cybercrime stats reveal that 95% of the time, attackers succeed due to human error, carelessness, or trust. Data protection officers (DPOs), chief information security officers (CISOs), and security decision makers shoulder the responsibility of safeguarding sensitive information. Since hackers know companies have security experts, they often resort to tricking less informed employees into granting access to networks and systems, a tactic known as "phishing" or "social engineering" scams.

A survey was conducted among representatives of small businesses operating in various sectors. The analysis revealed that all respondents (100%) acknowledged the critical importance of cyber hygiene and the need for a prompt and appropriate response to cyberattacks. However, 66.7% indicated a lack of competence in the field, while 86% reported that their employees possess an insufficient level of knowledge regarding cyber hygiene and cybersecurity culture.

Additionally, 60% of managers emphasized that cyber hygiene and cybersecurity awareness are vital components of their company's overall security. While many employees claimed to be aware of cybersecurity risks and processes, their responses to simulated scenarios raised concerns. When asked how they would react to receiving a suspicious email or a potentially malicious link, 40% stated they would either ignore it or avoid opening the link, 20% admitted they would not recognize it as a threat at all, and notably, none reported they would escalate the issue to management.

Despite these challenges, most managers (83.3%) acknowledged that effective protection depends heavily on educating and training staff, and they highlighted the importance of regular training sessions and seminars. Nonetheless, due to the high costs associated with maintaining dedicated cybersecurity personnel or services, 66.7% of small businesses still lack a designated cybersecurity officer or relying on self-management of threats, if the smaller scale of their operations reduces their risk exposure.

It is important to remember that the human factor is characterized by significant vulnerability. Employees, often unintentionally, can become the weakest link in the security chain. Therefore, it is critical to develop a culture of cybersecurity awareness to root out not only bugs but also active insider threats.

Strategies to effectively increase cybersecurity awareness include:

Interactive training modules that simulate real cyber threats. These may include phishing simulations, role-playing scenarios, and gamified training;

Regular communication, creating a constant communication channel for updates, tips, and news on cybersecurity;

Recognition and reward. Implementation of a recognition and reward system for employees who comply with cyber hygiene rules. Publicly recognizing their efforts can create a positive culture.[1]

When an employee leaves, it's crucial to swiftly revoke their access to sensitive data as a preventive measure. Following this, monitoring employees' actions within the organization becomes essential. Transparency within the company facilitates the early detection of potential threats, enabling prompt action to mitigate them.

Conclusions

The points discussed above highlight the importance of cultivating a strong cybersecurity culture. But what does this mean? It involves employees' attitudes, knowledge, norms, and values regarding cybersecurity—shaped by an organization's goals, structure, policies, and leadership.

A strong cybersecurity culture recognizes that people—not just technologically are critical to security. It's essential to create an environment where employees are informed and prepared to serve as the first line of defense.

---

[1] https://www.linkedin.com/pulse/how-do-you-make-employees-aware-cyber-security-thesecurityco

Cyberattacks are constant and evolving. However, by adopting best practices, building a resilient cybersecurity culture, and staying alert to new threats, businesses can significantly reduce their risk. Cybersecurity is not a one-time task—it requires ongoing attention. Prioritizing ensures not only your organization's safety but also contributes to a more secure digital ecosystem.

References

BPN.ge. (2024). როგორია კიბერდანაშაულის სტატისტიკა საქართველოში? [What are the cybercrime statistics in Georgia?]. *Business Press News.* https://www.bpn.ge/article/126634-rogoria-kiberdanashaulis-statistika-sakartveloshi

Cobalt.io. (2024). Top Cybersecurity Statistics 2024: With around 2,220 Cyberattacks Each Day. *Cobalt Blog.* https://www.cobalt.io/blog/cybersecurity-statistics-2024

DataProt. (2024). Cyber Security Statistics – Everything You Need to Know. *DataProt Blog.* https://dataprot.net/blog/cyber-security-statistics/

Embroker. (2024). 2024 Must-Know Cyber Attack Statistics and Trends. *Embroker Blog.* https://www.embroker.com/blog/cyber-attack-statistics/

Government of Georgia. (2021). Resolution No. 482: National Cybersecurity Strategy of Georgia 2021–2024 and Action Plan. *Matsne.gov.ge.* https://matsne.gov.ge/ka/document/view/5263611?publication=0

NCSI (E-Governance Academy). (2024). Georgia – National Cybersecurity Index Profile. *National Cyber Security Index.* https://ncsi.ega.ee/country/ge/1011/#details

PA Consulting. (2023). What Is Cyber Security Culture and Why Does It Matter for Your Organisation? *PA Consulting Insights.* https://www.paconsulting.com/insights/what-is-cyber-security-culture-and-why-does-it-matter-for-your-organisation

Saeed, S. et al.. (2023). A Systematic Literature Review on Cyber Threat Intelligence for Organizational Cybersecurity Resilience. *Sensors (Basel, Switzerland)*, 23. https://doi.org/10.3390/s23167273

Talesh, S. A. (2018). Data Breach, Privacy, and Cyber Insurance: How Insurance Companies Act as 'Compliance Managers' for Businesses. *Law & Social Inquiry*, 43, 417–440. https://doi.org/10.1111/lsi.12303

The Security Company. (2023). How Do You Make Employees Aware of Cyber Security? *LinkedIn Pulse*. https://www.linkedin.com/pulse/how-do-you-make-employees-aware-cyber-security-thesecurityco

Wang, Z., Hongsong, Z., & Limin S. (2021). Social Engineering in Cybersecurity: Effect Mechanisms, Human Vulnerabilities and Attack Methods. *IEEE Access*, 9, 11895–11910. https://doi.org/10.1109/ACCESS.2021.3051633

Legal and Administrative Studies, www.jlas.upit.ro
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 806-813

EU COMMON SECURITY AND DEFENSE POLICY. PAST AND PRESENT

Sorina IONESCU
ORCID ID: https://orcid.org/0009-0004-3087-6916
E-mail: sorina.ionescu@upb.ro
Afiliation: Faculty of Economic Sciences and Law, National University of Science and Technology POLITEHNICA Bucharest, Pitești University Centre, Romania

Abstract: *The objectives of the European Union are to create an area of freedom, security and justice without internal borders, in accordance with the rule of law and fundamental rights. However, recently, security threats have become increasingly diverse and have violence and terrorism as sources of instability, requiring a coordinated policy at European level.*

Keywords: *security; defense; policy; European; EU.*

Introduction

The current challenges that the EU is facing need a new reminder of what the EU security and defence policy consists of. This important policy of the European Union has the role of ensuring a safe area for those who want to escape persecution and also to be attractive for the talent and entrepreneurship of students, researchers and workers. In order to obtain this it has to be found a balance between the need to respect international commitments and the need to ensure safer boarders.

So, the need for a set of measures and a clear and consistent common policy appears. In this context, Member States need to establish a common policy together with the EU institutions, the International Organisations, the civil society, the local authorities and the third countries.

1. General aspects regarding the EU Common Security and Defence Policy

The general regulations regarding the EU Common Security and Defence Policy are contained by the Treaty of Lisbon, which entered into force in 2009 and amended the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). Articles 21-46, TEU, under Title V – General provisions on the Union's external action and specific provisions on the common foreign and security policy describe the Common Security and Defence Policy.(Craig & de Burca, p.385).

Also, the protocols to the Treaties that were added by the Treaty of Lisbon, mainly Protocols No 1 (on the role of National Parliaments in the European Union), No 10 (on permanent structured cooperation established by Article 42 TEU) and No 11 (on Article 42 TEU), as well as in Declarations 13 and 14 (declarations concerning the common foreign and security policy) describe the EU Common Security and Defence Policy.

During the recent decades, the European Commission established The European Agenda on Security. The European Commission tried to set a long term strategy that can ensure a secure area for its citizens and for the Member States.

In order to maintain a high level of security within the European Union, the strategies have to be regulated in a coordinated and smart way within the Member States.

2. A brief glimpse at the past strategy in the field of Common Security and Defence Policy at EU level

In the recent past years, at EU level important strategic objectives were set within the European Commission's Strategy regarding the

internal security[1] and we strongly believe that these objectives should continue to be followed within the next period of time.

The European Commission`s objectives were set to be developed in long periods of time and to be implemented by the Member States. Among the most important we can mention:

- *Increased operational cooperation.* The cooperation between authorities of the Member States represents a field regulated by the Lisbon Treaty that provides legal ground to make operational this kind of cooperation.
- *Better information exchange*. The European Commission established various ways to facilitate the exchange of information between national law enforcement authorities. Thus, the Schengen Information System (SIS) is the most important tool that the national and European authorities can use[2].
- *Supporting action: training, funding, research and innovation*. EU provides support to security-related actions through training, funding and the promotion of security-related research and innovation. Research and innovation is very important because in this way security threats and their impacts on European societies can be identified.

---

[1] The Internal Security Strategy for the European Union: "Towards a European Security Model" (Internal Security Strategy) was adopted by the Council on 25-26 February 2010 and endorsed by the European Council on 25-26 of March 2010.

[2] On 6 April 2016, the European Commission adopted the legislative proposal for Smart Borders that contains: a Regulation for the establishment of an Entry/Exit System and a proposed amendment to the Schengen Borders Code to integrate the technical changes needed for the Entry/Exit System. This proposal aims to improve the management of the external borders of the Schengen Member States, and also to facilitate border crossings for pre-vetted frequent third country national (TCN) travelers. This proposal entered into force in 2017 and it is known as Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011.

An important moment was the launch of the Communication on Stronger and Smarter Information Systems in 2016 and also establishing an EU Travel Information and Authorisation System (ETIAS)[1]. This system brought together information in order to assess and manage the potential irregular migration and security risks represented by third country nationals visiting the EU. (Singh (Gheoculescu), 2019, p. 209).

On November 16th 2016 the Commission published the Proposal for a Regulation of the European Parliament and of the Council establishing a European Travel Information and Authorisation System (ETIAS). The Regulation entered into force in 2018 and it is known as Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 1077/2011, (EU) No 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226.

By article 4 of the Regulation are set the most important objectives of the European Commission regarding the security policy which can be obtained by the European Travel Information and Authorisation System:

- to contribute to a high level of security by providing for a thorough security risk assessment of applicants;
- to contribute to the prevention of irregular migration by providing for an irregular migration risk assessment of applicants prior to their arrival at the external borders crossing points (Gheoculescu, 2022, p.101);
- to contribute to the protection of public health by providing for an assessment of whether the applicant poses a public health risk prior to their arrival at the external borders crossing points;
- to enhance the effectiveness of border checks;
- to support the objectives of the Schengen Information System (SIS) related to the alerts in respect of persons wanted for arrest or for

[1] See also Communication from the Commission to the European Parliament, the European Council and the Council. Enhancing security in a world of mobility: improved information exchange in the fight against terrorism and stronger external borders, Brussels, 14.9.2016 COM(2016) 602 final.

surrender or extradition purposes, on missing persons, on persons sought to assist with a judicial procedure and on persons for discreet checks or specific checks;
- to contribute to the prevention, detection and investigation of terrorist offences or of other serious criminal offences.

The ETIAS Information System had to ensure the interoperability with other information systems such as the Entry/Exit System (EES), Europol Information System (EIS)[1], the Visa Information System (VIS), the Schengen Information System (SIS), the Eurodac[2], the European Criminal Records Information System (ECRIS)[3].

After this moment, the Common and Security Defence Policy launched a few very important programmes, and we mention the Permanent Structured Cooperation (PESCO), representing a permanent command and control structure for planning and conducting non-executive military missions; the European Defence Fund, the Commission's instrument to support Research and Development in defence with a budget of nearly €7.3 billion for 2021-2027; the 2018 Civilian Common and Security Defence Policy Compact; the Civilian Common and Security Defence Policy Compact, reviewed and updated in 2023; and an off-budget European Peace Facility.

3. Present developments in the field of EU Common Security and Defence Policy

The Russian war of aggression against Ukraine that began on 24 February 2022, generated the need to rethink the EU Common

[1] Launched in 2005, the EIS contains information on serious international crimes, suspected and convicted persons, criminal structures, and offences and the means used to commit them.
[2] EURODAC, which stands for European Dactyloscopy, is the European fingerprint database for identifying asylum seekers and irregular border-crossers.
[3] The computerized system ECRIS was established in April 2012 to create an efficient exchange of information on criminal convictions between Member States.

Security and Defence Policy in order to respond to the current situation that the Member States were facing. Before 24 February 2022, in 2021, the EU was developing a policy roadmap for strengthening the EU's security and defence over the coming decade, by providing an action framework for developing a shared vision in security and defence named *A Strategic Compass for Security and Defence*.

Taking into account the destabilisation of the European security order, the document was modified and in March 2022 was published the final version, that contains four pillars regarding the security and defence policy: *act*- presence and engagement on the ground, *secure*- anticipate threats and protect citizens, *invest*- increased and improved spending and *partner*- a key source of strength and resilience.

Nowadays, Europe has to face various changes in the geopolitical landscape that bring instability and severe threats. In this context, the war in Ukraine emphasised the vulnerabilities in the EU's defence technological and industrial base. So, many initiatives are needed in order to develop defence industry cooperation.

By 2024 Parliament's annual report on the implementation of the CSDP[1] was highlighted the need to enhance the EU's strategic autonomy and reinforce its role as a global security provider. Thus, are mentioned the importance of shared security challenges, even in the field of the hybrid threats, and the importance of NATO partnerships.

Also, the Commission and the High Representative's Joint White Paper for European Defence Readiness 2030 *ReArm Europe Plan/Readiness 2030* adopted on 19 March 2025, highlights the priority areas where gaps are identified: air and missile defence; artillery systems; ammunition and missiles; drones and counter-drone systems; military mobility; cyber and electronic warfare; strategic enablers; and protection of critical infrastructure.

The White Paper represents an important document that provides the framework for defence investment. The Member States are invited to

[1] adopted in Parliament's plenary session on 10 February 2025

collaborate and replenish their stocks of ammunition, weapons and military equipment, in order to rebuild European defence. Also, a set of Defence Projects of Common European Interest has to become a priority for the Member States and the White Paper contains some directions that lead to stimulating research and creating an EU-wide market for defence equipment.

Conclusions

The EU Common Security and Defence Policy is put to a hard test during this period of time by the migration, the refugee crises, the terrorist and the Russian war of aggression against Ukraine.

In this context, Member States and also the European citizens wish to feel secure within the EU, so the security strategy of the European Union needs to change in order to meet its citizens expectations and to continue to be a space of free movement by being first a secure area for its citizens.

The current situation generates changes in the international order very profound and Europe is writing a new page of its history by making fundamental choices with determination, collective action and a clear strategy

References

Craig, P. & de Burca, G. (2017). *Dreptul Uniunii Europene. Comentarii, jurisprudență și doctrină. Ediția a VI-a*. Hamangiu.

Gheoculescu, A. (2022). The EU mobility package for transport. In *Bulletin of the Transilvania University of Braşov, vol. 15(64) Special Issue.*

Singh (Gheoculescu), A. (2019). Adapting the national and Unional Rules in copyright in the Digital Era. *Law Review.* vol X, 2.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the

Committee of the Regions, The European Agenda on Security Strasbourg, 28.4.2015, COM(2015) 185 final.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European agenda on migration, Brussels, 13.5.2015 COM(2015) 240 final.

Communication from the Commission to the European Parliament and the Council. Stronger and Smarter Information Systems for Borders and Security, Brussels, 6.4.2016 COM(2016) 205 final.

Communication from the Commission to the European Parliament, the European Council and the Council. Enhancing security in a world of mobility: improved information exchange in the fight against terrorism and stronger external borders, Brussels, 14.9.2016 COM(2016) 602 final.

European Parliament's 2024 annual report on the implementation of the CSDP.

Regulation of the European Parliament and of the Council establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 515/2014, (EU) 2016/399, (EU) 2016/794 and (EU) 2016/1624, Brussels, 16.11.2016 COM(2016) 731 final 2016/0357 (COD).

The Commission and the High Representative's Joint White Paper for European Defence Readiness 2030 *ReArm Europe Plan/Readiness 2030.*

https://defence-industry-space.ec.europa.eu30b50d2c-49aa-4250-9ca6-27a0347cf009_en.

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 814-825

TOWARDS A EUROPEAN PRIVATE SPACE LAW. CHARACTERIZING THE CIVIL LIABILITY OF PRIVATE SPACE OPERATORS

Radu STANCU
ORCID ID: https://orcid.org/0009-0000-2552-7827
E-mail: radu.stancu@email.com
Afiliation: Legal Research Institute „Acad. Andrei Rădulescu" of Romanian Academy

Abstract: *The recent evolution of technologies has enabled space exploration to become a new virgin territory for private companies, with significant profit potential. In this context, the President of the European Commission, Mrs. Ursula von der Leyen, highlighted, among the current priorities of the Commission in Brussels, the creation of a European legal framework to regulate outer space. The purpose of this regulation is to legally define the peaceful use and exploitation of outer space, both by the Member States of the European Union and by private entities. The way in which civil liability can be attributed to private entities operating in outer space thus represents a central issue for European legal experts. The European Commission's work agenda for 2025 foresees the publication of a legislative proposal in the second half of the year.*

Keywords: *Civil liability; International Space Law; EU Space Act; Private space operators.*

Introduction

As a daily necessity for European citizens, space technologies, data, and services are of strategic importance for the European Union. However, the emergence of new state actors from outside the European area, as well as private entities that have succeeded in leveraging revolutionary new

technologies, led the European Parliament and the Council to adopt, on 28 April 2021, Regulation (EU) 2021/696 establishing the Union Space Programme and the European Union Agency for the Space Programme, repealing Regulations (EU) No 912/2010, (EU) No 1285/2013, and (EU) No 377/2014, as well as Decision No 541/2014/EU[1].

It is worth noting that, since the late 1990s, the official institutions of the European Union have begun to implement and develop their own space programmes, such as the European Geostationary Navigation Overlay Service (*EGNOS*)[2], *Galileo*[3], and *Copernicus*[4]. The aim of these programmes is to respond to the needs of European citizens and the current requirements of public policy.

---

[1] *Regulation (EU) 2021/696* of the European Parliament and of the Council of 28 April 2021 establishing the Union Space Programme and the European Union Agency for the Space Programme and repealing Regulations (EU) No 912/2010, (EU) No 1285/2013 and (EU) No 377/2014 and Decision No 541/2014/EU, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021R0696

[2] *EGNOS* stands for the European Geostationary Navigation Overlay Service, specifically the European satellite-based regional augmentation system (SBAS). SBAS systems are used to enhance the signals of Global Navigation Satellite Systems (GNSS), so that they can be used for safety-of-life applications, such as precision approaches in aviation, https://www.euspa.europa.eu/eu-space-programme/egnos.

[3] *Galileo*, the European Union's Global Navigation Satellite System (GNSS), provides navigation, positioning, and timing information. Unlike other global satellite navigation systems, Galileo is a civilian system. Galileo consists of 28 satellites orbiting Earth at an altitude of 23,000 km. The signals transmitted by Galileo are freely available to anyone with a device capable of receiving them (e.g., a smartphone). Galileo is four times more accurate than GPS, offering meter-level precision and a wide range of serviceshttps://defence-industry-space.ec.europa.eu/eu-space/galileo-satellite-navigation_en.

[4] *Copernicus* is the European Union's Earth Observation Programme, which monitors the planet and the environment for the benefit of all European citizens. It provides information services based on satellite Earth observation and in situ (non-space) data, https://www.copernicus.eu/en/404.

Moreover, the EU Regulation highlights the need to explore synergies between the transport, space, and digital sectors, with a view to the wider use of new technologies such as eCall emergency calls, the digital tachograph, traffic monitoring and management, autonomous driving of unmanned vehicles, and drones.

In order to achieve the desired objectives—namely freedom of action, independence, and security—it is essential for the EU to have autonomous access to outer space. Consequently, it is imperative that the European Commission has the technical and legal tools to coordinate launch services at the European level, in accordance with Article 189, paragraph 2 of the Treaty on the Functioning of the European Union (TFEU)[1].

It should be noted that in the field of space, the EU exercises its competences in accordance with Article 4, paragraph 3 of the TFEU[2]. However, this regulation is general in nature and does not adequately address the new challenges brought about by current technological and economic developments. Furthermore, in response to these emerging

---

[1] Art. 189 of TFUE: „*1. To promote scientific and technical progress, industrial competitiveness and the implementation of its policies, the Union shall draw up a European space policy. To this end, it may promote joint initiatives, support research and technological development and coordinate the efforts needed for the exploration and exploitation of space.*

2. To contribute to attaining the objectives referred to in paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the necessary measures, which may take the form of a European space programme, excluding any harmonisation of the laws and regulations of the Member States.

3. The Union shall establish any appropriate relations with the European Space Agency.

4. This Article shall be without prejudice to the other provisions of this Title."

6 Art. 4, al. 3 of TFUE: „ *In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.*"

challenges, some EU Member States have already adopted specific national regulations, creating, on the one hand, a lack of harmonisation at the European level and, on the other hand, undermining fair competition conditions, which inevitably affects the competitiveness of private space operators.

In light of these technical and legal challenges, the need for a dedicated law to regulate the scope of the EU's intervention in the space domain becomes essential—especially as space is becoming an increasingly contested field, with certain states already pursuing strategic interests in this area.

But what do we mean by space law, and more specifically by private space law (***I***), and what are the characteristics of the legal framework applicable to private entities operating in outer space, including the civil liability that may arise in the event of damage caused by them (***II***), these are the aspects we will examine in the following sections.

I. The Concept of "*Space Law*"

With the successful launch of the first satellite into Earth's orbit on 21 October 1957, a new era began for all of humanity. At the same time, a fundamental question emerged: what law would apply to outer space?
It is well known that the rules governing aeronautical flight up to that point were laid down in the Paris Convention on Aerial Navigation, signed on 13 October 1919[1] and the Chicago Convention on International Civil Aviation, dated 7 December 1944[2]. These conventions enshrined the principle of the inviolability of national sovereignty over a state's own

[1] *The Convention on the Regulation of Aerial Navigation*, signed in Paris on 13 October 1919, https://applications.icao.int/postalhistory/1919_the_paris_convention.htm

[2] *The Convention on International Civil Aviation*, signed in Chicago on 7 December 1944, published in the Official Gazette no. 14 of 24 April 1965, https://legislatie.just.ro/Public/DetaliiDocument/22939

airspace. In other words, the freedom of flight ended at the boundary of a state's sovereignty.

With the crossing of the atmospheric boundary and entry into outer space—a territory untouched by legal rules—jurists were compelled to reflect by referring to pre-existing frameworks, namely air law and maritime law. Initially, space was divided into defined zones. However, it soon became evident that outer space is unlimited, and attempting to confine it within specific areas was unrealistic. At the same time, an effort was made to characterize space law, which emerged as a consequence of an international custom grounded in the principle of freedom to explore and use outer space, starting at an altitude of approximately 100–110 km above sea level.

This approach was not accepted by legal doctrine either (Courteix, 1997). Due to the absence of a natural boundary, a rule inspired by the aforementioned international custom would be considered far too arbitrary.

Ultimately, a decision was made to establish a specific legal framework centered around the activities that can be carried out in space, in such a way that each state would have the opportunity to explore and use outer space, provided that scientific and research activities are not obstructed.

The United Nations (UN) regulates outer space through the adoption of five international treaties[1] and a set of five legal principles[1].

---

[1] *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies* (Annex to UN General Assembly Resolution 2222 (XXI)) – adopted on 19 December 1966, opened for signature on 27 January 1967, entered into force on 10 October 1967; *Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space* (Annex to Resolution 2345 (XXII)) – adopted on 19 December 1967, opened for signature on 22 April 1968, entered into force on 3 December 1968; *Convention on International Liability for Damage Caused by Space Objects* (Annex to Resolution 2777 (XXVI)) – adopted on 29 November 1971, opened for signature on 29 March 1972, entered into force on 1 September 1972; *Convention on Registration of Objects Launched into Outer Space* (Annex to Resolution 3235 (XXIX)) – adopted on 12 November 1974,

Among all the treaties and agreements adopted by the United Nations, the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, adopted in 1967, serves as the foundation of space law. The other four treaties are intended to further develop the provisions set out in this foundational treaty.

The guiding thread of the legal framework developed by the United Nations revolves around three core ideas (Reijnen, 1992): the freedom of scientific research, the principle of non-appropriation, and the absence of sovereignty by any signatory state over outer space, the Moon, and other celestial bodies (Courteix, 1998). In other words, all states equally enjoy the right to explore and use outer space.

In the following sections, we will examine how special legislation regulates the engagement of civil liability.

II. THE ENGAGEMENT OF CIVIL LIABILITY IN POSITIVE PRIVATE SPACE LAW

Traditionally, under private international law, the rules applicable to civil liability follow the principle of lex loci delicti, meaning that the national law of the country where the damage occurred shall apply.

---

opened for signature on 14 January 1975, entered into force on 15 September 1976; *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies* (Annex to Resolution 34/68) – adopted on 5 December 1979, opened for signature on 18 December 1979, entered into force on 11 July 1984.

[1] *Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space*, adopted on 13 December 1963 (Resolution 1962 (XVIII); *Principles Governing the Use* by States of Artificial Earth Satellites for International Direct Television Broadcasting, adopted on 10 December 1982 (Resolution 37/92); *Principles Relating to Remote Sensing of the Earth from Outer Space*, adopted on 3 December 1986 (Resolution 41/65); *Principles Relevant to the Use of Nuclear Power Sources in Outer Space*, adopted on 14 December 1992 (Resolution 47/68); *Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries*, adopted on 13 December 1996 (Resolution 51/122).

However, finding a rule to frame civil liability in space presents a real challenge for legal experts, precisely due to its unique nature—namely, the absence of geographical boundaries. In particular, legal challenges arise in defining the nature of compensation, identifying appropriate means of evidence, ensuring equality between the parties involved, and avoiding obstacles in the enforcement of judicial decisions. Specifically, the 1967 Outer Space Treaty stipulates that signatory states bear full international civil liability for all national activities conducted in outer space, even if those activities are carried out by private entities (Von Derdunk, 2001)[1].

Accordingly, Article 6 of the Treaty sets out the obligation of states to continuously authorize and supervise private activities, thereby effecting a transfer of international legal liability from the private companies responsible for causing damage to the state of origin[2].

By regulating civil liability in this manner, private companies operating in space do not hold the status of direct subjects of space law, but are instead guaranteed by the states in which they are registered. For example, if a satellite owned by a private company causes damage, civil liability is incurred by the state that authorized the launch. The legal reasoning is based on the obligation of the state to exercise direct supervision and control over the private company.

---

[1] https://digitalcommons.unl.edu/spacelaw/38/?utm_source=digitalcommons.unl.edu%2Fspacelaw%2F38&utm_medium=PDF&utm_campaign=PDFCoverPages

[2] Article 6 – Outer Space Treaty (1967) : "*States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the Moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty.*

The activities of non-governmental entities in outer space, including the Moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty.

When activities are carried on in outer space, including the Moon and other celestial bodies, by an international organization, responsibility for compliance with this Treaty shall be borne both by the international organization and by the States Parties to the Treaty participating in such organization. "

Furthermore, the 1972 Convention on International Liability for Damage Caused by Space Objects, which governs the financial liability regime applicable to states, distinguishes between absolute liability and fault-based liability. Thus, the 1972 Convention defines absolute liability as the full responsibility of the state from whose territory the space object that caused the damage was launched, whether the damage occurred on the surface of the Earth or to an aircraft in flight[1].

The situation is entirely different when the damage occurs in outer space. In such cases, the state from whose territory the space object or rocket was launched is liable only if it can be shown that the damage was caused by its own direct fault or by the fault of a private company for which it bears responsibility[2]. From our perspective, this places the mechanism of engaging civil liability for a private company in a grey area, as there is no direct provision for sanctioning the private operator—liability is instead mediated through the state.

In light of the above, we can state that the rapid expansion of private companies in the space sector is driving profound changes and fundamental transformations, marked by a shift from state monopoly to accelerated privatization. This evolution, fueled by technological progress, presents international law with complex challenges. At the same time, the growing congestion of Earth's orbit and the need for global cybersecurity underscore the urgent necessity of adopting a regulatory framework that is aligned with these new realities.

What is the response of the legislator in Brussels, and how does the European Union define space law?

---

[1] Article 2 - Liability Convention (1972): „*A launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the Earth or to aircraft in flight*."

[2] Article III – Liability Convention (1972): „*In the event of damage being caused elsewhere than on the surface of the Earth to a space object of one launching State or to persons or property on board such a space object by a space object of another launching State, the latter shall be liable only if the damage is due to its fault or the fault of persons for whom it is responsible*."

Conclusions

As mentioned in the introduction of this study, the European Union has, for the first time, launched a legislative initiative aimed at regulating outer space, under the coordination of the Directorate-General for Defence Industry and Space (DG DEFIS). This legislative effort seeks to create a coherent legal framework adapted to the new technological, commercial, and geopolitical challenges.

The proposed legal rules also aim to provide solutions to several pressing issues: the increasing risk of satellite and space debris collisions; cyber threats and the lack of a unified incident notification system; difficulties in applying environmental standards due to the absence of appropriate assessment methods; and the fragmentation of the internal European market caused by the proliferation of national space laws.

An essential role in this process is played by the new generation of private actors in the space sector, commonly referred to as "*new space.*"[1] This category includes start-ups, small and medium-sized enterprises, and emerging tech companies offering innovative solutions for launch, communications, Earth observation, or downstream services[2]. Unlike traditional operators, these entities operate in a highly competitive environment and require a clear, predictable, and tailored legal framework. European regulation thus has the potential to support "*new space*" by establishing common standards that facilitate market access, attract private investment, and promote international cooperation.

At the same time, new business models proposed by companies such as SpaceX, Rocket Lab, Relativity Space, and Varda Space Industries demonstrate the potential to reduce costs, accelerate launches, and diversify orbital and suborbital services. These technical and commercial

---

[1] *Top 20 New Space companies*, https://www.go-astronomy.com/top20-newspace-companies.htm

[2] C. Piloto, *MIT Professional Education, What is the New Space Economy?*, h ttps://professionalprograms.mit.edu/blog/technology/what-is-new-space-economy

developments require legislators, including those at the EU level, to adopt a flexible, coherent regulatory framework aligned with the real needs of this expanding market.

Moreover, the associated risks—from orbital congestion to cyber threats and legal fragmentation—demand a strengthened governance model at the European Union level. The legislative initiative announced by the European Commission for 2025 directly addresses this need: to define a regulatory framework that ensures the security, resilience, and sustainability of space activities without compromising the innovative spirit that defines the new space industry[1].

Therefore, the coherent integration of "*New Space*" actors into the future European legal framework is essential for maintaining the EU's global competitiveness and for ensuring fair, safe, and sustainable access to space for all involved stakeholders.

References

Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space (Annex to Resolution 2345 (XXII)) – adopted on 19 December 1967, opened for signature on 22 April 1968, entered into force on 3 December 1968.

Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Annex to Resolution 34/68) – adopted on 5 December 1979, opened for signature on 18 December 1979, entered into force on 11 July 1984.

[1]Comisia Europeană – Call for evidence: EU Space Law. Ares (2023)7269859 – 25/10/2023, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13971-EU-Space-Law-new-rules-for-safe-resilient-and-sustainable-space-activities_en

Comisia Europeană – Call for evidence: EU Space Law. Ares (2023) 7269859, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13971-EU-Space-Law-new-rules-for-safe-resilient- and-sustainable-space-activities_en.

Convention on International Liability for Damage Caused by Space Objects (Annex to Resolution 2777 (XXVI)) – adopted on 29 November 1971, opened for signature on 29 March 1972, entered into force on 1 September 1972.

Convention on Registration of Objects Launched into Outer Space (Annex to Resolution 3235 (XXIX)) – adopted on 12 November 1974, opened for signature on 14 January 1975, entered into force on 15 September 1976.

Courteix, S. (dir.). (1997). *Le cadre institutionnel des activités spatiales des États. Étude comparative*. A. Pedonne.

Courteix, S. (1998). *Droit de l'espace, Répertoire de droit international*. Dalloz.

Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, adopted on 13 December 1963 (Resolution 1962 (XVIII))

Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries, adopted on 13 December 1996 (Resolution 51/122)

Von Derdunk, F.G. (2001). *Space for dispute settlement mechanisms - dispute resolution mechanisms for space? A few legal considerations*, Space and Telecommunications Law Program Faculty Publications. https://digitalcommons.unl.edu/spacelaw/38/?utm_source=digitalcommons.unl.edu%2Fspacelaw%2F38&utm_medium=PDF&utm_ca mpaign=PDFCoverPages

Piloto, C. *MIT Professional Education, What is the New Space Economy?*. https://professionalprograms.mit.edu/blog/technology/what-is-new-space-economy

Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting, adopted on 10 December 1982 (Resolution 37/92)

Principles Relating to Remote Sensing of the Earth from Outer Space, adopted on 3 December 1986 (Resolution 41/65)

Principles Relevant to the Use of Nuclear Power Sources in Outer Space, adopted on 14 December 1992 (Resolution 47/68)

Reijnen, C. M. (1994) . The United National Space Treaties Analysed, Frontières ed, Gif-sur-Yvette, in *Leiden Journal of International Law, vol. 7, 2.*

Top 20 New Space companies. https://www.go-astronomy.com/top20-newspace-companies.htm

Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Annex to UN General Assembly Resolution 2222 (XXI)) – adopted on 19 December 1966, opened for signature on 27 January 1967, entered into force on 10 October 1967

LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 826-839

DIGITALIZATION OF BANKING CONTRACTS: BETWEEN TECHNOLOGICAL INNOVATION AND LEGAL PROTECTION OF CONSUMERS

Amelia-Veronica GHEOCULESCU[1]
ORCID [ID]: https://orcid.org/0000-0001-7179-2875
E-mail: amelia.gheoculescu@upb.ro
Marilena-Lavinia OLAH[2]
ORCID [ID]: https://orcid.org/0009-0003-9330-8337
E-mail: marilena.olah@up.ro
Afiliation: [1,2] National University of Science and Technology Politehnica Bucharest, Pitesti University Center, Faculty of Economic Sciences and Law

Abstract: *It is important to analyze the impact of digitalization on banking contracts, because they are positioned at the intersection of technological innovation (driven by Fintech and traditional banks) and the urgent need for consumer legal protection.*

The paper explores how new technologies (such as online platforms, Artificial Intelligence, and blockchain) are transforming the banking contract lifecycle, from the pre-contractual stage (digital offerings, profiling) to its conclusion, execution, and termination (electronic signature, smart contracts). Major benefits like efficiency, speed, and cost reduction are highlighted.

The article argues for the necessity of a balanced regulatory framework that encourages innovation (providing flexibility to new business models) without compromising the fundamental rights of consumers, advocating for an urgent adaptation of legal norms to the reality of the digital banking market.

Keywords*: digital banking; electronic banking contracts; consumer protection; technological innovation; smart contracts; banking law.*

Introduction

Legal relationships have undergone significant change as a result of the development of new technologies, especially in light of the widespread use of electronic and distance contracting methods, but also of new technologies in the banking system.

The digitalization of financial and legal services is becoming a global imperative, driven by the need for companies to optimize their operations and increase their efficiency by reducing operating costs, as well as by increasing productivity (Georgescu, 2016). Companies must adapt to changes by implementing effective financial and even legal management solutions in a timely manner. This trend leads to a growing demand in the market for solutions to automate internal processes or in customer relations in order to increase efficiency and productivity.

The economic outlook for the coming years in the European Union and in the world has changed substantially as a result of the Covid 19 pandemic, since the beginning of 2020. The urgent and coordinated response from the European Union and its members, to deal with the enormous economic and social consequences, included digital transformation, involving the transition from analogue to digital, the optimization of work processes, teamwork and customer experience, as well as the implementation of digitalized and integrated business solutions that signal errors through which business can be coordinated remotely.

In most European countries, digitalization is not only the form of drafting and transmitting documents in electronic format and is mainly aimed at facilitating the relationship with institutions in order to eliminate bureaucracy and avoid wasting time.

It is imperative to consider both the benefits that technology generates in the short term, as well as understanding and anticipating the legal consequences generated by its dynamics and how contracts, terms and conditions, and policies can be drafted, respecting the rules of best practices and professional ethics.

I. The paradigm of digital transformation in the banking sector

The digitalization of the banking sector is accelerated by the transformations produced in the market demand and supply depending on the expectations and needs of customers, non-bank competition, as well as the needs to increase resilience and banking profitability.

In this sense, action was taken to operationalize digital banks, functioning as technology companies that offer an improved experience to customers, with their involvement and to support the operations carried out by them through the banking system (by digitizing existing processes, making them available via the internet and mobile channels and building new opportunities for customers, considering digital and data first).

Therefore, Covid-19 has accelerated the addressing and implementation of new technologies (Ionescu, 2021, p. 550) to include as much information as possible in real time and usefully and to respond quickly to changing market conditions.

We can say that central banks and system banks constitute banking financial institutions and capital market which, as public interest institutions, are called upon to serve the interests of all stakeholders.

With reference to the banking sector, their digital transformation is probably the most urgent issue to be solved, especially since the pressure comes from the demands and expectations of stakeholders, as well as from non-banking competition represented by FinTech's.

At the European level, the digital transformation of banks is supported, monitored and supervised by adopting a digital financing and transformation strategy, with a view to ensuring the sustainability of the business model and strategy of each banking institution in the long term, as well as ensuring good risk management; the national targets of this package of measures are customer protection, fair competition and financial stability.

Digitalization is an effective and efficient transformational force for financial institutions, but digitalization must not lead to financial exclusion. In other words, not to deprive of necessary financial services

geographical areas and population not yet involved in the use of digital services. A balance must be ensured between achieving the efficiency of financial activity and its social utility. Digitalization, like other policies and solutions for transformation and progress, must be completed by ensuring prosperity, sustainability and inclusion for Romanian society, on the one hand, and allow the transition from quantitative to qualitative approaches, when discussing risk management with an emphasis on preventive and proactive aspects, through identification, detection, protection and prompt response, with quality repairs following disruptions caused by cyber risks.

In the current climate, banks must implement strategies and business models that make them stronger and more competitive in a market involved in innovation and at the same time strengthen customer trust and loyalty.

Going through the list of challenges and priorities that banks need to pay immediate attention to, points us towards cybersecurity and data protection, as well as transparency and reporting. We are members of the European Union and in this regard, at national and institutional level, we need to know, make decisions and stay integrated into the new phenomena and processes underway.

Digitalization is the driving force of the contemporary financial market, generating a fundamental redefinition of the way banking contracts are concluded and executed (Grundmann, & Hacker, 2018). The transition from physical support to digital interfaces (mobile banking, online lending platforms, robo-advisory) requires rigorous legal analysis. On the one hand, innovation promises efficiency, inclusion and reduced costs. On the other hand, the digital environment amplifies consumers' vulnerabilities (Stănciulescu, 2023) in the face of product complexity, algorithm opacity and the risk of manipulation (the phenomenon of dark patterns).

What allows banks - and the entire economy - to survive and prosper is our trust in the future (Harari, 2017).

The purpose of this article is to examine the national and European regulatory framework that regulates this area, emphasizing the

imperatives of consumer protection (Popa Tache, 2024) in the face of technological innovations, with reference to the main legislative acts, doctrinal trends and relevant jurisprudential solutions.

II. Validity of the Digital Legal Act: Certainty and Authenticity

The validity of banking contracts concluded remotely depends crucially on Regulation (EU) No. 910/2014 (e-IDAS). It establishes a unified framework for trust services, essential for the digitalization of contracts. First, according to e-IDAS, the Qualified Electronic Signature (QES) has the same legal value as the handwritten signature (Rizoiu, 2024). Banks are increasingly using QES and other types of (advanced) signatures for contractual documents (Capisizu, 2024), thus conferring full opposability and probative force to the digital act. Second, the Know Your Customer (KYC) process is digitized through video and electronic identification solutions, ensuring that the identity of the party is verified with an appropriate level of confidence, thus fulfilling the condition of capacity of the parties, according to art. 1179 of the Civil Code.

Digitalization does not cancel the requirement of written form for certain types of financial contracts, but transposes it into the concept of a durable medium. According to the case law of the CJEU (e.g. Case C-49/11 Content Services), a durable medium is any instrument which enables the consumer to store information, in an accessible manner for an appropriate period, and which allows its unchanged reproduction. Simply making the documents available in an online account (Internet Banking) is not sufficient if the bank can modify the content or if access is conditional on the maintenance of an active contractual relationship. The bank must offer the effective possibility of downloading, local storage or printing.

III. Digitalization and consumer protection: the transparency imperative

European legislation on distance marketing of financial services focuses on the protection of consent and the right to information.

The consumer benefits from a period for unilateral termination of the contract (GEO no. 85/2004), a legal compensation for the lack of reflection in the digital environment (the right of withdrawal). The provisions of the new directive in the field, Directive 2023/2673, introduce anti-dark patterns measures and the obligation to use a "Withdrawal Button" on digital platforms, ensuring that the exercise of the right of withdrawal is as easy as concluding the contract. The new directive also explicitly regulates the use of layered information to combat information overload, requiring that essential information be immediately visible.

Digitalization does not reduce the risk of unfair terms; on the contrary, it may facilitate their rapid dissemination in standard contracts of adhesion. Referring to Directive 93/13/EEC, the case law of the Court of Justice of the European Union (e.g. Judgment C-176/23 UG vs. Raiffeisen Bank SA) reconfirms that the lack of individual negotiation is presumed in standard contracts (including digital ones). A clause that has not been negotiated and that creates a significant imbalance between the rights of the parties to the detriment of the consumer is abusive, and the national court is obliged to examine it ex officio. The practice of unilaterally sending customers, on electronic media, unsigned additional documents, based on the presumption of tacit acceptance, is often invalidated by the courts, because it contravenes the requirement of free and uncorrupted consent.

IV. Ethical-Legal Challenges: GDPR, AI and Consumer Profiling

The massive digitalization of banking contracts is inextricably linked to the vast collection and processing of data, generating significant

risks under the umbrella of Regulation (EU) 2016/679 GDPR (Onufreiciuc, & Stănescu, 2023; Ionescu, 2020, p.124).

Banks use data for credit scoring, fraud detection and targeted marketing. Any processing must have a solid legal basis (art. 6 GDPR). Consent, when necessary, must be free, specific, informed and unambiguous. Sanctions applied by the National Supervisory Authority for the Processing of Personal Data often target the violation of the right to opposition and the principle of purpose limitation, in the situation where customer data (former or current) is used for unsolicited commercial communications, even after the contract has been closed.

The use of Artificial Intelligence (AI) to decide whether to grant a loan or set an interest rate (consumer profiling) represents a major challenge. Art. 22 prohibits decisions based exclusively on automatic processing that produce negative legal effects on the person. In the case of using AI, the bank must offer the consumer the right to obtain human intervention, to contest the decision and to receive meaningful explanations regarding the logic of the algorithm. In the absence of algorithmic transparency, the risk of indirect discrimination arises (discrimination based on statistical criteria that unjustifiably affects certain social groups).

An ethical and social risk of digitalization is the financial exclusion of vulnerable groups, such as the senior citizens or those with limited access to technology. Banking institutions have the obligation to ensure alternative access channels (branches, consultants) and to avoid digital efficiency becoming a barrier to essential services, respecting the principle of financial inclusion also promoted by the National Bank of Romania.

V. Innovation beyond the classic contract: smart contracts, AI and new challenges for the consumer

Banking digitalization goes beyond the simple transition from paper to screen; it includes the integration of disruptive technologies that redefine the legal and operational nature of the contract. The Romanian

banking system (see the ARB report and NBR trends – Panțoiu, 2017) is in full transition, focusing on Artificial Intelligence (AI) and blockchain technology.

AI is widely used to streamline banking operations, from drafting repetitive documents to interacting with customers (Manoliu, 2023).

Banks use AI (Mănescu, 2025) and robots for time-consuming tasks, such as drafting contracts, sending standardized responses and interacting in call centers (chatbots). This leads to a reduction in operational costs and an increase in revenues, especially in the consumer credit and payment segments (ARB/IBR reports).

Although AI takes over repetitive tasks, a reorientation of banking staff towards high value-added activities (financial analysis, risk management) is expected, requiring new digital skills and abilities and the adaptation of personnel management policies.

The use of AI for customer profiling (automated credit scoring) raises major issues related to algorithmic transparency and compliance with art. 22 GDPR (automated individual decisions). The consumer (Dumitru, & Tomescu, 2020) must benefit from the right to human intervention and to challenge decisions based exclusively on algorithms. AI is also implemented with caution in direct relations with end customers, with human supervision remaining essential in making final decisions.

Blockchain technology is being explored for its ability to ensure security, immutability and transparency in transaction chains.

New contracts - Smart Contracts (Botu, 2022) represent a new type of digital contract (Raskin, 2017), a self-executable code stored on the blockchain, which automatically implements the clauses once the pre-established conditions are met (Tiutiu, 2023). They bring unprecedented speed and contractual certainty (e.g. their use in crowdfunding or escrow), but generate an intense doctrinal debate regarding validity and form: How does self-executable code align with the requirements of consent (art. 1179 CC) and written form (durable medium), especially in the absence of direct human intervention? If the contractual logic is "frozen" in the code (blockchain immutability), how can judicial control

be exercised ex officio over abusive clauses, according to Directive 93/13/EEC?

The debate focuses on harmonizing the digital and self-executable nature of the Smart Contract with the essential requirements of validity in the Civil Code (Capisizu, 2024).

Regarding consent (art. 1179 CC), the dilemma is given by the fact that Smart Contracts are often implemented through interactions based on "click-wrap" or "browse-wrap", where the parties (or their digital wallets) interact directly with the code, not with a traditional legal document. The parties give their consent to the contractual logic encapsulated in the code. The subsequent interaction with the code (e.g. sending the amount of money) represents the execution of the consent, not its formation. If a party does not understand the programming language (the code), the question arises whether the consent is "free and informed". There is a risk of a vice of consent (error). Thus, a mixed variant would be preferable, where the self-executable code is accompanied by a classic legal text, thus ensuring the formal fulfillment of the consent requirement.

In terms of form, within the Smart Contract (De Filippi, Wray, & Sileno, 2021) it is known that it is a sequence of code and transactions recorded on a distributed ledger (blockchain). Is this the equivalent of a "document" or a "durable medium"?

The nature of the blockchain, which is impartial, unalterable and publicly verifiable, is considered by some to be even more secure than a physical document or a file on a centralized server, thus best fulfilling the function of proof of the written form. Law no. 455/2001 on electronic signature could be applied, since a transaction on the blockchain is authenticated by a private key, which can be assimilated to a form of advanced electronic signature (although not necessarily qualified, in the absence of a trusted service provider). Thus, the validity of the digital form can be recognized, provided that the intention of the parties to bind themselves is clear, and the code is considered the form of expression of that intention.

Regarding unfair terms, this is one of the most thorny issues, given that immutability is a defining characteristic of blockchain, and ex officio

judicial review is a requirement of European law. Directive 93/13/EEC on unfair terms in consumer contracts imposes on national courts the obligation to verify ex officio whether a contractual term between a professional and a consumer is unfair and, if so, to declare it null (Didea, 2010).

If the payment logic is embedded in the code (e.g. automatic seizure of funds) and the code is unstoppable (self-executable and immutable on the blockchain), how can a court prevent the execution of an abusive clause (interim measure) and retroactively annul the effects (return the funds) if they have already occurred?! A court decision should target the underlying legal contract (the one behind the code), not the code itself. The court declares the clause null, and the professional is legally obliged to compensate the consumer.

It is necessary to include a mechanism (code function) that allows a party (or a third party, e.g. an arbitrator/court) to stop or modify the Smart Contract in cases of force majeure, abusive clauses or errors. At the same time, it is necessary to use services that introduce real-world data (including court decisions) into the blockchain. A decision declaring an unfair clause could be transmitted to the Smart Contract via a button, triggering a refund or stoppage of further execution.

Digital innovations are directly proportional to cyber risks, an aspect also underlined by the NBR. Information security is becoming a fundamental precondition for trust in the digital banking system. The cost of securing networks and protecting data is significant, but it is essential to prevent fraud and cyberattacks. Transformation remains slow in many Romanian banks, with mixed (hybrid) solutions still being observed, where the digital initiation of a contract is completed with physical documentation and traditional procedures, diminishing the advantage of speed and efficiency. However, there is significant progress, such as the online remote contracting of some banking products, approved by the Romanian Digitalization Authority (RGA).

Conclusions

The digitalization of banking contracts is an irreversible reality, placed at the intersection of technological innovation and strict legal regulation. The European legislative framework, supported by the case law of the CJEU and transposed into national legislation (CC, GEO 34/2014, e-IDAS legislation), establishes a set of fundamental guarantees, including: informed consent, durable support, the right of withdrawal and protection against abusive clauses.

The future challenge lies in managing the risks of compliance with the GDPR and in regulating the ethical use of AI in decision-making processes. In order to maintain the balance, constant supervision by the authorities (BNR, ANPC, ANSPDCP) and a dynamic adaptation of the doctrine and judicial practice to the new forms of manifestation of contractual will and potential abuse in the virtual environment are necessary.

References

Botu, C.-C. (2022). Contractele inteligente şi normele legale imperative. Quo vadis? [Smart contracts and mandatory legal norms. Quo vadis?]. *Revista Romana de Drept Privat, 1*

Capisizu, L. A. (2024). *Smart contracts in dreptul civil roman* [*Smart contracts in Romanian civil law*]. Wolters Kluwer.

Capisizu, L. (2024). Semnătura electronică în domeniul bancar. Onboarding online, o poveste de success (Electronic signature in banking. Online onboarding, a success story). *Revista de Drept Bancar si Financiar, 2*

Codul de conduită al Asociaţiei Române a *Băncilor [Code of conduct of the Romanian Banking Association]*. (2018). https://www.arb.ro/wp-content/uploads/Comunicat-de-Presa-Cod-de-Conduita.pdf

Didea, I. (2010). *Drepturile consumatorului-curs pentru studentii programului frecventa redusa [Consumer rights course for reduced frequency program students]*. Universul Juridic.

Dumitru, O.I., & Tomescu, A.V. (2020). European consumer law in the digital single market. *Juridical Tribune*, Volum 10, Number 2, p. 222;

European Crypto Initiative. The Data Act - Implications for the Future of Smart Contracts in Europe - Annex, https://eu.ci/the-data-act-implications-for-the-future-of-smart-contracts-in-europe-annex/

De Filippi, P., Wray, C., & Sileno, G. (2021). Smart contracts, in *Internet Policy Review, vol. 10, nr. 2*.

Georgescu, F. (2016). Digitalizarea in banci – provocari si oportunitati [Digitalization in banks – challenges and opportunities]. *Institutul National Bancar*.https://www.academia.edu/42076009/Digitalizarea_in_banci_provocari_si_oportunitati?email_work_card=thumbnail

Grundmann, S., & Hacker, Ph. (2018). The Digital Dimension as a Challenge to European Contract Law - The Architecture, în S. Grundmann (ed.), *European Contract Law in the Digital Age*, Intersentia.

Harari, Y.N. (2017). *Sapiens. Scurtă istorie a omenirii [Sapiens. A Brief History of Humanity]*. Polirom.

Ionescu, S. (2021). Scientific research and the present EU crises challenges. In Proceedings of the International Conference European Union's History, Culture and Citizenship 13th edition. CH Beck.

Ionescu, S. (2020). EU Data Protection, Obstacle in the Way of Medical Scientific Research?. In *Academic Journal o Law and Governance, Special Number. No. 8.2*.

Manoliu, R. (2023). Rolul inteligenţei artificiale în sistemul bancar românesc [The role of artificial intelligence in the Romanian banking system]. *Revista de Ştiinţe Militare nr. 4*, Ed. Academiei Oamenilor de Ştiinţă din România. https://www.aos.ro/wp-content/anale/RSMVol23Nr4(73)Art.10.pdf

Mănescu, D. M. (2025). Inteligenţa artificială şi contractele bancare [Artificial intelligence and banking contracts]. *Pandectele Romane 2*.

Onufreiciuc, R. A., & Stănescu, L.-E. (2023). Reflecţii jurisprudenţiale asupra contractelor inteligente în contextul Legii privind datele [Jurisprudential reflections on smart contracts in the context of the Data Protection Act]. *Revista Romana de Drept al Afacerilor 5*.

Panțoiu, A. I. (2017). *Drept bancar. Note de curs [Banking Law. Course Notes]*. Sitech.

Popa Tache, C. E. (2024). Evaluarea eficienţei măsurilor de protecţie a consumatorilor în sectorul bancar românesc [Evaluating the effectiveness of consumer protection measures in the Romanian banking sector]. *Revista de Drept Bancar si Financiar 1*

Raskin, M. (2017). The Law and Legality of Smart Contracts. *Georgetown Law Technology Review 304*

Rizoiu, R. (2024). Cui i-e frică de digitalizare? Despre mitologia semnăturii (electronice) [Who's Afraid of Digitalization? On the Mythology of the (Electronic) Signature]. https://www.juridice.ro/essentials/8132/cui-i-e-frica-de-digitalizare-despre-mitologia-semnaturii-electronice

Rizoiu, R. (2024). Ați fost scanat! Despre formă și format(are) în materie de documente electronice [You have been scanned! About form and format(s) in electronic documents]. https://www.juridice.ro/essentials/8149/ati-fost-scanat-despre-forma-si-formatare-in-materie-de-documente-electronice

Stănciulescu, A.A.M. (2023). Digital single market: consumer protection rules in the digital services act. *International Journal of Legal and Social Order 3(1),* p. 400-411.

Tiutiu, R. (2023). Contractele inteligente în realitatea contemporană [Smart contracts in contemporary reality]. *Revista Romana de Drept al Afacerilor 3*

United Nations Environment Programme (UNEP). (2018). *The Role of Digital Technologies in Promoting Sustainability*.

United Nations General Assembly. (2015). Transforming our world: the 2030 Agenda for Sustainable Development. A/RES/70/1. https://sdgs.un.org/2030agenda

World Bank. (2021). *World Development Report 2021: Data for Better Lives*. The World Bank.

https://digital-strategy.ec.europa.eu/ro/news/commission-launches-european-regulatory-sandbox-blockchain